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STATE OF NEBRASKA, APPELLEE, V. NORDELL FRANKLIN GLOVER, APPELLANT.

299 N.W.2d 445

Filed December 12, 1980. No. 43419.

1. **Sexual Assault: Judgments.** A determination made by a trial court that a defendant is a mentally disordered sex offender under Neb. Rev. Stat. §§ 29-2911 et seq. (Reissue 1979) is a question of fact to be determined by the trial court.
2. **Sentences: Felonies.** In a sentencing for a felony not involving the death penalty, there is no requirement that the sentencing judge conduct a case-by-case review of similar sentencings in that jurisdiction.
3. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal unless there is an abuse of discretion.
4. **Criminal Trials: Sentences: Courts.** In imposing sentences in criminal proceedings, the courts have a duty to consider protection of the public as well as the rehabilitative needs of the defendant.

Appeal from the District Court for Madison County: RICHARD P. GARDEN, Judge. Affirmed.

Thomas DeLay of Mueting & DeLay for appellant.

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

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

HASTINGS, J.

Pursuant to a plea bargain, defendant pleaded guilty to a violation of Neb. Rev. Stat. § 28-319 (Reissue 1979), first degree sexual assault, and Neb. Rev. Stat. § 28-310 (1)(b) (Reissue 1979), assault in the third degree, which violations provide for penalties of from 1 year to 50 years' imprisonment, and of not more than 1 year's imprisonment, respectively. Defendant was sentenced to concurrent terms of from 7 to 10 years' imprisonment on the sexual assault charge and 1 year's imprisonment on the third degree assault, with credit given for all time served in jail preceding sentencing. The District Court, after an appropriate hearing, also found the defendant to be a treatable mentally disordered sex

offender, as defined by Neb. Rev. Stat. §§ 29-2911 et seq. (Reissue 1979), and ordered him confined for treatment at the maximum security unit of the Lincoln Regional Center until he is found to be no longer mentally disordered, or has received the maximum benefit of treatment, or has served the maximum length of his sentence of imprisonment. The defendant appeals, contending generally that his sentence for sexual assault was excessive and that the evidence was insufficient to find him to be a mentally disordered sex offender. We affirm.

Defendant is a 36-year-old married man who, on August 3, 1979, came upon the 22-year-old female victim sunbathing in a park northwest of Norfolk, in Madison County, Nebraska. After becoming tired of the defendant watching her, the victim went into the ladies' bathroom to change from her swimsuit to her street clothes. Shortly thereafter, and before she had any more than put on her underwear, the defendant entered, carrying a knife, grabbed her around the neck with one hand, and forced her into one of the toilet stalls and to a sitting position on the stool. He then proceeded to fondle her breasts and pubic region, and penetrated her vagina with his finger. He then compelled her to engage in a completed act of fellatio with him, during all of which time he required her to keep her eyes covered with her shorts. Although he did not physically injure the victim with his knife, all through the ordeal he would poke her with the point of it to punctuate his commands, and she could feel the point prick her skin. When he had finished, he commanded her to stay in the bathroom for 10 minutes, under threat of death, and further threatened her if she told the police of the incident.

On September 27, 1979, the defendant stopped at a watermelon stand south of Norfolk, and after engaging a woman in conversation, grabbed her by the throat, pulled her to his pickup truck, and told her to get in. The defendant had taken a knife from his trouser

pocket, which the victim grabbed, resulting in a cut to her hand and fingers. At the sight of blood, the defendant released the victim, got into his truck, and drove away.

When the defendant was later confronted by the police, he at first denied the incidents, but later confessed, agreeing in substance with the facts as related above.

Although not raised as an issue in this appeal, we should note in passing that the defendant's arraignment was a model of propriety. The trial judge fully and fairly explained all of defendant's rights and the consequences of his pleas of guilty, which the record showed were freely, voluntarily, and knowingly entered. The factual basis for the pleas was established by the defendant's own admissions.

The complaint that the evidence was insufficient to determine defendant to be a mentally disordered sex offender is not tenable. Although there was some equivocation, the examining psychiatrist, when asked if he believed the defendant to be presently disposed to repeated commissions of sexual offenses, replied in the affirmative. Again, this question was asked of the same witness: "And would this lead you to believe that Mr. Glover is, in fact, a person with a mental disorder who is disposed to repeated commissions of sexual offenses which are likely to cause substantial injury to the health of others?" to which the witness replied "Yes." A finding as to whether one is a mentally disordered sex offender is a question of fact, to be determined by the trial court. *State v. Sell*, 202 Neb. 840, 277 N.W.2d 256 (1979). From our examination of the record, we agree with the conclusion reached by the trial court.

Defendant's assignment of error as to excessiveness of the sentence is a multipronged attack, in that he contends that the trial court abused its discretion because the sentence is for a term beyond that necessary for the protection of the public and rehabilitative needs

of the defendant; it was imposed without consideration of any objective standards to determine the length of the sentence; and it was constitutionally disproportionate to punishments imposed for similar and more severe offenses. The district judge, at the time of sentencing, reviewed in detail the provisions of Neb. Rev. Stat. § 29-2260 (Reissue 1979) as it relates to consideration for probation, and found that the risk was substantial that the defendant would engage in additional criminal conduct and that a lesser sentence than imprisonment would depreciate the seriousness of the defendant's crime. While the defendant had no other criminal record and had caused no serious personal injury by the use of a knife on both occasions, the fact remains that a dangerous weapon was used, with repeated threats of death while doing so. Although urged to do so by the defendant, the sentencing judge did not conduct a case-by-case review of all felony sentences found among the recent records of the Madison County District Court, nor was he required by law to do so. Such a comparison, to avoid the "freakishness of sentencing" referred to in *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), and which resulted in the passage of Neb. Rev. Stat. § 29-2521.01 (Reissue 1979), is limited primarily to cases involving the death penalty, *Brown v. Parratt*, 560 F.2d 303 (8th Cir. 1977), and particularly to cases where the death penalty has, in fact, been imposed. *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979).

Finally, a sentence imposed within statutory limits will not be disturbed on appeal unless there is an abuse of discretion. *State v. Kincaid*, 203 Neb. 495, 279 N.W. 2d 152 (1979). Recognizing defendant's traumatic experience of some 2 years earlier involving a bankruptcy and the death of a brother, and the observation of mental health experts that proper treatment might reverse his personality deterioration, the fact remains that the defendant manifested extremely dangerous traits in committing a crime which was particularly

despicable in nature. The trial judge has a duty to protect the public, as well as to attempt rehabilitation of the criminal. There was no abuse of discretion and the judgment and sentence of the trial court are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LEON P. JANIS, ALSO KNOWN AS CHUCK JANIS, APPELLANT.

299 N.W.2d 447

Filed December 12, 1980. No. 43441.

1. **Courts: Sentences.** One of the obligations of a sentencing judge after making a finding of guilt is to impose an appropriate sentence within fixed statutory and constitutional limits.
2. ____: ____. In imposing an appropriate sentence, a sentencing judge has wide discretion as to the type of information he may use to assist him in determining the kind and extent of punishment to be imposed within statutory and constitutional limits, including information concerning the defendant's life, character, and previous conduct.
3. ____: ____. The law invests the trial judge with a wide discretion as to the sources and types of information used to assist him in determining the sentence to be imposed within statutory limits.
4. **Sentences: Appeal and Error.** Where it appears that a sentence imposed is within statutory limits, a sentence will not be disturbed on appeal in the absence of an abuse of discretion on the part of the trial court.

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

James D. Leach and Charles Plantz for appellant.

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

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

KRIVOSHA, C.J.

The appellant, Leon P. Janis, entered a plea of guilty on February 12, 1980, to the charge of operating a motor vehicle to flee in an effort to avoid arrest for a felony, a violation of Neb. Rev. Stat. § 60-430.07 (Reissue 1978). He had also been charged with a further count of assault which was dismissed as part of a plea bargain arrangement. Likewise, a separate charge of murder in the first degree was dismissed as part of the plea bargain. The sentence for committing the crime of operating a motor vehicle to flee in an effort to avoid arrest for a felony may be a fine in a sum not to exceed $500, imprisonment in the Nebraska Penal and Correctional Complex for a period of not less than 1 year nor more than 3 years, or both fine and imprisonment. The trial court, after receiving the plea of guilty and obtaining a presentence investigation, sentenced the appellant to a term of 1 year in the Nebraska Penal and Correctional Complex, giving the appellant credit for some 84 days he had already served.

It is from this sentence of imprisonment that appellant appeals, maintaining that the trial court improperly sentenced the appellant because, in imposing the sentence, the trial court indicated that it had taken into account the fact that the appellant had been charged with both assault with intent to inflict great bodily harm and with murder in the first degree, both of which charges were dismissed. We believe, however, that an examination of the record will disclose that the trial court did not consider matters which could not properly have been considered by the court and did not abuse its discretion in imposing the sentence. For that reason, we affirm the judgment of the trial court.

In the case of *Williams v. New York*, 337 U.S. 241, 247, 69 S. Ct. 1079, 93 L. Ed. 1337 (1949), the U.S. Supreme Court said: "A sentencing judge . . . is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt

has been determined. Highly relevant — if not essential — to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics."

And, likewise, in the case of *State v. Rose*, 183 Neb. 809, 811, 164 N.W.2d 646, 648 (1969), this court said: "It is a long accepted practice in this state that before sentencing a defendant after conviction a trial judge has a broad discretion in the source and type of evidence he may use to assist him in determining the kind and extent of punishment to be imposed within the limits fixed by statute. Highly relevant, if not essential, to his determination of an appropriate sentence is the gaining of knowledge concerning defendant's life, character, and previous conduct." And, further, in the recent case of *State v. Anderson and Hochstein, ante* p. 51, 72, 296 N.W.2d 440, 453 (1980), we said: "We are unable to find any requirement in the law that a sentencing court may consider only information adduced at trial when exercising discretion in imposing sentence."

A reading of the transcript in this case discloses that the trial court, in imposing the minimum sentence of imprisonment on appellant, took into account a number of factors in addition to the complaints which had been dismissed as a part of a plea bargain. In particular, the court took into account the undisputed fact that appellant produced and displayed a loaded weapon during the scuffle which ultimately led to his attempting to flee to avoid arrest. While there is some dispute in the record as to whether the gun was operable at the time of its display, it is clear, as noted by the trial court, that the production of a loaded weapon may, indeed, result in the production of other loaded weapons and consequent grave and serious injury.

The chase itself was not something of minor significance. Speeds upwards of 100 m.p.h. were observed. Appellant maintains that he continued to flee because he was fearful for his life, not from the police who

were chasing him, but from other citizens. Yet, this argument, in some manner, seems to fall short of its mark. If, indeed, he was fearful for his life, surrendering to the police, who were then attempting to take him into custody, would have provided him greater protection than continuing to move recklessly about the highway. Not only was his own life then in jeopardy, but, likewise, the lives of innocent persons who might then have been upon the road. As a matter of fact, the presentence investigation discloses that, at one point, appellant had stopped and was talking to the officer when he observed the other individual appear on the scene in an automobile and fled from the custody and safety of the police officer. His justification for fleeing appears a little weak under the circumstances. It was only when he lost control of his vehicle and left the roadway that he stopped and was arrested.

Appellant argues that the trial judge erred because he stated in open court that this was a case for probation but for the existence of the two dismissed charges. While it is true that the court did say that "if it weren't for two factors, this would be a case for probation," it is not true that the court considered the dismissed charges as those factors. What the judge stated in great detail was that he had considered the records made in connection with the dismissed charges. That is to say, he reviewed the facts underlying the charges. The trial court placed great emphasis on the fact that appellant displayed a loaded gun, a fact not disputed. He considered the fact that the evidence produced at the preliminary hearing in connection with the first degree murder charge was sufficient to permit the court to find that there was probable cause to believe that a crime had been committed and probable cause to believe that the appellant had committed the crime. The court did not consider whether there was sufficient evidence to convict the appellant but only whether there was evidence of behavior by the appellant which might be taken into account in imposing a sentence.

As we said in *State v. Rapp*, 184 Neb. 156, 158, 165 N.W.2d 715, 717 (1969): "It must be assumed, we think, that a trial judge knows the difference between information that is pertinent to the issue before him and that which is unfounded rumor. The law invests a trial judge with a wide discretion as to the sources and types of information used to assist him in determining the sentence to be imposed within statutory limits." It is hard for us to understand how a trial court may properly consider information of the appellant's behavior if no charges are filed, but may not consider the *underlying facts* if a charge is filed and later dismissed, not because the facts are untrue, but due to a plea bargain. While we do not mean to suggest by this opinion that a trial court is free to consider any matter having no relevance or basis, we do mean to say that a trial court is, indeed, given wide discretion and where it appears that a sentence imposed is within statutory and constitutional limitations, it will not be disturbed on appeal in the absence of an abuse of discretion on the part of the trial court. *State v. Tipton*, 206 Neb. 731, 294 N.W.2d 869 (1980). We are unable to find any evidence in this record which would indicate an abuse of discretion on the part of the trial court in determining the sentence as imposed. For that reason, the judgment is affirmed.

AFFIRMED.

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

299 N.W.2d 753

Filed December 12, 1980. No. 43454.

1. **Criminal Trials: Right to Counsel.** The standard for determining whether counsel for defendant in a criminal prosecution has adequately represented his client is based upon a standard which requires that trial counsel perform at least as well as a lawyer with ordinary training and skill in the criminal law in his area and that he conscientiously protect the interests of his client.
2. ____: ____. Where one maintains that counsel was inadequate, one must likewise show how or in what manner the alleged inadequacy prejudiced the defendant.
3. **Right to Counsel: Burden of Proof.** The person challenging the competency of counsel has the burden of proof to establish the counsel's incompetence.

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

John K. Sorensen for appellant.

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

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

KRIVOSHA, C.J.

The appellant, Richard Colgrove, appeals from a judgment entered by the District Court for Scotts Bluff County, Nebraska, denying appellant's motion for post conviction relief. Our examination of the record, both in the post conviction hearing and in the original trial, offered in support of appellant's request for post conviction relief, discloses that the claims made herein are totally without merit and the judgment of the District Court denying post conviction relief is affirmed.

The appellant was convicted of first degree sexual assault. He now bases his claim for post conviction relief on alleged inadequacy of counsel, and to estab-

lish the inadequacy of counsel claims that counsel (1) Failed to call an important witness necessary to establish an alibi, and (2) Failed to object to the introduction of certain photographic exhibits offered by the State. As we have already indicated, the claims are totally without merit and the judgment denying post conviction relief should be affirmed.

Throughout the original trial, the appellant maintained that he was not guilty of the crime charged and was not with the prosecutrix during the time in which the crime is alleged to have occurred. He maintains that he was elsewhere during a critical 1-hour period when the assault is to have taken place and that the witness, Gary Kreiling, could have established his alibi had he been called. The evidence discloses that appellant's original counsel did, indeed, interview Kreiling about establishing the alibi and subpoenaed him for trial as a witness. Original trial counsel, however, concluded just before calling Kreiling as a witness that his testimony would do more harm than good. An examination of the record made at the post conviction hearing supports that position.

Appellant's original counsel testified at the post conviction hearing that he talked to Kreiling about the alibi. While Kreiling now claims he was willing to establish an alibi, the statements made by Kreiling to appellant's original counsel would not have supported such a claim. Appellant's original counsel testified that he spoke to Kreiling and advised him that what would be necessary to establish an alibi was testimony that appellant was at a certain place from and after about 1:15 a.m. on the day in question. Specifically, appellant's original counsel testified as follows: "So I approached him [Kreiling] and said, 'Can you testify to the idea that Dick was at the alibi location, Fred's Place, from 1:15 until 2:30 when Dick said he had left.' And he said, 'I remember him being there but I can't honestly tell you when it was. I have no clear recollection. I had been drinking that evening and I really don't know what time he was there.'"

Kreiling was then called to testify. He maintained at the post conviction hearing that had he been called to testify at the original hearing, he would have unequivocally established the fact that appellant was at Fred's Place during the critical times. However, he testified as follows:

"Q. Do you remember anything about the conversation with [appellant's original counsel]?

"A. Boy, not very much.

"Q. Did you tell him that you had seen Richard Colgrove that night?

"A. Yeah.

"Q. Right now, today, do you recall, as you're testifying right now do you recall what you told [original counsel] with respect to when you saw Mr. Colgrove?

"A. Not for sure.

"Q. Is there anything that you can recall today that helps you in knowing what time it was that you got home that night?

"A. It seems like the bar was just about ready to close.

"Q. Was there anything else that enables you or assists you in recalling what time it was that you actually got to your home?

"A. No."

Likewise, Kreiling testified on cross-examination that he did not have a watch with him that night and that the area where the parties were supposedly present was a vacant lot. There is simply nothing in the record to support the claim that appellant's original counsel had not properly investigated what the witness Kreiling would have said and whether it would have been of any particular benefit.

Other witnesses who appellant wanted called allegedly would have testified that appellant had sexual relations with the prosecutrix on earlier occasions. However, consent was not an issue. It was clear from the evidence that the prosecutrix had been attacked. In view of appellant's claim that he was not with the

prosecutrix when the attack occurred, evidence of previous sexual acts with the prosecutrix would have been irrelevant. The failure to call witnesses whose testimony would be irrelevant certainly cannot establish inadequacy of counsel.

With regard to the matter of the photographs, appellant maintains that the original trial counsel failed to adequately represent the appellant because he did not object to the introduction of some eight photographs in evidence. The record, however, amply supports the position that there was adequate foundation laid for the introduction of all of these exhibits and that, had any objection been made, the objection would have been overruled. Appellant does not, in any manner, suggest to us how the introduction of these exhibits was in error or how they prejudiced the appellant. He merely claims that because appellant's counsel did not go through the motions of objecting to the introduction of the exhibits, he failed to provide adequate counsel. The record discloses, as a matter of fact, that appellant's original counsel had unsuccessfully objected to seven earlier exhibits and that it was apparent that the trial court would not sustain any possible objection to the remaining eight exhibits. As a matter of fact, the objections were simply calling further attention to the exhibits and it may very well have been the conclusion of appellant's original counsel that to continue interposing baseless objections would do more harm than good. As we have already indicated, appellant does not, in any manner, suggest to us how the exhibits were not admissible in evidence or what benefit interposing an objection would have produced. Likewise, our own examination of the exhibits and the record fails to disclose how objecting would have served any useful purpose. As with the claim of failing to call the witness Kreiling, we find no merit in this objection either.

We have frequently said that the standard for determining whether counsel for defendant in a criminal

prosecution has adequately represented his client is whether trial counsel performed at least as well as a lawyer with ordinary training and skill in the criminal law in his area and conscientiously protected the interests of his client. See, *State v. Fowler*, 201 Neb. 647, 271 N.W.2d 341 (1978); *State v. Bartlett*, 199 Neb. 471, 259 N.W.2d 917 (1977). Likewise, we have declared that, where one maintains that counsel was inadequate, one must likewise show how or in what manner the alleged inadequacy prejudiced one. *State v. Harlan*, 205 Neb. 676, 289 N.W.2d 531 (1980). And, further, we have declared that the person challenging the competency of counsel has the burden of proof to establish the counsel's incompetence. *State v. Kelly*, 190 Neb. 41, 205 N.W.2d 646 (1973). Our examination of both the record made in the post conviction hearing and the trial itself fails to disclose how or in what manner original counsel failed to perform at least as well as a lawyer with ordinary training and skill in the criminal law in his area; or how or in what manner he failed to conscientiously protect the interests of his client. It is clear that, in a number of these areas, original trial counsel simply exercised the judgment which must be exercised by the trial counsel in establishing trial techniques. Obviously, if the decision to proceed in a particular manner provides a favorable result, the decision is thought to be one of good trial tactics; while if it produces an unfavorable result, one may claim that the tactic selected was not adequate. Nevertheless, we have already said that effectiveness of counsel is not to be judged by hindsight. *State v. Mackey*, 200 Neb. 549, 264 N.W.2d 430 (1978). We find nothing in the record to support a claim that counsel was inadequate. The failure to call witnesses to establish the appellant's alibi was not due to the fact that counsel was inadequate, but rather to the fact that there simply was no reliable evidence to establish the alibi. Likewise, the decision to object or not to object to the introduction of evidence is a part of trial

strategy and, accordingly, we grant due deference to the discretion of defense counsel to formulate trial tactics (see *State v. Bartlett, supra*), particularly where, as here, it appears no valid objections exist.

The claims now made by appellant in attacking the performance of his original counsel are totally unsupported in the record and wholly without merit Quite to the contrary, the record discloses that original counsel did everything that could have been done under the circumstances. To be sure, he had an extremely difficult client; nevertheless, he did perform adequately and it is regrettable that such unfounded claims are now made. The judgment of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM J. GUATNEY, APPELLANT.

299 N.W.2d 538

Filed December 12, 1980. No. 43609.

1. **Special Proceedings.** A special proceeding may be said to include every special statutory remedy which is not in itself an action.
2. _____. Where the law confers a right, and authorizes a special application to a court to enforce it, the proceeding is special, within the ordinary meaning of the term "special proceeding."
3. **Competence to Stand Trial: Special Proceedings.** Proceedings commenced pursuant to Neb. Rev. Stat. § 29-1823 (Reissue 1979) are special proceedings as referred to in Neb. Rev. Stat. § 25-1902 (Reissue 1979).
4. **Competence to Stand Trial: Special Proceedings: Final Orders: Appeal and Error.** A proceeding to determine the competency of an accused to stand trial is a special proceeding within the meaning of Neb. Rev. Stat. § 25-1902 (Reissue 1979), and an order finding the accused incompetent to stand trial and ordering him confined until such time as he is competent is a final order from which an appeal may be taken under Neb. Rev. Stat. § 25-1911 (Reissue 1979).
5. **Competence to Stand Trial.** The test of mental competency to stand trial is whether the defendant *now* has the capacity to understand the nature and object of the proceedings against him, to comprehend his own condition in reference to such proceedings, and to make a rational defense.

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

Dennis R. Keffe, Lancaster County Public Defender, and Rodney J. Rehm for appellant.

Ron Lahners, Lancaster County Attorney, and Robert R. Gibson for appellee.

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

PER CURIAM.

The appellant, William J. Guatney, appeals from an order of the District Court for Lancaster County, Nebraska, finding him incompetent to stand trial and committing him to the Lincoln Regional Center until such time as he is found to be competent. We have now concluded, based upon our reading of the record and the applicable law, that appellant is competent to stand trial and, therefore, we reverse and remand the order of the District Court.

There are a number of errors assigned by appellant. We believe, however, that only two issues need be considered in order for us to properly dispose of this matter. The first concerns the question of whether the court's finding that the appellant was incompetent to stand trial and its order committing him to the Lincoln Regional Center until he is competent to stand trial was a final order from which appellant could appeal to this court. The second is whether the evidence adduced at the competence hearing was sufficient to establish the fact that the appellant is incompetent to stand trial.

The facts relevant to the disposition of this matter disclose that on August 18, 1979, appellant was charged by a complaint and information in the Lancaster County court with two counts of first degree murder. He waived his right to a preliminary hearing and was arraigned in the District Court on the same charges on October 18, 1979, at which time he entered a plea

of not guilty to each count of the information.

On November 27, 1979, appellant's attorney filed a motion pursuant to Neb. Rev. Stat. § 29-1823 (Reissue 1979) to determine whether appellant was competent to stand trial. Hearing was held on November 30, 1979, as a result of which the trial court entered an order finding that a further examination should be performed upon appellant to determine whether appellant was competent to stand trial. The court, therefore, committed appellant to the Lincoln Regional Center for additional examination and ordered that a report be sent to the court by the authorities at the regional center. Following the further evaluation, a hearing was held on February 14, 1980. Based upon testimony given by Dr. Leonard E. Woytassek, chief of the security service at the Lincoln Regional Center, the court found that appellant was mentally incompetent to stand trial and committed him to the Lincoln Regional Center "until such time as the defendant's disability may be removed."

On June 10, 1980, appellant's attorneys filed a motion for review of the court's order finding the defendant incompetent to stand trial. The review was requested for "the reason that the defendant now appears competent to stand trial." A hearing on the motion was held on June 18 and 20, 1980.

Four mental health professionals who had examined appellant for competency to stand trial testified at the hearing. Mr. Guatney was diagnosed by Dr. Emmett Kenney as having mild organic brain syndrome with "a tendency to disorganize under serious stress." Dr. Kenney did, however, testify that, in his opinion, appellant now met all the necessary requirements to establish his competency to stand trial.

Dr. James K. Cole, a psychologist who had previously examined appellant, likewise testified that, in his opinion, appellant met all the necessary requirements to establish his competency to stand trial.

Dr. William C. Bruns, a psychiatrist, examined the

appellant on two occasions. While Dr. Bruns also believed that appellant had organic brain syndrome, he nevertheless testified that, in his opinion, appellant met the competency standards and said he felt that appellant could maintain his level of competency through trial.

Finally, Dr. Woytassek testified. Dr. Woytassek stated that he believed that appellant would understand the nature of the proceedings against him but he cautioned that, because of paranoid ideation, appellant has the general feeling that people involved in the proceedings are against him. Dr. Woytassek further felt that appellant was rather unstable and, therefore, sometimes he would be able to consult with his attorneys and sometimes he would not.

During the testimony of several witnesses, appellant interrupted the court proceedings, shouting and making verbal comments. While the evidence would indicate that the outbursts by appellant were disruptive, the evidence likewise indicates that the outbursts were directly related to the very testimony then being given by the witnesses. The trial court did not admonish appellant about his behavior or attempt any other means to restrain appellant from continuing his disruptive behavior, although appellant's counsel attempted to quiet him.

On June 24, 1980, the court issued a memorandum order finding appellant not competent to stand trial. The order specifically addressed the question of appellant's memory and found that, while appellant's memory was poor and might, therefore, have a limited effect on his ability to present his defense, it was not so poor as to prevent appellant from aiding in his own defense.

Of greater concern to the court was the appellant's mental and emotional instability. The court felt that appellant was unfamiliar with courtroom procedure, as evidenced by his outbursts in court, and that he further displayed an inability to cooperate with his

defense counsel, holding a desire for undeserved punishment rather than justice. The trial court, therefore, believed that the stress of a multiweek trial would result in appellant making profane responses to witnesses, counsel, the court, or even the jury, which would result in a mistrial and an ultimate finding that the appellant was incompetent to stand trial. Likewise, the trial court was concerned that appellant could not meaningfully waive any of his constitutional rights and would deteriorate during the course of the trial. Appellant was, therefore, committed to the Lincoln Regional Center until he was no longer incompetent. It is from that order that he now appeals.

We need first, then, to turn to the issue of whether an order finding appellant not competent to stand trial and directing him to be confined in the Lincoln Regional Center until he is competent to stand trial is a final order within the meaning of the applicable Nebraska statutes so as to entitle appellant to appeal from that order to this court.

Neb. Rev. Stat. § 25-1911 (Reissue 1979) provides that: "A judgment rendered or final order made by the district court may be reversed, vacated or modified by the Supreme Court for errors appearing on the record." A final order is defined by Neb. Rev. Stat. § 25-1902 (Reissue 1979) as: "An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment . . . ."

No Nebraska cases are cited to us, nor are we able to find any in which this specific issue has been decided. Other jurisdictions have split on the issue of whether an order finding one incompetent to stand trial and committing one to an institution is an appealable order. See Annot., 16 A.L.R.3d 714 (1967). We believe, however, a review of what is involved when one accused of a crime is declared incompetent to

stand trial and ordered confined until the defect is cured, in light of § 25-1902, compels us to join with those jurisdictions which have determined that an order finding an accused incompetent to stand trial and directing his confinement until he becomes competent is a final order in a special proceeding from which an appeal may be taken to this court.

We reach our conclusion concerning the right of appeal because we believe that a hearing pursuant to § 29-1823 to determine the competency of an accused to stand trial is a special proceeding within the meaning of § 25-1902.

We have previously said in the case of *Sullivan v. Storz*, 156 Neb. 177, 180, 55 N.W.2d 499, 502 (1952): "A special proceeding may be said to include every special statutory remedy which is not in itself an action. . . . 'Where the law confers a right, and authorizes a special application to a court to enforce it, the proceeding is special, within the ordinary meaning of the term "special proceeding."' [Citation omitted.]"

A reading of § 29-1823 clearly establishes that it is a "statutory remedy which is not itself an action." That it is a statutory remedy is self-evident. Likewise, it is not itself an action. Before one may be examined pursuant to § 29-1823, one must be charged with a crime and awaiting trial. One cannot be subjected to the provisions of § 29-1823 standing alone. There is no other conclusion which can be reached except to find that proceedings commenced pursuant to § 29-1823 are special proceedings as referred to in Neb. Rev. Stat. § 25-1902 (Reissue 1979). See, *People v. Fields*, 62 Cal. 2d 538, 399 P.2d 369, 42 Cal. Rptr. 833 (1965); *Turpin v. Coates*, 12 Neb. 321, 11 N.W. 300 (1882); *Western Smelting & Refining Co. v. First Nat. Bank*, 150 Neb. 477, 35 N.W.2d 116 (1948).

Further, in *Sullivan*, after establishing that the action was a special proceeding, we held that there was a right of appeal, saying at 181, 55 N.W.2d at 502: "We think it clear that the order here involved is

one made in a special proceeding. That it affects a substantial right of the plaintiff is also clear. The right to a trial without unreasonable and unnecessary delay is as old as Magna Charta. Our Constitution, Article I, section 13, provides: 'All courts shall be open, and every person, for any injury done him in his lands, goods, person or reputation, shall have a remedy by due course of law, and justice administered without denial or delay.' This provision is self executing and controlling, paramount and mandatory upon all courts of this state."

In *State v. Shaw*, 202 Neb. 766, 770, 277 N.W.2d 106, 110 (1979), we expressed our concern about denying a defendant a right of appeal saying: "It is therefore clear that by delaying the imposition of a sentence indefinitely, a defendant is denied the right of appeal from the original charge. Such denial offends basic notions of due process and equal protection of the law and cannot be permitted." See, likewise, *Jackson v. Indiana*, 406 U.S. 715, 92 S. Ct. 1845, 32 L. Ed. 2d 435 (1972).

If a defendant were found suffering from a mental illness and ordered confined to the Lincoln Regional Center by a mental health board, he would be entitled to appeal that order to this court. Neb. Rev. Stat. §83-1043 (Reissue 1976). If an individual had been unlawfully committed to the Lincoln Regional Center and had filed a writ of habeas corpus seeking his release, which writ was denied, he would be entitled to appeal that order to this court. *In re Application of Tail, Tail v. Olson*, 144 Neb. 820, 14 N.W.2d 840 (1944). We, therefore, find little reason or sense in suggesting that one may be deprived of his liberty under a court order finding him incompetent and denying him a speedy trial and have no recourse from that order. In the instant case, the court has done more than declare that the accused need not answer the charges against him. The court, by virtue of its order, has denied the appellant a right to a speedy

trial which he seeks and has likewise denied the appellant his liberty for an undetermined time. It is difficult, if not impossible, to see how that order, therefore, does not affect a substantial right or is not an order from which the appellant should be entitled to appeal pursuant to the provisions of § 25-1911. See, also, *Jackson v. Indiana*, *supra*.

The State argues that the appellant is not without recourse in that he may file an application for writ of habeas corpus or may depend upon the State to file an action for civil commitment. While all of that may be true, it does not answer the question, "Has an order been entered affecting a substantial right of the appellant in a special proceeding?" If, indeed, it has, then the fact that there may be other alternatives available should not preclude the appellant from seeking review of that order in this court by appeal. Had the trial court found the appellant competent and ordered him to trial, an entirely different situation would exist. Upon the conclusion of the case on its merits, should the accused be found guilty, he would have a means of bringing the issue of his competency to this court for review. Here, however, because the court order finds the accused incompetent to stand trial, he has no other effective means to test the trial court's order denying to him a right of trial unless he may, at this point in time, appeal to this court. We now hold that a proceeding to determine the competency of an accused to stand trial is a special proceeding within the meaning of § 25-1902 and that an order finding the appellant incompetent to stand trial and ordering him confined until such time as he is competent is a final order from which an appeal may be taken under § 25-1911. See, also, *State v. Loomis*, 195 Neb. 552, 239 N.W.2d 266 (1976).

Having thus determined that this court may appropriately review the order of the trial court, we now turn to the question of whether the appellant is, in fact, competent to stand trial.

The question of whether the appellant is now competent to stand trial is separate and distinct from the question of whether the appellant may be responsible for the commission of the crime. The test to determine whether an accused is competent to stand trial is not the same test applied to determine whether the accused may be not guilty by reason of insanity. The test of mental competency to stand trial is whether the defendant now has the capacity to understand the nature and object of the proceedings against him, to comprehend his own condition in reference to such proceedings, and to make a rational defense. See, *State v. Crenshaw*, 189 Neb. 780, 205 N.W.2d 517 (1973); *Dusky v. United States*, 362 U.S. 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960); *State v. Klatt*, 187 Neb. 274, 188 N.W.2d 821 (1971).

Competency is, to some extent, a relative matter arrived at by taking into account the average level of ability of criminal defendants. We cannot, however, exclude from trial all persons who lack the intelligence or legal sophistication to participate actively in their own defense. That is not the standard by which we measure competency. Should we do so, we would preclude the trial of a number of people who are, indeed, competent to stand trial as understood in the law. The accused need not understand every legal nuance in order to be competent. He need only meet the standards as established by us in *Crenshaw* and *Klatt* and set out above.

Applying those standards for determining competency as recited herein and referred to in part by us in both *State v. Klatt* and *State v. Crenshaw*, we are required to find that the appellant is competent to stand trial. The record reveals that all four expert witnesses who testified at the June 1980 hearing were of the opinion that the appellant could appreciate the proceedings in court; understand the nature of the roles that the judge, the prosecutor, and the defense attorney would play; and cooperate with his attorneys to provide

for a defense. None of the four suggested or testified that, in their medical opinion, the appellant was unable to meet those tests. Some of the witnesses were concerned that there was a possibility that appellant, under stress, might become incompetent. That is not the test of competency to stand trial. One might, under the stress of a trial, suffer a heart attack. The possibilities that the stress of trial may alter the appellant's present condition does not preclude him from his right to a speedy trial if, at this time, the evidence indicates that he is competent.

The record in this case indicates that appellant has most, if not all, of the requisite qualities necessary to establish competency. As a matter of fact, one of the most telling parts of the evidence was the fact that the appellant's outbursts in court, while disruptive of the court proceedings, were directly related to the testimony then being given. It was clear from a reading of the record that appellant knew exactly what was being said and chose to react to the testimony. While his reaction may not have been in as appropriate a fashion as one would hope in order to maintain decorum in the courtroom, it was not so bizarre as to indicate that the appellant did not understand the proceedings, or the effect of testimony, or his need to give aid on behalf of his own defense.

Three of the expert witnesses concluded that the appellant was competent to stand trial. And, while the fourth witness stated by way of a conclusion that appellant was not competent to stand trial, the facts reflected in the evidence from his testimony did not support his ultimate conclusion, but rather supported a finding that, under the standards established by the *Crenshaw* and *Klatt* cases, the appellant was indeed competent to stand trial.

The trial court was properly concerned that, if the appellant was ordered to stand trial, he might suffer withdrawal and, secondly, that he might continue to engage in outbursts which would cause a mistrial

based on prejudice. These are two important and significant concerns of which the trial court will have to be mindful during the course of the trial. The trial court will have to continually monitor the trial and the appellant's behavior to determine that the appellant is indeed competent during the course of the trial. Likewise, the trial court will be called upon to exercise the judicial role of attempting to maintain reasonable order within the courtroom so as to avoid prejudice. The need to maintain order in the courtroom, however, is not unique to this case. Courts are often called upon to restrain individuals, including ordering their removal from the courtroom, if they persist in disregarding proper courtroom decorum. See, *Illinois v. Allen*, 397 U.S. 337, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970); *State v. Blackwell*, 184 Neb. 121, 165 N.W.2d 730 (1969).

This was, indeed, an unusual proceeding in that the appellant here was seeking to have himself declared competent to stand trial. Most often, the reverse is true. If, however, one thinks of the evidence presented here as if it had been offered in support of a claim that the appellant should not be required to stand trial because he was not now competent to stand trial, one is led to the conclusion that such a request would be denied. One may not escape answering criminal charges based upon a *possibility* that the stress of trial may change one's present condition. More than a mere possibility must exist. While we appreciate the trial court's concerns about that possibility, we are of the opinion that, absent any testimony in this record that the appellant is now incompetent to stand trial, and, in the presence of the evidence that he is, in fact, competent to stand trial, he must be afforded his right to that speedy trial. We, therefore, reverse the order of the District Court and remand the case with directions to find the appellant competent to stand trial and to proceed accordingly. Should the condition of the appellant change, the trial court will be at liberty

to make appropriate and timely orders. Having so disposed of this appeal, we need not consider the other errors assigned by appellant.

REVERSED AND REMANDED.

KRIVOSHA, C.J., concurring.

I concur completely with the majority opinion herein. I wish, however, to make brief comment with regard to how a trial court may satisfy itself that, indeed, an accused meets the three-fold test for competency.

While the test for determining mental competency to stand trial as established in *State v. Crenshaw*, 189 Neb. 780, 205 N.W.2d 517 (1973), and *State v. Klatt*, 187 Neb. 274, 188 N.W.2d 821 (1971), standing alone, may be difficult to apply, other cases have discussed a number of factors which are of aid to a court in arriving at an appropriate conclusion. The factors which have been considered in determining competency include the following: (1) That the defendant has sufficient mental capacity to appreciate his presence in relation to time, place, and things; (2) That his elementary mental processes are such that he understands that he is in a court of law charged with a criminal offense; (3) That he realizes there is a judge on the bench; (4) That he understands that there is a prosecutor present who will try to convict him of a criminal charge; (5) That he has a lawyer who will undertake to defend him against the charge; (6) That he knows that he will be expected to tell his lawyer all he knows or remembers about the events involved in the alleged crime; (7) That he understands that there will be a jury present to pass upon evidence in determining his guilt or innocence; (8) That he has sufficient memory to relate answers to questions posed to him; (9) That he has established rapport with his lawyer; (10) That he can follow the testimony reasonably well; (11) That he has the ability to meet stresses without his rationality or judgment breaking down; (12) That he has at least minimal contact with reality; (13) That he has the minimum intelligence necessary to grasp the

events taking place; (14) That he can confer coherently with some appreciation of proceedings; (15) That he can both give and receive advice from his attorneys; (16) That he can divulge facts without paranoid distress; (17) That he can decide upon a plea; (18) That he can testify, if necessary; (19) That he can make simple decisions; and (20) That he has a desire for justice rather than undeserved punishment. *Wieter v. Settle*, 193 F. Supp. 318 (W.D. Mo. 1961); *Raithel v. State*, 280 Md. 291, 372 A.2d 1069 (1977); Comment, Incompetency to Stand Trial, 81 Har. L. Rev. 454 (1967).

It should be kept in mind that, in order to establish competency, it is not necessary that an accused meet all of the above factors but only that, considering the various factors as a whole, one is compelled to conclude that the accused has the capacity to understand the nature and object of the proceedings against him, to comprehend his own condition in reference to such proceedings, and to make a rational defense. By using some or all of the enumerated factors, a trial court should be aided in arriving at an appropriate conclusion.

JAMES R. CUNNINGHAM, APPELLEE, V. J. JAMES EXON ET AL., APPELLANTS.

300 N.W.2d 6

Filed December 19, 1980. No. 42989.

1. **Constitutional Law: Nebraska Constitution: Constitutional Amendments.** The adoption by the Legislature of a proposed amendment does not amend the Nebraska Constitution. Only the electorate can amend the Constitution by adopting the proposal by a majority vote.
2. ____: ____: ____. A proposed amendment to the Nebraska Constitution must be expressly adopted by the voters, including a proposal to repeal existing language.
3. ____: ____: ____. The Nebraska Constitution may be amended by implication only where language adopted by the voters conflicts with

existing constitutional provisions. In that situation, the newer provisions control and the prior provisions are implicitly repealed.

4. ____:____:____. A clause in a constitutional amendment will prevail over a provision in the original instrument inconsistent with the amendment only when they relate to the same subject, are adopted for the same purpose, and cannot be enforced without substantial conflict.

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

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

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

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

WHITE, J.

In *Cunningham v. Exon*, 202 Neb. 563, 276 N.W.2d 213 (1979), the question on appeal was whether plaintiff-taxpayer had standing to bring an action for a declaratory judgment that art. VII, § 11, of the Nebraska Constitution was not amended at the 1976 general election in such a way that the third full paragraph of that section was repealed. We reversed the District Court's dismissal of the action and remanded the case for a trial on the merits. The District Court found for the plaintiff. We affirm.

Art. XVI, § 1, of the Nebraska Constitution requires that amendments proposed by the Legislature be put to a vote of the people and that any such proposed amendments adopted by the people shall become part of the Constitution. The amendments voted on in the 1976 election were proposed by the Legislature in 1976 Neb. Laws, L.B. 666. Before the 1976 general election, art. VII, § 11, provided, in part:

"Sec. 11. Appropriation of public funds shall not be made to any school or institution of learning not owned or exclusively controlled by the state or a political subdivision thereof.

"All public schools shall be free of sectarian instruction.

"The state shall not accept money or property to be used for sectarian purposes; *Provided*, that the Legislature may provide that the state may receive money from the federal government and distribute it in accordance with the terms of any such federal grants, but no public funds of the state, any political subdivision, or any public corporation may be added thereto."

L.B. 666, as adopted by the Legislature, reads as follows:

"AN ACT for submission to the electors of amendments to Article VII, section 11, of the Constitution of Nebraska, relating to education; to permit contracting for nonsectarian services for handicapped children; to permit aid for nonsectarian purposes for postsecondary students; to prohibit the use of public funds for sectarian purposes; to provide for the time and manner of submission and form of ballots; and to provide the effective date thereof.

"Be it enacted by the people of the State of Nebraska,

"Section 1. That at the general election in November, 1976, there shall be submitted to the electors of the State of Nebraska for approval the following amendment to Article VII, section 11, of the Constitution of Nebraska, and the further amendment of Article VII by the addition of new section 11A thereto, which are hereby proposed by the Legislature:

"'Sec. 11. Notwithstanding any other provision in the Constitution, ~~Appropriation~~ appropriation of public funds shall not be made to any school or institution of learning not owned or exclusively controlled by the state or a political subdivision thereof; Provided, that the Legislature may provide that the state or any political subdivision thereof may contract with institutions not wholly owned or controlled by the state or any political subdivision to provide for educational or other services for the benefit of children under the age of twenty-one years who are handicapped, as that term is

from time to time defined by the Legislature, if such services are nonsectarian in nature. [This is the language represented on the November ballot by Part 1.]

"All public schools shall be free of sectarian instruction.

~~"The state shall not accept money or property to be used for sectarian purposes, Provided, that the Legislature may provide that the state may receive money from the federal government and distribute it in accordance with the terms of any such federal grants, but no public funds of the state, any political subdivision, or any public corporation may be added thereto.~~ [This is the paragraph in question.]

"A religious test or qualification shall not be required of any teacher or student for admission or continuance in any school or institution supported in whole or in part by public funds or taxation.

"Sec. 11A. Notwithstanding any other provision in the Constitution, the Legislature may provide financial aid in the form of loans or grants to students attending postsecondary educational institutions not wholly owned or controlled by the state or a political subdivision thereof if such aid is expressly limited to nonsectarian purposes. The Legislature may provide that the state may receive money from the federal government and distribute it in accordance with the terms of any such federal grants, but any public funds of the state, any political subdivision, or any public corporation added thereto shall not be used for sectarian purposes.'. [This is the language represented on the November ballot by Part 2.]

"Sec. 2. The proposed amendments shall be submitted to the electors in the manner prescribed by Article XVI, section 1, of the Constitution of Nebraska. The proposition for the submission of the proposed amendments shall be placed upon the ballots in the following form:

"'Constitutional amendment to permit contracting with institutions not wholly owned or controlled by the state or any political subdivision for nonsectarian services for handicapped children.

"For

"Against

"Constitutional amendment to permit financial aid for nonsectarian purposes to students attending postsecondary educational institutions not wholly owned or controlled by the state or a political subdivision thereof; and to prohibit the expenditure of public funds, added to funds received from the federal government, for sectarian purposes.

"For

"Against'

"Sec. 3. That the proposed amendments, if adopted, shall be in force and take effect immediately upon the completion of the canvass of the votes, at which time it shall be the duty of the Governor to proclaim them as a part of the Constitution of Nebraska."

At the 1976 general election in November, the proposed changes of art. VII, § 11, were presented to the voters in two parts. Part 1 appeared on the ballot as follows:

"PART 1

"A vote FOR this proposal will enable the Legislature to enact legislation providing that the state or any political subdivision may contract with non-public institutions for the provision of educational or other services to handicapped children as long as the services are nonsectarian in nature.

"A vote AGAINST this proposal will continue the present situation whereby neither the state nor any political subdivision may contract with non-public institutions for the provision of educational or other services to handicapped children even though nonsectarian in nature.

"☐ For
☐ Against

Constitutional amendment to permit contracting with institutions not wholly owned or controlled by the state or any political subdivision for nonsectarian services for handicapped children." Adoption of this amendment would have added the language underlined in the portion of L.B. 666 labelled "Sec. 11."

Part 2 was presented to the voters in the following manner:

"PART 2

"A vote FOR this proposal will authorize the Legislature to provide loans or grants to students attending non-public post high school educational institutions as long as such financial aid is expressly limited to nonsectarian purposes; and will require that any public funds used to match federal grants to be used to provide services to students in non-public schools must not be used for sectarian purposes.

"A vote AGAINST this proposal will prevent the Legislature from providing loans or grants to students attending non-public post high school educational institutions; and will continue the present provision prohibiting the use of any public funds to match federal grants to be used to provide services to students in non-public schools even if nonsectarian in nature.

"☐ For
☐ Against

Constitutional amendment to permit financial aid for nonsectarian purposes to students attending postsecondary educational institutions not wholly owned or controlled by the state or a political subdivision thereof; and to prohibit the expenditure of public funds, added to funds received from the federal government, for sectarian purposes." Adoption of this amendment would have added the new § 11A.

The voters adopted the amendment represented by Part 1 and rejected the amendment proposed in Part 2. The state's argument in this case is that the adoption

of the one amendment resulted in the repeal of paragraph 3 of the existing art. VII, § 11.

The method for amending the Nebraska Constitution, including the repeal of language, is prescribed by that Constitution. The provisions are set out in art. XVI, § 1. *Swanson v. State*, 132 Neb. 82, 271 N.W. 264 (1937). The adoption by the Legislature of a proposed amendment does not amend the Constitution. Only the electorate can amend the Constitution by adopting the proposal by a majority vote. Neither of the proposals submitted to the electorate at the 1976 general election provided for the repeal of any language in art. VII, § 11, and there was no instruction on the ballot that a vote for the amendment in Part 1 was a vote to repeal paragraph 3 of § 11. A proposed amendment to repeal paragraph 3 was not submitted to the electorate. Because the proposed repeal of paragraph 3 of art. VII, § 11, was not voted on by the electors, that provision remains in the Constitution unless the amendment adopted by the voters conflicts with it. In that situation, the newer provisions would control and the prior provisions would be implicitly repealed. *Swanson v. State, supra* at 94, 271 N.W. at 271. However, "[i]t will also be remembered that, while a clause in a constitutional amendment will prevail over a provision in the original instrument inconsistent with the amendment, 'distinct constitutional provisions are repugnant to each other only when they relate to the same subject, are adopted for the same purpose, and cannot be enforced without substantial conflict.'" *Id.*, quoting 12 C.J. *Constitutional Law* § 56 (1917). The language of the amendment proposed in Part 1, and adopted by the voters, is not inconsistent with the provisions existing in paragraph 3 of art. VII, § 11, of the Constitution. The adoption of the amendment did not implicitly repeal the language in paragraph 3.

The electorate did not vote to adopt an amendment which expressly repealed the language in paragraph 3. Because the amendment expressly adopted by the

voters does not conflict with any existing provisions of the Constitution, no existing provisions were implicitly repealed by the adoption of this amendment. The language of art. VII, § 11, paragraph 3, should not be omitted from the Constitution.

The judgment of the District Court is affirmed.

AFFIRMED.

BOSLAUGH, J., concurring in part and, in part, dissenting.

The Constitution of Nebraska may be amended by legislative proposals approved by the electorate, but this procedure requires submission of a definite proposal for approval or rejection by the voters.

1976 Neb. Laws, L.B. 666, proposed two amendments to art. VII of the Constitution. Section 11 was to be amended by adding language and deleting language; and a new section to be known as § 11A was to be added to art. VII. The two proposals were submitted separately.

It is unfortunate that the proposal to amend § 11, as printed on the ballot, described only a part of the proposed amendment. In such a case, it seems to me that the proposal was not fairly submitted and should be held to have failed of adoption.

The question prepared by the Legislature for submission to the electorate forms no part of the amendment, and an amendment presented to the voters by means of a question which is clearly misleading is void and of no effect. Opinion of the Justices, 283 A.2d 234 (Me. 1971). The Legislature cannot propose one question and submit to the voters another. *Lane v. Lukens*, 48 Idaho 517, 283 P. 532 (1929). See, also, *Ex parte Tipton*, 229 S.C. 471, 93 S.E.2d 640 (1956).

FRANCES A. JOHNSON, APPELLANT, V. FIRST NATIONAL BANK & TRUST COMPANY OF LINCOLN, A NATIONAL BANKING ASSOCIATION, APPELLEE.

300 N.W.2d 10

Filed December 19, 1980. No. 43020.

1. **Evidence: Courts.** Where the facts are conceded, undisputed, or are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question, as a matter of law, rather than submit it to a jury for determination.
2. **False Imprisonment.** A private citizen who by affirmative direction, persuasion, or request procures an unlawful arrest and detention of another is liable for false imprisonment. If an informer merely states to a peace officer his knowledge of a supposed offense and the officer makes the arrest entirely upon his own judgment and discretion, the informer is not liable.
3. **Malicious Prosecution.** In a malicious prosecution case, the necessary elements for the plaintiff to establish are: (1) The commencement or prosecution of the proceeding against him; (2) Its legal causation by the present defendant; (3) Its bona fide termination in favor of the present plaintiff; (4) The absence of probable cause for such proceeding; (5) The presence of malice therein; and (6) Damage conforming to legal standards resulting to plaintiff. All the above elements must coalesce, and if any of these elements are lacking, the result is fatal to the action. Its application, however, is not without limitations. Where the informant knowingly gives false or misleading information or in anywise directs or counsels officers in such a way as to actively persuade and induce an officer's decision, then the informant may still be held liable.

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

John McArthur and A. James McArthur for appellant.

James M. Bausch of Cline, Williams, Wright, Johnson & Oldfather for appellee.

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

COLWELL, District Judge.

This is a civil suit to recover damages on two counts: (1) False arrest and imprisonment, and (2) Malicious

prosecution. At the close of plaintiff's evidence, defendant moved for a directed verdict or, in the alternative, to withdraw the jury and dismiss plaintiff's petition. The motion was granted and the petition was dismissed. Plaintiff appeals and we affirm.

We summarize the direct evidence in a manner most favorable to the plaintiff. In May 1977, Anna L. Protsman, age 63, opened a joint checking account with her daughter, Frances A. Johnson, the plaintiff herein, in the First National Bank & Trust Company of Lincoln. Protsman closed this account in March 1978, and opened a new account in the same bank, substituting her brother, Archer Smith, as joint owner. Shortly thereafter, Protsman was hospitalized for 7 weeks. While in the hospital, plaintiff states, her mother told her that she wished to close out this bank account. She asked plaintiff to call the bank's drive-in facility, which she did, speaking to manager Larry Volland, who refused to give plaintiff any information. Plaintiff handed the telephone to her mother, who determined her bank balance was $701.60, and she told Volland that she wished to close the account. Plaintiff's mother then signed one of her printed check forms bearing the printed names of the joint owners and gave it to plaintiff, who filled in the amount of $701.60, payable "To close account." Plaintiff took the check to the defendant bank and presented it to Volland, who recalled the telephone conversation and noted on the check "cash. OK to close" and initialed it. Plaintiff presented the check for payment and received $125 in cash and a cashier's check for $576.60 payable to Anna L. Protsman. Plaintiff completed a change of address form for her mother, substituting her own address at Beatrice, Nebraska. The final statement of account was sent to plaintiff rather than to her mother. Plaintiff took the cashier's check to her mother, who endorsed it and told plaintiff to take it home with her, which she did. According to plaintiff, most of the cash was left with her mother. Protsman was discharged from

the hospital in late May and spent the next 3 months in nursing homes. During this time, plaintiff claims that Protsman suffered from hallucinations and her memory was impaired.

In August 1978, Archer Smith appeared at defendant bank and inquired about the joint account, stating that he had not been receiving the bank statements as usual. Being informed that the account was closed, Smith advised two bank employees, Ray Sellmeyer and JoAnn Case, that Protsman had not asked plaintiff to close the account, and that Protsman had not signed the check. Based on this complaint from a joint owner of an account, Sellmeyer obtained a photocopy of the check, a surveillance photograph taken of plaintiff when she cashed the check, and a forgery affidavit form. Thereafter, he interviewed Protsman at Tabitha Home, Lincoln, Nebraska. The affidavit was on a printed form regularly used by the bank for completion by depositors in forgery complaint situations. Protsman denied having signed the check and identified the surveillance photograph as being of her daughter. She signed the affidavit which, in substance, recites that she had examined the check, that the signature was not hers, that she did not either authorize or consent to the making of such signature, and that it was a forgery. Sellmeyer returned the affidavit form to the bank where it was later notarized by Case. Sellmeyer telephoned Detective Marlin Rauscher of the Lincoln Police Department and informed him of Smith's complaint, the interview with Protsman, and the contents of the affidavit form. Later, Sellmeyer gave Rauscher a copy of the check, the surveillance photo, and the completed affidavit form; he also advised Rauscher concerning Volland's notation on the check. Protsman's signature card was available at the bank, but it was not given to Rauscher and he did not ask for it, although he knew that the same was available.

Rauscher did not contact Protsman; however, he did interview Archer Smith, who advised that Protsman conducted most of her own business affairs. Volland had informed Rauscher that at the time he interviewed Protsman, she appeared to be competent and understood the statements contained in the affidavit. Rauscher made arrangements with Tabitha Home to be advised when plaintiff next visited her mother, which she did on August 12, 1978. She was then arrested without a warrant by Officer Gregory Sims and confined in the city jail. Rauscher interviewed plaintiff on August 14th at the jail and she denied the charges and denied receiving all the money. Rauscher furnished Deputy County Attorney James Luers with an investigative report which included the interview and contents of the forgery affidavit form. Based on this report, Luers made the decision to commence criminal prosecution proceedings against plaintiff and filed a complaint against her for the crime of possession of a forged instrument. Later, Luers and Rauscher interviewed Protsman, who again stated that she did not sign the check. Thereafter, an expert examination of the check determined that the signature on the check was genuine and prosecution proceedings were dismissed on Luers' motion. The bank made restitution to Protsman for the amount of the check.

"Where the facts are conceded, undisputed, or are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question, as a matter of law, rather than submit it to a jury for determination." *Huskinson v. Vanderheiden*, 197 Neb. 739, 742, 251 N.W.2d 144, 146 (1977). See, also, *Hoefer v. Marinan*, 195 Neb. 477, 238 N.W.2d 900 (1976). However, "[w]hen the evidence is conflicting, the question whether the officer had reasonable ground for believing that the person arrested had committed a felony is for the jury under proper instructions." *Wilson v. Gutschenritter*, 185 Neb. 311,

175 N.W.2d 282 (1970) (syllabus of the court). We conclude, as the trial court did, that the question of reasonable cause for arrest was a jury question.

"A private citizen who by *affirmative direction, persuasion, or request procures an unlawful arrest* and detention of another is liable for false imprisonment. If an informer merely states to a peace officer his knowledge of a supposed offense and the officer makes the arrest entirely upon his own judgment and discretion, the informer is not liable. *If an informer knowingly gives to an officer false information which* is a determining factor in his decision to make an arrest, the informer is liable." *Jensen v. Barnett*, 178 Neb. 429, 134 N.W.2d 53 (1965) (emphasis supplied) (syllabus of the court).

Did defendant procure plaintiff's arrest? Defendant, through its several employees, provided the police with information including the original complaint made by Smith, a photograph of plaintiff, a copy of the check in question, and a written statement executed by plaintiff's mother that a forgery had been committed by plaintiff. This was in keeping with standard procedures followed by the bank in such situations. Defendant did not originate any further contact with the police and its agents did nothing more than give a report of information to the proper governmental agency having authority in such matters. The defendant did not procure plaintiff's arrest.

Did defendant knowingly give the police false information which was a determining factor in the decision to arrest plaintiff? Plaintiff urges that such was done when defendant failed to compare Protsman's signature with her known signature on the signature card in the possession of defendant; failed to furnish the signature card to Rauscher; and failed to inform Rauscher of the conversations Volland had with Protsman in which Protsman authorized the closing of the account and the cashing of the check. Plaintiff urges that the above-cited reasons plus the

irregular completion of the jurat on the affidavit all amounted to the giving of false information. The defendant did not have a duty to further investigate the complaint made by Smith, under the circumstances here. Forgery is a serious crime; investigation and prosecution processes are for persons and agencies other than the defendant.

Plaintiff's first cause of action was properly dismissed.

"'In a malicious prosecution case, the necessary elements for the plaintiff to establish are: (1) The commencement or prosecution of the proceeding against him; (2) its legal causation by the present defendant; (3) its bona fide termination in favor of the present plaintiff; (4) the absence of probable cause for such proceeding; (5) the presence of malice therein; (6) damage, conforming to legal standards resulting to plaintiff.' [Citation omitted.] All the above elements must coalesce, and if any of these elements are lacking the result is fatal to the action. . . . '*Its application, however, is not without limitations.* Where the informant knowingly gives *false or misleading information* or in any wise directs or counsels officials in such a way so as to actively persuade and induce the officer's decision, then the informant may still be held liable . . . .'" *Schmidt v. Richman Gordman, Inc.*, 191 Neb. 345, 351, 215 N.W.2d 105, 109 (1974) (emphasis in original); *Cimino v. Rosen*, 193 Neb. 162, 225 N.W.2d 567 (1975).

The three elements of malicious prosecution that we consider are: (1) Legal causation by the defendant; (2) The absence of probable cause; and (3) The presence of malice.

As to legal causation, plaintiff urges that defendant knowingly gave false or misleading information, citing *Schmidt* as authority. We do not agree. In *Schmidt*, it was held that the informant knowingly gave false or misleading information by its "conclusionary report" and by failing to give the prosecutor the "plain-

tiffs' version" of the complaint. Here, defendant furnished the police with the facts and circumstances of the alleged offense as known to it and there was no contact by defendant with plaintiff. No false information was knowingly given to the county attorney's office, and Deputy County Attorney Luers made the decision to file a complaint against plaintiff based upon Rauscher's investigative report and Protsman's affidavit. Luers had no contact with anyone from the bank prior to filing the complaint.

The record is clear that there was sufficient evidence possessed by Luers that would lead him to the conclusion that the signature on the check was false (forged), that plaintiff possessed it and cashed it, and that there was probable cause for the filing of the complaint.

Plaintiff urges that malice can be inferred from defendant's acts and omissions. *Schmidt v. Richman Gordman, supra.* While wanton and reckless disregard for the rights of others may imply malice, 54 C.J.S. *Malicious Prosecution* § 42 (1948), there is no evidence here that reasonably meets that proof. Defendant here made a routine report to the police concerning a complaint received from a former joint depositor to the effect that the bank had honored a forged check. This information, together with Protsman's statement, was furnished to the police for investigation and disposition. We do not view the evidence as supporting any reasonable conclusion that defendant was guilty of malice. Plaintiff's second cause of action was also properly dismissed.

From the evidence, reasonable minds can draw but one conclusion: that plaintiff had failed to sustain her burden of proof and that, as a matter of law, her petition should have been dismissed.

AFFIRMED.

ELAGENE WHITE, APPELLANT, V. FATHER FLANAGAN'S BOYS' HOME, APPELLEE.

300 N.W.2d 15

Filed December 19, 1980. No. 43050.

1. **Workmen's Compensation: Appeal and Error.** Findings of fact made by the Nebraska Workmen's Compensation Court after rehearing shall have the same force and effect as a jury verdict in a civil case and will not be set aside on appeal unless clearly wrong.
2. ____: ____. In testing the sufficiency of the evidence to support findings of fact made by the Workmen's Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor, and he should have the benefit of every inference that can reasonably be drawn therefrom.
3. **Workmen's Compensation: Heart Disease.** In a workmen's compensation case, death or disability caused by (1) heart disease that was a personal risk and (2) emotional strain that was an employment risk is not compensable where the emotional strain is not greater than that of nonemployment life. The comparison is not with the employee's usual exertion in his employment but rather with the exertions present in the employee's normal nonemployment life.
4. **Workmen's Compensation: 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.

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

Benjamin M. Wall of Wall, Wintroub & Weiner for appellant.

Michael P. Cavel of Emil F. Sodoro, P.C., for appellee.

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

BRODKEY, J.

The plaintiff below, Elagene White (Elagene), appeals from an order entered on rehearing by the Nebraska Workmen's Compensation Court, dismissing her petition against the defendant and appellee herein,

Father Flanagan's Boys' Home. The plaintiff sought benefits allegedly due her under the Nebraska workmen's compensation law for an injury which she alleged occurred on or about March 10, 1978. It appears from the record that the plaintiff was employed by Father Flanagan's Boys' Home at Boys Town, Nebraska, but on the date in question she was employed at the downtown branch office in Omaha in the mail department, where she performed a variety of tasks, including the checking of addresses, the operating of the envelope machine, and the sorting of mail. It appears from the record that, on the date above-mentioned, she developed heart palpitations or atrial tachycardia, which is a rapid beating of the heart. She was taken to a hospital and underwent electrical shock treatment to restore the normal rhythm of her heart.

On March 23, 1979, Elagene filed a petition in the Nebraska Workmen's Compensation Court alleging that her heart palpitations, distress diarrhea, gastritis, and nervous tension were due to work-related stress. In particular, Elagene contends that the stress she experienced while at work was due to the harassment she received from one of her supervisors. On May 22, 1979, a hearing was held before Judge James P. Monen of the Workmen's Compensation Court. Based upon the testimony and medical evidence presented, the court determined that the plaintiff had not met her burden of proof, and had failed to show that her employment created a greater strain than nonemployment life. On June 25, 1979, the court ordered that the plaintiff's petition be dismissed.

Elagene then petitioned for a rehearing before a three-judge panel; and on November 2, 1979, the court affirmed the original order of dismissal entered by Judge Monen, finding in its order of dismissal that the plaintiff had failed to offer or adduce any evidence to show how the strain of her employment compared to that of her nonemployment life. The court stated in its order: "An award of workmen's compensa-

tion benefits may not be based on possibility or speculation and the claimant, unaided by presumption bears the burden of proof; this applies to the evidence necessary to show that the employment contribution involved a strain greater than non-employment life; this evidence is not present in this case; therefore, the plaintiff has failed to sustain her burden of proof and her petition should be dismissed."

The plaintiff then perfected her appeal to this court; and in her brief on appeal, assigns as error that the Workmen's Compensation Court ignored the evidence in the record that plaintiff's working conditions not only produced a greater amount of stress than her non-employment environment, but also produced greater stress than in other places of work maintained by the same employer. She also assigned as error that the Workmen's Compensation Court was mistaken in requiring the plaintiff to prove that her employment stress was greater than her nonemployment stress, in view of the fact that there was medical testimony to the effect that the cause of her atrial tachycardia was the stress of her employment.

The record in this case indicates that the plaintiff is a woman, now 59 years of age, with an extensive history of heart disability. The plaintiff testified that she had rheumatic fever as a teenager, and that she was hospitalized for congestive heart failure in 1964, in 1966, and on two occasions in 1971. In addition, the plaintiff has had mitral heart disease and underwent open heart surgery to have a prosthetic mitral valve implanted on January 18, 1972.

After her recovery from the 1972 surgery, Elagene was advised that she could engage in nonstrenuous employment, and in 1974, she started work for the defendant, Father Flanagan's Boys' Home, as a clerical worker in the mail department. The record indicates that, in the course of her employment, Elagene was assigned to work under various supervisors within the different divisions of the mailing department.

She testified that the stress she had experienced at work began in 1976, when she was assigned to work under Sharon Hault, a supervisor in the Boys Town mailing department. In her testimony, Elagene contended that Sharon Hault acted in a hostile manner toward her for a period in excess of 2 years, belittling her work, calling her derogatory names, refusing her privileges granted to other employees, separating her work out for special attention, and criticizing her in a loud voice in front of other employees.

It further appears from the record that Elagene was hospitalized twice in 1976, the first time in August of that year when she was admitted to the hospital because of acute gastritis. She was subsequently discharged and her treating physician recommended to defendant's personnel manager that Elagene be assigned to a different supervisor. This request was complied with, but it appears that Elagene was subsequently reassigned to work under Sharon Hault, following personnel changes made at Boys Town. Thereafter, in December of 1976, Elagene suffered a stroke which resulted in the permanent loss of sight in her right eye. She testified at the hearing before the Workmen's Compensation Court that she had been running up a stairway from the first floor to her fourth floor place of work when the stroke occurred, adding that the elevator had been full and she wanted to return to work in time after lunch to avoid a confrontation with Sharon Hault.

Elagene subsequently returned to work after suffering the stroke resulting in the loss of the sight of her eye, but was again transferred to work under Sharon Hault. On March 10, 1978, Elagene requested a transfer to another supervisor. According to Elagene, Sharon continued to harass her at work and Elagene therefore requested a transfer to another supervisor on another floor, which would have necessitated carrying certain phone books, from which she was checking names and addresses, out of their regular location.

Her request to do so was denied, and at that time, according to the evidence in the record, her heart palpitations began. She then took a bus to her physician's office where she complained of the palpitations and chest pains. Her doctor examined her, gave her some medication, and sent her home. However, the palpitations about which she complained continued; and on March 12, 1978, she was admitted to Bishop Clarkson Hospital, where she received treatment for her atrial tachycardia. Subsequently, Elagene's employment with Father Flanagan's Boys' Home was suspended for 7 days, commencing July 28, 1978, and she was thereafter terminated as an employee of the defendant, effective July 28, 1978, by letter directed to her and dated August 3, 1978.

The scope of review in this court on appeals from the Workmen's Compensation Court is set out in Neb. Rev. Stat. § 48-185 (Reissue 1978), which provides, among other things, that the findings of fact made by the Nebraska Workmen's Compensation Court after rehearing shall have the same force and effect as a jury verdict in a civil case. That statute has been frequently interpreted since its enactment in 1975, and it is well-established law in this state that the findings of fact made by the Nebraska Workmen's Compensation Court after rehearing will not be set aside on appeal unless clearly wrong; and that in testing the sufficiency of evidence to support findings of fact made by the Workmen's Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor, and he should have the benefit of every inference that can reasonably be drawn therefrom. *Scamperino v. Federal Envelope Co.*, 205 Neb. 508, 288 N.W.2d 477 (1980); *Keith v. School Dist. No. 1*, 205 Neb. 631, 289 N.W.2d 196 (1980); *Alcaraz v. Wilson & Co., Inc.*, *ante* p. 256, 298 N.W.2d 160 (1980). We must, therefore, determine whether the Workmen's Compensation Court was "clearly wrong" in dismissing Elagene's petition.

In its order of dismissal, the Workmen's Compensation Court relied upon our previous decision in the case of *Beck v. State*, 184 Neb. 477, 168 N.W.2d 532 (1969). In *Beck*, this court had before it a claim made by the widow of a state official who claimed that the emotional strain of her husband's employment, combined with chronic coronary artery disease, caused his death. In reversing the order of the District Court for Lancaster County granting workmen's compensation benefits to the widow, this court held that, 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 nonemployment life. In its opinion, this court stated: "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 *non-employment* life of this or any other person.' Arthur Larson, 'The "Heart Cases" in Workmen's Compensation: An Analysis and Suggested Solution,' 65 Mich. L. Rev. 441 at 469." *Beck* at 479-80, 168 N.W.2d at 533-34 (emphasis in *Beck*). We have recently

cited the above rule with approval in *Sellens v. Allen Products Co., Inc.*, 206 Neb. 506, 293 N.W.2d 415 (1980). In this connection, see, also, *Conn v. ITL, Inc.*, 187 Neb. 112, 187 N.W.2d 641 (1971). We have also held that 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). In *Brokaw v. Robinson*, 183 Neb. 760, 164 N.W.2d 461 (1969), we also held that the presence of a preexisting disease or condition enhances the degree of proof required to establish that the injury arose out of the employment.

In the present case, the Workmen's Compensation Court on rehearing affirmed the dismissal of plaintiff's petition because she had failed to introduce proof that the emotional stress that she experienced on her job was greater than that of nonemployment life. The court found that there was no evidence "to show any comparison either with the nonemployment life of this plaintiff or any other person, or the average employee's nonemployment life." We, also, have checked the record, and find no evidence on that issue. Such comparison and determination was a factual matter. The three-judge panel was not "clearly wrong" in its determination of lack of evidence, and its judgment must be affirmed.

No other errors appearing, the judgment of the Nebraska Workmen's Compensation Court must be affirmed.

AFFIRMED.

ROBERT NOVOTNY, APPELLEE AND CROSS-APPELLANT, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLANT AND CROSS-APPELLEE.

299 N.W.2d 757

Filed December 19, 1980. No. 43091.

1. **Workmen's Compensation: Insurance.** Liability for workmen's compensation shall not be reduced or affected by any insurance of the injured employee or any contribution or other benefit whatsoever due to or received by the person entitled to such compensation.
2. ____:____. No agreement by an employee to pay any portion of premium paid by his employer or to contribute to a benefit fund or department maintained by such employer for the purpose of providing compensation as required by the workmen's compensation act shall be valid.
3. ____:____. The payment of disability retirement benefits to a civilian employee under Omaha, Neb., Code § 22-35 (1980) does not affect the right of the employee to claim and receive benefits under the workmen's compensation act.
4. **Workmen's Compensation: Penalties.** Where a reasonable controversy exists between an employer and employee as to the employer's liability under the workmen's compensation act, the employer is not liable for the penalty for waiting time or for the allowance of attorney fees.

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

Herbert M. Fitle and George S. Selders, Jr., for appellant.

Thomas F. Dowd, P.C., for appellee.

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

MCCOWN, J.

This is a workmen's compensation case. The Workmen's Compensation Court awarded the plaintiff $100 per week for temporary total disability from January 29, 1977, to November 1, 1979, and thereafter for so long as the plaintiff remained totally disabled. The court also gave the defendant credit for the payment of 109 4/7 weeks' compensation previously paid and

awarded the plaintiff an attorney fee of $500 on rehearing. The defendant City of Omaha has appealed and the plaintiff has cross-appealed.

On January 28, 1977, the plaintiff, Robert Novotny, a plumbing inspector for the City of Omaha, while in the performance of his duties, fell and sustained serious injuries to his head and neck. Since that date, he has been totally disabled and unable to return to work. Commencing January 28, 1977, Novotny received injury-on-duty payments in lieu of workmen's compensation benefits. On October 5, 1978, his injury-on-duty payments terminated and, on October 6, 1978, the city commenced workmen's compensation total disability payments of $100 per week and continued to make such temporary total disability payments through March 6, 1979. Novotny makes no claim for workmen's compensation benefits for the period prior to March 6, 1979.

On March 7, 1979, the City began making payments to Novotny of $889.84 per month under a disability and retirement pension plan for city employees and discontinued payments of workmen's compensation benefits. All municipal employees except firemen and policemen were required to make contributions to the pension plan. The employee and employer contributions under the plan are commingled. The pension plan provided disability benefits prior to age 65 and service retirement pensions thereafter. The ordinance of the City of Omaha providing for disability pension benefits provided that the City would pay medical, surgical, and hospital expenses directly from its general fund in workmen's compensation cases, "but the pension and other benefits, being in excess of benefits under workmen's compensation act, shall be in lieu thereof." Omaha, Neb., Code § 22-35 (1980).

The issue in this case is whether the City is relieved of its statutory obligation to pay temporary total disability workmen's compensation benefits when the provisions of a pension plan under which employee and

employer contributions are commingled provides that payment of disability benefits shall be in lieu of workmen's compensation benefits.

Neb. Rev. Stat. § 48-130 (Reissue 1978) provides: "No savings or insurance of the injured employee, or any contribution made by him to any benefit fund or protective association independent of this act shall be taken into consideration in determining the compensation to be paid thereunder; nor shall benefits derived from any other source than those paid or caused to be paid by the employer as herein provided, be considered in fixing compensation under this act."

Neb. Rev. Stat. § 48-147 (Reissue 1978) provides: "Nothing in this act shall affect any existing contract for employer's liability insurance, or affect the organization of any mutual or other insurance company, or any arrangement existing between employers and employees, providing for payment to such employees, their families, dependents or representatives, sick, accident or death benefits in addition to the compensation provided for by this act; but liability for compensation under this act shall not be reduced or affected by any insurance of the injured employee, or any contribution or other benefit whatsoever, due to or received by the person entitled to such compensation, and the person so entitled shall, irrespective of any insurance or other contract, have the right to recover the same directly from the employer, and in addition thereto, the right to enforce in his own name in the manner provided in section 48-146 the liability of any insurer who may, in whole or in part, have insured the liability for such compensation; *Provided*, payment in whole or in part of such compensation by either the employer or the insurer, as the case may be, shall, to the extent thereof, be a bar to recovery against the other, of the amount so paid. No agreement by an employee to pay any portion of premium paid by his employer or to contribute to a benefit fund or department maintained by such employer for the purpose of

providing compensation as required by this act shall be valid, and any employer who makes a deduction for such purpose from the pay of any employee entitled to the benefits of this act shall be guilty of a Class II misdemeanor."

As early as 1934, in the case of *Shandy v. City of Omaha*, 127 Neb. 406, 255 N.W. 477 (1934), the contention was made that receipt and acceptance of pension benefits from the City of Omaha exceeding the amount of benefits provided under the workmen's compensation act barred any further relief under the workmen's compensation act. This court rejected the contention and held that the payment of pensions to firemen or their dependents under the laws relating to metropolitan cities in no way affects the claims of such persons under the workmen's compensation act.

In another case involving a fireman's pension, the claimant first filed a claim for workmen's compensation benefits and was receiving those benefits at the time he applied for a fireman's pension. This court held that the fireman was entitled to receive the benefit of the workmen's compensation act and the fireman's pension act, and that it was of no consequence under which act he first accepted benefits. The court also held that a fireman's pension was not "compensation" within the meaning of the workmen's compensation act. See *City of Lincoln v. Steffensmeyer*, 134 Neb. 613, 279 N.W. 272 (1938).

In the present case, the City contends that the disability pension benefits provided by the city ordinances should be treated as supplemental to workmen's compensation benefits, and that since they are more than the workmen's compensation benefits, they should be treated as payments of workmen's compensation benefits to the extent of the amount due under the workmen's compensation act. One difficulty with that contention is that the only portion of workmen's compensation benefits that is paid solely by the City from the City's general fund is the medical,

surgical, and hospital expense involved. The pension payments which the City wants to treat as compensation benefit payments are paid from the commingled joint funds contributed by both the City and the employee, in violation of the provisions of § 48-130.

The City also argues that it has implied authority for the pension plan here because state statutes now authorize primary cities to provide for pension plans for firemen or policemen which provide that the amount of such pension may be reduced by the sum of amounts paid under the workmen's compensation act until the disabled employee reaches the age of 62. See Neb. Rev. Stat. § 15-1006(4) (Reissue 1977). Somewhat similar statutes are applicable to first-class cities as to police pensions. See Neb. Rev. Stat. §§ 16-335 and 337 (Reissue 1977).

The statutes referred to do not apply to the City of Omaha, but even if they were applicable, the pension ordinance here does not comply. Here the City has combined a disability pension with a service retirement pension and intermingled both with workmen's compensation payments and provided that all payments are to be made from commingled contributions of employees and employer, thus failing to protect and maintain the full and separate protection of the workmen's compensation act. The payment of disability benefits to the plaintiff under the pension plan of the City of Omaha involved here did not affect the right of the plaintiff to claim and receive benefits under the workmen's compensation act.

In his cross-appeal, the plaintiff contends that the Workmen's Compensation Court erroneously denied plaintiff waiting time penalties for delinquent payments and an attorney fee at the time of the initial hearing before the single judge. The ground for denial was that a reasonable controversy existed as to the employer's liability. This court has consistently held that, where a reasonable controversy exists between an employer and employee as to the employer's liabil-

ity, the employer is not liable for the penalty for waiting time or for the allowance of attorney fees. *Redfern v. Safeway Stores, Inc.*, 145 Neb. 288, 16 N.W.2d 196 (1944).

In the present case, the employer had never denied liability under the workmen's compensation act and had continuously maintained payments due under that act until the date the employer commenced paying disability benefits to the plaintiff under the pension plan involved here. Those payments were approximately twice the amount of workmen's compensation benefits and the disability pension plan provided that such benefits were in lieu of workmen's compensation benefits. Under such circumstances the Workmen's Compensation Court determined that a reasonable controversy existed, and the evidence supports that determination.

The judgment and award of the Workmen's Compensation Court are affirmed. The plaintiff is awarded the sum of $750 for the services of his attorney in this court.

AFFIRMED.

IN RE INTEREST OF CARLSON. STATE OF NEBRASKA, APPELLEE, V. DEBRA LYNN CARLSON, NATURAL MOTHER, APPELLANT.

299 N.W.2d 760

Filed December 19, 1980. No. 43153.

1. **Parental Rights: Appeal and Error.** A review of a juvenile case is by trial de novo in this court, and an order terminating parental rights must be supported by clear and convincing evidence.
2. **Parental Rights: Courts.** Once the parent has been shown to be unfit to have the care and custody of a minor child, the primary concern of the court is the best interests and welfare of the child.
3. ____: ____. There is no requirement that the court, having found a child to be within Neb. Rev. Stat. §§ 43-201 et seq. (Reissue 1978), must first implement a rehabilitation plan for the parents before terminating parental rights.

Appeal from the Separate Juvenile Court of Douglas County. Affirmed.

John B. Ashford of Bradford & Coenen for appellant.

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

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

HASTINGS, J.

This is an appeal by Debra Lynn Carlson from an order of the Separate Juvenile Court of Douglas County, terminating her parental rights to her three minor children, Andrea, Nigkeyla, and Kenyantia Carlson. The appellant assigns as error generally that the termination was not supported by clear and convincing evidence, and specifically that the court erred in not implementing a plan of rehabilitation for the mother. We affirm the juvenile court order.

The Carlson daughters are 8, 5, and 3 years of age, and each has a different father, judicially determined to be John Doe, real name unknown. The fathers' parental rights were also terminated by the juvenile court order. A petition was filed on December 13, 1978, by the Douglas County attorney's office, alleging that the three girls came within the meaning of Neb. Rev. Stat. §§ 43-202(1), 43-202(2)(b), and 43-209(2) (Reissue 1978) as to their mother, Debra Carlson, and requesting, inter alia, termination of her parental rights. The girls were placed in the temporary custoday of Douglas County Social Services for placement in foster homes, where they still remain.

On June 18, 1979, the juvenile court found that the children came within the meaning of §§ 43-202(2) and 43-209(2), and took the matter of the best interests of the children and the parental rights under advisement. A disposition hearing was held on August 24, 1979, and evidence was adduced, after which the court

ordered the mother to undergo psychiatric and psychological evaluation, and continued the disposition hearing until November 6, 1979. On November 7, 1979, after further hearing, the court entered an order terminating the rights of Debra Lynn Carlson to her three daughters, pursuant to § 43-209(2), in that she had substantially, continuously, or repeatedly neglected the children, and refused to give them necessary parental care and protection.

The evidence shows that Debra Lynn Carlson is an illiterate young woman of very low intelligence. She is not now, nor has she ever been, married. Ms. Carlson has a history of drug abuse, and has supported herself through prostitution since the age of 15. The oldest child, who was born addicted to heroin, has lived with her maternal grandparents most of her life, and the grandparents were very frequent babysitters for the other two girls. There is substantial evidence that at least the older girls were sexually abused by their grandfather and their maternal uncles. Debra Lynn Carlson knew that her father had a history of sexual abuse of children and that he has a history of mental problems. In fact, she had been a victim of his sexual abuse herself. She suspected that he might be similarly abusing her children and yet she permitted the grandparents to be the main source of child care. The two older girls further reported that they had witnessed their mother engage in sexual encounters with men friends.

Other than welfare assistance, Ms. Carlson's only means of supporting herself and her daughters has been through prostitution. Her reading skills are so limited that she requires assistance in filling out job application forms. In spite of this, she testified on cross-examination that she did not feel that she needed vocational training, nor did she feel that she needed psychological or psychiatric therapy. In fairness, we note that she did express the willingness to go through a training program. However, as recently as September

1979, Debra Lynn had been "non-positively terminated" from an Opportunities Industrialization Center (OIC) training program for failure to cooperate.

It is well established that a review of a juvenile case is by trial de novo, and an order terminating parental rights must be supported by clear and convincing evidence. *In re Interest of O'Donnell, ante* p. 367, 299 N.W.2d 428 (1980). The appellant argues that the evidence does not support termination; rather, it points toward the implementation of a rehabilitation plan and the court's failure to do so was error.

Once the parent has been shown to be unfit to have the care and custody of a minor child, the primary concern of the court is the best interests and welfare of the child. *Mullikin v. Lutkehuse*, 182 Neb. 132, 153 N.W.2d 361 (1967); *Mingus v. Stuchlick*, 185 Neb. 139, 174 N.W.2d 194 (1970). Parental rights may be terminated for any one of the six independent circumstances proscribed by § 43-209. *State v. Burger*, 205 Neb. 340, 288 N.W.2d 22 (1980). There is no requirement that the court must implement a rehabilitation plan for the parent of a child found to be dependent and neglected, and particularly if such a plan has very little chance of success and it would not be in the best interests of the child. The right of a parent to custody and control of his child is a natural, but not an inalienable, right. The public has a paramount interest in the protection of children from abuse and neglect. *State v. Wedige*, 205 Neb. 687, 289 N.W.2d 538 (1980).

The Carlson children were receiving no protection from recurrent sexual abuse. They were being exposed to completely unsatisfactory social conditions at home. They have a right to grow up in a healthy and wholesome environment. Each day's delay in making them available for permanent placement in such satisfactory surroundings causes such right to become increasingly unobtainable. In reviewing this case de novo, we find that there is clear and convincing evidence supporting the termination of parental rights of Debra

Lynn Carlson to her three children. The judgment of the Separate Juvenile Court was correct, and it is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LEO LOUIS WOUNDED ARROW, APPELLANT.

300 N.W.2d 19

Filed December 19, 1980. No. 43183.

1. **Juries: Jury Selection.** The Nebraska system of selecting jurors by the use of voter registration lists is constitutionally permissible.
2. ____: ____. The states are free to grant exemptions from jury service to individuals in case of special hardships or incapacity and to those engaged in particular occupations the uninterrupted performance of which is critical to the community's welfare. Such exemptions do not pose substantial threats that the remaining pool of jurors would not be representative of the community.
3. **Prosecutor Misconduct: Criminal Trials.** Before it is necessary to grant a mistrial due to prosecutorial misconduct, the defendant must show that a substantial miscarriage of justice has actually occurred.
4. **Criminal Trials: Appeal and Error.** Limiting the scope of a prosecutor's opening statement is largely within the trial court's discretion; its rulings will not be disturbed unless a prejudicial abuse of discretion occurred.
5. **Criminal Trials.** Provided the prosecutor does not mislead the jury, he may make reasonable comments on the evidence and draw inferences from testimony to support his theory of the case.
6. **Prosecutor Misconduct: Criminal Trials.** A party may not complain of misconduct of counsel if, with knowledge of such misconduct, he does not ask for a mistrial, but consents to take the chance of a favorable verdict.
7. **Sexual Assault: Corroboration.** In a sexual assault case, the victim need not be independently corroborated on the particular acts constituting sexual assault, but must be corroborated on the material facts and circumstances tending to support the victim's testimony about the principal fact in issue.
8. **Sexual Assault: Circumstantial Evidence: Consent.** In a sexual assault case, circumstantial evidence may be sufficient to present a jury question on consent.
9. **Sexual Assault: Corroboration.** 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.

10. **Sexual Assault.** It is not necessary that the victim of the assault make the complaint at the first available opportunity, especially if the victim is afraid and ashamed of what has happened. It is only necessary that the complaint be within a reasonable amount of time following the assault.
11. **Criminal Trials: Appeal and Error.** In determining the sufficiency of evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. The verdict of a jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
12. ____: ____. Alleged errors not raised in the trial court and not referred to in a motion for new trial will not be considered by this court on appeal. In order to obtain a review of alleged errors occurring during the trial, such errors must be pointed out to the trial court in a motion for new trial and a ruling thereon obtained.

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

Richard L. Schmeling for appellant.

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

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

BURKHARD, District Judge.

The defendant was charged with the offense of first degree sexual assault. After jury trial in the District Court for Lancaster County, Nebraska, defendant was found guilty of the charge and sentenced to an indeterminate term of not less than 5 years and not more than 9 years in the Nebraska Penal and Correctional Complex. Defendant has appealed to this court.

The relevant facts are that defendant and the victim were incarcerated in the County-City Jail in Lincoln, Nebraska, during the occurrence of all events giving rise to the trial of this case. They had first met in the summer of 1978, and met again about January 19, 1979, in the jail. At some point in time after the victim and Wounded Arrow started staying together in the same cell, two other inmates were placed in the same cell with

them. Both were present when the events complained of occurred.

The victim testified that, early on the morning of January 28, 1979, he was awakened by the defendant and forced by threats of murder to have sexual intercourse with him. The defendant admitted that he and the victim had sexual intercourse on that night but contended that the acts were consensual and were instigated by the victim. Both also testified that another jail inmate passed by in the hall shortly after the sexual acts occurred and talked to the victim. The victim did not report the incident until more than a day later, at which time he told his mother, the jail administrator, and a Lincoln Police Department detective.

Defendant assigns as error that (1) The jury panel was not a jury of defendant's peers and was not a representative cross-section of the citizens of Lancaster County, Nebraska; (2) A mistrial should have been ordered by the trial court because of alleged improper and prejudicial statements and arguments made by the attorneys for the prosecution during both opening statement and closing argument; (3) There was lack of corroboration of the testimony of the victim; (4) The trial court failed to instruct the jury regarding the effect of impeachment testimony; and (5) Instruction No. 9 as regards corroboration was improper because it permitted the jury to find the defendant guilty if there was corroboration as to the occurrence of the "particular act," the sexual intrusion, *or* as to the "principal fact in issue," which in this case was the use of force by the defendant. We affirm.

In support of his first assignment, defendant argues that the Nebraska jury selection system is unconstitutional because (1) Jury panels drawn from lists of registered voters are not representative of the community at large because of the relatively lower rate of voter registration among some minorities, certain age groups, the poor, and the lesser educated, and (2) Nebraska's jury exemption statute, Neb. Rev. Stat.

§ 25-1601 (Reissue 1975) exempted upon request those persons engaged in certain occupations. (The amendment removing those exemptions, codified as Neb. Rev. Stat. § 25-1601 (Reissue 1979), did not take effect until after this jury was selected.)

Nebraska's jury selection system has been held to be constitutional upon several occasions. This court held in *State v. Wright*, 196 Neb. 377, 379, 243 N.W. 2d 66, 67 (1972), as follows: "For all practical purposes, defendant's arguments constitute an evidentially unsupported attack on the Nebraska system of selecting jurors by the use of voter registration lists. This court has already held that the Nebraska system of selecting jurors by the use of voter registration lists is constitutionally permissible."

It has been established that a state may grant exemption to certain occupations: "The States are free to grant exemptions from jury service to individuals in case of special hardship or incapacity and to those engaged in particular occupations the uninterrupted performance of which is critical to the community's welfare. *Rawlins v. Georgia*, 201 U.S. 638 (1906). It would not appear that such exemptions would pose substantial threats that the remaining pool of jurors would not be representative of the community." *Taylor v. Louisiana*, 419 U.S. 522, 534, 95 S. Ct. 692, 42 L.Ed. 2d 690 (1974).

The trial court did not err in refusing to sustain defendant's motion to quash the jury panel.

Defendant objects to the following portion of the prosecution's opening statement on the ground that the prosecutor expressed his personal belief or opinion as to the guilt of the defendant: "At the close of the case, the State of Nebraska expects that you will receive instructions from this Court concerning the essential elements that are necessary to find the defendant guilty of the offense charged. The state expects that the testimony of the various witnesses that we will call — and as I've said earlier, we expect to call seven wit-

nesses. We expect that those witnesses' testimony, in conjunction with the exhibits which we will offer into evidence, coupled with the instructions that you will receive at the conclusion of the case, will prove that every essential element of the crime being prosecuted was committed by this defendant.

"The state accepts and is prepared to meet in this case its burden of proving a case beyond a reasonable doubt, and that is why this case is being tried at this time. The state expects that the evidence will show the defendant did forcibly sexually assault [the victim] on the day in question."

It should be noted that prior to the above-quoted remarks of the prosecution, the court and the prosecutor had made the following introductory comments to the jury:

"THE COURT: The next phase of the trial are opening statements by both counsel. They are not evidence or statements made by counsel at this point is not evidence or at any point. They are simply to give you an idea of what each side expects to prove in the case." Alan G. Stoler, the deputy county attorney who made the opening statement for the State, said: "As the judge has just said to you, what I say in this opening statement and what the defense attorney also says is not to be considered by you as evidence. *Everything that we say in the opening statement is what we as the State of Nebraska expect to prove, what we expect the evidence will show you during the trial in this matter.*" (Emphasis supplied.)

The gist of the prosecutor's opening statement was that the prosecutor expected the evidence to show that the defendant was guilty beyond a reasonable doubt of the crime charged. It was not an expression of a personal belief or opinion as to the guilt of the defendant.

Before it is necessary to grant a mistrial due to prosecutorial misconduct, the defendant must show that a "substantial miscarriage of justice has actually occurred." Neb. Rev. Stat. § 29-2308 (Reissue 1979); *State v. Van Ackeren*, 194 Neb. 650, 659, 235 N.W.2d 210,

216 (1975). Limiting the scope of a prosecutor's opening statement is largely within the trial court's discretion; its rulings will not be disturbed unless a prejudicial abuse of discretion occurred. 23A C.J.S. *Criminal Law* § 1085 at 99 (1961); 24A C.J.S. *Criminal Law* § 1873 (1962).

During closing arguments, the prosecutor made several remarks which were successfully objected to by defendant's counsel. At the close of the prosecution's arguments, defendant asked for a mistrial. Defendant then withdrew his motion for a mistrial in exchange for an appropriate precautionary instruction.

The defendant may not now complain of misconduct of counsel when, with knowledge of such alleged misconduct, he did not ask for a mistrial, but consented to take the chance of a favorable verdict. *Davis v. State*, 171 Neb. 333, 342, 106 N.W.2d 490, 497 (1960), citing *Johnson v. Nathan*, 161 Neb. 399, 73 N.W.2d 398 (1955). There is no showing that the court abused its discretion in failing to order a mistrial on its own motion with respect to the closing statements made by the prosecution.

Defendant's next complaint pertains to lack of corroboration, specifically as regards the use of force, or threat of force, express or implied. Conversely, defendant contends the sexual acts occurred with the victim's consent. Defendant correctly states that the victim's testimony need not be independently corroborated on the particular acts constituting the sexual assault, but must be corroborated on the material facts and circumstances tending to support the victim's testimony about the principal fact in issue. *State v. Tatum*, 206 Neb. 625, 294 N.W.2d 354 (1980).

The law was also correctly stated in the court's instructions to the jury. Instruction No. 9 was as follows: "There must be testimony on behalf of the state corroborating the testimony of [the victim] to justify a conviction. Such corroboration may consist of testimony of another witness or witnesses to the particular act consti-

tuting the offense or by material facts and circumstances which tend to support the testimony of [the victim] and from which, together with his testimony as to the principal fact, the inference of guilt of the defendant must be drawn beyond a reasonable doubt before you may find him guilty."

There is no merit to defendant's contention that instruction No. 9 was not a correct statement of the law. As previously pointed out, there was sufficient corroboration as to the "principal fact in issue," which was the use of force by defendant.

It should also be pointed out that defendant did not object to the wording of instruction No. 9 at the jury instruction conference and did not complain about it in his motion for a new trial. The applicable rule is as follows: "We have repeatedly said that alleged errors not raised in the trial court and not referred to in a motion for a new trial will not be considered by this court on appeal. In order to obtain a review of alleged errors occurring during the trial, such errors must be pointed out to the trial court in a motion for a new trial and a ruling thereon obtained." *State v. Lytle*, 194 Neb. 353, 359, 231 N.W.2d 681, 686 (1975).

The defendant, in the instant case, did not deny that he had homosexual intercourse with the victim, nor did he challenge the victim's testimony as to the time or place of the sexual act. In a broad sense, the defendant's testimony corroborates the victim's testimony except as to whether the penetration was with the victim's consent or against his will.

On the issue of consent, *State v. Pankey*, 202 Neb. 595, 276 N.W.2d 233 (1979), held that, "[w]here resistance would obviously be useless, fruitless, or foolhardy, it is wholly unrealistic to require affirmative direct demonstration of the utmost physical resistance as proof of the [victim's] opposition and lack of consent. It is only required that the [victim] make reasonable resistance in good faith under all the circumstances . . . ." *Id.* at 597, 276 N.W.2d at 234-35.

More importantly, did the victim make a timely complaint after the acts were committed? "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." *State v. Tatum*, 206 Neb. 625, 628-29, 294 N.W.2d 354, 356 (1980).

It is not necessary that the victim of the assault make the complaint at the first available opportunity, especially if the victim is afraid and ashamed of what has happened. It is only necessary that the complaint be within a reasonable amount of time following the assault. *State v. Aby*, 205 Neb. 267, 287 N.W.2d 68 (1980).

In this case, the victim first complained of the assault on Monday, January 29, 1979, the day following the early Sunday morning sexual assault. This complaint was made in a telephone call to his mother at about noon, while he was a trustee and able to leave the cell block. He was upset when he called. He complained of the assault to Kenneth Johnson, the jail administrator, on the same day, January 29, 1979, and was upset and crying. He also gave a full report to a detective of the Lincoln Police Department on that same day.

The victim stated that he did not report the incident on Sunday, January 28, 1979, because the defendant was near him in the cell block or in the hallway most of the day, and the victim was still scared. He also testified that he attempted, without success, to contact his attorney on Sunday to tell him about the assault.

The victim was never questioned as to why he did not report the assault to his mother when she visited him at the jail on Sunday, January 28, 1979.

The jury had an opportunity to observe the witnesses

as they testified to determine whether to believe the defendant's or the victim's version of the incident. "[A] question of fact as to the issue of consent was created.

"In determining the sufficiency of evidence to sustain a conviction, however, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the jury. [Citations omitted.] The verdict of a jury must be sustained if taking the view most favorable to the State, there is sufficient evidence to support it." *State v. Pankey* at 597, 276 N.W.2d at 235.

Under all of the circumstances, the victim's complaint was made within a reasonable period of time after the assault took place, and the use of force by the defendant was corroborated.

Defendant's next assignment of error is that the trial court should have instructed the jury on the nature and purpose for which impeachment evidence was received.

On cross-examination, the defendant was questioned as to whether or not he had been involved in fights in the jail or had threatened jail personnel. Defendant claims that these questions were intended to impeach his testimony that he was a peacemaker in jail, and, therefore, the jury should have been instructed on the effect of impeachment testimony. Defendant did not request such an instruction. The State claims that defendant put his character into issue by testifying that he was a peacemaker, and therefore, its questions were to test his credibility on that issue. An instruction on character evidence was given. It was not necessary to instruct the jury on impeachment evidence because the prosecution's questions were only asked to rebut defendant's testimony.

As with instruction No. 9, discussed above, the defendant did not complain at the jury instruction conference of the failure to give an impeachment instruc-

tion nor did he raise the issue in his motion for a new trial.

The assignments of error of the defendant are without merit. The judgment of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
LEE E. SUHR, APPELLANT.
300 N.W.2d 25

Filed December 19, 1980. No. 43228.

1. **Prior Convictions: Enhanced Penalties.** In order to warrant the imposition of the enhanced penalties for issuing a bad check under Neb. Rev. Stat. § 28-611(2) (Reissue 1979), effective January 1, 1979, prior convictions must have occurred under subdivision (1)(c) or (1)(d) of that section; and prior convictions under previous "bad check" statutes may not be used to enhance the penalties under the "bad check" statute currently in effect.
2. **Crimes and Punishment: Legislature.** No act is criminal unless the Legislature has in express terms declared it to be so, and no person can be punished for any act or omission which is not made penal by the plain import of the written law.
3. **Statutes: Criminal Law.** It is a fundamental principle of statutory construction that a penal statute is to be strictly construed.
4. **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.
5. **Statutes: Legislature.** In enacting an amendatory statute, the Legislature is presumed to have known the preexisting law.

Appeal from the District Court for Lancaster County: HERBERT A. RONIN, Judge. Conviction affirmed. Cause remanded for resentencing.

Dennis R. Keefe, Lancaster County Public Defender, for appellant.

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

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

BRODKEY, J.

In an information filed in the county court of Lancaster County, Nebraska, on June 5, 1979, Lee E. Suhr, the defendant and appellant herein, was charged under Neb. Rev. Stat. § 28-611(2) (Reissue 1979) with issuing a bad check, second offense. On June 19, 1979, the defendant waived his right to a preliminary hearing in the matter and was bound over to the District Court for Lancaster County for trial. Prior to his arraignment on the charge, the defendant filed a motion to quash, challenging the use of a prior misdemeanor conviction for no-account checks under the provisions of the criminal code in effect prior to the effective date of the new Criminal Code, January 1, 1979. The District Court overruled the defendant's motion, and he entered a plea of not guilty to the charge at his arraignment.

On November 26, 1979, the defendant waived his right to a trial by jury and the case was set for trial to the court on December 19, 1979. At trial, all the facts of the case were stipulated by the parties and the defendant was found guilty as charged. Suhr was sentenced to a term of imprisonment from 18 months to 2 years, with credit given for 77 days spent in custody while awaiting disposition of his case.

The facts, as stipulated, appear to be as follows: On April 24, 1979, the defendant, Lee E. Suhr, went to the Gateway Western store located in the Gateway Shopping Center, Lincoln, Lancaster County, Nebraska, and presented a check drawn on his checking account at the Lincoln Bank South to Bethine Clark, an employee of the Gateway Western store. This check, signed by the defendant, in the amount of $18.71, was dated April 24, 1979, and was made payable to Gateway Western. In return for this check, Suhr received western wear clothing from the Gateway Western store. There was no agreement between Lee E. Suhr and Bethine Clark, or anyone else at Gateway Western, that the check would be held before being presented for pay-

ment, nor did the above-described check constitute payment on any account in any form whatsoever.

After receiving the above-described check, MarJean Schweitzer, the bookkeeper for Gateway Western, sent the check to Lincoln Bank South for payment in the normal course of Gateway Western's business. The check was returned to Gateway Western by Lincoln Bank South unpaid because the account had been closed. On May 10, 1979, MarJean Schweitzer turned the check over to the office of the Lancaster County Attorney for prosecution.

The stipulation for trial also provided that Rod Johnson, an officer at the Lincoln Bank South, would testify that the defendant did open a checking account at the Lincoln Bank South on February 16, 1979, with a deposit of $135.78, and that it was on this account that the check was drawn. When Suhr opened this account, he advised the bank that his address was 5200 South 40th Street, Lincoln, Nebraska, and never notified the bank of any change in his address. There were no other deposits made to this account by Suhr and on March 8, 1979, Lincoln Bank South closed his checking account because it was $61.88 overdrawn. Rod Johnson would also testify that, in the ordinary course of the bank's daily business, the bank sends to customers, at the address provided to the bank by the customer, notice of all checks returned by the bank by reason of "insufficient funds" or "account closed," and that, in the ordinary course of the bank's daily business, the bank does notify customers when an account is closed by the bank. Johnson would further state that, as far as he knows, this standard procedure was followed with regard to Suhr.

The stipulation also provided that Kim Stratman would testify that she was employed by the Lancaster County Attorney's office as a paralegal in the bogus check division; and that on April 26, 1979, a letter was sent by U.S. mail, postage prepaid, to Lee Suhr's last known address of 5200 South 40th Street, Lincoln,

Nebraska, advising him that the county attorney's office was in possession of a number of checks written by him which had been returned to the depositor by reason of insufficient funds or because his account had been closed. This letter advised Suhr that it is against the law in the State of Nebraska to write checks knowing that there is no account or that there are insufficient funds to cover the amount of the check. This letter stated that Suhr had 10 days within which payment for all the checks must be received by the county attorney's office. This letter was not returned to the county attorney's office by the U.S. Postal Service as undeliverable for any reason, and the county attorney's office received no response from Suhr as a result of the sending of this letter. On May 2, 1979, another letter was sent to Suhr by U.S. mail, postage prepaid, to the address of 5200 South 40th Street, reminding him that he had been contacted with regard to his bogus check situation and advising him that, since he had not satisfactorily taken care of the matter, a warrant for his arrest would be issued in 7 days. This letter, too, was not returned to the county attorney's office. On May 14, 1979, the defendant contacted the county attorney's office and was advised of the current total number of bogus checks in its possession. This total included the check written to Gateway Western. The defendant stated at that time that he would take care of all those checks by the next day, May 15, 1979.

It was also stipulated that Kim Stratman would further testify that the Lancaster County Attorney's office was in possession of 58 checks written by the defendant on this same account at Lincoln Bank South; and that all those checks had been turned over to the county attorney's office for prosecution because the checks had been unpaid by reason of insufficient funds or by reason of the account being closed. The checks in the possession of the county attorney's office included 3 checks written in the month of February 1979; 16 checks written in the month of March 1979; 19 checks

written in the month of April 1979; and 20 checks written in the month of May 1979. The checks written in the month of May included 12 checks which were written by the defendant on or after May 15, 1979. The total dollar amount of bogus checks in the possession of the county attorney's office was $1,411.24; and there were $118 in statutory prosecution fees which have accumulated in this case, making the total amount owed to the county attorney's office by the defendant of $1,527.24. As of December 19, 1979, Suhr had made no restitution with regard to any of these checks.

Further, on June 16, 1976, a complaint was filed in the county court of Lancaster County, Nebraska, at docket 166, page 969, charging the defendant with a misdemeanor offense of writing a no-account check, pursuant to Neb. Rev. Stat. § 28-1212 (Reissue 1975) (repealed 1977). On June 23, 1976, the defendant was arraigned on this offense in the Lancaster County court. He was advised of the nature of the charges against him by a reading of the complaint, and the possible penalties were explained. Suhr's constitutional rights were explained to him by a Lancaster County judge. The defendant pleaded not guilty and the Lancaster County Public Defender's office was appointed to represent him. On July 12, 1976, the defendant again appeared in Lancaster County court with his attorney, George Sornberger, an attorney on the staff of the Lancaster County Public Defender's office. At that time, Suhr changed his plea to "no contest." The court heard the State's evidence and found the defendant guilty of the offense of writing a no-account check. Suhr was sentenced to 45 days in the Lancaster County jail and ordered to pay court costs. It was stipulated that there was no appeal of this case and there were no legal matters pending as of December 19, 1979, with regard to the misdemeanor offense found at docket 166, page 969, of the Lancaster County court.

Suhr has appealed to this court, contending that the trial court committed error by holding that his

1976 misdemeanor conviction for a no-account check, entered prior to the operative date of § 28-611, qualified as a conviction for the purpose of enhancing his sentence under § 28-611(2). In this regard, § 28-611 provides, in pertinent part:

"(1) Whoever obtains property, services, or present value of any kind by issuing or passing a check or similar signed order for the payment of money, knowing that he has no account with the drawee at the time the check or order is issued, or, if he has such an account, knowing that he does not have sufficient funds in, or credit with, the drawee for the payment of such check or order in full upon its presentation, *commits the offense of issuing a bad check.* Issuing a bad check is: (a) A Class III felony if the amount of the check or order is one thousand dollars or more; (b) A Class IV felony if the amount of the check or order is three hundred dollars or more, but less than one thousand dollars; (c) A Class I misdemeanor if the amount of the check or order is seventy-five dollars or more, but less than three hundred dollars; and (d) A Class II misdemeanor if the amount of the check or order is less than seventy-five dollars.

"(2) *For any second or subsequent offense under subdivision (1) (c) or (1) (d) of this section,* any person so offending shall be guilty of a Class IV felony." (Emphasis supplied.)

In this state, all public offenses are statutory. "No act is criminal unless the Legislature has in express terms declared it to be so, and no person can be punished for any act or omission which is not made penal by the plain import of written law." *State v. Ewert,* 194 Neb. 203, 204, 230 N.W.2d 609, 610 (1975). See, also, *State v. Hauck,* 190 Neb. 534, 209 N.W.2d 580 (1973); *Lane v. State,* 120 Neb. 302, 232 N.W. 96 (1930). In the present case, § 28-611 (2) makes it a Class IV felony for any person to be convicted of a *second or subsequent bad check offense under subdivision (1) (c) or (1) (d) of the statutory provisions.* It is clear that the statutory lanugage expressly requires that the

prior conviction necessary to create a second or subsequent offense be a conviction under § 28-611 (1) (c) or (1) (d).

In this case, the defendant's prior conviction was a misdemeanor conviction entered in 1976 under Neb. Rev. Stat. § 28-1212 (Reissue 1975) (repealed 1977), and not under either subdivision (1) (c) or (1) (d) of § 28-611. Section 28-1212, under which the defendant was convicted, provided: "Any person who, with intent to defraud, shall make or draw, utter or deliver any check, draft, assignment of funds, or order for the payment of money upon any bank, cooperative credit association, or other depository knowing, at the time of such making, drawing, uttering, or delivering, that the maker or drawer has no account or deposit in such bank, cooperative credit association, or depository, upon conviction thereof, shall be punished as follows: (1) If such check, draft, order or assignment of funds so issued be for a sum not exceeding seventy-five dollars, the person so convicted shall be fined in any sum not less than five dollars nor more than five hundred dollars, or shall be imprisoned in the county jail not more than six months, or be both so fined and imprisoned, at the discretion of the court, and shall pay the costs of prosecution; or (2) if such check, draft, order or assignment of funds so issued be for a sum greater than seventy-five dollars, *or if any person shall have been previously convicted* of issuing a check, draft, order or assignment of funds under one hundred dollars, the person so convicted shall be imprisoned in the Nebraska Penal and Correctional Complex not exceeding ten years, or be imprisoned in the county jail not exceeding one year, or be fined not less than fifty dollars nor more than five thousand dollars, or be both so fined and imprisoned, at the discretion of the court. Any such instrument given in payment for lodging or other accommodations at any apartment house, hotel or motel shall be presumed to have been given with intent to defraud, but such presumption may be rebutted." (Emphasis supplied.)

Section 28-611, the "bad check" statute in the new Criminal Code, effective January 1, 1979, sets out in specific terms the requirements which must be met in order to convict a person for a second or subsequent offense. We note that the Legislature, in enacting the new statutory language, deleted the words *"or if any person shall have been previously convicted,"* originally found in § 28-1212. In the new statute, not only were the above words eliminated, but the statute affirmatively declares that, for an offense to be a second or subsequent offense, it must be a prior conviction under subdivision (1) (c) or (1) (d) of § 28-611.

It is a fundamental principle of statutory construction that a penal statute is to be strictly construed. *State v. Robinson*, 202 Neb. 210, 274 N.W.2d 553 (1979). See, also, *State v. Nance*, 197 Neb. 257, 248 N.W.2d 339 (1976); *State v. Lewis*, 184 Neb. 111, 165 N.W.2d 569 (1969); *State v. Simants*, 182 Neb. 491, 155 N.W.2d 788 (1968). This court has also held that "Where the language of a statute is plain and unambiguous, no interpretation is needed and the court is without authority to change the language." *State v. Gallegos*, 193 Neb. 651, 653, 228 N.W.2d 615, 617 (1975). See, also, *Rudder v. American Standard Ins. Co. of Wisconsin*, 187 Neb. 778, 194 N.W.2d 175 (1972); *Insurance Co. of North America v. County of Hall*, 188 Neb. 609, 198 N.W.2d 490 (1972). There is no ambiguity or gap in the new statute which would require us to resort to any of the traditional rules of statutory construction in order to ascertain the intent of the Legislature. The language in the new statute is clear and unambiguous, and is not subject to interpretation. If the Legislature had intended to allow a previous conviction for no-account checks under prior statutes to constitute a prior offense upon which a conviction for a second or subsequent offense could be based, it could easily have adopted in the new statute the language previously contained in § 28-1212. However, the Legislature did not do so, but has specifically pro-

vided that a prior conviction under subdivision (1) (c) or (1) (d) of § 28-611 is required in order to enhance the penalties for the issuance of a second or subsequent bad check.

The Legislature, in enacting the present statute, is presumed to have known the preexisting law, and in enacting the amendatory statute, we must conclude that the language was intentionally changed for the purpose of effecting a change in the law itself. In any event, the Legislature has the power to change the above provisions if it so desires.

We therefore hold that § 28-611 is controlling of the disposition of this case, and that defendant's prior misdemeanor conviction under § 28-1212 is not a "prior offense" within the plain import of § 28-611(1)(c) or (1)(d). Under § 28-611(1)(d), the issuance of a bad check in an amount less than $75 is declared to be a Class II misdemeanor. Neb. Rev. Stat. § 28-106 (Reissue 1979) provides that the penalty for conviction of a Class II misdemeanor shall be: "Maximum-six months imprisonment, or one thousand dollars fine, or both "Minimum-none."

We, therefore, affirm the conviction of the defendant for issuing a bad check and remand the cause to the District Court for further proceedings and resentencing in conformity with the provisions of the above-quoted statutes.

CONVICTION AFFIRMED.
CAUSE REMANDED FOR RESENTENCING.

PETER T. SUZUKI AND CAROL J. SUZUKI, APPELLANTS, V. GATEWAY REALTY OF AMERICA, A NEBRASKA CORPORATION, APPELLEE.

299 N.W.2d 762

Filed December 29, 1980. No. 42776.

1. **Summary Judgment: Amendment of Pleadings.** Neb. Rev. Stat. § 25-854 (Reissue 1979) provides that, if a demurrer be sustained, the adverse party may amend, if the defect can be remedied by way of amendment, with or without costs, as the court in its discretion shall direct.
2. ____: ____. Neb. Rev. Stat. § 25-854 (Reissue 1979) has been held by this court on several occasions to not provide an absolute right of amendment.
3. **Summary Judgment: Amendment of Pleadings: Appeal and Error.** This court has previously stated that, before error can be predicated upon the refusal of the court to permit an amendment to a petition after demurrer thereto is sustained, the record must show that, under the circumstances, the ruling of the court was an abuse of discretion.
4. **Summary Judgment: Burden of Proof.** A motion for summary judgment may be granted only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The burden is upon the party moving for the summary judgment to show no issue of fact exists, and unless he can conclusively do so, the motion must be overruled.
5. **Principal and Agent.** As a general rule, where an obligation is that of a principal, a court cannot enforce the obligation against the agent as long as he is merely acting as agent.
6. ____. An agent can be held liable if he makes some representation or performs some act on his own responsibility, without authorization from his principal, but only where the unauthorized act of the agent leaves the third party with no claim against the principal, who is not bound by the transaction.
7. **Fraudulent Misrepresentation.** The essential elements required to sustain an action for fraudulent misrepresentation are, generally speaking, that a representation was made as a statement of fact, which was untrue or known to be untrue by the party making it, or else recklessly made; that it was made with the intent to deceive and for the purpose of inducing the other party to act upon it; and the injured party did in fact rely upon it and was induced thereby to act to his injury or damage.

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

Clarence E. Mock of Johnson & Mock for appellants.

Frank H. Kulig of Marer, Venteicher, Strasheim, Laughlin & Murray, P.C., for appellee.

Heard before BOSLAUGH and MCCOWN, JJ., and COLWELL, KNEIFL, and WHITEHEAD, District Judges.

WHITEHEAD, District Judge.

This action was filed in the District Court for Douglas County, Nebraska, by Peter and Carol Suzuki (Suzukis). Action was originally filed against Gateway Realty of America, Omaha Division, Inc., a Nebraska corporation, but by agreement of the parties, Gateway Realty of America, Bellevue Division, Inc., a Nebraska corporation (Gateway), was substituted as a proper party defendant. This action was joined with causes of action filed against John and Cynthia McLaughlin (McLaughlins), Betty Vodicka (Vodicka), and John Wagner (Wagner). The first amended petition alleged four causes of action against all parties as joint tortfeasors. In their petition, the Suzukis alleged that the McLaughlins were the owners of a residence located at 1030 Chapel Hills Drive, Elkhorn, Nebraska, and that they listed the residence for sale with Gateway. Vodicka, identified as the listing agent, and Wagner, identified as the selling agent, were alleged to be employees of Gateway.

The first cause of action alleged negligence on the part of defendants in offering for sale and constructing the home in an unworkmanlike manner so as to make it uninhabitable. Gateway filed a motion to make more definite and certain, asking the appellants to set forth acts or omissions, if any, of Gateway in offering the subject property for sale in an unworkmanlike manner so as to make it uninhabitable, and the acts and omissions of Gateway constituting constructing the home in an unworkmanlike manner. The trial court sustained the motion and granted the appellants 10 days to amend. Appellants' amendment to amended petition inserted the names of the sellers, McLaughlins, immediately following the word "defendants" in their

first cause of action, thus apparently restricting the first cause of action to those defendants. Subsequently, demurrers were filed on behalf of Gateway, Wagner, and Vodicka to all four causes of action. The demurrers of Wagner and Vodicka were sustained by the trial court on June 9, 1978, to all four causes of action. Gateway's demurrer to the first cause of action as amended was sustained, the court being silent as to whether Suzukis had permission to amend. No motion was filed by Suzukis for leave to further amend their petition.

On January 3, 1979, Gateway filed a motion for summary judgment on all the remaining causes of action set forth in the first amended petition. On February 8, 1979, Suzukis sought and obtained leave to file a second amended petition. On February 16, 1979, a second amended petition was filed which was not substantially different from the first amended petition except that a fifth cause of action had been pleaded claiming damages as a result of violation of Neb. Rev. Stat. § 31-727.03 (Reissue 1978), which required disclosure of certain information about sanitary and improvement districts.

A hearing was subsequently held on Gateway's motion for summary judgment. On February 27, 1979, that motion was sustained as to the second, third, and fourth causes of action. The motion had not, however, encompassed the newly pleaded fifth cause of action which remained for trial. On March 7th, Suzukis filed a motion for new trial which was subsequently expanded by a pleading entitled "amended motion for new trial." On April 18, 1979, the court, after hearing, overruled those motions. On May 17, 1979, Suzukis filed their notice of intention to appeal, and on May 24, 1979, Suzukis voluntarily dismissed their fifth cause of action as set forth in their second amended petition.

Suzukis assign as error the District Court's sustaining of Gateway's demurrer to Suzukis' first cause of action as set forth in their second amended petition

without giving the plaintiffs leave to amend. The Suzukis also claim that the court erred in sustaining Gateway's motion for summary judgment as to the third cause of action on breach of express warranty as set forth in Suzukis' second amended petition and in granting Gateway's motion for summary judgment as to the fourth cause of action for fraudulent misrepresentation as set forth in Suzukis' second amended petition. We affirm.

Neb. Rev. Stat. § 25-854 (Reissue 1979) provides that, if a demurrer be sustained, the adverse party may amend, if the defect can be remedied by way of amendment, with or without costs, as the court in its discretion shall direct.

This section of the statute has been held by this court on several occasions to not provide an absolute right of amendment. See, *Evans v. Metropolitan Utilities Dist.*, 184 Neb. 172, 166 N.W.2d 411 (1969); *Weiner v. Morgan*, 175 Neb. 656, 122 N.W.2d 871 (1963); *Coverdale & Colpitts v. Dakota County*, 144 Neb. 166, 12 N.W.2d 764 (1944). This court has previously stated that, before error can be predicated upon the refusal of the court to permit an amendment to a petition after demurrer thereto is sustained, the record must show that, under the circumstances, the ruling of the court was an abuse of discretion. *Coverdale & Colpitts v. Dakota County; Weiner v. Morgan.*

In this case, the trial court, after sustaining the demurrer to the first cause of action, did not refuse to grant permission to amend the petition, but was silent on the matter and the plaintiffs at no time requested leave to amend their petition prior to the time of filing a motion for new trial in this case. This is the same fact situation as *Evans v. Metropolitan Utilities Dist., supra.* In this case, as in the *Evans* case, the plaintiffs made no effort to amend their petition.

This court then can only conclude that the plaintiffs could not see any manner in which to amend their petition to allege a cause of action in negligence against

Gateway and the ruling of the District Court is correct.

The granting of the defendant's motion for summary judgment as to the second cause of action of plaintiffs' petition is not at any time during the course of these proceedings contested by Suzukis as being in error and the granting of a summary judgment on the plaintiffs' second cause of action is, therefore, affirmed.

It is commonly understood that a motion for summary judgment may be granted only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Warren v. Papillion School Dist. No. 27*, 199 Neb. 410, 259 N.W.2d 281 (1977). It is also commonly understood that 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. *Green v. Village of Terrytown*, 189 Neb. 615, 204 N.W.2d 152 (1973). In the case at hand, the third cause of action alleges a breach of express warranty and the fourth cause of action alleges that the Suzukis purchased this home because of the fraudulent misrepresentations of the defendant Gateway or its agents.

The Suzukis' third cause of action alleges that Gateway, through its agents, "as agents for defendants McLaughlin," expressly warranted that the house was built of reasonable quality workmanship, that unfinished items in the home would be completed at no expense to Suzukis, and that the home was fit and suitable for the purpose for which it was to be used by Suzukis; and Suzukis were induced to purchase said home and relied on the alleged express warranties.

Suzukis allege, and the evidence is undisputed, that Gateway was an agent of the defendant owners, McLaughlins, and this fact was disclosed to Suzukis.

It is generally recognized that "[a]s a general rule, where an obligation is that of a principal, a court cannot enforce the obligation againt the agent as long as he is merely acting as agent." 3 C.J.S. *Agency* § 361

(1973). See, also, *Arnold Livestock Sales Company, Inc. v. Pearson*, 383 F. Supp. 1319 (D. Neb. 1974).

However, an agent can be held liable if he makes some representation or performs some act on his own responsibility without authorization from his principal. See 3 C.J.S. *Agency* § 362 (1973). But "[t]his rule is intended to apply only where the unauthorized act of the agent leaves the third party with no claim against the principal, who is not bound by the transaction . . . ." *Id.*

The express warranties alleged and evidence presented do not place Gateway in excess of the authority of the agency and, therefore, the granting of summary judgment for Gateway on Suzukis' third cause of action was proper.

In the fourth cause of action, the Suzukis allege that the defendant Gateway, by and through its agents, Wagner and Vodicka, fraudulently misrepresented to plaintiffs that the aforementioned home was reasonably fit for habitation and that the home was a quality built home; willfully concealed from the plaintiffs the fact that the home was of inferior construction and contained many latent defects which the plaintiffs could not have discovered upon the reasonable inspection of the same; and since the property had been listed with Gateway for the previous 11 months, Gateway, through imputed knowledge, knew of some of the defects.

This court has said many times that the essential elements required to sustain an action for fraudulent misrepresentation are, generally speaking, that a representation was made as a statement of fact, which was untrue or known to be untrue by the party making it, or else recklessly made, that it was made with the intent to deceive and for the purpose of inducing the other party to act upon it, and the injured party did in fact rely upon it and was induced thereby to act to his injury or damage. *Ames Bank v. Hahn*, 205 Neb. 353, 287 N.W.2d 687 (1980).

The undisputed facts in this matter are that plaintiffs had examined the home and the defects complained of were not readily visible. The testimony is uncontested that the defendant Gateway or its agents did not know of the alleged defects. Suzukis state the square footage of the house was smaller than represented; however, it is uncontested that the square footage figure was supplied to Gateway by the owners McLaughlins and the discrepancy in the square footage was brought to the attention of the Suzukis prior to closing. The court can find nothing in the depositions offered that in any way shows that the representations complained of were made with an intention to deceive or that the plaintiffs relied thereon and, therefore, the granting of the motion for summary judgment as to the fourth cause of action was proper.

In conclusion, the plaintiffs' assignments of error are not sustained by the record and the judgment of the trial court is affirmed.

AFFIRMED.

HILT TRUCK LINES, INC., A NEBRASKA CORPORATION, APPELLEE, V.
HOUSE OF WINES, INC., A FOREIGN CORPORATION, APPELLANT.

299 N.W.2d 767

Filed December 29, 1980. No. 42838.

Equitable Estoppel: Consignee and Consignor: Burden of Proof. To establish an equitable estoppel the defendant consignee must prove: That the plaintiff made a false representation or concealment of material facts with actual or constructive knowledge of such false representation or concealment; that the defendant consignee did not have the knowledge or means of knowledge that such facts were misrepresented; and that the defendant consignee acted with reliance upon said facts to his prejudice.

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

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

Michael O. Johanns of Peterson, Bowman & Johanns for appellee.

Heard before MCCOWN and BOSLAUGH, JJ., and COLWELL, KNEIFL, and WHITEHEAD, District Judges.

WHITEHEAD, District Judge.

This appeal involves an action wherein the plaintiff-appellee, Hilt Truck Lines, Inc. (Hilt), brought suit against the defendant-appellant, House of Wines, Inc. (House of Wines), for the transportation charges to transport seven loads of Coors beer at an agreed upon consideration. House of Wines denied responsibility, except for one load, stating that the shippers of the goods were not its agents but were independent contractors, also that Hilt was estopped from collection from House of Wines, and therefore, House of Wines was not liable to Hilt for payment. The matter was tried to a jury and the jury found for the defendant and plaintiff's petition was dismissed. A motion for new trial and judgment notwithstanding the verdict was filed. The court, after hearing thereon, granted a judgment notwithstanding the verdict for four shipments, from which the defendant, House of Wines, appeals. We affirm.

Hilt is a common motor carrier operating throughout the United States under Interstate Commerce Commission authority, and the House of Wines is a beer and wine distributor in Washington, D. C. Among the beers that House of Wines sells to retailers in Washington, D. C., and vicinity is Coors beer. Because of its marketing policies, Coors will not ship directly to House of Wines, necessitating House of Wines to contract with independent Coors distributors in the western United States for the purchase and shipment of Coors beer to House of Wines or its designee. Western States Beverage was the principal shipper involved in this litigation.

The plaintiff, in its petition, proceeded under two theories of recovery, the first theory being that the defendant, through its agents, acts as consignor of the goods, and therefore was subject to pay the shipping charges, and the second theory was that the defendant also acts as consignee or receiver of the goods, and therefore was required to pay the shipping charges as consignee. Defendant's defense was based upon the theory that the bills of lading were marked "Prepaid" and therefore under the theory of equitable estoppel because the House of Wines relied on the markings on said invoices and paid the shipper directly, and that Western States Beverage was not an agent of the House of Wines. A trial was had on the matter and, at the conclusion thereof, the jury returned a verdict for the defendant, House of Wines, Inc. The motion for judgment notwithstanding the verdict and for a new trial was filed by the plaintiff, and after hearing thereon, the court found for the plaintiff as a matter of law on four of the six shipments sued under and entered a judgment notwithstanding the verdict. The defendant has appealed the judgment notwithstanding the verdict on the four shipments.

The first of the bills of lading in question was dated March 20, 1976. It shows that the consignor was House of Wines; Western States Beverage, agent. The consignee was House of Wines, care of J. W. Phillips & Sons, Richmond, Virginia. The shipment was for 2,000 cases of Coors beer, shipped from Silver City, New Mexico, to Richmond, Virginia. The federal basic permit number that the shipment was made under was the federal basic permit of the defendant, House of Wines, Inc. The shipment was received by the defendant on March 24, 1976.

The bill of lading of the second shipment shows that it was made on March 27, 1976, from Western States Beverage, agent, House of Wines, from Silver City, New Mexico, to the consignee, House of Wines, care of Northern Virginia Beverage in Alexandria, Vir-

ginia, for 2,000 cases of Coors beer. The shipment was received by the defendant on March 31, 1976. The bill of lading further shows that the shipment was to be prepaid and further that it was to be charged to Western States Beverage.

The bill of lading of the third shipment involved was dated March 30, 1976. The bill of lading shows that the consignor was Western States Beverage, agent, House of Wines. The consignee was House of Wines, Inc., Washington, D. C. It was for a shipment of 2,000 cases of Coors beer. The shipment was received April 6, 1976. The bill of lading indicates that it was prepaid.

The fourth shipment was shipped on April 6, 1976. The bill of lading states that the consignor is House of Wines, Western States Beverage, agent. The consignee is House of Wines in care of Northern Virginia Beverage in Alexandria, Virginia. It also was for 2,000 cases of Coors beer shipped from Silver City, New Mexico, to Alexandria, Virginia. It was shipped under the federal permit of defendant, House of Wines. There is no statement on the bill of lading as to whether it is prepaid or C.O.D., or whom to bill. The shipment was received by the consignee April 11, 1976.

The testimony shows that the first shipment of March 20 was paid by the defendant on March 19. The second shipment was paid for by the defendant on March 19, 1976. The third and fourth shipments were paid for with payments made March 23, 24, and 26. The defendant, in its testimony, stated that the payments made included freight to be paid by Western States Beverage. The plaintiff admitted that it had billed Western States Beverage prior to attempting to collect from the defendant, House of Wines.

The Interstate Commerce Commission regulations Hilt is required to operate under, particularly 49 U.S.C. § 323 (1976), provided in part: "No common carrier by motor vehicle shall deliver or relinquish possession at destination of any freight transported by it in interstate or foreign commerce until all tariff

rates and charges thereon have been paid, except under such rules and regulations as the Commission may from time to time prescribe to govern the settlement of all such rates and charges, including rules and regulations for weekly or monthly settlement, and to prevent unjust discrimination or undue preference or prejudice."

The courts have interpreted this provision as a statutory mandate enacted for the purpose of preventing discrimination in the credit treatment accorded shippers by carriers. See, *United States v. General Expressways, Inc.*, 270 F. Supp. 115 (D. Colo. 1967); *E. L. Murphy Trucking Company v. Climate Control, Inc.*, 523 P.2d 1224 (Utah 1974).

A carrier has under the law two sources from which to seek payment of shipping charges. The first source is the consignor, the one who shipped the goods and who is generally primarily liable, and the second is the one who received the goods, called the consignee. They both, as a matter of law, are liable for the shipping charges. See, 49 U.S.C. § 323 (1976); *Southern Pacific Company v. Miller Abattoir Company*, 454 F.2d 357 (3d Cir. 1972).

In the case at hand, the bills of lading state that the consignor in all four loads in question is Western States Beverage, agent, House of Wines, and the consignee in all four loads in question is the defendant, House of Wines. All shipments were made under the House of Wines federal basic permit. House of Wines defends as to its potential liability as a consignor that Western States Beverage was never acting as its agent and as a consignee, that the plaintiff is estopped by its conduct from collecting freight payments from House of Wines.

A short description of the development of the Interstate Commerce Act is appropriate at this point. Since the adoption of the Interstate Commerce Act on February 4, 1887, it was considered a matter of public policy that the Interstate Commerce Act demanded

that the carrier receive full payment in every case. The case of *Pittsburgh & c. Ry. Co. v. Fink*, 250 U.S. 577, 40 S. Ct. 27, 63 L. Ed. 1151 (1919), established the rule that regardless of contract, in equitable principles, a consignee who accepts delivery cannot avoid liability for freight charges. Further, see *L. & N. R.R. v. Central Iron Co.*, 265 U.S. 59, 44 S. Ct. 441, 68 L. Ed. 900 (1924). In a large number of cases subsequent thereto the courts consistently stated that, by the Interstate Commerce Act, Congress intended to impose absolute liability upon a consignee. Beginning with the case of *Missouri Pacific Railroad Co. v. National Milling Co.*, 276 F. Supp. 367 (D. N.J. 1967), *aff'd* 409 F.2d 882 (3d Cir. 1969), principles of estoppel were applied to bar a carrier from imposing a double payment upon a consignee that accepted delivery of a shipment under a uniform straight bill of lading marked "freight prepaid," and then reimbursing the consignor for the full amount of the freight charges in accordance with the separate agreement. By marking the bill of lading "prepaid," the carrier was held to have represented satisfaction with freight charges upon which the consignee reasonably relied in paying the same amount to the consignor. The leading case in this area is *Consolidated Freightways Corp. of Del. v. Admiral Corp.*, 442 F.2d 56 (7th Cir. 1971).

Inasmuch as the consignee of goods is liable as a matter of law for payment of the freight charges for goods delivered and accepted, the defendant, as consignee, must prove the facts sufficient to create an equitable estoppel to avoid liability.

To establish an equitable estoppel the defendant consignee must prove: that the plaintiff made a false representation or concealment of material facts with actual or constructive knowledge of such false representation or concealment; that the defendant consignee did not have the knowledge or means of knowledge that such facts were misrepresented; and that the

defendant consignee acted with reliance upon said facts to his prejudice. *Bastian v. Weber*, 150 Neb. 709, 35 N.W.2d 791 (1949); *Wiltse v. Bolton*, 132 Neb. 354, 272 N.W. 197 (1937).

In the case at hand, the four bills of lading in question from the plaintiff to the defendant for the goods shipped were all marked "Prepaid" or were not marked at all, which is recognized in the trade as meaning prepaid. The testimony further showed that the House of Wines did not have knowledge that Western States had not paid the shipping charges to Hilt Truck Lines. The testimony further shows, however, that all payments were made to Western States prior to receipt of the goods and bills of lading and, in several instances, payments were even made prior to shipping. Therefore, the defendant failed to prove that there was reliance upon the statements in the bills of lading, and therefore the court finds that, as a matter of law, the defendant is liable to the plaintiff for the four shipments in question as consignee.

Inasmuch as the defendant failed to carry the burdent of proof of an estoppel, it is liable as a matter of law as consignee in the matter and the court does not have to consider the separate question of whether or not it was also liable as consignor. The judgment of the District Court is affirmed.

AFFIRMED.

IN RE APPLICATION OF FRANKLIN D. REIS ET AL. FRANKLIN D. REIS ET AL., APPELLEES, V. THE GLENWOOD TELEPHONE MEMBERSHIP CORPORATION, APPELLANT.

299 N.W.2d 771

Filed December 29, 1980. No. 43011.

1. **Public Service Commission: Public Utilities.** In determining "economic soundness" under Neb. Rev. Stat. § 75-613(2) (Reissue 1976), the Nebraska Public Service Commission must consider the financial condition of the protestant telephone company, the effect of the revision on its income and ability to service its debt, the likelihood that the revision will require future rate increases by the affected company, the fact that subscribers other than the applicants may have equally meritorious claims, and the general effect of gradual erosion.
2. **Public Service Commission: Public Utilities: Appeal and Error.** This court will not disturb an order of the Public Service Commission unless the commission's order is illegal, arbitrary, capricious, or unreasonable.
3. **Public Service Commission: Public Utilities.** The determination of what is economically sound under Neb. Rev. Stat. § 75-613(2) (Reissue 1976) is peculiarly within the discretion and expertise of the Public Service Commission.

Appeal from the Nebraska Public Service Commission. Affirmed.

W. G. Cambridge for appellant.

Conway and Connolly for appellees.

Bert L. Overcash, amicus curiae.

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

WHITE, J.

This is an appeal from an order of the Nebraska Public Service Commission granting the application of three subscribers of the Glenwood Telephone Membership Corporation (hereafter telephone company) to receive telephone service from the Hastings or Juniata exchange of the Lincoln Telephone and Telegraph Company (LT&T).

The original applications were filed with the com-

mission on February 7, 1977. After a hearing, the commission granted the applications and held that the applicants had met the requirements of Neb. Rev. Stat. § 75-613 (Reissue 1976). The telephone company appealed. We remanded the case with specific directions to the commission to determine whether the granting of the applications would be economically sound within the meaning of § 75-613(2). *Reis v. Glenwood Telephone Membership Corp.*, 202 Neb. 187, 274 N.W.2d 539 (1979). On September 11, 1979, after a hearing, the commission voted 3 to 2 to grant the applications and the telephone company has appealed. We affirm.

Section 75-613 requires that an applicant establish all of the following: "(1) That such applicant or applicants are not receiving, and will not within a reasonable time receive, reasonably adequate exchange telephone service from the company furnishing such service in the exchange service area in which the applicant or applicants reside or operate;

"(2) The revision of the exchange service area or areas required to grant the application will not create a duplication of facilities, is economically sound and will not impair the capability of the telephone company or companies affected to serve the remaining subscribers in any affected exchanges;

"(3) The community of interest in the general territory is such that the public offering of each telephone company in its own exchange service area involved should include all the territory in its service area as revised by the commission's order; and

"(4) The applicant or applicants are willing and will be required to pay such construction and other costs and rates as are fair and equitable and will reimburse the affected company for any necessary loss of investment in existing property as determined by the Public Service Commission."

In *Reis v. Glenwood Telephone Membership Corp.* (1979), we found that these applicants had met the

requirements of § 75-613 except subsection (2). Originally, the commission held that the revision in the exchange service areas was economically sound, based on the applicants' testimony that they would reimburse Glenwood for its loss of investment. However, we held that was an insufficient basis under the statute. "[I]n determining economic soundness the commission must consider the financial condition of the protestant telephone company, the effect of the revision on its income and ability to service its debt, the likelihood that the revision will require future rate increases by the affected company, the fact that subscribers other than the applicants may have equally meritorious claims and the general effect of gradual erosion . . . ." *Id.* at 199, 274 N.W.2d at 545.

At the hearing preceding the September 11, 1979, order the commission received evidence in the form of testimony from 24 witnesses living in the Glenwood service area near the border of the LT&T exchanges. The telephone company called these witnesses to show the effect of granting the applications on other subscribers of Glenwood who were similarly situated. The commission also received evidence showing the number of people who had transferred from the Glenwood exchange to other exchanges in the past and the number of people who had transferred to Glenwood from LT&T. The telephone company's financial statements for the years 1968 to 1978 were admitted into evidence showing the telephone company's budgeted revenue and actual revenue and expenses.

Based on the evidence, the commission specifically found that, of the 24 witnesses called by the telephone company, 7 were either undecided as to their preference or preferred Glenwood service; 4 indicated they intended to file applications for change of service if these applicants were successful, and 13 did not intend to file an application or were not willing to reimburse Glenwood for its investment. The commission further noted that, of the four who intended to

file applications, two were not presently subscribers of Glenwood, and concluded that the other two subscribers may have equally meritorious claims as the present applicants. The commission stated that "based upon the evidence of the past, it is even more likely that Glenwood will gain more subscribers than it will lose," and that, including the other two subscribers indicating an intention to file an application, the loss of revenue to Glenwood would be less than .20 of 1 percent of its total operating revenue, and that the loss of revenue from these applicants would not significantly affect the income of Glenwood or its ability to service its debt, and would not require future rate increases. There is evidence in the record to support these findings.

"This court will not disturb an order of the Commission unless the Commission's order is illegal, arbitrary, capricious, or unreasonable." *Dilts Trucking, Inc. v. Peake, Inc.*, 197 Neb. 459, 466, 249 N.W.2d 732, 737 (1977). The determination of what is economically sound under § 75-613(2) is peculiarly within the discretion and expertise of the Public Service Commission. See, *Gentry Real Estate Co., v. King's Limousine Service, Inc.*, 201 Neb. 761, 272 N.W.2d 359 (1978); *Dilts Trucking, Inc. v. Peake, Inc., supra.* "[W]here the evidence is in conflict, the weight of the evidence is for the determination of the Commission and not this court." *Dilts Trucking Inc. v. Peake, Inc., supra* at 466, 249 N.W.2d at 737.

There is ample evidence in the record to support the conclusions and order of the Nebraska Public Service Commission, and that order is affirmed.

AFFIRMED.

BRODKEY, J., concurs in result.

DONALD L. GOERS, APPELLEE, V. BUD IRONS EXCAVATING, APPELLANT.

300 N.W.2d 29

Filed December 29, 1980. No. 43103.

1. **Workmen's Compensation: Appeal and Error.** The findings of fact made by the Nebraska Workmen's Compensation Court after rehearing shall have the same force and effect as a jury verdict in a civil case. A judgment, order, or award of the Nebraska Workmen's Compensation Court may be modified, reversed, or set aside only upon the grounds that (1) the court acted without or in excess of its powers, (2) the judgment, order, or award was procured by fraud, (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award, or (4) the findings of fact by the court do not support the order or award. Neb. Rev. Stat. § 48-185 (Reissue 1978).
2. **Workmen's Compensation: Evidence.** In testing the sufficiency of the evidence to support findings of fact made by the Workmen's Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor, and he should have the benefit of every inference that can be reasonably drawn therefrom.
3. **Extrajudicial Statements.** Extrajudicial statements of fact made by a witness relating to matters material to issues in a controversy are available for impeachment, but such statements are not conclusive and may be explained, rebutted, or contradicted, and thereafter are to be given such weight as the trier of fact deems them entitled.
4. **Workmen's Compensation.** An employee suffering a schedule injury falling under subdivision (3) of Neb. Rev. Stat. § 48-121 is entitled only to the compensation provided for in that subdivision, unless some unusual or extraordinary condition as to the other members or other parts of the body has developed; and the presence or absence of industrial disability is immaterial.
5. **Workmen's Compensation: Questions of Fact.** Whether an injury results in an unusual or extraordinary condition affecting other parts of the body ordinarily presents a question of fact.
6. **Workmen's Compensation: Attorney Fees.** In the event the employer files an application for a rehearing before a three-judge panel of the Workmen's Compensation Court from an award of a judge of the Workmen's Compensation Court and fails to obtain any reduction in the amount of such award, the Workmen's Compensation Court may allow the employee a reasonable attorney fee to be taxed as costs against the employer for such rehearing. Neb. Rev. Stat. § 48-125 (Reissue 1978).

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

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

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

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

CLINTON, J.

The defendant employer, Bud Irons Excavating (Irons), appeals from an award made to its employee, Donald L. Goers (Goers), by a three-judge panel of the Workmen's Compensation Court on rehearing.

A brief summary of the background of the case will aid in understanding the issues made by the errors assigned on appeal. In 1973, Goers was employed as a firefighter by the city of Lincoln fire department. He also held a second job as a truckdriver, equipment operator, and laborer for Irons. On January 15, 1973, while working for Irons, he was injured when a large piece of frozen dirt and ice fell from a load, striking his right shoulder, hip, and ankle. He suffered an ankle fracture. He also received severe bruises on the right hip. The ankle healed satisfactorily. During September 1973, the pain in Goers' hip area increased. A bone cyst in the femur of his right leg was diagnosed. Surgery was performed and an aneurysmal bone cyst excised. The excised area of the femur was packed with bone chips taken from the iliac crest. In November 1973, Goers returned to work as a firefighter and resumed his part-time employment with Irons. The workmen's compensation carrier for Irons paid medical expenses, hospital bills, and, also, temporary total disability while Goers was off work because of his ankle injury and bone surgery.

In 1978, the cyst again developed. A larger cyst, at the same site as the earlier one, was removed and the bone repaired using the techniques employed in 1973.

In 1979, Goers filed a petition in the Workmen's Compensation Court. The award from which this appeal was taken resulted.

The Workmen's Compensation Court made the following findings and award: "There are two main questions: First, whether the increased disability and additional hospital and medical expense occurring in 1978 and 1979 are compensable; and second, whether the disability is to the leg or to the body as a whole. On conflicting medical testimony, we find that plaintiff has proved by a preponderance of the evidence that a causal relationship exists between the accident of January 15, 1973, and the subsequent deterioration of plaintiff's initial injury which occurred five years later in 1978. We further find that plaintiff's injury is limited to the leg and does not involve the hip joint as such. Consequently, it is compensable as a partial loss of a member and not as a disability to the body as a whole."

The court made a specific finding on the temporary total disability payments to which Goers was entitled because of time lost in 1973; found that he suffered a 25 percent permanent partial loss of use of the right leg in 1974, and, in 1978, a further 25 percent permanent partial loss of use of that leg; and determined the amounts payable on account of said losses, and allowed credit to the employer for compensation already paid in the sum of $4,301.51. It entered an appropriate order for payment. It further ordered payment of hospital and medical expenses in the sum of $6,587.56, and awarded attorney fees for the rehearing in the sum of $500.

The assignments of error made by Irons on this appeal raise the following issues: (1) Whether the recurrence of the cyst in 1978 was causally related to the 1973 injury; (2) whether the surgeon's testimony, that the 1978 recurrence was caused by the 1973 injury, should have been excluded because the opinion lacked foundation and his testimony supporting the same was contradictory; (3) if the 1978 recurrence was causally connected to the 1973 injury, did the evidence support the Workmen's Compensation Court's

finding that the injury was to a member, compensable under Neb. Rev. Stat. § 48-121(3) (Reissue 1978), rather than to the body as a whole, compensable under § 48-121(2), in which case the benefits paid for partial disability must be reduced by the number of weeks for which temporary total disability was paid; and (4) whether the Workmen's Compensation Court erred in making an allowance for attorney fees on rehearing because the employer did obtain a reduction in the amount of medical and hospital expenses allowed.

We sustain the findings of the Workmen's Compensation Court except on the award of attorney fees on rehearing.

Our review of these findings is governed by Neb. Rev. Stat. § 48-185 (Reissue 1978) which provides, in part: "The findings of fact made by the Nebraska Workmen's Compensation Court after rehearing shall have the same force and effect as a jury verdict in a civil case. A judgment, order, or award of the Nebraska Workmen's Compensation Court may be modified, reversed, or set aside only upon the grounds that (1) the court acted without or in excess of its powers, (2) the judgment, order, or award was procured by fraud, (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award, or (4) the findings of fact by the court do not support the order or award." Findings of fact made by the Workmen's Compensation Court after rehearing will not be set aside unless clearly wrong. In testing the sufficiency of evidence to support factual findings made by the Workmen's Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor, and he should have the benefit of every inference that can be reasonably drawn therefrom. *Scamperino v. Federal Envelope Co.*, 205 Neb. 508, 288 N.W.2d 477 (1980).

Issues (1) and (2) are interdependent and will be discussed together. The expert testimony indicates that

the cause of aneurysmal bone cysts is unknown. It further shows that a high percentage of the population have such cysts and, in most cases, they cause no problems, i.e., they are asymptomatic. However, the cysts can begin to grow spontaneously, or growth may result from trauma, causing microfractures and hemorrhaging. Such growth produces pain and destroys normal bone cell structure. Treatment in cases like Goers' is surgical by curetting the tumor and replacing the destroyed bone with chips, all as previously described in this opinion.

The treating surgeon testified that Goers' cyst existed before the 1973 accident; in his opinion, that injury damaged the cyst and caused it to activate and begin growing. This causal connection was evidenced by his findings during surgery which disclosed recent local hemorrhaging and blood clots within the cyst. He further gave his opinion that the 1978 recurrence was causally related to the 1973 injury, saying it was directly connected to the early injury and that, except for the 1973 trauma, the cyst would have remained dormant. He based this opinion, about the causal relationship between the 1973 trauma and the 1978 recurrence, upon his past knowledge and experience. The treating surgeon also testified that it was not possible to tell with certainty that the 1973 surgery excised all the abnormal cells.

In a deposition offered by Irons, another physician, certified in internal medicine, testified that the 1973 trauma neither caused nor aggravated the recurrence of the bone cyst. He founded his opinion upon the fact that the surgeon's record indicated that Goers was symptom free for an approximate 2-year period between 1973 and 1978, and the further fact that even slight trauma such as walking, lifting, or weight-bearing, can cause microfractures and hemorrhaging which result in reactivation.

Irons contends that the surgeon's opinion lacked sufficient foundation. This argument is based upon

the surgeon's testimony that the cause of aneurysmal cysts is unknown; that they may activate spontaneously; and the fact that the doctor, before giving his testimony, stated in a report to Goers' counsel: "Then it became apparent that his right hip was reactivated, how, why and the like after apparently being regressed is anyones guess. We don't know enough about this matter except from previous experience."

Examining the surgeon's testimony in toto and taking into consideration the alleged inconsistent statement, as well as the lack of precise scientific knowledge about the mechanism of cyst activation, it seems to be substantially as follows: Based upon his past clinical experience, it is his opinion, founded upon his observations and treatment of the patient in this case, that, except for the 1973 injury, the cyst would have remained dormant and the 1978 recurrence would not have happened. It is to be noted that the impeaching statement about "anyones guess" was qualified by the one which followed: "We don't know enough about this matter *except from previous experience.*" (Emphasis supplied.)

The legal principle governing this issue is that if a witness makes extrajudicial statements of fact concerning matters material to issues in a controversy, such statements are available for impeachment. However, impeaching statements are not conclusive. They may be explained, rebutted, or contradicted, and thereafter are to be given such weight as the trier of fact deems them entitled. *Ferlise v. Raznick*, 202 Neb. 745, 277 N.W.2d 94 (1979); *State v. Price*, 202 Neb. 308, 275 N.W.2d 82 (1979); *Wilson v. State*, 170 Neb. 494, 103 N.W.2d 258 (1960), *cert. denied* 364 U.S. 887, 81 S. Ct. 178, 5 L. Ed. 2d 108 (1960). The trier of fact was entitled to consider the surgeon's opinion on the causation issue and thus its finding on causation is supported by the evidence.

We now turn to the question of whether the evidence supports the Workmen's Compensation Court's

finding that the injury was to a member rather than to the body as a whole. The standard governing review in this court, we have previously mentioned. The other applicable legal principles are: "An employee suffering a schedule injury falling under subdivision (3) of section 48-121, R. R. S. 1943, is entitled only to the compensation provided for in that subdivision, unless some unusual or extraordinary condition as to the other members or other parts of the body has developed; and the presence or absence of industrial disability is immaterial.

"Whether an injury results in an unusual or extraordinary condition affecting other parts of the body ordinarily presents a question of fact. . . .

"Under either subdivision (1) or (2) of section 48-121, R. R. S. 1943, a determination must be made as to the employee's loss of employability or earning capacity, and loss of bodily function is not an issue." *Scamperino v. Federal Envelope Co., supra* (syllabus of the court). We can overturn the factfindings of the Workmen's Compensation Court under the circumstances of this case only if a finding is not supported by sufficient competent evidence.

The evidence in this case shows without contradiction that the cyst involved only the femur. The femur is a part of the leg as defined by this court in *Jeffers v. Pappas Trucking, Inc.*, 198 Neb. 379, 253 N.W.2d 30 (1977). The surgeon's testimony was that "the mass [cyst] was the size of a lemon and involved the whole neck and up into the head part of the ball part of the femur and this was a much more extensive lesion or tumor than even the original one, and as a matter of fact had actually fractured through the neck segment of the . . . femur." The cyst removed in 1978 was located at exactly the same site as the 1973 cyst. There was no evidence that the socket of the innominate bone was affected as in *Jeffers*.

The surgeon also testified that Goers may experience future difficulties and require further surgical treat-

ment because the possibility of a fracture of the femur still exists.

As to disability, the surgeon testified: "[H]e has at least 50 percent disability of the right hip; *in effect the whole extremity.*" (Emphasis supplied.) He also rendered this opinion: If disability is based on "employability," Goers was disabled 50 percent of the body as a whole because he is not able to climb or walk distances, he must maintain crutch support, and his mobility will be affected by weather conditions. At another point, the surgeon testified that the injury resulted in limitations on Goers' ability to jump and lift weights because of the danger of fracture. He also mentioned limitation of motion at Goers' hip joint. Part of the surgeon's opinion concerning disability was based on the presence of arthralgia and myalgia. Both are nonspecific terms referring respectively to joint discomfort and muscular pain. They were not further defined.

The expert witness called by the defendant, taking into consideration the factors above described, testified that the plaintiff suffered a 20 percent disability of the leg.

There was no expert testimony that the cyst and surgery caused some "unusual or extraordinary" condition in other members of the body to develop. It is noted that the limitations on Goers' ability to climb, walk distances, maintain crutch support, jump, and lift weights, as well as the effect of weather conditions mentioned by the surgeon, could have occurred even if the cyst had been lower in the femur, or even in the lower part of the leg.

Under the foregoing state of the evidence, the trier of fact was entitled to conclude that the disability was one of the lower right extremity and that there was no "unusual or extraordinary" condition in another member of the body. In sum, the evidence was not of such a nature that it compelled a finding otherwise.

The third issue relates to the allowance of attorney fees for the rehearing. Neb. Rev. Stat. § 48-125 (Reissue 1978) provides, in part: "In the event the employer files an application for a rehearing before the compensation court en banc from an award of a judge of the compensation court and fails to obtain any reduction in the amount of such award, the compensation court sitting en banc may allow the employee a reasonable attorney's fee to be taxed as costs against the employer for such rehearing, ..." The record establishes that on rehearing the Workmen's Compensation Court reduced the amount of allowable hospital and medical expenses from $6,616.32 to $6,587.56. This reduction appears to have been the cumulative effect of correcting various errors in the allowance by the single judge. Since Irons obtained a reduction on appeal, no attorney fee should have been allowed on rehearing.

Irons, on appeal to this court, has failed to obtain a further reduction in the allowances made by the three-judge panel. Goers, therefore, is entitled to an allowance for services of his attorney in this court. Section 48-125 provides: "[T]he Supreme Court shall in like manner allow the employee a reasonable sum as attorney's fees for the proceedings in that court." Goers is awarded a fee of $1,250 for the services of his attorney in this court.

AFFIRMED AS MODIFIED.

HASTINGS, J., concurs in result.

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

I concur generally with the majority in this case. I dissent, however, from that portion of the majority opinion which found that the attorney fee taxed as costs against the employer on rehearing should not have been allowed because the employer obtained a reduction in the amount of allowable hospital and medical expenses from $6,616.32 to $6,587.56. Neb.

Rev. Stat. § 48-125 (Reissue 1978) provides, as noted by the majority, as follows: "In the event the employer files an application for a rehearing before the compensation court en banc from an award of a judge of the compensation court and fails to obtain any reduction in the amount of such award, the compensation court sitting en banc may allow the employee a reasonable attorney's fee to be taxed as costs against the employer for such rehearing, . . ." It would be my view, in light of the purposes of the workmen's compensation act, that unless the evidence discloses that the employer obtains a reduction by reason of something more than a mathematical error, an attorney fee may properly be allowed. The evidence in this case discloses that the reduction obtained was simply the result of correcting certain mathematical errors which were allowed by the single judge. The reduction did not come about by reason of any new findings of fact or errors of law. I believe that where the reduction is simply the correcting of a mathematical error, the Workmen's Compensation Court is authorized to allow an attorney fee, as it did in this case, and we are in error in now disallowing it.

C. PATRICK ROWAN, APPELLANT, V.
UNIVERSITY OF NEBRASKA, APPELLEE.

299 N.W.2d 774

Filed December 29, 1980. No. 43227.

Workmen's Compensation. As a general rule, the compensation act extends to and covers workmen only while engaged in, on, or about the premises where their duties are being performed, or where their service requires their presence as a part of such service at the time of injury, and during the hours of service of such workmen.

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

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

Paul L. Douglas, Attorney General, and John R. Thompson for appellee.

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

BOSLAUGH, J.

This is an appeal in a proceeding under the workmen's compensation act. The plaintiff, who was employed as an associate professor of art by the defendant, was injured in an accident on April 10, 1978, while working in a private studio at his home. The plaintiff was standing on a ladder attempting to open a window when the window came loose causing him to fall to the floor.

After the hearing before a single judge of the compensation court, the plaintiff recovered an award for medical and hospital expenses. There was no award for temporary total disability because the defendant had continued to pay the plaintiff his regular salary.

On rehearing before three judges of the compensation court, the judgment was reversed and the petition dismissed, one judge dissenting. The court found that the accident in which the plaintiff was injured did not arise out of or in the course of his employment. The principal issue upon the appeal is whether the evidence was sufficient to sustain this finding.

The plaintiff was first employed by the defendant in 1971 as a visiting instructor in art. He later became an assistant professor and was promoted to associate professor in 1976. When the defendant was hired he was told that, in addition to his teaching duties, he was expected to do as much creative work as possible. Prior to February 1978, the plaintiff used a classroom at the university as a studio. This was not a satisfactory arrangement because the classrooms were crowded, there was no privacy, and the lighting, heating, and cooling in the classroom was not satisfactory.

In February 1978, the plaintiff purchased a residence that had a separate building on the property which could be used as a studio. The defendant had no objection to the plaintiff doing his creative work at his home and knew that he was doing so. The plaintiff had been working on a sculpture project described as a table painting series when the accident happened.

The defendant furnished none of the materials used in the plaintiff's creative work, and the finished product was the property of the plaintiff. The only contribution from the defendant was shipping expense incurred in exhibiting the plaintiff's work at other institutions.

As a general rule, the compensation act extends to and covers workmen only while engaged in, on, or about the premises where their duties are being performed, or where their service requires their presence as a part of such service at the time of injury, and during the hours of service of such workmen. Neb. Rev. Stat. § 48-151(6) (Reissue 1978) provides; "(6) Without otherwise affecting either the meaning or the interpretation of the abridged clause, personal injuries arising out of and in the course of employment, it is hereby declared: Not to cover workmen except while engaged in, on or about the premises where their duties are being performed, or where their service requires their presence as a part of such service at the time of the injury, and during the hours of service as such workmen, and not to cover workmen who, on their own initiative, leave their line of duty or hours of employment for purposes of their own."

The evidence in this case is that the plaintiff was required to perform creative work but there was no requirement that it be performed away from the premises of the employer. The dean of the College of Arts and Sciences testified that the college did not encourage art professors to do their art work in any particular place, such as their home, but merely encourages them to do the work. The evidence indi-

cates that before 1978, the plaintiff did his creative work in classroom space furnished by the defendant.

The plaintiff was in a situation similar to that of an employee who was required to satisfy certain requirements as a part of the employment but was at liberty to choose the time and place where he would accomplish the work. In such a situation the activity performed by the employee is generally considered to be of but incidental benefit to the employer and not covered by the compensation act. See *Meyer v. First United Methodist Church*, 206 Neb. 607, 294 N.W.2d 611 (1980).

The essential inquiry is whether the plaintiff was injured as a result of a risk connected with the employment. In *Henry v. Village of Coleridge*, 147 Neb. 686, 24 N.W.2d 922 (1946), a volunteer fireman who slipped and fell at his home while responding to a fire alarm was denied compensation. The injury was not compensable because the accident did not have its origin in or was not incidental to the employment, and the employment did not expose the employee to a greater hazard than if he had not been so employed. See, also, *Sheets v. Glenwood Telephone Co.*, 135 Neb. 56, 280 N.W. 238 (1938).

The plaintiff in this case was not at a place where his service required him to be at the time he was injured. The defendant was not required to assume the risk incidental to the defective window in the private studio. The evidence was sufficient to sustain the finding that the accident did not arise out of or in the course of the plaintiff's employment by the defendant.

The judgment is affirmed.

AFFIRMED.

KRIVOSHA, C.J., dissenting.

I must respectfully dissent from the majority in this case. While I find no fault with the legal propositions relied upon by the majority in its opinion, I do not view the evidence as does the majority. In my view, the record clearly establishes that the appellant was

not only urged to perform creative work outside of the classroom but was required to do so. The testimony reflects that the appellant's immediate supervisor, Professor Dan Howard, who was chairman of the department of art, discussed with Rowan what would be required in the way of creative design. He was informed by Professor Howard that he must do as much creative work as time would possibly allow and make all and any attempts to exhibit his work. As noted by the majority, the appellee considered this so significant that it paid the cost of shipping the artwork to its place of exhibition. The evidence is without dispute that appellant was advised that faculty members were expected to put in somewhere in the area of 70 hours a week, including 18 to 21 contact hours, with the remaining hours devoted to creative research, advising, and committee assignments. Appellant testified that in his conversation with Professor Howard he was advised that creative activity and scholarly research was an integral, imperative part of his duty and a condition of his employment. The dean of the college acknowledged that he considered the doing of professional work at home a part of appellant's job as a member of the faculty.

It may be true that under certain circumstances work performed by a college professor at home may be unrelated to his employment and, therefore, not covered by the workmen's compensation act; however, in this case, the employer did not deny that appellant was expected to perform this work, including the work done at home. Had the employer denied this fact, the majority opinion might be correct. But here both the employer and the employee testified that the work being performed at the time of the injury was considered by the employer as part of the employee's duties. It is difficult to see how we can find, as a matter of law, that the work was not a part of the employee's duties. The majority appears to give little credence to the requirement of a college professor to either

"publish or perish." That view, in my judgment, ignores the reality of the matter. Had the university wished to maintain control over the safety of the studio facilities used by the faculty, it could have easily provided the appellant with adequate facilities and instructed him not to perform the required work at home. Quite to the contrary, it not only failed to provide him with adequate facilities but encouraged him to use his home facilities in lieu of those which were not otherwise adequately provided by the university. Many types of employment are of such nature that they are not performed solely within identifiable premises controlled and operated by the employer. It occurs to me that our decision in this case today, under the facts presented, does violence to our oft-stated rule that the workmen's compensation act is to be construed liberally so that its beneficent purposes may not be thwarted by technical refinement of interpretation. See *Haler v. Gering Bean Co.*, 163 Neb. 748, 81 N.W.2d 152 (1957); *Franzen v. Blakley*, 155 Neb. 621, 52 N.W.2d 833 (1952). Under the facts in this case, I would have found that the injury arose out of and in the course of the appellant's employment and was compensable.

WHITE, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V.
DAVID PAUL FERREE, APPELLANT.

299 N.W.2d 777

Filed December 29, 1980. No. 43323.

1. **Probation and Parole: Right to Hearing: Due Process.** A probationer is entitled to a preliminary hearing at or near the place of the alleged violation of probation or the arrest.
2. ____:____:____. At the preliminary hearing, the probationer is entitled to notice of the alleged violations of probation, an opportunity to

appear and present evidence in his own behalf, a conditional right to confront adverse witnesses, an independent decisionmaker, and a written report of the hearing.

3. ____: ____: ____. Where evidence produced at the preliminary hearing does not support charges made in the State's amended complaint, the defendant must be given a second preliminary hearing on the new charges.

4. **Probation and Parole: Right to Hearing: Due Process: Waiver.** A probationer does not waive his right to a preliminary hearing because he fails to request one.

Appeal from the District Court for Holt County: HENRY F. REIMER, Judge. Reversed and remanded with directions.

James W. Symonds of Cronin, Hannon & Symonds for appellant.

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

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

WHITE, J.

This is an appeal from the District Court for Holt County, Nebraska. The court found that the appellant, David Paul Ferree, had violated his probation and sentenced him to a term of not less than 2 nor more than 4 years in the Nebraska Penal and Correctional Complex for the crime of burglary.

On December 16, 1977, appellant had pleaded guilty to a charge of burglary and, on April 12, 1978, appellant had been sentenced to probation for a term of 4 years. In July 1978, appellant was charged with violation of his probation and, in September, he was found guilty and sentenced to 90 days in the Holt County jail and his probation was extended. In September 1978, appellant was again charged with violation of probation by setting a fire in the wastebasket in his jail cell. On October 18, 1978, at a preliminary hearing, the hearing officer found that probable cause existed to believe that appellant had violated his probation. At trial on De-

cember 15, 1978, appellant was sentenced to 1 year and 3 months probation. Among other provisions, his probation was conditioned on his refraining from unlawful conduct, making written reports to his probation officer, notifying his probation officer or the court of any change in his place of address or employment, and remaining within the jurisdiction of the court.

On March 7, 1979, the Holt County attorney filed a complaint charging that between January 9, 1979, and February 26, 1979, appellant had violated his probation by conveying false information to his probation officer concerning his place of residence and employment. On March 8, 1979, a warrant was issued and appellant was arrested and returned to Holt County on January 25, 1980. At the time of his arrest, appellant was still incarcerated in the Nebraska Penal and Correctional Complex. He had been sentenced to 1½ to 3 years for theft by unlawful taking by the District Court for Douglas County after pleading guilty to that charge on January 18, 1980.

On January 28, 1980, appellant was given a preliminary hearing in Holt County. The court determined that probable cause existed and set a final hearing date. On January 29, 1980, the State amended its complaint and, on February 8, 1980, appellant was found guilty of violating his probation.

Appellant assigns as error the following: (1) The District Court's failure to dismiss the original complaint after the preliminary hearing; and (2) The District Court's failure to dismiss the amended complaint. Appellant alleges in his brief that he was not given a preliminary hearing that complied with the requirements established in *Morrissey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972). *Morrissey* established that a parolee is entitled to a preliminary hearing at or near the place of the alleged violation of parole or the arrest. In 1973, the U.S. Supreme Court extended those same requirements

to persons charged with violation of probation. *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973). Appellant contends his preliminary hearing was not held at or reasonably near the place of the alleged violation or arrest as required. This contention is without merit. At the time of his arrest, appellant was incarcerated and not at liberty to gather witnesses or evidence. The record of his probation proceedings was in the exclusive possession of the District Court for Holt County and appellant "has alleged no demonstrative prejudice, and we can perceive none." *Kartman v. Parratt*, 535 F.2d 450, 457 (8th Cir. 1976).

Appellant also contends that he was not given a preliminary hearing on the charges of which he was later convicted. A probationer is entitled to two hearings, "one a preliminary hearing at the time of his arrest and detention to determine whether there is probable cause to believe that he has committed a violation of his [probation], and the other a somewhat more comprehensive hearing prior to the making of the final revocation decision." *Gagnon v. Scarpelli*, *supra* at 781-82. See, also, *Morrissey v. Brewer*, *supra* at 484-89.

"At the preliminary hearing, a probationer or parolee is entitled to notice of the alleged violations of probation or parole, an opportunity to appear and to present evidence in his own behalf, a conditional right to confront adverse witnesses, an independent decisionmaker, and a written report of the hearing." *Gagnon v. Scarpelli*, *supra* at 786.

The original complaint filed March 7, 1979, charged appellant with knowingly and willfully violating the terms of his probation by conveying false information to his probation officer regarding the place of his employment and the place of his residence between the dates of January 9, 1979, and February 26, 1979, in *Dodge* County, Nebraska. After a preliminary hearing on January 28, 1980, the trial court judge

found, over the objection of appellant's attorney, that there were sufficient grounds to believe that appellant had violated his probation as charged. The record does not support that finding.

The State was allowed to amend its complaint on January 29, 1980, to charge appellant with violating his probation in the following manner: (1) By being sentenced for the crime of theft in excess of $300; (2) By not remaining within the jurisdiction of the court nor notifying the court of any change in his address or employment; (3) By not making a report to his probation officer since January 5, 1979; and (4) By not serving the last 90 days of his term of probation in the Holt County jail.

In *State v. Costello*, 199 Neb. 43, 256 N.W.2d 97 (1977), this court held that a District Court may, in its discretion, permit an amendment of a criminal information, provided that the amendment does not change the nature or identity of the offense charged and the amended information does not charge a crime other than the one on which the accused has had his preliminary examination. *Id.* at 51-52, 256 N.W.2d at 103. It is true that, if the defendant is given a preliminary hearing and the complaint is later amended to charge a crime that includes some of the elements of the original crime charged without the addition of any element irrelevant to that original charge, no new preliminary hearing is necessary. *State v. Forbes*, 203 Neb. 349, 278 N.W.2d 615 (1979). However, the record shows that evidence produced at the appellant's preliminary hearing did not support the charges made in the amended complaint.

Under our holding in *State v. Costello, supra*, the State may not, as it did here, amend its complaint so that the nature or identity of the offenses charged has been changed. Appellant has not been afforded due process. Although appellant did not specifically request a preliminary hearing on the amended complaint, with Justice Douglas, we conclude that "[w]e

cannot presume a waiver of . . . important federal rights from a silent record." *Boykin v. Alabama*, 395 U.S. 238, 243, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). For a waiver of constitutional rights to be valid under the Due Process Clause, it must be an "intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938).

This judgment is reversed and the case is remanded for a preliminary hearing on the charges alleged in the State's amended complaint.

REVERSED AND REMANDED WITH DIRECTIONS.

BOSLAUGH, J., concurs in result.

STATE OF NEBRASKA EX REL. PAUL L. DOUGLAS, ATTORNEY GENERAL OF THE STATE OF NEBRASKA, RELATOR, V. FRANK MARSH, TREASURER OF THE STATE OF NEBRASKA; FRED A. HERRINGTON, TAX COMMISSIONER OF THE STATE OF NEBRASKA; AND BRENT R. STEVENSON, DIRECTOR OF ADMINISTRATIVE SERVICES OF THE STATE OF NEBRASKA, RESPONDENTS.

300 N.W.2d 181

Filed December 29, 1980. No. 43463.

1. **Special Legislation.** While the question of classification is one primarily for the Legislature and in the exercise of this power the Legislature possesses a wide discretion, there must, nevertheless, be some rational basis for the classification.
2. ——. A classification which limits the application of the law to a presently existing class, and leaves no room or opportunity for an increase in the numbers of the class by future growth or development, is special, and a violation of the Constitution of the State of Nebraska.
3. ——. It is competent for the Legislature to classify objects of legislation, and if the classification is reasonable and not arbitrary, it is a legitimate exercise of legislative power.
4. **Special Legislation: Constitutional Law.** 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.

5. **Special Legislation.** A legislative classification, in order to be valid, must be based upon some reason of public policy, some substantial difference of situation or circumstances, that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified. Classifications for the purpose of legislation must be real and not illusive; they cannot be based upon distinctions without a substantial difference.

Original action. Judgment for relator.

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

James E. Ryan for respondents.

Ron Lahners, Lancaster County Attorney, and Emil M. Fabian, amicus curiae.

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

KRIVOSHA, C.J.

The instant appeal is an original action filed by the Attorney General of the State of Nebraska attacking the constitutionality of sections 2, 3, 4, and 5 of L.B. 882 passed by the 86th Legislature, Second Session, and approved by the Governor of the State of Nebraska on April 23, 1980 (L.B. 882). For reasons more particularly set out hereinafter, we agree with the claim made by the Attorney General that the specific provisions of L.B. 882 attacked by the Attorney General violate the Constitution of the State of Nebraska and, accordingly, we are compelled to declare sections 2, 3, 4, and 5 of L.B. 882 invalid and unenforceable.

In order to fully understand the problems involved herein, it is necessary that we set out in detail the pertinent provisions of L.B. 882. They read as follows:

"Sec. 2. (1) There is hereby created a fund to be known as the Local Government Revenue Fund. The Local Government Revenue Fund shall contain such amounts as may be appropriated by the Legislature.

"(2) It is the intent of the Legislature that for fiscal year 1980-81 there shall be appropriated to the Local Government Revenue Fund seventy million dollars and for ensuing fiscal years there shall be appropriated to the Local Government Revenue Fund such amounts as determined by this section.

"(3) During December, 1980, and each year thereafter, the Tax Commissioner, upon receipt of the reports required by section 77-628, Reissue Revised Statutes of Nebraska, 1943, shall prepare a report showing by county the total amount of all property taxes including motor vehicle taxes levied during the current year and the immediately preceding year and the dollar amount of change as such are reported pursuant to section 77-628. Such report shall be filed on or before December 31, 1980, and each year thereafter with the Governor and the Clerk of the Legislature.

"(4) It is the intent of the Legislature that for fiscal year 1981-82 and each fiscal year thereafter there be appropriated to the fund an amount equal to the amount appropriated for the prior fiscal year, plus an amount equal to ten per cent of the amount of change in the total amount of general taxes levied as determined from the report of the Tax Commissioner filed the December 31st prior to the fiscal year of the appropriation.

"Sec. 3. The Tax Commissioner shall determine the amount of money distributed or to be distributed to each county during fiscal year 1979-80 pursuant to section 77-202.42, Revised Statutes Supplement, 1978, and shall determine the percentage each county received of the total amount so distributed. For fiscal year 1980-81 each county shall receive an amount of money from the Local Government Revenue Fund equal to the percentage of the total that each county received during the fiscal year 1979-80 times the appropriation to the Local Government Revenue Fund for the fiscal year 1980-81. For ensuing fiscal years each county shall receive an amount equal to the amount received the prior fiscal year plus an amount equal to ten per cent

of the amount of change in the total amount of general taxes levied in that county as determined pursuant to section 2 of this act. If in any fiscal year the appropriation to the Local Government Revenue Fund shall be different than the total amount for all counties as determined pursuant to section 2 of this act, then the amount to be received by each county shall be in the same portion as the total amount of the funds to be received by each county as calculated pursuant to section 2 of this act is to the total amount to be received by all counties, as calculated pursuant to section 2 of this act.

"Within ten days after the adjournment of each regular session of the Legislature the Tax Commissioner shall notify each county treasurer of the amount to be received by that county during the ensuing fiscal year from the Local Government Revenue Fund, and shall at the same time notify the State Treasurer of the amount to be received by every county during the ensuing fiscal year."

The Attorney General argues that the act is invalid on several grounds. The first ground is that the classifications created by the provisions of L.B. 882 constitute an arbitrary and unreasonable closed classification in that they prevent a county from moving from one classification to another and L.B. 882 is, therefore, a special law as to each of the state's 93 counties, contrary to Neb. Const. art. III, § 18, which provides that where a general law can be made applicable no special law shall be enacted. Likewise, the Attorney General maintains that the formula for distributing the additional money authorized by section 3 of L.B. 882 has no rational basis and is, therefore, arbitrary and capricious in violation of the Constitution of the State of Nebraska. At this point, perhaps some history leading to the adoption of L.B. 882 might be helpful in understanding the problem.

In 1970, the people of the State of Nebraska approved a constitutional amendment now found in Neb. Const.

art. VIII, § 2. The language specifically provides, in part: "The Legislature may classify personal property in such manner as it sees fit, and may exempt any of such classes, or may exempt all personal property from taxation." As a result of the adoption of that constitutional provision, the Legislature, in 1972, adopted legislation creating three general classes of personal property to receive exemptions. They were (1) livestock; (2) farm equipment, farm inventory, and grain and seed; and (3) business inventory. All three classes of property were given partial tax exemptions which increased at the rate of 12½ percent of actual value each year until 1977 when 62½ percent of the value of such property was exempt from personal property taxes. See 1972 Neb. Laws, L.B. 1241, Neb. Rev. Stat. §§ 77-202.25 to 77-202.33 (Reissue 1976).

Because the Legislature recognized that the governmental subdivision in the several counties would lose revenue by reason of the exemption, there was also created, as a part of the 1972 legislation, a "Personal Property Tax Relief Fund." See Neb. Rev. Stat. § 77-202.30 (Reissue 1976). The purpose of this fund was to reimburse the governmental subdivisions in the several counties for some part of the revenue they would otherwise lose by reason of the property located in the county being exempted from taxation. The statute prescribed the manner in which this was to be done but, in essence, the county simply reported on behalf of the various governmental subdivisions the property that was present in the county but exempt from taxation, and the state allocated funds to the county equal to that which was lost by reason of the exemption.

In 1977, the Legislature further amended the act through the passage of 1977 Neb. Laws, L.B. 518, Neb. Rev. Stat. §§ 77-202.30 and 77-202.36 to 77-202.43 (Cum. Supp. 1978). L.B. 518 eliminated the previous limitation of 62½ percent on the exempted property and provided for a total exemption for the three classes of property previously exempted in part by L.B. 1241. The

exemptions were to take effect in a planned sequence, with farm equipment and inventory being totally exempted by January 1, 1978; business inventory totally exempted by January 1, 1979; and livestock totally exempted by January 1, 1980. Neb. Rev. Stat. §§ 77-202.36, 77-202.38, and 77-202.40 (Cum. Supp. 1978). Under the provisions of L.B. 518, the state continued to reimburse the counties for the revenue lost by reason of the exemption but limited the maximum amount that would be reimbursed in any one year to $70 million. The maximum reimbursement was to take effect in 1980. Neb. Rev. Stat. § 77-202.41 (Cum. Supp. 1978).

Due to the fact that, under the provisions of L.B. 518, the entire class of property was to be exempted, no reporting was thereafter required to be made to the state as it had been done in earlier years. This, therefore, now made it impossible for the state to determine the amount of the loss suffered by each county by reason of the exemptions and, likewise, made it impossible for the state to reimburse to the counties the exact amount lost by reason of the exemption. To solve this problem, the Legislature determined that it would simply reimburse each county the same pro rata share of the Personal Property Tax Relief Fund as the county had received pursuant to its certification for the year 1976, plus a further amount lost due to the creation of a freeport exemption in certain counties. The freeport exemption was authorized by the provisions of Neb. Const. art. VIII, § 2A, which exempted from taxation intransit goods, wares, and merchandise held in licensed warehouses or storage areas. While the Attorney General raises some question as to the validity of the formula contained in L.B. 518, in view of the fact that L.B. 882 repealed the provisions of L.B. 518, we need not concern ourselves with that matter except to note that the result of the formula created by L.B. 518 was to freeze the percentage of the fund distributed to each county in future years at that figure which represented the county's actual losses in 1976, plus the freeport reim-

bursement, where applicable, determined as provided by statute. See Neb. Rev. Stat § 77-202.42 (Cum. Supp. 1978). For reasons already noted, it is unnecessary for us to consider the provisions of either L.B. 1241 or L.B. 518. For purposes of our discussion herein, however, we call attention to the fact that the principal concept embodied in both L.B. 1241, adopted in 1972, and L.B. 518, adopted in 1977, was to reimburse counties, in full or in part, for the funds actually lost due to the steadily increasing personal property tax exemption.

The adoption of L.B. 882 in 1980 eliminated the Personal Property Tax Relief Fund and abolished the reimbursement concept contained in both L.B. 1241 and L.B. 518. In its stead, the Legislature created what was identified in L.B. 882 as the "Local Government Revenue Fund." Neb. Rev. Stat. § 77-3601 (Cum. Supp. 1980). The Local Government Revenue Fund created by L.B. 882 and the distribution of those funds to the various counties in no way is dependent upon any continuing loss of revenue caused by property actually being located in the county but exempt from taxation. Rather, distribution is more in the form of state aid to governmental subdivisions and is based upon a formula set out in the statute and which, once created, cannot be changed regardless of a change in circumstances. The fact that it has nothing to do with reimbursement is quite clear when one recognizes that under the reporting provisions of L.B. 882, the state is never advised as to the amount of property present in the county but exempt from taxation. There is no absolute constitutional prohibition against the state granting aid to governmental subdivisions. The formula for granting the aid, however, must be of such nature that similar governmental subdivisions are treated in a similar manner and, as circumstances change, adjustments between governmental subdivisions are made. Under L.B. 882 that does not happen.

Section 3 of the act simply directs the State Tax Commissioner to determine the amount of money distributed or to be distributed to each county during the fiscal year 1979-80 pursuant to § 77-202.42 (Cum. Supp. 1978) which was the formula created under the provisions of L.B. 518. For the fiscal year 1980-81 each county is to receive an amount of money equal to the percentage of the total that each county received during the fiscal year 1979-80 times the appropriation to the Local Government Revenue Fund for the fiscal year 1980-81. In other words, once it is determined how much the county is to receive for the year 1979-80, then it is to receive that same amount each year thereafter during the life of L.B. 882, without regard to whether there has been an increase or decrease of exempt property in the county. In addition to the fixed amount, each county may also receive an amount equal to 10 percent of the amount of change in the total amount of general taxes levied in the county as determined pursuant to section 2 of L.B. 882. Presumably, the thought was that as more property is exempt from taxation, more general taxes will have to be levied in the county to make up the difference. This assumption, however, is not necessarily valid nor can it be determined by anything contained in the law. The increase may come about simply by reason of the various governmental subdivisions determining to levy higher taxes, subject, of course, only to the lid limitations, or it may result in a reduction in total taxes levied by reason of a county's desire to spend less money in a given year. In any event, no one can determine how the increase in general taxes levied in the county is related to the exemption of property or the payment of state funds.

Finally, section 3 provides that in the event that insufficient money is appropriated by the Legislature to make all of the distribution otherwise required, each county shall receive a proportionate share of the total appropriated by the Legislature based upon the formulas otherwise contained in section 3.

At the outset, we are asked to determine whether the Legislature has acted within its constitutional authority or, in fact, has exceeded the provisions of the Nebraska Constitution. That is always a difficult question in that courts are reluctant to interfere with the action of the Legislature and recognize that the Legislature has broad discretion in the exercise of its legislative powers. We have oftentimes recognized in our decisions that in construing an act of the Legislature all reasonable doubts must be resolved in favor of its constitutionality. *State ex rel. Douglas v. Nebraska Mortgage Finance Fund*, 204 Neb. 445, 283 N.W.2d 12 (1979). The court, in construing the meaning of a statute, should, if possible, discover the legislative intent from the language and give it effect. *Pelzer v. City of Bellevue*, 198 Neb. 19, 251 N.W.2d 662 (1977). Notwithstanding those admonitions, our examination of the provisions of L.B. 882 compel us to find the act is in violation of the Constitution of the State of Nebraska as urged by the Attorney General.

Turning first to the matter of the frozen classification, we find no way to overcome that defect. An examination of all of the legislative history leading up to the adoption of L.B. 882, scant as it is, does not in any manner aid us in our determination herein or provide us with any additional understanding or background as to how the distribution of state funds under L.B. 882 might operate so as not to be in violation of the Constitution. Having determined that the amount to be paid to the county is based upon a formula established in 1977 and thereafter to be followed without regard to change in circumstances does, indeed, create a frozen classification into which no other county may enter even though it may subsequently acquire the very same characteristics which afforded the first county the benefits it receives. Perhaps two examples best illustrate the problem. Certain livestock might have been kept in county A when the formula under L.B. 518 was first determined. Under the previous legislative acts, having

been in the county and reported as exempt, the county received reimbursement. If those cattle are then moved to adjoining county B where they are now located, county A continues to receive the same payment even though the property is no longer located in that county and would not have been available for taxation but for the exemption; and county B, which has now acquired the property and which, but for the exemption, would be entitled to tax the property, receives no payment. It appears that the criteria which granted compensation to county A in the first instance is inapplicable to county B when the property is moved.

Likewise, consider the matter of business inventory. Inventory may have been located in county A when the formula was created. By reason of either the business terminating or moving to another county, the inventory may no longer be in county A and may, in fact, now be in adjoining county B. Yet, county A continues to receive the same money and county B receives no increase. The reason for that division is totally without any rational basis and must, therefore, be considered to be arbitrary and capricious, having been created by legislation special to each county. While the question of classification is one primarily for the Legislature and in the exercise of this power the Legislature possesses a wide discretion, there must, nevertheless, be some rational basis for the classification. See 16A C.J.S. *Constitutional Law* § 489, p. 247 and following (1956).

In *State v. Kelso*, 92 Neb. 628, 632, 139 N.W. 226, 227-28 (1912), we said, "The rule appears to be settled by an almost unbroken line of decisions that a classification which limits the application of the law to present condition, and leaves no room or opportunity for an increase in the numbers of the class by future growth or development, is special, and a violation of the clause of the constitution above quoted. It follows that the limitation in the act to all county seats which had existed for ten successive years at the time of the pas-

sage of the act, and not permitting the rule to be applied to other counties, is equivalent to the naming of the county seats of that class, and is therefore void."

The *Kelso* rule remains the law of this state and was reaffirmed by this court in *City of Scottsbluff v. Tiemann*, 185 Neb. 256, 261, 175 N.W.2d 74, 79 (1970), wherein we said: "The law is unmistakably clear that a statute classifying cities for legislative purposes in such a way that no other city may ever be added to the class violates the constitutional provision forbidding special laws where general laws can be applicable." See, also, *Axberg v. City of Lincoln*, 141 Neb. 55, 2 N.W.2d 613 (1942). No matter what may happen in the future with regard to the location of exempt property, once the amount to be paid by the state to each of the several counties is determined, no change with regard to that basic formula may thereafter be made. Such provision clearly flies in the face of the prohibition contained in Neb. Const. art. III, § 18.

Likewise, the reason for creating such classifications, which appear to number 93, is totally lost in the act. While it is true that the Legislature may classify where reasonable (see *State ex rel. Douglas v. Nebraska Mortgage Finance Fund, supra*), it may not do so in an arbitrary manner. In *City of Scottsbluff v. Tiemann, supra* at 266, 175 N.W.2d at 81, we specifically said: "It is competent for the Legislature to classify objects of legislation and if the classification is reasonable and not arbitrary, it is a legitimate exercise of legislative power. [Citation omitted.] The classification must rest upon real differences in situation and circumstances surrounding members of the class relative to the subject of the legislation which renders appropriate its enactment. [Citations omitted.] 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.

[Citation omitted.] A legislative classification, in order to be valid, must be based upon some reason of public policy, some substantial difference of situation or circumstances, that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified. *Classifications for the purpose of legislation must be real and not illusive; they cannot be based on distinctions without a substantial difference.* [Citations omitted.]" (Emphasis in original.) And in the case of *Campbell v. City of Lincoln*, 195 Neb. 703, 709, 240 N.W.2d 339, 342 (1976), we said: "Classification is proper if the special class has some reasonable distinction from other subjects of a like general character, which distinction bears some reasonable relation to the legitimate objectives and purposes of the legislation. The question is always whether the things or persons classified by the act form by themselves a proper and legitimate class with reference to the purpose of the act."

We fail to see how it can be argued that there is any reasonable classification when the classes in the first instance are based upon historic facts alone. To be sure, if the formula were continued to be used in future years and adjustments made accordingly, the action of the Legislature might be held to be reasonable; but where it is determined that the classification is based upon happenstance events in a given year and thereafter remains forever, regardless of the changes in circumstances, the classification must be held to be invalid and the act in violation of our State Constitution.

Likewise, what we have said with regard to the overall classification applies equally as well to the payment of the additional 10 percent. As the act notes, the only factor to be taken into account by the Tax Commissioner is whether the amount of general taxes levied in the county in a subsequent year is greater than it was in the immediate prior year. When that occurs, the county is to receive an amount equal to 10 percent of the increase. While the act is silent as to the reverse

situation, one must presume that if the general taxes levied in a county in a subsequent year is less than it was in the prior year, the Tax Commissioner is to withhold an amount equal to 10 percent of the reduction. This then seems to indicate that if a county within its lid limitations imposes a higher mill levy, thereby raising more general taxes, it is rewarded by receiving an additional 10 percent. On the other hand, if it acts cautiously and carefully, reducing the general tax levy, it is penalized by receiving 10 percent less. It is difficult, if not impossible, on the state of the record to understand how that, in any manner, would promote the objects sought to be promoted by the provisions of either L.B. 882 or the earlier exemption statutes and how that has any rational basis. We must, therefore, conclude that the provisions of section 3 of L.B. 882, as outlined herein, are arbitrary and capricious and bear no reasonable relationship to the purposes sought to be attained.

Respondent urges us to find the act valid, maintaining that even if the current formula is frozen, the Legislature is always at liberty to amend the law and open the class. While that may be true, that is not a matter of immediate concern to us in examining the constitutionality of the act. The question before us is not whether the Legislature might correct the defect at some future date but whether, in fact, the act, as presented to us now, is defective. As we noted in *Bachus v. Swanson*, 179 Neb. 1, 8, 136 N.W.2d 189, 194 (1965), "The constitutional validity of an act of the Legislature is to be tested and determined not by what has been or possibly may be done under it, but by what the law authorized to be done under and by virtue of its provisions." On that basis, we must conclude that section 3 is defective for all of the reasons more particularly set out above.

Having reached the conclusion we have, we are com-

pelled to grant the relief sought by the Attorney General and declare sections 2, 3, 4, and 5 of L.B. 882 invalid and unenforceable.

JUDGMENT FOR RELATOR.

STATE OF NEBRASKA, APPELLEE, V. ERNEST W. CHAMBERS, APPELLANT.

299 N.W.2d 780

Filed December 29, 1980. No. 43510.

1. **Police Officers.** Statutory authorization is not required for law enforcement officers to use ordinary means of communication in carrying out their duties.
2. **Speeding: Motor Vehicles.** A driver who operates his vehicle at a speed in excess of the legal limit commits an offense in the presence of an officer observing the vehicle from an airplane and an officer on the ground who stops the vehicle at the direction of the officer in the airplane.
3. **Police Officers.** An officer making an arrest may rely upon the collective knowledge of all the officers involved in the case.

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

Ernest W. Chambers, pro se.

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

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

BOSLAUGH, J.

The defendant was convicted in Lincoln municipal court of operating a motor vehicle at a speed of 69 miles per hour in a 55-mile-per-hour zone and was fined $20 and costs. Upon appeal to the District Court for Lancaster County, Nebraska, the judgment was affirmed. The defendant has appealed to this court and contends the evidence was not sufficient to sustain the judgment and that the trial court erred in allowing the State to rely on Neb. Rev. Stat. § 39-664 (Reissue 1978).

The offense occurred at about 2:15 p.m. on August 24, 1978. The defendant was observed driving a small blue car west on Interstate 80 east of the Waverly, Nebraska, interchange. The defendant was timed by a state patrolman using a mechanical stopwatch in an airplane. The distance traveled was the second "aircraft mile" east of the Waverly exit which was marked by white rectangles painted on the highway. The distance between the rectangles at the east end and west end of the mile was measured with a 300-foot steel tape and determined to be 5,326 feet 5½ inches. The stopwatch was started when the front end of the vehicle was at the east edge of the east rectangle and stopped when the rear end of the vehicle was at the west end of the west rectangle. The elapsed time was 52 seconds. By reference to a table, the patrolman determined that the defendant's average speed was 69.2 miles per hour. The patrolman in the airplane then, by radio, directed patrolmen waiting near the Waverly exit to stop the small blue car. The defendant's car was stopped and he was issued a citation for speeding.

The defendant contends that the evidence was not sufficient to sustain the judgment because there was no proof that the stopwatch had been properly tested and was functioning accurately or that the machine used to test the stopwatch was accurate and reliable, and because the length of the "aircraft mile" was not known in advance.

We believe the foundation evidence was sufficient to allow the State to establish the speed of the defendant's vehicle by use of the stopwatch. The evidence was that Lt. Donald Grieser, the officer flying the airplane, had been trained and certified for clocking ground vehicles from aircraft. The stopwatch had been tested on July 19, 1978, and again on August 25, 1978, and found to be accurate within 1 second per 24 hours or 6/10,000 of a second per minute. Fred A. Wilson, the jeweler who performed the tests on the stopwatch, testified that the stopwatch had been tested on a Vibro-

graph machine which was an accepted method for determining the accuracy of watches. The Vibrograph machine was tested occasionally with another Vibrograph machine and other watches whose timekeeping accuracy was verified by a digital watch or an electric clock.

The distance of the "aircraft mile" was measured on September 2, 1978, 9 days after the offense. Lt. Grieser testified that, so far as he could tell, the white marks in the roadway were in the same place when the distance was measured as they were when the defendant's vehicle was timed on August 24, 1978. In the absence of any evidence to the contrary, this was sufficient to establish the distance on the date of the offense.

At a pretrial hearing on September 20, 1978, the defendant made an oral motion that the court declare § 39-664 unconstitutional. Upon a statement by the deputy county attorney that the State would not rely upon the statute for any purpose, the motion was withdrawn. The defendant now contends that the trial court erred in allowing the State to rely on § 39-664.

Section 39-664 provides as follows: "(1) The speed of any motor vehicle may be determined by the use of radio microwaves or other electronic device. The results of such determinations shall be accepted as prima facie evidence of the speed of the vehicle in any court or legal proceedings when the speed of the vehicle is at issue.

"(2) The driver of any motor vehicle found by use of radio microwaves or other electronic device to be driving in excess of the applicable speed limit may be apprehended:

"(a) If the apprehending officer has observed the recording of the speed of the motor vehicle by the radio microwaves or other electronic device;

"(b) If such apprehending officer has received a radio message from an officer who observed the speed recorded and the radio message (i) has been dispatched immediately after the speed of the motor vehicle was

recorded, and (ii) gives a description of the vehicle and its recorded speed; and

"(c) If the apprehending officer is in uniform or displays his badge of authority."

Section 39-664 permits the use of radio microwaves or other electronic device to determine the speed of a motor vehicle and makes the result of that determination prima facie evidence of the speed of the vehicle. It also contains provisions relating to the use of radio messages in the apprehension of such drivers. The statute has no application in this case because no electronic device was used to determine speed. The speed of the defendant's automobile was determined by use of a mechanical stopwatch.

The defendant argues that the statute was used because Lt. Grieser sent a radio message to Trooper Steven Groshans to stop the defendant's automobile. The difficulty with this argument is that law enforcement officers need no statutory authorization to use ordinary means of communication in carrying out their duties.

Neb. Rev. Stat. § 29-404.02 (Reissue 1979) authorizes any peace officer to arrest a person who commits a misdemeanor in his presence. Although Lt. Grieser was flying at an altitude of 1,800 feet at the time he observed and timed the defendant's automobile, the offense was committed in the presence of Groshans and the other officers. See *State v. Cook*, 194 Kan. 495, 399 P.2d 835 (1965). An officer making an arrest may rely upon the collective knowledge of all the officers involved in the case. See, *State v. Anderson*, 204 Neb. 186, 281 N.W.2d 743 (1979); *State v. Aden*, 196 Neb. 149, 241 N.W.2d 669 (1976); *Poindexter v. Wolff*, 403 F. Supp. 723 (1975) *aff'd* 540 F.2d 390 (1976).

The record shows that the arrest was proper and the evidence was sufficient to sustain the judgment. The judgment is, therefore, affirmed.

AFFIRMED.

NANCY HOLMAN GRADOVILLE, APPELLANT, V. BOARD OF EQUALIZATION OF CASS COUNTY, NEBRASKA, APPELLEE.

301 N.W.2d 62

Filed January 9, 1981. No. 43030.

1. **Political Subdivisions: Taxation: Appeal and Error.** The trial of an appeal from a county board of equalization involving the valuation of real estate, both in the District Court and the Supreme Court, is de novo as an equitable proceeding.
2. **Political Subdivisions: Taxation: Presumptions.** There is a presumption that a board of equalization has faithfully performed its official duties, and such presumption remains until there is competent evidence to the contrary. The presumption obtains only while there is an absence of competent evidence to the contrary. It disappears when there is competent evidence on appeal to the contrary, and from that point on the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon evidence, unaided by presumption, with the burden of showing such value to be unreasonable resting upon the appellant on appeal from the action of the board.

Appeal from the District Court for Cass County: RAYMOND J. CASE, Judge. Reversed and remanded with directions.

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

Ronald D. Moravec, Cass County Attorney, for appellee.

Heard before KRIVOSHA, C.J., MCCOWN, BRODKEY, and HASTINGS, JJ., and STUART, District Judge.

KRIVOSHA, C.J.

The appellant, Nancy Holman Gradoville (Gradoville), appeals from two judgments entered by the District Court for Cass County, Nebraska, which essentially affirmed the action of the Board of Equalization of Cass County, Nebraska, in assessing certain property owned by Gradoville in Cass County for the year 1979. We have now reviewed all the evidence presented in this case and have concluded that the

judgments entered by the trial court must be reversed.

Two separate actions were originally filed by Gradoville in the District Court for Cass County, Nebraska. The first action involved the 1979 valuation of certain real estate owned by Gradoville in Cass County, being described as Lot 3 and Sublot 1 of Tax Lot 21 in the east half of the northwest quarter of Section 35, Township 13, Range 13 East of the 6th P.M., Cass County, Nebraska. The property contains some 34.30 acres and has a home constructed on it. The property will hereafter be referred to as the "34 acres." The Board of Equalization assessed the value of the land for 1979 at $32,650 and the improvements for 1979 in the amount of $38,460. The District Court affirmed the action of the Board of Equalization.

The second action involved the 1979 valuation of a second tract of land owned by Gradoville in Cass County, being described generally as the north part of the northeast quarter of the southwest quarter of Section 35, Township 13, Range 13 East of the 6th P.M., Cass County, Nebraska, containing approximately 12.66 acres. That property will hereafter be referred to as the "12-acre tract." The 12-acre tract was leased to the Missouri Valley Dredging Company and was assessed for the year 1979 by the Board of Equalization in the amount of $12,225. The trial court, for reasons not fully clear from the record, concluded that a certain isolated trailer belonging to Missouri Valley Dredging Company and located upon the 12-acre tract was not, in fact, being used by Missouri Valley and that, therefore, the valuation of the 12-acre tract should be reduced by $2,000, thereby valuing the 12-acre tract for 1979 in the amount of $10,225. Both appeals from the Board of Equalization had been consolidated for trial before the District Court and by stipulation consolidated for hearing before this court. We shall, therefore, consider them together.

Appellant first argues that the evidence clearly establishes that the action of the Board of Equalization

in assessing the two tracts for the year 1979 was arbitrary and capricious. Appellant raises two other errors. However, in view of the action taken by us in the instant case, we need only consider the appellant's first claim.

Before proceeding to review the evidence, such as it is in the record, it may be helpful to set out the legal principles by which this appeal must be considered. It has frequently been held by this court that the trial of an appeal from a county board of equalization involving the valuation of real estate, both in the District Court and the Supreme Court, is de novo as an equitable proceeding. *Leech, Inc. v. Board of Equalization*, 176 Neb. 841, 127 N.W.2d 917 (1964); *Matzke v. Board of Equalization*, 167 Neb. 875, 95 N.W.2d 61 (1959); *Adams v. Board of Equalization*, 168 Neb. 286, 95 N.W.2d 627 (1959).

Even though the appeal is de novo, there are certain statutory requirements which this court must follow in reviewing such matters. Neb. Rev. Stat. § 77-201 (Reissue 1976) requires that all real property subject to taxation "shall be valued at its actual value . . . and shall be assessed at thirty-five per cent of such actual value." Likewise, Neb. Rev. Stat. § 77-112 (Reissue 1976) provides: "Actual value of property for taxation shall mean and include the value of property for taxation that is ascertained by using the following formula where applicable: (1) Earning capacity of the property; (2) relative location; (3) desirability and functional use; (4) reproduction cost less depreciation; (5) comparison with other properties of known or recognized value; (6) market value in the ordinary course of trade; and (7) existing zoning of the property."

The items set out by statute as examples of actual value, however, are not exclusive to all others. As we noted in *County of Gage v. State Board of Equalization & Assessment*, 185 Neb. 749, 751, 178 N.W.2d 759, 761-62 (1970): "The Legislature has attempted to define 'actual value' for purposes of taxation by application

of a formula 'when applicable.' [Citation omitted.] 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.'"

And, likewise, in *Newman v. County of Dawson*, 167 Neb. 666, 672-73, 94 N.W.2d 47, 50-51 (1959), we said, in part: "It has been frequently recognized by this court that absolute or perfect equality and uniformity in taxation cannot be attained. Something more than a difference of opinion must be shown. It must be demonstrated by evidence that the assessment is grossly excessive and is a result of arbitrary or unlawful action, and not a mere error of judgment. . . . The law imposes the duty of valuing and equalizing of property for taxation purposes upon the county assessor and the county board of equalization. In reviewing the actions of tribunals created by law for ascertaining the valuation and equalization of property for taxation purposes, courts will not usurp the functions of such tribunals. It is only where such assessed valuations are not in accordance with law, or it is made to appear that they were made arbitrarily or capriciously, that courts will interfere. The valuation of property is largely a matter of judgment, but mere differences of opinion, honestly entertained, though erroneous, will not warrant the interference of the courts. If uniformity of opinion were required, no assessment could ever be sustained."

The county urges us to keep in mind that there is a presumption that a board of equalization has faithfully performed its official duties, and that in making an assessment of Gradoville's property it acted upon

sufficient competent evidence to justify its action and such presumption remains until there is competent evidence to the contrary. See, *Chudomelka v. Board of Equalization*, 187 Neb. 542, 192 N.W.2d 403 (1971); *Clearwater Corp. v. City of Lincoln*, 202 Neb. 796, 277 N.W.2d 236 (1979); *Hastings Building Co. v. Board of Equalization*, 190 Neb. 63, 206 N.W.2d 338 (1973). While such statement does, indeed, correctly recite the law, there is a further corollary to that proposition. We have frequently said, "The presumption obtains only while there is an absence of competent evidence to the contrary. It disappears when there is competent evidence on appeal to the contrary, and from that point on the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon evidence, unaided by presumption, with the burden of showing such value to be unreasonable resting upon the appellant on appeal from the action of the board." *Weller v. Valley County*, 141 Neb. 69, 73, 2 N.W.2d 606, 608-09 (1942); *Leech, Inc. v. Board of Equalization, supra.*

We believe that the record in this case does, indeed, rebut the presumption urged by the county and, in fact, establishes that its action in arriving at the valuation of the property for the year 1979 is not supported by evidence as required by law. It must, therefore, be considered to have been made arbitrarily and capriciously. We turn now to the record for an examination of the facts.

The 34 acres are located near but not adjacent to the Platte River. The record does not indicate the distance from the Platte River. An exhibit offered in evidence, however, indicates that the 34 acres are located somewhere between a quarter of a mile to as much as a mile from the Platte River itself. The 12-acre tract lies immediately south of the 34 acres and is even farther from the Platte River than the 34 acres.

Located upon the 34 acres is the Gradoville home, constructed and completed in 1975. The house con-

sists of seven rooms with attached garage. The outside of the house is constructed of metal siding and was classified by the assessor as a type "C" quality of construction, meaning that it was only fair construction. The land upon which the house is located is zoned "agricultural" and is in the flood plain, so that if the home is destroyed it cannot be replaced.

Gradoville testified that the house leaked when the river flooded and that she had problems with the plumbing in the house. Likewise, she testified that the well had water but that the water was rusty. She further testified that the surrounding land owned by Gradoville is occupied by snakes, turtles, mosquitoes, and rats. There was no testimony to the contrary offered by the county.

The land itself was, at one time, used for the excavation of waste sand by the State of Nebraska. The removal of the waste sand left a borrow pit about 4 feet deep covering most of the west side of the 34 acres. There was, likewise, formerly located on the 34 acres a lake which was at one time rented out for fishing but which, in 1977, was destroyed when the Platte River came through, filling it in. It is now nothing more than a swamp and has not been used as a lake since 1977 because it is not deep enough to support fish life. Ten mobile trailers are also located on the 34 acres. These mobile homes belong to other individuals who lease the ground from Gradoville. Gradoville receives a total of approximately $4,000 a year rental for the space upon which the 10 trailers are located. The record is devoid of any evidence as to who the owners of the trailers are, how the trailers are used, or whether the tenants occupy the trailers on a full-time or part-time basis. The record leaves one with the impression that both the house and the 34 acres are substandard and not particularly desirable as a suburban dwelling site.

The 12-acre tract of land located immediately south of the 34 acres of land has, for a number of years, been

leased to Missouri Valley Dredging Company. There is a fence surrounding approximately 7 acres of the tract and the rest of the land is outside the fence. The land is all waste sand left after the sand was pumped out. There is nothing on the 12-acre tract but the property of the dredging company. It was described as mostly "a junkyard."

The county employed Mr. Boyd Roberts, an experienced appraiser, to assess both the 34 acres and the 12-acre tract. This was done sometime between 1975 and 1977.

Roberts assessed the value of the improvements for 1979 on the 34 acres at $38,460. This consisted of the Gradoville home which he assessed at $37,040, plus a fishing stand and concession stand, which he last saw in 1975, in the amount of $1,420. Gradoville testified that both the fishing stand and the concession stand were no longer there, one having been removed by order of the county and the other having been destroyed by the flood. Roberts conceded that he had not been on the property since the events which Gradoville maintained occurred and, therefore, did not know what had happened. Nevertheless, he assessed both improvements for 1979.

Insofar as the value of the house is concerned, Roberts testified that he saw it once briefly in 1975 when he examined a few of the rooms and then measured the outside dimensions. He arrived at his value by multiplying the outside square feet times a factor which was contained in a formula used throughout the county to determine reconstruction value of improvements. He thought he saw the property a second time, but the record was unclear as to when or under what conditions. He conceded that he did not take into account the fact that the property was in a flood plain area or that it had a number of defects, though he did recognize that it was a class C construction as opposed to an A or B. He arrived at a figure of $32,650 for the value of the 34 acres through a series of mathematical computations which he made.

With regard to the value of the land in the 34 acres, he determined that some of the land upon which the trailers were located were 1 acre in size while others were only a half an acre. There is no evidence to indicate that they were leased in that manner or in any way divided up into tracts. Nevertheless, by reason of some observation he made, he concluded that there were three 1-acre lots which should be valued at $2,500 per acre. This apparently was based upon some notion that other comparable "recreational land" in the county had a value of $1,000 per acre. To the base of $1,000, he added what he perceived as the value of improvements to the leased land and arrived at a final figure of $2,500 per acre. He, likewise, concluded that there were five half-acre lots which should be valued at $1,250 per lot, determined in the same manner as the 1-acre tracts. On that basis, he determined that the 5½ acres devoted to the trailer courts had a value of $13,750. He, likewise, determined that the value of the land upon which the home was located was in the amount of $6,500. When asked as to how he arrived at that figure, he testified that the first acre of all suburban land in the county is assessed at $6,500 per acre and the balance of the land at $500 per acre. On that basis, he concluded that there was 1 acre valued at $6,500 and the remaining 24.8 acres at $500 an acre for a total of $12,400. Agricultural land which is unproductive is valued in the county at only $20 per acre. There is no evidence in the record to indicate how or in what manner any of this property should be assessed as either "recreational property" or "suburban." It is zoned agricultural and, while it is located near the Platte River, there is no indication that it is used in any manner as recreational land nor could be used in any manner for recreational purposes. There is simply no evidence to indicate how or in what manner the eight trailers located upon the property are put to use and whether anyone uses them for recreational purposes. The old pay lake which was

seen by Roberts in 1975 no longer exists. In summary, there is no evidence in the record that the 34 acres are, in any manner, properly classified as recreational or suburban. It would appear from the evidence that such classification is arbitrary.

Roberts never testified that, in his opinion, the actual value of the improvements was in the amount of $38,460 or that the 34 acres was in the amount of $32,650. He simply testified that he used a formula created for appraising property throughout the county in arriving at a number. To be sure, it appears that the method by which the Gradoville property was appraised was consistent with the manner in which other property in the county was appraised. The difficulty, however, is that there is no evidence in the record that the classification was correct or that the manner of appraisal resulted in obtaining the actual value of the property as required by law. The assumptions and conclusions made by the county cannot, in any manner, be supported in this record. To suggest that the first acre of all land outside of an incorporated city in the county, regardless of its location, size, or condition, should be valued at $6,500 indicates arbitrary action. Likewise, to suggest that the remaining land, zoned agricultural in the flood plain and from the evidence not suitable for any use because of its condition, should be identified as recreational land and assessed at $500 an acre instead of unusable agricultural land valued at $20 per acre appears to be arbitrary. While it is true and we have so held that absolute or perfect equality and uniformity in taxation cannot be obtained, see *Newman v. County of Dawson, supra*, it is likewise clear that to avoid arbitrary and capricious action, the assessment must be in some manner supported by the evidence.

The county, in support of its claim, maintains that it has used comparable sales to arrive at land values and to check what it has done in valuing the Gradoville property. The properties offered by the county as

comparables, however, do not in any serious manner indicate that, in fact, they are comparable and support its claim. The county indicated that it had used at least three other properties which it maintained were comparable. The first was property identified as the "McKenzie property" which was located east of the northern part and across the road from the Gradoville property. The record, however, indicates that considerable improvements to the land had been made, including the bringing in of some 6 inches of black dirt. A home considered by the appraiser as being of excellent quality was constructed on the McKenzie property. Interestingly enough, the McKenzie property, while some 50 acres in size as compared to the 34 acres of the Gradoville property, is assessed at less than the Gradoville property. The comparability between the two is not at all clear in the record.

A second tract of land used by the county as a comparable is property identified in the record as the "Kilton property." This was property located some 5 miles west of the Gradoville property, with a lake and a river frontage. There is nothing in the record to indicate that the properties are in any way comparable except that they are both in Cass County. The third piece relied upon by the county as a comparable is a tract of land some 268.5 acres in size owned by Omaha Fish and Wildlife. There is located upon the property two clear lakes and the land abuts the Platte River. Roberts conceded, however, that it made no difference to him whether the lake upon the "recreational property" was clear and 30 feet deep or shallow and unusable as on the Gradoville property. He said, "It all looks the same depth to me on top." The record does not in any way support the claim that the Omaha Fish and Wildlife property is comparable to the Gradoville property and could be used to establish comparable values.

The record, as it presently exists, indicates that there are 34 acres of wasteland without river frontage

upon which there is constructed a home and eight trailers. Gradoville testified that in her opinion the actual value of the house, plus 4 acres of land upon which the house sits, was in the amount of $25,000; that the remaining 30 acres were worth $15,000. There is no other evidence in this record as to actual value, and in deciding this case de novo we have no other alternative but to determine that the actual value of the 34 acres for the year 1979 must be in the sum of $40,000. While not directly related to the instant case, the record reflected that the house located upon the 34 acres has, for several years, been assessed on other property owned by Gradoville and that it was not until 1979 that the county determined that the property had been assessed on the wrong site. All of this simply goes to show the lack of care which the county exercised in attempting to arrive at the required statutory values for the Gradoville property.

Turning then to the 12-acre tract lying immediately south of the 34 acres, the evidence is even stronger that the valuations placed upon the property by the county is arbitrary. The county has determined that there is located upon the property four structures, two of which are located on 1-acre tracts and two of which are located on half-acre tracts. The record is unclear as to whether all of these alleged structures are mobile trailers or only three of the structures are mobile trailers and one is a building. Gradoville maintained that the trailers were not on the 12-acre tract but, in fact, were on other property owned by Gradoville and already assessed by the county. The trial court, in its order, concluded that at least one of the structures should not have been considered by the assessor and reduced the value of the land by $2,000. The record, however, is totally devoid as to how or in what manner the trial court reached that conclusion. It does not appear, from the record, that the trial court actually viewed the premises. The two 1-acre tracts were assessed by the county at $2,500 each and the

two half-acre tracts at $1,250 each. The remaining 9.45 acres were classified as recreational land and assessed at $500 an acre. Again, the record does not indicate how or in what manner anyone might consider the 12-acre tract rented by Missouri Valley Dredging Company and used by them as a "junkyard" to be recreational land. Gradoville testified that in her opinion the 12-acre tract had a total value of $6,000. There is no other evidence in the record with regard to the actual value. We are, therefore, compelled to find that the value of the 12-acre tract for the year 1979 is in the amount of $6,000.

Lest we leave the wrong impression by our action herein, let us further note that it is not improper for the county, in attempting to arrive at values, to use formulas. Nor is it improper for counties, in arriving at values, to use comparable lands or sales. All of those factors, however, must be part and parcel of an overall evaluation and must, in some manner, be supported by the facts. Perhaps no one of the actions taken by the county herein, individually and standing alone, might have been sufficient to establish that the valuation was arbitrary and capricious. Nevertheless, when one views the entirety of the record and the absence of any sufficient supporting evidence offered by the county as to how it arrived at its values, one is left with the inescapable conclusion that the valuation was arbitrary and capricious. Neither party should point to this record as an example of how such a case should be tried. The evidence is at best weak and confusing as offered by both parties. It may very well be that upon subsequent valuation the county can establish a higher value. We make no finding in that regard, and only base our decision upon the evidence which is presented to us in the instant case. For the reasons, therefore, set out above, the judgment of the trial court is reversed and remanded with instructions to find that the 34 acres has a value for the year 1979 in the amount of $40,000 and the 12-

acre tract in the amount of $12,000. Having so disposed of the appeal, we need not consider any other assignments of error.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE INTEREST OF MORFORD. STATE OF NEBRASKA, APPELLEE, V. LAURIE SUSAN MORFORD, APPELLANT.

300 N.W.2d 795

Filed January 9, 1981. No. 43059.

1. **Juvenile Courts: Jurisdiction of Courts.** The juvenile court in each county has exclusive original jurisdiction as to any child under the age of 18 years, who is homeless or destitute, or without proper support through no fault of his parent, guardian, or custodian.
2. **Parental Rights.** The juvenile court may terminate all parental rights between the parents or the mother of a child born out of wedlock and such child when the court finds such action to be in the best interests of the child and it appears by the evidence that one or more of the following conditions exists: . . . (6) Following upon a determination that the child is one as described in subdivision (1) or (2) of Neb. Rev. Stat. § 43-202 (Reissue 1978), reasonable efforts, under the direction of the court have failed to correct the conditions leading to the determination. Parental rights may be terminated for any one of the six independent circumstances referred to in the above statute authorizing termination of parental rights.
3. **Appeal and Error: Juvenile Courts.** An appeal of a juvenile case is heard by trial de novo upon the record; and the findings of fact by the trial court will be accorded great weight because the trial court heard and observed the parties and witnesses, and those findings will not be set aside on appeal unless they are against the weight of the evidence or there is a clear abuse of discretion.
4. **Parental Rights.** An order of the juvenile court terminating parental rights under Neb. Rev. Stat. § 43-209 (Reissue 1978) must be supported by clear and convincing evidence.
5. ——. In a proceeding in juvenile court under Neb. Rev. Stat. § 43-209 (Reissue 1978), the court may terminate all parental rights of parents when the court finds such action to be in the best interests of the child or children.

Appeal from the Separate Juvenile Court of Douglas County. Affirmed.

Phillip M. Bowen of Welsh, Sibbernsen & Bowen for appellant.

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

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

BRODKEY, J.

Laurie S. Morford (Laurie), the defendant-appellant and natural mother of Christopher Michael Morford, appeals to this court from an order entered by the Separate Juvenile Court of Douglas County on September 18, 1979, terminating the parental rights to her child, Christopher Morford, who was born on June 7, 1977. The parental rights of the alleged natural father of Christopher, referred to as John Doe, were also terminated and are not involved in this appeal. In its order entered on September 18, 1979, the court found that the allegations contained in the motion of the State of Nebraska to terminate the parental rights were, with the exception of one paragraph, true and supported by clear and convincing evidence, terminated such parental rights, and found that it was in the best interests and welfare of Christopher Morford, the minor child, that he be placed in custody of the Nebraska Children's Home Society for care, custody, and permanent planning, to include adoption. We affirm.

To aid in an understanding of the issues of this appeal, it will be helpful at this point to review some of the background and prior history of the appellant, Laurie, the mother of Christopher, who at the time of the incidents and proceedings referred to in this opinion was herself a minor. Laurie's background, as revealed in the record of this case, including a social history taken in connection with her own commitment to the Youth Development Center, Geneva,

Nebraska, on October 17, 1977, indicates that Laurie is a female Caucasian, who was born on March 31, 1962, and was the oldest of four children born to Robert and Delores Morford. It appears that Laurie's involvement with the juvenile court commenced in 1975, at the time her parents were obtaining a divorce. The social history report indicates that Laurie's mother, Delores, had difficulties controlling Laurie, and as a result thereof filed a petition in the juvenile court alleging that Laurie was an "ungovernable" child, presumably under Neb. Rev. Stat. § 43-202(4) (Cum. Supp. 1976). While the details of the proceedings are not set forth in the record, the report reveals that Laurie was thereafter placed in a foster care home, which placement continued through July of 1977. Laurie's child, Christopher Morford, was born on June 7, 1977, while she was under such foster care. On September 1, 1977, Laurie was placed with her mother, Delores, who thereafter complained that Laurie refused to do her chores while at home, and also indicated that she did not have room for Laurie in her house. In addition, Delores stated that Laurie had thrown a telephone at her, an act characterized by the State as an assault upon Mrs. Morford. In any event, Laurie was admitted to the Douglas County Youth Center on September 14, 1977, and remained there until October 17, 1977, when she was committed to the Youth Development Center at Geneva, Nebraska. At that time, Christopher Morford, the minor child, was placed in a foster care facility, where he has remained to the present time.

It appears that the next event which occurred in the chronology of this case is that on November 3, 1977, shortly after Laurie's commitment to Geneva, the county attorney of Douglas County, Nebraska, filed a petition in the Separate Juvenile Court of Douglas County under Neb. Rev. Stat. § 43-202(1) (Cum. Supp. 1976), alleging that Christopher was a child within the meaning of that section, being under

the age of 18 years, homeless or destitute, or without proper support through no fault of Laurie Susan Morford, natural mother of said child, who is presently unable to assume the care and custody of said child because of her confinement in the Youth Development Center at Geneva, Nebraska. After an adjudication hearing held on January 6, 1978, the juvenile court, on January 9, 1978, entered its order finding Christopher to be a child within the meaning of the aforesaid § 43-202(1), as it pertains to his mother, Laurie Susan Morford.

Laurie remained confined at Geneva, Nebraska, until her release in November of 1978, at which time she was placed in a licensed foster care home operated by a Mrs. Paula Hyland and her husband. Mrs. Hyland testified at the termination hearing that while the original goal of placement was to reunite Laurie with her child, Mrs. Hyland was unable to do so in her home. It also appears that during that period Laurie had limited visitational rights with Christopher at the home.

The record further reveals that at a review hearing held in the Separate Juvenile Court on March 15, 1979, the court, after providing that Laurie should have reasonable rights of visitation with Christopher as arranged by the director of the Douglas County Social Services, provided in addition as follows: "That Laurie Susan Morford, natural mother, in order to demonstrate emotional stability in her own life and the desire to maintain and care for Christopher Michael Morford, minor child, is ordered to do the following:

"1. That Laurie shall attend school on a regular basis.

"2. That Laurie shall participate in Positive Parenting classes.

"3. That Laurie shall participate in individual counseling along with her mother, Mrs. Morford." On April 18, 1979, the juvenile court entered a fur-

ther order, in effect reaffirming its order of March 15, 1979, but adding two additional conditions, to wit: (1) That Laurie was to attend group programs conducted by Jo Ann (sic) Furay, who was a counselor at the Child Saving Institute; and (2) That Laurie was to meet with Jo Ann (sic) Furay on an individual basis. The court entered additional orders on April 25, 1979, and July 23, 1979, which in effect continued the requirements contained in its previous orders.

It next appears that on August 17, 1979, the county attorney of Douglas County filed a motion in the juvenile court proceedings, above referred to, seeking to terminate the parental rights of the natural parents of Christopher Michael Morford, under Neb. Rev. Stat. § 43-209(6) (Reissue 1978), for the reason that reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the determination that Christopher was a child within the meaning of § 43-202(1). In support thereof, (1) the petition alleged that Laurie was ordered to attend a group program arranged by Jo Ann (sic) Furay, upon acceptance at the Child Saving Institute; and that although Laurie attended the teen parent group regularly, she was inconsistent, demanding, and uncooperative in the group and had not been responsive to suggestions given the group and failed to utilize her skills discussed in the group in her home situation. The county attorney also alleged that Laurie had taken an overdose of a drug in an attempt at suicide or suicide gesture, the latter three words being added as an amendment. The petition also alleged that Laurie had on numerous occasions left the foster home under the pretense of leaving for employment, but had instead gone to her mother's home to meet her boyfriend. (2) With reference to the requirement that Laurie attend school on a regular basis, the petition alleged that she had been expelled from school for 19 days for failure to cooperate and do the required work, as a result of which she was placed in the Douglas County

Youth Center on April 21, 1979, the length of said detention, however, not being set out in the petition, but which was apparently of very short duration. (3) With reference to the requirement that Laurie participate in positive parenting classes, the petition alleged that she did not attend those classes on May (sic) 24, 1979, May 1, 8, 15, 22, 29, 1979, June 5 and 12, 1979, and July 3, 1979. (4) The petition finally alleged that it was the recommendation of Mrs. Hyland, the foster mother of Laurie; Joan Furay, the caseworker at the Child Saving Institute; the Child Protective Services worker; the foster care caseworker; the guardian ad litem; and the juvenile court service officer that Laurie's parental rights be terminated. The motion for termination of parental rights came on for hearing in the juvenile court on September 18, 1979, and on that date the court entered its order terminating such parental rights, as previously referred to, and finding, with the exception of the last allegation in the petition with reference to the recommendations for the termination by the various persons named therein, that the other facts alleged as grounds for termination were generally true and supported by clear and convincing evidence.

Before discussing the evidence in the record as adduced by witnesses at the termination hearing, and also with reference to the background of the mother, Laurie, at the time of her commitment to Geneva, we first discuss the pertinent statutory provisions applicable to this appeal and also certain principles of law which are now well established in this jurisdiction. We have previously in this opinion referred to § 43-202, which sets out the jurisdiction of the juvenile court. Subsection (1) of that statute provides that the juvenile court in each county shall have exclusive original jurisdiction as to any child under the age of 18 years, who is homeless or destitute, or without proper support through no fault of his parent, guardian, or custodian. The section of the juvenile court act

dealing with the termination of parental rights is § 43-209. The part of that statute specifically applicable to this appeal reads as follows: "The court may terminate all parental rights between the parents or the mother of a child born out of wedlock and such child when the court finds such action to be in the best interests of the child and it appears by the evidence that one or more of the following conditions exist: . . . (6) Following upon a determination that the child is one as described in subdivision (1) or (2) of section 43-202, reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the determination." We have held that parental rights may be terminated for any one of the six independent circumstances referred to in the above statute authorizing termination of parental rights. *State v. Burger*, 205 Neb. 340, 288 N.W.2d 22 (1980).

We have also held, with reference to the scope of review in this court, that as a general rule an appeal of a juvenile case is heard by trial de novo upon the record; and also that findings of fact by the trial court will be accorded great weight because the trial court heard and observed the parties and witnesses, and those findings will not be set aside on appeal unless they are against the weight of the evidence or there is a clear abuse of discretion. See, *State v. Duran*, 204 Neb. 546, 283 N.W.2d 382 (1979); *State v. Logan*, 204 Neb. 204, 281 N.W.2d 753 (1979). We have also stated that an order of the juvenile court terminating parental rights under § 43-209 must be supported by clear and convincing evidence. *In re Interest of Hill*, *ante* p. 234, 298 N.W.2d 143 (1980); *State v. Hamilton*, 204 Neb. 537, 283 N.W.2d 66 (1979); *State v. Souza-Spittler*, 204 Neb. 503, 283 N.W.2d 48 (1979).

With the foregoing statutes and rules in mind, we now examine the evidence contained in the record to determine whether there has been an improvement in Laurie's condition since her confinement to Geneva in 1977, and since her release from that institution;

and also to determine the extent and effect of her compliance or noncompliance with the orders of the court, particularly with reference to the best interests of the minor child, Christopher. The rule is well established that in a proceeding in juvenile court under § 43-209, the court may terminate all parental rights of parents when the court finds such action to be in the best interests of the child or children. See *State v. Wedige*, 205 Neb. 687, 289 N.W.2d 538 (1980). While we concede that the evidence presented in the hearing for commitment of Laurie to Geneva in 1977 would not, in itself, be sufficient for the termination of such rights in 1979, we think it is clear that such evidence may well be considered by this court in determining whether there has been an improvement in such condition, and whether, as of the date of the termination, there were grounds existing to do so. In the report of Barbara Schuett, psychologist, dated October 4, 1977, Laurie was diagnosed as having a sociopathic personality and described as being impulsive, restless, irritable, immature, moody, hostile, and rebellious. In her conclusions in that report, the psychologist stated: "Laurie is now 15½ years of age. She has a 4-month-old baby and miscarried during this stay at the Douglas County Youth Center. She reports that the father of her second child is not the father of her living baby. Laurie's behavior pattern has not improved since the evaluation in 1975, and in fact seems to have worsened." In the psychiatric evaluation by David W. Bean, M.D., consulting psychiatrist, dated October 11, 1977, he observes: "In reference to the patient's role as a mother to her four-month-old infant, this examiner has strong reservations concerning her abilities to function in that regard. Her past behavior indicates that she is unable or unwilling to structure her own life in an appropriate manner, thus leaving this examiner significantly in doubt over the patient's abilities to act in an appropriate mother role to her infant son." Also, in the "social

history" of Laurie written by Barbara Thomas, social worker, in October of 1977, the observation is made: "Although Laurie has not put her child up for adoption, she has thus far not demonstrated either an ability or a desire to properly care for him. Shortly after her present admission to the Youth Center, Laurie again was found to be pregnant. This pregnancy terminated in a miscarriage, however. Laurie was not adverse to the idea of being pregnant again, as she felt this was a means by which she could leave the Youth Center. This again demonstrates this girl's total lack of a sense of responsibility, and manipulative tendencies."

We now consider the evidence adduced at the hearing for the termination of parental rights to determine whether or not the efforts of the court to correct conditions, as reflected by its orders of March 15, 1979, et seq., have succeeded. A review of the testimony of the witnesses convinces us that the efforts have failed to do so.

Joan Furay, the counselor at the Child Saving Institute, who worked as a counselor to Laurie for a period of 3 or 4 months testified that Laurie was uncooperative with respect to her suggestions for improvement in her life at the foster home; and also in response to the question, "Do you feel that Laurie Morford still needs your type of group?" answered, "Definitely." On cross-examination she was asked:

"Q. If you have more time with Laurie, do you believe that you could be successful in obtaining some improvement in her parenting skills?

"A. I really — I don't know, because it just would depend if Laurie were willing to make some changes. But at this point up in the three or four months that I have been working with her, she had not made any changes."

Again, on redirect examination Joan Furay was asked:

"Q. Based on her past performance, do you have

any reason to believe, say, the Court was to grant you additional time to work with Laurie. Do you have any reason to believe on her past performance that she would change?

"A. No, I don't."

The next witness was Teri Beck, a state parole officer. She was asked on redirect examination:

"Q. Based on your working with Laurie Morford and her performance or lack of performance in the course of the Parole, would you at this time have an opinion as to whether Laurie Morford should have her child in her custody?

. . . .

"THE WITNESS: I believe not at this time."

Paula Hyland, the foster mother, also testified at the hearing. She was asked the following questions and made the following answers:

"Q. Did you ask that she [Laurie] be removed from your home?

"A. Yes.

"Q. Are you saying at this time that the situation between you and Laurie never improved during the whole time she was there?

. . . .

"THE WITNESS: It got increasingly worse. It had — it had started out being really quite good, I had thought, with the idea that her son could eventually come and be there as a foster child while she learned parenting and worked on this. But it just deteriorated over the eight months to the point that at that point, I felt it was hopeless for Laurie at our house."

On further cross-examination she testified as follows:

"Q. Would you say at least a portion of Laurie's problem was because there was continued frustration of her not being able to see her child but for an hour every two weeks?

"A. In my opinion, no."

Barbara Harris, service officer for the juvenile court, testified that Laurie had missed numerous

classes of the positive parenting group, and had subsequently informed her that she had obtained employment at A & W, and was unable to attend the group. Barbara Harris testified that she had talked to Laurie about it and had informed her that as far as the court was concerned, the court order would remain in effect and that she had to attend positive parenting regardless of a work schedule. She stated further that it was her opinion that Laurie's attendance at the group was more important than her seeking employment at the time. She was also asked on direct examination:

"Q. At any time during the course that she was to comply with these requirements of the Court Order, did she state to you that she just wished to give up the child?

"A. She — I did visit with Laurie when she was in Geneva. And at that time, she — we discussed Chris, when she was in Geneva, and she had informed me that she didn't have any real feelings for Chris because she hadn't been with him. And at this point, she had been talking to Joan Clemons from Nebraska Children's Home and was really unsure what to do about Chris, because she was confused that she didn't have any real motherly feelings for him."

The appellant did not call any witnesses at the termination hearing.

We feel that the court considered all the evidence presented in the case and correctly summarized valid reasons for its decision to terminate the parental rights, in its remarks announcing its decision. After finding that the allegations contained in the petition for termination were true (with one minor exception), the court stated: "Numerous attempts were made over a long period of time to stabilize Laurie in her own personal life. She was brought to Court by — on the information of her mother to the County Attorney and the status offense was filed. Thereupon, she was in, I believe, at least five different foster homes. And

during that period of time, she became pregnant and gave birth to Christopher. After Christopher's birth, he remained and resided in the home of Laurie and her mother for a time. And as the Petition before the Court now indicates, Laurie's life never did stabilize at that time sufficient for her to take charge of it in a normal and reasonable manner. . . . And I certainly can understand why the County Attorney would feel that simply because a child is young herself and gives birth to a child that that should not in itself be a reason for termination of one's parental rights. That a young person also should be given the opportunity to learn how to become a parent and raise a child, and that age itself should not be a deterrent to being a good parent. . . . However since that time, since those initial proceedings, subsequent to the filing of this Petition, there have been numerable [sic] hearings. There has been the involvement of agencies with the child; there have been the involvement of Geneva through furloughs, Laurie seeing the child when she would come home. We had review hearings in which we found she hadn't made sufficient progress while at the Youth Development Center. . . . When she finally did achieve a Parole status through the Youth Development Center into the Department of Correctional Services, we heard the testimony today that it was an off again, on again relationship with progress. That we've heard testimony from Teri Beck, her Parole Officer, from Joan Furay, from her foster parents that at no time was there any type of consistent behavior to the Court that she had attained the status of being able to take charge of her own life, and therefore the life of son Christopher. From the date this Petition was filed to today's date, her personal life has been in such disarray, she has shown such an inability to manage her own personal affairs, that in the foreseeable future, there is simply — it just doesn't appear to be a reasonable likelihood that Laurie will ever be able to give the needed support, care, and concern to enable a child to grow and

be healthy and attain an adult stature in any kind of productive and meaningful way. . . . But we really have to ask ourselves how long must we wait for Laurie to grow up? She became a parent at a young age and two years later she — Christopher has been in foster care all this time. Her position has not changed. She is still quite unable to care for him and again, how long must Christopher wait for his mother to grow up so that he could reasonably expect that he could be raised in any way sufficient to go through childhood and into an adulthood in that family? Laurie's been given opportunities, and they all haven't been easy. But it's the Court's finding that they've been sufficient, they've been fair. That there was opportunity, that opportunity was disregarded, and that when her son and the relationship between them is on the line, she chose something other than following the Order of the Court and following whatever it would take to attain — whatever it would take to obtain custody of her son and raise a son in a way that she felt would be appropriate."

Further, in announcing its decision on the motion for a new trial, the court added the following: "I just simply still believe that the child needs permanency in his life. And by leaving the matter open, that could be years, and we could be in a no man's land of Laurie doing a little bit, but not quite enough for, until Christopher is who knows how old."

We agree with the comments of the court, as set out above; and we conclude upon review in this court that the State has established by clear and convincing evidence that it was in the best interests of the child, Christopher, that the parental rights between him and his mother, Laurie, be terminated.

The appellant also assigns as error the action of the court in admitting evidence of an alleged "suicide attempt" or "suicide gesture" by the appellant. However, the record reveals that Laurie told Mrs. Hyland, her foster mother, that she had attempted to kill

herself because she was so unhappy, the reason being that her foster mother had placed restrictions on her seeing her boyfriend, and not because, as claimed by the appellant, she was frustrated by not being able to see her child more often. Whether her actions might or might not be considered a bona fide suicide attempt, the "gesture" is indicative of appellant's continuing immature behavior, and we believe the evidence was properly admitted; and appellant's claim of error in this regard is without merit.

We also wish to comment briefly on appellant's contention that § 43-209(6) is unconstitutionally vague and violated Laurie's rights to due process of law.

Counsel for Laurie admitted in oral argument to this court that he had not complied with the rules of this court as to constitutional questions and had not notified the attorney general of the presence of constitutional questions. Be that as it may, we have previously passed upon this issue in several prior opinions of this court, and the constitutionality of § 43-209 has been upheld with respect to the termination of parental rights under the above statute. See, *State v. Metteer*, 203 Neb. 515, 279 N.W.2d 374 (1979); *State v. Souza-Spittler*, 204 Neb. 503, 283 N.W.2d 48 (1979); *State v. A.H.*, 198 Neb. 444, 253 N.W.2d 283 (1977).

There being no merit to appellant's assignments of error, and no further errors appearing in the record, we determine that the order of termination of parental rights entered by the Separate Juvenile Court was correct in all respects, and must be affirmed.

AFFIRMED.

KRIVOSHA, C.J., dissents.

MATTHEW A. O'CONNOR, APPELLEE, V. ANDERSON BROTHERS PLUMBING AND HEATING, APPELLEE, AND UNITED STATES FIDELITY AND GUARANTY COMPANY, APPELLANT.

300 N.W.2d 188

Filed January 9, 1981. No. 43080.

1. **Workmen's Compensation: Limitations of Actions.** A proceeding under Neb. Rev. Stat. § 48-141 (Reissue 1978) to modify a previous award of the compensation court to recover additional compensation for an increase in incapacity can only be brought within 2 years of the time the employee knows or is chargeable with knowledge that his condition has materially changed, and there is such a substantial increase in his disability as to entitle him to additional compensation.
2. **Workmen's Compensation: Subsequent Claim: Limitations of Actions.** If an employee suffers an injury, which appears to be slight but which is progressive in its course, and which several physicians are unable to correctly diagnose, his failure to file claim or bring suit within the time limited by law will not defeat his right to recovery, if he gave notice and commenced action within the statutory period after he had knowledge that compensable disability resulted from the original accident.

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

Ross, Schroeder & Fritzler for appellant.

Charles H. Beatty and John T. Tarrell of Tarrell & Alexander for appellee O'Connor.

Heard before KRIVOSHA, C.J., MCCOWN, BRODKEY, and HASTINGS, JJ., and STUART, District Judge.

STUART, District Judge.

This is a workmen's compensation case. The only issue presented is whether the action was barred by the 2-year statute of limitations, Neb. Rev. Stat. § 48-137 (Reissue 1978).

The one-judge compensation court entered an order of dismissal, holding that the plaintiff's claim was barred. On rehearing, the three-judge panel of the Workmen's Compensation Court reversed, and found

that plaintiff's condition was latent and progressive and his claim was, therefore, not barred by the statute of limitations. Defendant United States Fidelity and Guaranty Company appeals. We affirm.

On September 21, 1965, plaintiff was laying a sewer line in a ditch when the ditch caved in on him. Plaintiff suffered an injury to his neck, together with a fractured left clavicle and dislocation of his shoulder. On August 17, 1967, the Workmen's Compensation Court made an award to plaintiff for 24 weeks of temporary total disability and for a 7 percent permanent partial disability to the body as a whole, which latter award resulted in a payment of $5.73 per week for 276 weeks. The last payment to plaintiff was made on November 15, 1971.

The evidence showed that on October 8, 1977, when operating a cigarette machine, the plaintiff's left arm went completely dead, and there was constant pain in his fingers and pain radiating down through his neck and shoulder. After treatment by several different doctors, an orthopedic surgeon surgically removed approximately 2 inches of the collarbone from the left shoulder in February 1978. Plaintiff was then referred to different neurologists and neurosurgeons; a myelogram was administered in August 1978; and this was followed on September 12, 1978, by an anterior cervical diskectomy at C-4-5 and C-5-6, with fusion (fusion of cervical vertebrae).

This action was commenced August 25, 1978, 10½ months after the cigarette machine incident; almost 13 years after the original injury; and well over 6 years from the time of the making of the last payment to plaintiff under the original Workmen's Compensation Court award.

The determination turns on whether or not plaintiff's claim to increased disability was based upon an injury that was latent and progressive, and did not definitely manifest itself until October 1977.

From the time of the accident until the original

award, plaintiff was examined or treated by five different doctors: a general practitioner, three orthopedic surgeons, and a neurologist. From the original award until the cigarette machine incident, plaintiff continued to complain of pains in his neck and head and in his left shoulder and arm. He repeatedly consulted his personal physician and periodically received ultrasonic treatments and physiotherapy for relief of pain in the neck, shoulder, and left arm. In July 1968, plaintiff was referred by his personal physician to one of the original treating orthopedic surgeons for treatment of continuing pain, dizziness, and nausea. At the time of the examination this doctor told the plaintiff, "It's all in your head. Go see a psychiatrist." This doctor returned a written report in which he recommended exercises and intermittent use of traction, and further suggested "a complete psychiatric evaluation." These ultrasonic treatments and physical therapy continued in the years 1968, 1969, 1971, 1972, 1973, and 1974 for the relief of pain as described. In addition, plaintiff was given other treatment for pain, including hot packs and drugs. During this same time span, plaintiff's doctor considered the possibility of multiple sclerosis and communicated this possible diagnosis to the plaintiff. Although there was continuing pain and the other symptoms described, and the plaintiff became less active, he continued at his work as a plumber until the cigarette machine incident in October 1977. Following this incident, plaintiff was examined and treated by some seven different doctors, and, finally, in August 1978 plaintiff's condition was fully diagnosed following the administration of a myelogram. This diagnosis found plaintiff's condition was the result of the injury that occurred on September 21, 1965, and the operation to fuse cervical vertebrae followed.

Neb. Rev. Stat. § 48-141 (Reissue 1978) reads in part: ". . . the amount of any agreement or award payable periodically for six months or more may be

modified as follows: . . . if the parties cannot agree, then at any time after six months from the date of the agreement or award, an application may be made by either party on the ground of increase or decrease of incapacity due solely to the injury . . . ."

Neb. Rev. Stat. § 48-137 (Reissue 1978) reads in part: "In case of personal injury, all claims for compensation shall be forever barred unless, within two years after the accident, the parties shall have agreed upon the compensation payable under this act, or unless, within two years after the accident, one of the parties shall have filed a petition as provided in section 48-173. . . . When payments of compensation have been made in any case, such limitation shall not take effect until the expiration of two years from the time of the making of the last payment. . . ."

A proceeding under § 48-141 to modify a previous award of the compensation court to recover additional compensation for an increase in incapacity can only be brought within 2 years of the time the employee knows or is chargeable with knowledge that his condition has materially changed, and there is such a substantial increase in his disability as to entitle him to additional compensation. *Peek v. Ayers Auto Supply*, 157 Neb. 363, 59 N.W.2d 564 (1953).

However, pain alone is not compensable under our statute. *Borowski v. Armco Steel Corp.*, 188 Neb. 654, 198 N.W.2d 460 (1972). In addition, it must be remembered that plaintiff was awarded a 7 percent permanent partial disability to the body as a whole. Prior to the cigarette machine incident it is questionable if plaintiff could have proved a disability greater than that already awarded. His disability was one of continuing pain which plaintiff tried to have treated and further diagnosed, without success. His doctors either did not know what was the matter, or thought it was "all in his head."

We have previously stated: "If an employee suffers an injury, which appears to be slight but which is

progressive in its course, and which several physicians were unable to correctly diagnose, his failure to file claim or bring suit within the time limited by law will not defeat his right to recovery, if he gave notice and commenced action within the statutory period after he had knowledge that compensable disability resulted from the original accident." *Borowski v. Armco Steel Corp.*, *supra* (syllabus of the court).

"It has been held many times by this court that failure to file claim, or bring suit within the specified time, does not defeat the right to compensation where the injury is latent, provided the notice is given and the action commenced within the statutory period after the employee has knowledge that compensable injury has resulted." *Astuto v. V. Ray Gould Co.*, 123 Neb. 138, 141, 242 N.W. 375, 376 (1932).

"It is unreasonable to conclude that an injury is not latent merely because the plaintiff suffered pain, when thereafter several physicians were unable to correctly diagnose his injury. In Welke v. City of Ainsworth, 179 Neb. 496, 138 N.W.2d 808, we reaffirmed the rule of Astuto v. Ray Gould Co., 123 Neb. 138, 242 N.W. 375: 'If an employee suffers an injury, which appears to be slight, but which is progressive in its course, and which several physicians were unable to correctly diagnose, his failure to file claim, or bring suit within the time limited by law, will not defeat his right to recovery, if he gave notice and commenced action within the statutory period after he had knowledge that compensable disability resulted from the original accident.' See, also, Ohnmacht v. Peter Kiewit Sons Co., 178 Neb. 741, 135 N.W.2d 237." *Williams v. Dobberstein*, 182 Neb. 862, 864-65, 157 N.W.2d 776, 778 (1968).

Under our present procedure, the Workmen's Compensation Court was the trial court. With reference to an appeal upon which there is conflicting evidence, we have held: "On appeal of a workmen's compensation

case to the Supreme Court, if there is reasonable competent evidence to support the findings of fact in the trial court, the judgment, order, or award will not be modified or set aside for insufficiency of the evidence." *Borowski v. Armco Steel Corp.*, *supra* (syllabus of the court).

The finding of the Workmen's Compensation Court that plaintiff's claim was timely brought was correct and should be affirmed.

AFFIRMED.

IN RE ESTATE OF LAYTON. JAMES C. EICH, APPELLANT, V. ESTATE OF LAYTON, APPELLEE.

300 N.W.2d 802

Filed January 9, 1981. No. 43102.

1. **Decedents' Estates: Jurisdiction of Courts.** County courts have exclusive original jurisdiction of all matters related to decedents' estates, including the probate of wills and the construction thereof, and all other jurisdiction heretofore provided and not specifically repealed by 1972 Neb. Laws, L.B. 1032, and such other jurisdiction as thereafter provided by law.
2. ____: ____. To the full extent permitted by the Constitution of Nebraska, the county courts have jurisdiction over all subject matter relating to estates of decedents, including construction of wills and determination of heirs and successors of decedents, and estates of protected persons; protection of minors and incapacitated persons; and trusts. Such courts have 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 them.
3. **Decedents' Estates: Jurisdiction of Courts: Equity.** County courts, in exercising exclusive original jurisdiction over estates, may apply equitable principles to matters within probate jurisdiction.
4. **Decedents' Estates: Personal Representatives.** Except as restricted or otherwise provided by the will or by an order in a formal proceeding and subject to the priorities stated in Neb. Rev. Stat. § 30-24,100 (Reissue 1979), a personal representative, acting reasonably for the benefit of the interested persons, may properly perform, compromise, or refuse performance of the decedent's contracts that continue as obligations

of the estate, as he may determine under the circumstances. In performing enforceable contracts by the decedent to convey or lease land, the personal representative, among other possible courses of action, may execute and deliver a deed of conveyance for cash payment of all sums remaining due or the purchaser's note for the sum remaining due secured by a mortgage or deed of trust on the land; or deliver a deed in escrow with directions that the proceeds, when paid in accordance with the escrow agreement, be paid to the successors of the decedent, as designated in the escrow agreement.

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

James B. Cavanagh of Erickson, Sederstrom, Leigh, Johnson, Koukol & Fortune, P.C., for appellant.

Steven W. Floersch and Collins & Gleason for appellee.

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

BRODKEY, J.

James C. Eich, plaintiff and appellant herein, appeals from an order entered by the District Court for Sarpy County on October 30, 1979, dismissing his claim previously filed against the estate of Harry H. Layton in the county court of Sarpy County, which claim was allowed by that court and from which order the personal representatives subsequently appealed to the District Court. We reverse and remand.

It appears from the record that Harry H. Layton, a resident of Sarpy County, died intestate on August 5, 1978. He was predeceased by his wife and left no surviving issue. Two of his cousins, Lester J. Lutz and Ward Thompson, were appointed personal representatives in intestacy by the Sarpy County court on August 10, 1978. The inventory in that estate reveals that it was valued at $621,208.64 at the date of decedent's death, and consisted of a residence in Sarpy County; a hardware store and business proper-

ties located in Omaha, Nebraska; and also various stocks, bonds, and bank accounts.

On October 16, 1978, the plaintiff, who had been an employee of the decedent for over 40 years, filed a statement of claim in the estate, alleging that during his employment in decedent's hardware store the decedent on numerous occasions had advised him that because of his long and faithful service, he, the decedent, would execute a will in which he would provide that the inventory, goodwill, equipment, and business building in which the Layton Hardware Store is located would be left in its entirety to the claimant; and despite such promises, the decedent failed to execute such will and made no other provisions for leaving the hardware business and building to the claimant. Eich further alleged that the value of the property promised to him by the decedent was $54,000; and that the claim was due, was an unliquidated claim, and was unsecured. Eich also alleged that he should receive the Layton Hardware Store business, including the inventory of merchandise, the equipment and goodwill, and the building in which the business is located, from the estate of the deceased; or in the alternative he should receive the sum of $54,000, "for which claim is made hereunder." The record further reveals that on the following day, October 17, 1978, Eich filed an amended statement of claim, repeating generally the allegations contained in his original statement of claim, but adding the following statement: "THAT THE ABOVE CLAIM IS SUBMITTED WITHOUT PREJUDICE TO CLAIMANT'S RIGHT TO PURSUE ANY OTHER REMEDY ON SAID DECEDENT'S ORAL PROMISE TO DEVISE AND BEQUEATH THE LAYTON HARDWARE STORE BUSINESS AND THE BUSINESS BUILDING AS DESCRIBED ABOVE TO CLAIMANT."

Thereafter, on October 24, 1978, the aforesaid personal representatives of the estate disallowed the claim filed by the plaintiff, as amended; and thereafter,

on November 14, 1978, Eich filed his petition in the county court of Sarpy County for allowance of his claim. Following a hearing on the matter on December 19, 1978, the county court, on January 26, 1979, entered its order allowing the claim filed by Eich on October 16, 1978, and the amended claim filed on October 17, 1978, finding that the decedent, Harry H. Layton, did make an enforceable unilateral contract to transfer to the claimant, James C. Eich, the decedent's hardware store, including the land, building, equipment, and inventory. The court also found and ordered that Eich should be awarded the value of the inventory of the hardware store in the sum of $15,381.37, as shown in the inventory, which amount should be awarded to Eich in cash. The court also found and ordered that Eich should be awarded the land, building, and equipment used in the operation of the hardware store, and also the trade name "Layton Hardware Store," all subject to taxes and other liabilities. Finally, the court ordered: "That Lester J. Lutz and Ward A. Thompson, the Personal Representatives of said estate, are hereby ordered and directed to pay to James C. Eich the Claimant herein, the amount awarded to him as set forth above and that they are further directed to execute the necessary deeds, transfers and conveyances to vest title in James C. Eich to the land, building, and equipment and the trade name of 'Layton Hardware Store' . . . ."

On January 25, 1979, the personal representatives appealed the foregoing order of the county court to the District Court for Sarpy County and on March 13, 1979, filed their petition praying for an order disallowing Eich's claims. Eich filed an answer and cross-petition asking that the order of the county court allowing the claim, dated January 26, 1979, be affirmed, and the appeal by the personal representatives be dismissed. The parties stipulated that the transcript of the testimony presented during the trial was to have the same force and effect as a deposition of the wit-

nesses who had appeared before the county court.

The record next reveals that on May 4, 1979, the personal representatives filed a motion for summary judgment on Eich's claim, alleging that there was no question of material fact and that the estate of Harry H. Layton was entitled to a judgment in its favor as a matter of law. Hearing was held on the motion for summary judgment on May 23, 1979, and it was taken under advisement by the trial judge. The court entered its opinion and order on October 30, 1979, but did not specifically rule on the motion for summary judgment, and dismissed the action on the ground that the county court was without jurisdiction to hear the matter. In its opinion and order, the court stated:

"The claimant herein is one James C. Eich. The substance of the claim filed before the county court was that the decedent had made oral promises to leave a hardware store, furnishings, and inventory to the claimant in return for the claimant's continued employment. In plain language, the action is one founded on an oral promise to make a will. The claimant prayed for alternative relief in the form of money damages, but either form of relief would be founded on an oral contract to make a will, if one existed.

"The Sarpy County Court, Judge Walsh, heard the evidence, concluded the contract existed, gave the claimant a money judgment for the value of the inventory, and directed the personal representatives to convey title to the store and furnishings to the claimant. *In short, the County Court decreed specific performance save for the value of the inventory.* The estate prosecuted this appeal.

"The motion for summary judgment was initially presented as if the issues were properly before the Court. They are not. An action for specific performance may be litigated only in the court possessing equity jurisdiction — the district court. The county court has no authority or jurisdiction to try such actions,

even if they are denominated as a 'claim' against an estate. The order of the county court allowing the 'claim' of James Eich is a nullity, and the matter should be remanded to the County Court of Sarpy County with directions to dismiss the matter for lack of jurisdiction." (Emphasis supplied.)

The issue in this case is whether the county court had jurisdiction to hear plaintiff's claim, allegedly based on a promise of the decedent "to execute a will" in his favor.

In our disposition of this matter, we first examine the applicable constitutional and statutory provisions with reference to the jurisdiction of county courts in probate matters. We note at the outset that prior to 1970, Neb. Const. art. V, § 16, set out the jurisdiction of county courts, and provided in part as follows: "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 in question; nor in actions on mortgages or contracts for the conveyance of real estate . . . ." However, that provision of the Constitution, and several others, including the abolishment of justice of the peace courts, was repealed in 1970; and that at all times material to this case, there was no constitutional provision in effect with reference to jurisdiction of county courts. Since 1970, the jurisdiction of such courts has been set forth in the statutes of this state, specifically Neb. Rev. Stat. § 30-2211 (Reissue 1979) and Neb. Rev. Stat. § 24-517 (Reissue 1979).

Section 24-517 now provides in pertinent 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."

Section 30-2211 (above referred to), the Nebraska Probate Code, sets forth the jurisdiction of county courts as follows: "(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 § 30-2211 specifically states that this section corresponds to § 24-517 and includes the statement: "'In carrying out this statutory authorization, it is to be remembered that county courts are without equity jurisdiction, *but in exercising original jurisdiction over estates, may apply equitable principles to matters within probate jurisdiction.*'" (Emphasis supplied.)

We are of the opinion that the disposition of this case is governed by our recent opinion involving the same statutory provisions in *Kentopp v. Kentopp*, 206 Neb. 776, 295 N.W.2d 275 (1980), where we held that the county court had the power to partition real estate which was a part of the estate of a decedent whose estate proceedings were pending in Richardson County, at least until the termination of the proceedings, notwithstanding the fact that under the Constitution of this state district courts have original powers in both law and equity, including the right to partition real estate. In rejecting the proposition that the partition action must be treated as an equity case, separate and distinct from matters relating to a decedent's estate or settlement, the court in *Kentopp* at 786-87, 295 N.W.2d at 280-81, stated:

"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.'

. . . .

"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."

In deciding *Kentopp*, this court quoted and relied upon Neb. Rev. Stat. § 30-2476 (Reissue 1979), particularly subsections (6) and (23) of that section. We also rely upon that section, particularly subsection (3) thereof. That section and subsection (3) provide as follows: "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: . . . (3) Perform, compromise or refuse performance of the decedent's contracts that continue as obligations of the estate, as he may determine under the circumstances. In performing enforceable contracts by the decedent to convey or lease land, the personal representative, among other possible courses of action, may: (i) execute and deliver a deed of conveyance for cash payment of all sums remaining due or the purchaser's note for the sum remaining due secured by a mortgage or deed of trust on the land; or (ii) deliver a deed in escrow with directions that

the proceeds, when paid in accordance with the escrow agreement, be paid to the successors of the decedent, as designated in the escrow agreement . . . ." It appears clear that by virtue of the above statute, the county court had jurisdiction with reference to the claim filed by Eich against the estate, based upon an alleged breach of contract by the decedent, and to rule upon and dispose of said matter as a claim against the estate. Likewise, the county court, in its order allowing the claim and providing for a cash payment, as well as distribution in kind, to the claimant, had jurisdiction to do so, as did also the District Court on appeal.

The facts, as revealed in the record of this case, indicate that the parties complied with the applicable statutory provisions with reference to the presentation and disposition of claims against the decedent's estate; and we determine that upon the filing of the intestacy proceeding in this case, the county court acquired jurisdiction under the Nebraska statutes above set out to hear all matters relating to the decedent's estate, including jurisdiction to make a determination as to the claim filed by Eich in this matter. We conclude that the District Court erred in finding that the county court of Sarpy County had no jurisdiction in the matter, and we therefore reverse its order and remand the cause for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

KRIVOSHA, C.J., concurs in result.

DEBRA SUE MAURER, APPELLANT, V. JAMES F. HARPER ET AL., APPELLEES.

300 N.W.2d 191

Filed January 9, 1981. No. 43133.

1. **Negligence: Motor Vehicles.** Generally, it is negligence as a matter of law for a motorist to drive an automobile on the highway in such a manner that he is unable to stop in time to avoid a collision with an object within his range of vision.
2. ____:____. The applicability of the rule, as a matter of law, depends on the individual circumstances and is for the court's determination. Where an exception clearly applies, the general rule does not apply. Where the general rule does not apply as a matter of law, the determination of negligence is for the jury under the rules and standards of due care under the particular circumstances as applied in motor vehicle cases.
3. ____:____. The rule presupposes an obstruction discernible within the range of the driver's vision ahead. A following driver need not anticipate that a motorist will suddenly stop or slow on a highway, and where a dispute exists as to whether such a stop was made, the issue is for the jury.
4. ____:____. It is negligence for a motorist to stop on a highway in front of a following motorist without justification.
5. **Negligence: Motor Vehicles: Sudden Emergency.** The doctrine of sudden emergency may not be successfully invoked by a litigant unless there is evidence that such an emergency existed, that the party seeking the benefit of the doctrine did not cause the emergency, and that he used due care to avoid it.

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

Frank Meares for appellant.

Ray C. Simmons for appellee Harper.

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

PER CURIAM.

This is an appeal from a jury verdict in favor of defendant James F. Harper. Plaintiff appeals, assigning as error: (1) The court instructed the jury on sudden emergency; (2) The issue of contributory negligence of plaintiff was submitted to the jury;

(3) The court failed to direct a verdict in favor of the plaintiff and against the defendant Harper; and (4) The court granted a summary judgment dismissing the defendant Stephan John Dlouhy. We affirm.

Plaintiff brought this action for damages and personal injuries arising from an automobile collision on July 23, 1978. Plaintiff and both defendants were all traveling west on Interstate 80, west of 42nd Street, Douglas County, Omaha, Nebraska. According to the version of the facts most supportive of the defendant Harper's version, plaintiff and both defendants were traveling in the southernmost lane, or fast lane, when a car traveling in front of Harper's car abruptly switched lanes, revealing plaintiff's stopped car. Plaintiff's car was struck from the rear by defendant Harper. Plaintiff's car was propelled into the median where plaintiff was struck by defendant Dlouhy.

Prior to trial, defendant Dlouhy moved the court for a summary judgment, which was granted on November 2, 1979. The order was not appealed. The cause proceeded to trial, resulting in a verdict for defendant Harper. In response to a motion by defendant Dlouhy, this court dismissed the appeal as to him for want of jurisdiction. The appeal then concerns itself with the three assignments relating to defendant Harper.

Was the defendant Harper negligent as a matter of law? We have said: "Generally it is negligence as a matter of law for a motorist to drive an automobile on the highway in such a manner that he is unable to stop in time to avoid a collision with an object within his range of vision." *Duling v. Berryman*, 193 Neb. 409, 411, 227 N.W.2d 584, 586 (1975). The evidence produced at trial sharply conflicted as to whether plaintiff had stopped her car or was driving slowly, and whether plaintiff's car was masked from defendant Harper's view by another car until shortly before defendant Harper struck plaintiff. Plaintiff

urges that defendant was negligent as a matter of law and that the issue should not have been submitted to the jury. "The applicability of the rule, as a matter of law, depends on the individual circumstances and is for the court's determination. Where an exception clearly applies, the general rule does not apply. Where the general rule does not apply as a matter of law, the determination of negligence is for the jury under the rules and standards of due care under the particular circumstances as applied in motor vehicle cases." *Bartosh v. Schlautman*, 181 Neb. 130, 133-34, 147 N.W.2d 492, 495 (1966). It is not "the duty or the function or the power of the District Court to decide between the directly contrasting factual theories of this accident. . . . Where the testimony is conflicting as to whether the range of vision rule is applicable or whether another factual version of how the accident occurred is supported by the evidence, then it becomes the duty of the court to submit both factual issues to the jury." *Duling v. Berryman*, *supra* at 411-12, 227 N.W.2d at 586.

If the jury determined the facts to be as defendant Harper claimed, that his vision of plaintiff was blocked by another car until shortly before he struck the plaintiff, the rule would not apply. In *Andelt v. County of Seward*, 157 Neb. 527, 532, 60 N.W.2d 604, 607 (1953), we held: "[The] rule presupposes 'an obstruction discernible within the range' of the driver's 'vision ahead.' Here the obstruction is not in that classification. The obstruction here was a hidden one, discernible only when a driver was almost upon it.

"If defendant's contention . . . is correct, then any motorist driving Nebraska highways would be required to maintain a rate of speed that would at all times enable him to stop in 50 to 100 feet, lest he hit a hidden defect . . . not discernible theretofore . . . . Such is not the law."

We have held in a line of cases that a following driver need not anticipate that a motorist will sud-

denly stop or slow on a highway, and where a dispute exists as to whether such a stop was made, the issue of the following driver's negligence is for the jury. *O'Brien v. J. I. Case Co.*, 140 Neb. 847, 2 N.W.2d 107 (1942); *Keiserman v. Lydon*, 153 Neb. 279, 44 N.W.2d 513 (1950); *Caster v. Moeller*, 176 Neb. 30, 125 N.W.2d 89 (1963); *Sacher v. Petersen*, 184 Neb. 305, 167 N.W.2d 384 (1969).

The defendant Harper was not negligent as a matter of law, and the court was correct in refusing to direct a verdict for plaintiff. It is also obvious that the plaintiff under the version of facts could have been found guilty of contributory negligence.

Was the defendant Harper entitled to an instruction as to sudden emergency? "'The doctrine of sudden emergency may not be successfully invoked by a litigant unless there is evidence that such an emergency existed, that the party seeking the benefit of the doctrine did not cause the emergency, and that he used due care to avoid it.'" *Brazier v. English*, 177 Neb. 889, 893, 131 N.W.2d 601, 604 (1964). In considering the evidence, the jury could have found that defendant Harper's view of plaintiff was completely blocked until shortly before he struck plaintiff and that plaintiff stopped suddenly in front of defendant Harper on a highway. The court properly submitted the issue of sudden emergency.

Plaintiff's assignments are without merit. The judgment of the District Court is affirmed.

AFFIRMED.

WALTER F. HANSMANN, JR., APPELLEE, V. COUNTY OF GOSPER, NEBRASKA, APPELLANT, AND ZURICH-AMERICAN INSURANCE COMPANIES, A CORPORATION, APPELLEE.

300 N.W.2d 807

Filed January 9, 1981. No. 43168.

1. **Counties: Highways: Bridges.** It is the duty of a county to use reasonable and ordinary care in the construction, maintenance, and repair of its highways and bridges so that they will be reasonably safe for the traveler using them while he is in the exercise of reasonable and ordinary care and prudence.
2. **Counties: Bridges: Damages: Liability.** Under Neb. Rev. Stat. § 23-2410 (Reissue 1977), a county is liable for damages caused by insufficiency or want of repair of a county bridge.
3. **Counties: Bridges.** A county is required to maintain bridges that are sufficient for the proper accommodation of the public at large in the various occupations which from time to time may be pursued in the locality where the bridge is situated.
4. **Bridges: Presumptions.** A person using a bridge has a right to assume that the bridge is sufficient in the absence of knowledge that it is unsafe.
5. **Counties: Bridges.** The county is not required to have actual notice of defects in a bridge. It is sufficient if the defect existed for such a length of time that, by the exercise of ordinary diligence, the defect would have been discovered and repaired.
6. **Bridges: Negligence.** A failure to post a load limit on a bridge may be negligence or evidence of negligence.

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

Murphy, Pederson, Piccolo & Anderson for appellant.

Conway & Connolly for appellee Hansmann.

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

BOSLAUGH, J.

The plaintiff, Walter F. Hansmann, Jr., was injured while driving a truck across a bridge across Deer Creek on a county road in Gosper County, Nebraska, when the bridge collapsed. This action was brought against the county to recover damage for the injuries the plaintiff sustained in the accident.

The bridge which collapsed was a steel-pipe truss bridge, 50 feet long, and approximately 18 feet wide. It was located on a well-traveled gravel road.

The plaintiff was driving a 1974 Ford straight truck with dual rear axles. The truck was approximately 28 feet long and had a 20-foot box. The truck itself weighed between 11 and 12 tons and it was loaded with 12 tons of hog feed.

The plaintiff was almost across the bridge when the bridge started to fall. The truck slid backward and fell to the bottom of the ravine with the wreckage of the bridge.

The petition alleged that the defendant had allowed the bridge to become weak and unsafe for normal use by a lack of sufficient repair and maintenance, and that the carrying capacity or weight which the bridge would safely carry was not posted on the bridge as required by statute.

The trial court found that a 10-ton-limit sign was posted on the bridge in the fall of 1974, but the sign was not on the bridge in January and February of 1975 and was not on the bridge on June 24, 1975, at the time of the accident; the sign had been off of the bridge for a sufficient period of time that it ought to have been replaced; and the failure to replace the sign was an insufficiency or want of repair of the bridge which rendered the defendant liable to the plaintiff. The plaintiff was awarded judgment in the sum of $8,500, and the cross-petition of the defendant for the cost of replacing the bridge was dismissed. The defendant has appealed.

The principal issue on the appeal is whether the county was liable to the plaintiff because it failed to have the load limit posted on the bridge at the time of the accident.

It is the duty of a county to use reasonable and ordinary care in the construction, maintenance, and repair of its highways and bridges so that they will be reasonably safe for the traveler using them while

he is in the exercise of reasonable and ordinary care and prudence. *Olson v. County of Wayne*, 157 Neb. 213, 59 N.W.2d 400 (1953).

Under Neb. Rev. Stat. § 23-2410 (Reissue 1977), a county is liable for damages caused by insufficiency or want of repair of a county bridge. We have held that a county is required to maintain bridges that are sufficient for the proper accommodation of the public at large in the various occupations which from time to time may be pursued in the locality where the bridge is situated. *Kovarik v. Saline County*, 86 Neb. 440, 125 N.W. 1082 (1910); *Miles v. Richardson County*, 100 Neb. 294, 159 N.W. 411 (1916). A person using a bridge has a right to assume that the bridge is sufficient in the absence of knowledge that it is unsafe. *City of Central City v. Marquis*, 75 Neb. 233, 106 N.W. 221 (1905).

Neb. Rev. Stat. § 39-1411 (Reissue 1978) provides that the county highway superintendent "shall cause to be firmly posted or attached upon each bridge in a conspicuous place at each end thereof a board or metal sign showing the carrying capacity or weight which the bridge will safely convey or bear." The evidence in this case was clearly sufficient to support the finding of the trial court that a 10-ton-limit sign was posted on the bridge in the fall of 1974 but had not been on the bridge for approximately 6 months before the accident.

The county is not required to have actual notice of a defect in a bridge. It is sufficient if the defect existed for such a length of time that by the exercise of ordinary diligence, the defect would have been discovered and repaired. *City of Central City v. Marquis, supra; Bethel v. Pawnee County*, 95 Neb. 203, 145 N.W. 363 (1914); *Miles v. Richardson County, supra.*

Richard A. Anderson, who was the county highway superintendent for Gosper County at the time of the accident, testified that a 10-ton-limit sign was posted on the bridge in the fall of 1974 at the time he inspected

the bridge. Anderson testified that the bridge had been posted before he became the county highway superintendent in 1971 and that he did not post a weight limit sign on the bridge or have it posted. Anderson considered the bridge to be "a real good bridge" and capable of carrying loads of 23 or 24 tons. Anderson further testified that if a bridge was capable of carrying a 30-ton load, he did not post it. He knew that gravel trucks weighing 23 to 24 tons had used the bridge frequently.

The plaintiff testified that he had driven across the bridge on several other occasions but with a smaller load. On the day of the accident he approached the bridge at about 20 miles per hour, having downshifted to third gear before the truck reached the bridge. The plaintiff saw there was no load limit sign on the bridge. The bridge looked safe so the plaintiff drove onto the bridge. The plaintiff did not shift gears or apply his brakes while he was on the bridge, and was almost across the bridge — the front wheels of the truck being off of the bridge — when it collapsed.

There is no evidence as to why the bridge collapsed, other than the inference that the bridge was insufficient to carry the load. The county highway superintendent testified that in his opinion the collapse was caused by weight and "impact." He explained that impact might be caused by the load bouncing, the application of brakes or downshifting, or anything of that nature. There was no evidence of any impact occurring on the bridge at the time of the accident.

In a number of cases it has been held that a failure to post a load limit on a bridge was negligence or evidence of negligence. In *Department of Highways v. Fogleman*, 210 La. 375, 27 So. 2d 155 (1946), the failure to replace a missing load capacity sign was held to be contributory negligence. In *Department of Highways v. Jones*, 35 So. 2d 828 (La. App. 1948), the failure to post load limit signs on a bridge was held to be negligence. See, also, *Norman v. State*, 227 La. 904, 80 So.

2d 858 (1955); *Township of Livingston v. Parkhurst*, 122 N.J.L. 598, 7 A.2d 627 (1939); *Turner v. County of Clinton*, 285 App. Div. 210, 136 N.Y.S.2d 471 (1954).

Although the trial court in this case found that the weight of the truck was a cause or contributing cause of the collapse of the bridge, the evidence shows there was nothing unusual about the load and that it did not exceed the weight that the bridge was accustomed to bear.

In an action under the Political Subdivisions Tort Claims Act, the finding of the trial court will not be disturbed unless it is clearly wrong. The record in this case supports the finding and judgment of the trial court.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
STEVE SCHLOTHAUER, APPELLANT.

300 N.W.2d 194

Filed January 9, 1981. No. 43187.

SUPPLEMENTAL OPINION

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

James T. Hansen and Douglas Warner for appellant.

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

PER CURIAM.

In their argument at rehearing, the State urged us to hold that the arrest was not illegal under *Payton v. New York*, *Riddick v. New York*, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980). In the first

opinion, *State v. Schlothauer*, 206 Neb. 670, 294 N.W.2d 382 (1980), we remanded for a determination of the existence of exigent circumstances. In the opinion of the majority of the court, we should also remand for a determination as to whether the arrest was consensual.

We do not initially make factual determinations. Such determinations are for the trial court. We cannot comply with the State's request. In the event that the evidence establishes either consent or exigent circumstances, the arrest was legal, and the escape, a criminal offense.

The court, though invited to do so, expressly does not pass on whether under *Payton, supra*, evidence of an escape from custody must be suppressed as the fruit of an illegal arrest, or whether under our statute, Neb. Rev. Stat. § 28-912 (Reissue 1979), an illegal arrest can be said to have been effected "in good faith under color of law."

The original opinion is confirmed with the modification set forth above.

REVERSED AND REMANDED.

BOSLAUGH, J., dissenting.

Upon reargument and reconsideration of this case, I am unable to join the opinion of the court because I believe it is in error in several respects.

The opinion assumes that the legality of the arrest was an issue in this case and relies upon *State v. Dickson*, 205 Neb. 476, 288 N.W.2d 48 (1980), in support of that premise. The opinion further relies upon *Payton v. New York, Riddick v. New York*, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639, decided April 15, 1980, to establish that the arrest may have been illegal.

The *Payton* case has no application because the arrest in this case was made on August 28, 1979, more than 7 months before the *Payton* case was decided.

The *Dickson* case has no application because it involved an offense under Neb. Rev. Stat. § 28-736 (Re-

issue 1975) in which "legal custody" was an element of the offense.

This case is a prosecution under Neb. Rev. Stat. § 28-912 (Reissue 1979) in which legality of the custody, or arrest, is not an element of the offense. The statute provides: "(1) A person commits escape if he unlawfully removes himself from official detention or fails to return to official detention following temporary leave granted for a specific purpose or limited period. Official detention shall mean arrest, detention in or transportation to any facility for custody of persons under charge or conviction of crime or contempt or for persons alleged or found to be delinquent, detention for extradition or deportation, or any other detention for law enforcement purposes; but official detention does not include supervision of probation or parole or constraint incidental to release on bail.

"(2) A public servant concerned in detention commits an offense if he knowingly permits an escape. Any person who knowingly causes or facilitates an escape commits a Class IV felony.

"(3) Irregularity in bringing about or maintaining detention, or lack of jurisdiction of the committing or detaining authority shall not be a defense to prosecution under this section if the escape is from a prison or other custodial facility or from detention pursuant to commitment by official proceedings. In the case of other detentions, irregularity or lack of jurisdiction shall be a defense only if:

"(a) The escape involved no substantial risk of harm to the person or property of anyone other than the detainee; and

"(b) The detaining authority did not act in good faith under color of law.

"(4) Except as provided in subsection (5) of this section, escape is a Class IV felony.

"(5) Escape is a Class III felony where:

"(a) The detainee was under arrest for or detained on a felony charge or following conviction for the commission of an offense; or

"(b) The actor employs force, threat, deadly weapon, or other dangerous instrumentality to effect the escape; or

"(c) A public servant concerned in detention of persons convicted of crime purposely facilitates or permits an escape from a detention facility or from transportation thereto."

Since at least 1972 the use of force to resist an unlawful arrest has been prohibited. Neb. Rev. Stat. § 28-1409(2) (Reissue 1979) provides: "(2) The use of such force is not justifiable under this section to resist an arrest which the actor knows is being made by a peace officer, although the arrest is unlawful."

In *State v. Bear Runner*, 198 Neb. 368, 252 N.W.2d 638 (1977), a prosecution for an assault upon a police officer making an arrest, we held that the legality of the arrest and the existence of probable cause for the arrest was not an issue in the case. We said at 374-75, 252 N.W.2d at 642: "This brings us to the central issue in the case: Does a person have the right to use force to resist arrest? Defendant contends that the question of probable cause for arrest is material to a determination of this issue. This clearly is not the law. Section 28-836(2), R.R.S. 1943, provides: 'The use of such force is not justifiable under this section to resist an arrest which the actor knows is being made by a peace officer, although the arrest is unlawful.' This section is identical to section 3.04(2)(a)(i) of the Model Penal Code.

"In the comments to the Model Penal Code section, the drafters noted that while prior law may have allowed the use of force to avoid unlawful arrest, '* * * Legislative reconsideration of the issue should result in the conclusion that there ought not be a privilege to employ force against a public officer who, to the actor's knowledge, is attempting only to arrest him and subject him to the processes of law. It should be possible to provide adequate remedies against illegal arrest, without permitting the ar-

rested person to resort to force — a course of action highly likely to result in greater injury even to himself than the detention.'

"The comments continue: 'The paragraph, it should be noted, forbids the use of force for the purpose of preventing an arrest; it has no application when the actor apprehends bodily injury, as when the arresting officer unlawfully employs or threatens deadly force, unless the actor knows that he is in no peril greater than arrest if he submits to the assertion of authority.' Comments, Model Penal Code, Tent. Dr. No. 8, pp. 18, 19. Section 28-836, R.R.S. 1943, adequately covers these contingencies."

Section 28-912 adopts the same principle for escape. The theory of the new law is that a dispute involving the legality of an arrest should be resolved in the courtroom rather than by force and combat. As stated in *State v. Kyles*, 169 Conn. 438, 441-42, 363 A.2d 97, 98-99 (1975), in a case involving a similar statute: "Under our statutes, illegal confinement is no defense to escape or to assault on a correctional officer. This is clearly indicated by the change from prior statutes, in that the new legislation eliminated any prerequisite that a person be 'legally confined.' It must be presumed that when the legislature changed the language, it intended to change the meaning. [Citations omitted.] Furthermore, it must be presumed that the legislature was aware of prior judicial decisions following the common-law rule that it is lawful for a person to use force to resist an unlawful arrest as set forth in *State v. Amara* [citations omitted] or to escape from a confinement when the process under which he had been detained is invalid as enunciated in *State v. Leach* [citations omitted]."

Under § 28-912, irregularity or lack of jurisdiction is a *defense* to escape from some detention but only if the escape involved no substantial risk of harm to anyone other than the detainee *and* the detaining authority did not act in good faith under color of

law. The defendant offered no evidence in this case and there is no evidence upon which a finding could be based that the second element of the defense was satisfied.

The trial court ruled as a matter of law that there was probable cause for the arrest. This was not prejudicial because the legality of the arrest was not an issue.

The judgment should have been affirmed.

HASTINGS, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V. TOM GREASER, APPELLANT.

300 N.W.2d 197

Filed January 9, 1981. No. 43194.

1. **Escape.** Under Neb. Rev. Stat. § 28-912 (Reissue 1979), punishing escape from official detention in a facility for custody of persons under charge of crime, it is no defense that the prisoner may be innocent of the offense for which he is being held.
2. **Criminal Law: Constitutional Law: Statutes.** A person to whom a statute may be constitutionally applied will not be heard to challenge the statute on the ground that it might conceivably be applied unconstitutionally to others in situations not before the court.

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

Haessler, Sullivan & Inbody 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.

PER CURIAM.

The defendant was convicted of unlawfully removing himself from official detention by escaping from

the Saunders County jail and was sentenced to imprisonment for 1 year. He has appealed and contends that the evidence was not sufficient to sustain the finding of guilty and that Neb. Rev. Stat. § 28-912 (Reissue 1979) is unconstitutional.

On February 27, 1979, the defendant was sentenced to 2 years probation for petty larceny and malicious destruction of property. On March 29, 1979, he was arrested for violation of probation and lodged in the Saunders County jail. On April 3, 1979, the defendant and another prisoner escaped from the jail.

The defendant contends he was not in "official detention" because the probation officer who ordered his arrest did not have probable cause to believe the defendant had violated his probation. The defendant relies on *State v. Dickson*, 205 Neb. 476, 288 N.W.2d 48 (1980), which involved an offense under the prior statute, Neb. Rev. Stat. § 28-736 (Reissue 1975), which has since been repealed. Under the prior statute "legal custody" was an element of the offense.

Under the new statute, Neb. Rev. Stat. § 28-912 (Reissue 1979), official detention includes detention in any facility for custody of persons under charge of crime or any other detention for law enforcement purposes. Under the present statute it is no defense that the prisoner may be innocent of the offense for which he is being held. If a prisoner escapes from jail while he is being held on a charge of violation of probation, the fact that the charge may be unfounded does not prevent him from being guilty of escape.

The defendant further contends § 28-912 is overbroad because it prevents a citizen from fleeing to avoid an unlawful arrest. It is unnecessary to consider this contention at length in this case because the defendant lacks standing to raise the issue. Section 28-912 clearly applies to the defendant because at the time of his escape he was being held in a facility for custody of persons under charge of crime. A person to whom a statute may be constitutionally applied will not be

heard to challenge the statute on the ground that it might conceivably be applied unconstitutionally to others in situations not before the court. *State v. Shiffbauer*, 197 Neb. 805, 251 N.W.2d 359 (1977).

The judgment is affirmed.

AFFIRMED.

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

SHIRLEY J. STOLL, WIDOW OF EUGENE K. STOLL, APPELLANT, V.
SCHOOL DISTRICT (NO. 1) OF LINCOLN IN THE COUNTY OF LANCASTER IN THE STATE OF NEBRASKA, ET AL., APPELLEES.

301 N.W.2d 68

Filed January 9, 1981. No. 43281.

1. **Workmen's Compensation.** As a general rule, the workmen's compensation act extends to and covers workmen only while engaged in, on, or about the premises where their duties are being performed, or where their service requires their presence as a part of such service at the time of injury, and during the hours of service of such workmen.
2. ——. 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.

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

Barlow, Johnson, DeMars & Flodman for appellant.

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

Sodoro, Johnson, Daly, Stave, Cavel & Coffey for appellee School Dist. (No. 7) of O'Neill.

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

CLINTON, J.

This is an appeal from an order of the three-judge panel of the Nebraska Workmen's Compensation Court, one judge dissenting, dismissing the petition of the plaintiff, Shirley J. Stoll, widow of Eugene K. Stoll (Stoll), praying for benefits allegedly owing because of Stoll's death and claimed to have accrued while Stoll was in the employ of the defendants School District (No. 1) of Lincoln, in Lancaster County, Nebraska (LPS), the Nebraska School Activities Association (NSAA), and School District (No. 7) of O'Neill in the County of Holt (O'Neill).

The plaintiff's petition alleged that Stoll was killed in an automobile accident near Grand Island, Nebraska, on April 20, 1977; that at the time he was in the employ of one or more of the defendants; and that his death arose out of and in the course of that employment. LPS denied that Stoll was engaged in any of his duties as its employee at the time of the accident which caused his death. NSAA alleged that Stoll was not an employee, but an independent contractor. O'Neill, among other things, alleged that it was not an employer of Stoll, but merely an agent of the NSAA in carrying out certain functions in connection with a music contest at O'Neill sponsored by the NSAA.

There is no substantial factual dispute in the evidence. Such conflict as there is consists simply in differences of opinion of witnesses as to the effect of certain regulations. The record shows that Stoll was a permanent full-time employee of LPS as a curriculum consultant in instrumental music. He was, in that capacity, also the head of the music department. As a curriculum consultant, he was an administrative employee of the district and was not engaged in teaching. As an administrator, he was required to be certified. Neb. Rev. Stat. § 79-1229 (Reissue 1976).

In October 1976, he was asked by the administrative assistant to the superintendent of O'Neill to act as a judge for the district No. 3 music contest sponsored by

NSAA and which was to be held on April 21 and 22, 1977. He accepted the invitation, and on April 20, 1977, was killed in an automobile accident while on the way to O'Neill.

The errors assigned on appeal raise the following general question: Did Stoll's death arise out of and in the course of his employment with any one of the defendants?

An employee's injury or death is compensable, under the workmen's compensation act, if it was caused by an accident or occupational disease arising out of and in the course of his employment. Neb. Rev. Stat. § 48-101 (Reissue 1978); *Reis v. Douglas County Hospital*, 193 Neb. 542, 227 N.W.2d 879 (1975). The term "arising out of" describes the accident and its origin, cause, and character, i.e., whether it resulted from risks arising within the scope or sphere of the employee's job. The term "in the course of" refers to the time, place, and circumstances surrounding the accident. The two phrases are conjunctive and the claimant must establish by a preponderance of the evidence that both conditions exist. *Reis v. Douglas County Hospital, supra.*

We will first discuss the issue as it relates to LPS.

Arrangements for Stoll to serve as a judge were not made through LPS, but directly with him by the administrative assistant to the O'Neill superintendent of schools, the contest director for NSAA. The latter had delegated the duty of directing the contest to his assistant. She made motel reservations for Stoll at O'Neill for the nights of April 20 and 21. This expense, as well as mileage and meal allowances, and a judging fee of $45 per day were to be paid to Stoll from contest entry fees paid to NSAA by the participating members.

Certain rules and regulations of LPS are relevant. Stoll, a 12-month employee of LPS, was entitled to 24 days per year vacation time. The regulation concerning such employees was: "Staff members serving on a 12-month basis who receive a stipend are expected to use accrued vacation for consulting purposes." Other

regulations governed other types of employees. Teachers, for example, who received a stipend for such services would have their daily salaries adjusted by reimbursing the cost of a substitute. Staff members who served on less than a 12-month contract were required to take personal leave, i.e., unreimbursed leave. The regulations also recognized a third type of leave, referred to as professional leave. In such cases salary adjustments were not made. Stoll applied for and received professional leave to serve as a judge at the music contest in question. Professional leave, as defined by the regulations, is a type of leave for which no substitute is required because the employee's work can be carried on by others in the building. The regulations provided that professional leave was applicable where the employee was a program participant in a professional meeting or an officer of the organization holding the professional meeting.

The director of staff development for LPS testified that she erred in granting professional leave in this instance and that, if she had known a stipend would be paid, she would have required Stoll to take vacation time rather than professional leave.

The evidence is clear that LPS retained no control over Stoll while he was engaged as a contest judge. The director of staff development testified that staff members were neither discouraged nor encouraged to act in such a capacity. It was not encouraged because such activity took too much staff time.

The plaintiff's principal support for her contention that Stoll was acting within the course and scope of his employment with LPS is founded upon the claim that by serving as a judge he would be entitled to growth points as contemplated by rules and regulations of the district. Growth points for teachers could be earned in a number of ways, including college credit, college teaching, teaching adult education, professional writing, attending professional conferences, and other described activities. None of the specifically described

activities included contest judging. However, the rules and regulations contained a catchall provision for other types of activities which reads as follows:

"ACCREDITMENT OF OTHER ACTIVITIES

"This section provides for accreditment of activities worthy of professional growth which do not come within the scope of the above listing and descriptions. It applies only to activities clearly of a high quality which are exceptional in building principal [sic]. In making application for credit, the application shall present:

"A description of the nature of the work and conditions under which it was done.

"Evidence of completion of the work."

Two LPS staff members who were called as witnesses expressed the opinion that judging the music contest would, in Stoll's case, have entitled him to growth points. Judging such contests, however, was not a condition of Stoll's employment, although one of the witnesses testified to his conclusion that it came within the scope of his duties. One witness stated that such activities as judging benefited the school district because the stature of LPS was increased by the participation of its staff and teachers in such activities and because such activities gave the participants beneficial ideas which were brought back to the district.

The rules and regulations of LPS contained a job description for curriculum consultants. The introductory portion thereof reads as follows: "Curriculum consultants have broad responsibility for coordinating and improving the instructional program(s) with which they work. Their specific duties vary somewhat according to subject area, but often include those listed below. Most of these responsibilities involve cooperation with and participation by teachers, principals, and others." The job description then lists four categories of responsibility: (1) Coordination and planning, (2) consultation and public information, (3) evaluation, and (4) professional growth. An examination of the items speci-

fically described under the above headings indicates rather clearly that all the matters pertain to the internal operation of the district. It can be argued otherwise in only two instances. Item 2c reads: "Represent the district in contacts with other agencies." Professional growth is described as follows: "In order to provide leadership described above, keep informed about research and trends by attending professional meetings and reading professional literature in their area of expertise."

Based on the foregoing evidence, the Workmen's Compensation Court found that Stoll was not acting within the scope of his employment at the time of his death; that any benefit to LPS from the activity was indirect and minimal; and that the primary beneficiary was Stoll.

Whether or not travel falls within the scope and course of the employment in a particular case must be determined by the facts in each case. *Schademann v. Casey*, 194 Neb. 149, 231 N.W.2d 116 (1975).

The standard of review governing factual determinations made by the Workmen's Compensation Court is defined in Neb. Rev. Stat. § 48-185 (Reissue 1978). It states that such findings will have the same force and effect as a jury verdict and limits grounds of reversal to four. The single one relevant here is: ". . . there is not sufficient competent evidence in the record to warrant the making of the order . . . ." In applying that provision, this court has held that the Workmen's Compensation Court's findings of fact will not be set aside on appeal unless clearly wrong. *Keith v. School Dist. No. 1*, 205 Neb. 631, 289 N.W.2d 196 (1980); *Hyatt v. Kay Windsor, Inc.*, 198 Neb. 580, 254 N.W.2d 92 (1977).

Two recent opinions of this court are, in principle and on the facts, very closely on point. *Meyer v. First United Methodist Church*, 206 Neb. 607, 294 N.W.2d 611 (1980); *Rowan v. University of Nebraska*, *ante* p. 588, 299 N.W.2d 774 (1980).

In *Meyer, supra,* the claimant was employed as a "local pastor" by a group of Methodist churches. A local pastor is a lay person who is licensed to preach and who must meet certain educational requirements laid down by the national governing body of the United Methodist Church. Claimant was attending a 4-week continuing education course in Kansas City when she was struck by an automobile while crossing a street. During the course, claimant received her salary, but paid for her own tuition, board, and books. We upheld the finding of the Workmen's Compensation Court denying compensation and held: "'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, supra* at 610-11, 294 N.W.2d at 614.

In *Rowan, supra,* an associate professor of art at the University of Nebraska at Lincoln was injured when he fell from a ladder while opening a window in a studio which he maintained in his own home. At the time of his injury, he was working on a sculpture in his home studio. When hired, Rowan was told that he was to do as much creative work as possible. He furnished the material for his own creative work and kept the proceeds from such works if he sold them. The university, however, paid the expense of shipping his works when he exhibited them at other institutions. In that case we said: "As a general rule, the compensation act extends to and covers workmen only while engaged in, on, or about the premises where their duties are being performed, or where their service requires their presence as a part of such service at the time of injury, and during the hours of service of such workmen." *Rowan, supra* at 775, 299 N.W.2d at 774.

Under the facts of the case before us, the Workmen's Compensation Court was entitled under the evidence to find that, under the rules and regulations governing Stoll's employment, he was required to use his own

vacation time to perform contest judging; that his duties did not include the judging of music contests outside LPS; that this was a personal activity of which he was the primary beneficiary and not the school district; and that, in acting as a contest judge, he was not representing the school district. The denial of compensation was, therefore, supported by the evidence and we are not free to overturn the order of dismissal.

We turn now to the claim that an employer-employee relationship existed between NSAA, O'Neill, and Stoll. NSAA is a nonprofit corporation composed of Nebraska public and private high schools. Membership is voluntary. NSAA conducts state and district activities for its members in athletics, music, and debate. The members elect district managing committee representatives who coordinate events in each region. These representatives select the host schools for music contests. In 1977, O'Neill was chosen as host school because it and the local parochial school had ample facilities, between them, for contests.

The O'Neill superintendent of schools delegated organizational responsibility and supervision of the contest to his administrative assistant, Mrs. Johnson. Expenses of the contest came from entry fees paid by contestant schools. If these were insufficient to cover costs, then NSAA reimbursed O'Neill for the balance. Likewise, if the fees exceeded expenses then NSAA received the difference. The NSAA district committee secretary-treasurer was required to account for the funds and expenses.

One week before the contest, Mrs. Johnson sent Stoll a letter confirming their earlier oral arrangement. Among other things, it instructed him to check in at the O'Neill office on Thursday for a judges' meeting. It further stated that NSAA rules would be used for judging the contest.

The NSAA rule book covered eligibility criteria, classification of schools by size for music contests, and events to be offered at such gatherings. It also directed

that district committees or their designates select the judges. Judges, according to the rule book, should behave professionally, not fraternize with directors or discuss performances with unofficial persons, and not communicate with other judges during rounds. Finally, the rule book stated that NSAA judging forms should be used at district contests. Form categories were set forth and rating criteria defined. Form categories included interpretation, intonation, general effect, and direction. Contestants were to be rated outstanding, excellent, good average, below average, or poor on the above categories.

O'Neill officials instructed judges to complete the judging forms in accordance with NSAA rules. Otherwise the judges could fill in the form blanks as they wished. Their decisions were final. O'Neill officials did not review the judges' rulings, nor did NSAA. NSAA Executive Secretary Riley testified that the association did not receive copies of the completed judging forms. NSAA only received reports on the schools participating, number of students competing, and contest expenditures.

An employer has the right to control, supervise, and direct the manner in which his employees work; an independent contractor is generally subject to his cocontractor's control only for direction sufficient to insure that their contract will be met. *Stephens v. Celeryvale Transport, Inc.*, 205 Neb. 12, 286 N.W.2d 420 (1979); *Voycheske v. Osborn*, 196 Neb. 510, 244 N.W.2d 74 (1976); *Bohy v. Pfister Hybrid Co.*, 179 Neb. 337, 138 N.W.2d 23 (1965); *Snodgrass v. City of Holdrege*, 166 Neb. 329, 89 N.W.2d 66 (1958). *Stephens* and *Voycheske* dealt explicitly with the limitations of direction to insure contract compliance.

Deduction of social security taxes and withholding of income taxes ordinarily accompanies employment. *Stephens v. Celeryvale Transport, Inc.*, *supra*. NSAA and O'Neill did not deduct either.

Taken as a whole, the evidence indicates that Stoll

was not an employee of either NSAA or O'Neill. The degree of control exercised by NSAA and O'Neill was only that required to assure the result in accordance with specifications. The judging forms prepared by NSAA and utilized at the O'Neill contest provided guidelines for the judges to insure uniformity of categories, but did not control their discretion. The finding of the Workmen's Compensation Court that Stoll was an independent contractor with NSAA when he met his death is clearly supported by the evidence.

It is also clear that O'Neill was a mere agent of NSAA in supervising the contest. As a general rule, where an obligation is that of a principal, a court cannot enforce the obligation against the agent as long as he is merely acting as agent. *Suzuki v. Gateway Realty, ante* p. 562, 299 N.W.2d 762 (1980). Thus, even if there had been an employer-employee relationship between NSAA and Stoll, O'Neill would not have been liable.

AFFIRMED.

KRIVOSHA, C.J., concurs in result.

STATE OF NEBRASKA, APPELLEE, V. ROBERT C. MATTAN, APPELLANT.

300 N.W.2d 810

Filed January 9, 1981. No. 43370.

1. **Interrogations: Miranda Rights.** In on-the-scene investigations, the law enforcement officers may interview any person not in custody and not subject to coercion, for the purpose of determining whether a crime has been committed and who committed it.
2. ____: ____. Generally, Miranda warnings are required only for custodial interrogation.
3. **Due Process.** All the Due Process Clause requires is that the law give sufficient warning that men may conduct themselves so as to avoid that which is forbidden.
4. **Statutes: Criminal Law: Common Law.** The definition of an act forbidden by statute, but not defined by it, may be ascertained by reference to the common law.

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

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

Paul L. Douglas, Attorney General, Donald L. Knowles, Douglas County Attorney, and Robert J. Yaffe for appellee.

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

BOSLAUGH, J.

The defendant, Robert Mattan, was convicted of misdemeanor motor vehicle homicide and sentenced to 6 months probation, fined $500 and costs, and ordered to attend a 3-day driving school. The defendant was charged with unintentionally causing the death of a pedestrian while operating a motor vehicle in violation of Neb. Rev. Stat. §§ 39-615(1) and 644 (Reissue 1978). The Douglas County court found the defendant was in violation of both statutes. The District Court affirmed the conviction based solely on defendant's violation of § 39-644 because the evidence showed the victim was not in the crosswalk at the time of the accident.

The defendant has appealed and contends the evidence was insufficient to support the conviction; the trial court erred in admitting testimony concerning a conversation between the defendant and a police officer during the investigation of the accident; and that § 39-644 is unconstitutional.

The evidence shows that the accident happened at about 8 a.m. on October 22, 1979, near the intersection of 17th Street and Capitol Avenue in Omaha, Nebraska. The traffic signal for the crosswalk on the north side of this intersection displays a continuous "walk" indication. It was overcast and dark at the time and traffic was heavy. Rain mixed with heavy snow was falling and the streets were "slushy" but not slippery.

The defendant was driving a Ready-Mix cement truck west on Capitol Avenue. At the intersection, he turned north onto 17th Street which is 60 feet wide and is divided into six traffic lanes. The defendant told a police officer at the scene of the accident that, "just as he got even with the crosswalk or shortly thereafter, he said he heard a thump. Then he said a split second later, he felt a bump on his tandem wheels. Then he said he had to pull down the street several feet, so he could see in his rearview mirror as to see if and what he did hit. Then he said he saw the girl laying in the street, and so immediately, he pulled over to the curb, and got out."

An eyewitness to the accident testified that she saw the left front fender of the truck strike the victim when the victim was a foot or 2 north of the crosswalk. After being struck by the fender, the victim "flew up" against the headlight, then fell down and "kind of" rolled over. The wheel of the truck passed over the head of the victim. The point of impact was marked on a diagram used in the county court, but the diagram does not appear in the record.

Photographs taken by the police officers at the scene of the accident were received in evidence. These photographs show the victim's scalp, which was torn off in the accident, situated in the third traffic lane from the east, near the center of the street, and 23 feet north of the crosswalk. The victim's body was found further north. An umbrella was found between the scalp and the crosswalk.

The parties stipulated that the victim died as a result of multiple injuries suffered in the accident.

The defendant was convicted of unintentionally causing the death of the victim while operating a motor vehicle in violation of § 39-644, which requires a driver to "exercise due care to avoid colliding with any pedestrian upon any roadway . . . ." Although the evidence was not as complete as it might have been, it was sufficient to permit the trier of fact to find beyond a rea-

sonable doubt that the defendant failed to exercise due care because he failed to see a pedestrian who was in plain sight. The victim was plainly visible to the eyewitness who saw the accident while she was walking on the sidewalk on 17th Street. After the accident, when the defendant finally stopped the truck and looked back, he had no difficulty seeing the victim's body lying in the street.

The fact that the defendant was completely unaware of the victim's presence until after the truck had passed over her body permits an inference to be drawn that he failed to maintain a proper lookout, and thus failed to exercise due care to avoid colliding with a pedestrian.

The ultimate fact here was the failure to exercise due care.The evidence was sufficient to support a finding beyond a reasonable doubt that the defendant failed to maintain a proper lookout. The failure to maintain a proper lookout was a failure to exercise due care. The evidence was sufficient to sustain the conviction.

The evidence shows that when Officer Paul M. Rust arrived at the scene of the accident, the defendant was seated in a police cruiser. Officer Rust took the defendant to a different cruiser so that he could obtain the necessary information about the accident. The defendant was not under arrest so Officer Rust did not give him any warning as to his constitutional rights before asking about the accident. The defendant contends the officer should not have been permitted to testify as to the defendant's statements concerning the accident because of the failure to comply with the requirements of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

The *Miranda* decision recognized a distinction between custodial interrogation and preliminary investigation. The court stated: "General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement. In such

situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present." *Id.* at 477-78.

Officer Rust, at the time of the questioning, was engaged in the investigative process. As we stated in *State v. Bennett*, 204 Neb. 28, 35, 281 N.W.2d 216, 220 (1979), "The Miranda procedures . . . were not meant to preclude law enforcement personnel from performing their traditional investigatory functions such as general on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the factfinding process."

In *State v. Dubany*, 184 Neb. 337, 167 N.W.2d 556 (1969), the defendant raised the same issue of the failure to give a Miranda warning. In that case, the defendant was discovered in an automobile that had become stuck in a ditch. The automobile was in gear and jumping up and down, but not moving forward. The officer approached the vehicle and asked the driver if he had been drinking, to which the driver replied, "Yes." We held the defendant's constitutional rights had not been violated and noted: "In on-the-scene investigations the police may interview any person not in custody and not subject to coercion for the purpose of determining whether a crime has been committed and who committed it." *Id.* at 342, 167 N.W.2d at 559.

The fact that the defendant was in a police cruiser at the time of the questioning did not make the conversation a custodial interrogation. In *State v. Caha*, 184 Neb. 70, 165 N.W.2d 362 (1969), a police officer questioned the defendant in his patrol car and asked him to explain his relationship with the prosecutrix. The defendant thereupon volunteered incriminating information as to having had sexual relations with the girl in question. This court ruled that the conversation was not the product of a process of interrogation aimed at eliciting a confession and that the defendant's rights had not been violated. See, also, *United States v. Tobin*, 429 F.2d 1261 (8th Cir. 1970).

The defendant's contention that § 39-644 is unconstitutionally vague is without merit. The applicable rule was stated in *Rose v. Locke*, 423 U.S. 48, 96 S. Ct. 243, 46 L. Ed. 2d 185 (1975), as follows:

"It is settled that the fair-warning requirement embodied in the Due Process Clause prohibits the State from holding an individual 'criminally responsible for conduct which he could not reasonably understand to be proscribed.' *United States v. Harriss*, 347 U.S. 612, 617 (1954) . . . . But this prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision. Many statutes will have some inherent vagueness for '[i]n most English words and phrases there lurk uncertainties.' *Robinson v. United States*, 324 U.S. 282, 286 (1945). Even trained lawyers may find it necessary to consult legal dictionaries, treatises, and judicial opinions before they may say with any certainty what some statutes may compel or forbid. *Nash v. United States*, 229 U.S. 373 (1913); *United States v. National Dairy Corp.*, 372 U.S. 29 (1963). All the Due Process Clause requires is that the law give sufficient warning that men may conduct themselves so as to avoid that which is forbidden." *Id.* at 49-50.

The definition of an act forbidden by statute, but not defined by it, may be ascertained by reference to the common law. *State v. Eynon*, 197 Neb. 734, 250 N.W.2d 658 (1977). Due care is a well-understood term meaning the absence of negligence.

The rule is well established in this state that a driver must keep a lookout so that he can see what is plainly visible in front of him, and a failure to do so is negligence as a matter of law. The presence of snow or other conditions which interfere with visibility require the driver to use care commensurate with the situation.

Upon the facts in this case, a contention that the meaning of due care was unconstitutionally vague cannot be sustained.

The judgment of the District Court is affirmed.

AFFIRMED.

KRIVOSHA, C.J., dissenting.

For the reasons more particularly set out hereinafter, I must respectfully dissent from the opinion of the majority in this case.

I believe the evidence in this case is insufficient to convict the appellant of the crime charged. As noted by the majority, the defendant was charged with unintentionally causing the death of a pedestrian while operating a motor vehicle in violation of Neb. Rev. Stat. § 39-644 (Reissue 1978). All the evidence relied upon by the State to obtain the conviction was circumstantial.

Section 39-644 requires that "every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway . . . ." The statute, of course, must mean something more than imposing absolute liability upon a driver to avoid colliding with a pedestrian. The act, of necessity, presumes that the pedestrian is in a place and walking in a manner that a driver exercising due care can avoid colliding with the pedestrian. The record is totally devoid of any evidence as to where the pedestrian was moments before being struck by the truck. While it is true that a witness observed the truck striking the victim, the witness was unable to testify as to where the victim was just before being struck, and testified that the weather was "pretty bad."

We have previously held that "a defendant may not be convicted except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which the accused is charged." *State v. Doyle*, 205 Neb. 234, 238, 287 N.W.2d 59, 62 (1980). Not only is the driver of a motor vehicle obligated to operate a motor vehicle so as to avoid colliding with a pedestrian upon a roadway, but, likewise, the pedestrian is called upon to exercise due care to avoid a collision with the motor vehicle. See Neb. Rev. Stat. §§ 39-643(1) and 642(2) (Reissue 1978). The evidence in this case is not sufficient to eliminate the possibility that the victim suddenly darted in front of the vehicle. As a matter of fact,

there was some evidence that the victim may not have seen the vehicle because her vision was obscured by an umbrella she was holding. Likewise, there is some indication that she may have been running in a diagonal direction and not within the crosswalk. Any one of those factors, if true, might be sufficient to exonerate the appellant in this case. As we said in *State v. Doyle*, *supra* at 240, 287 N.W.2d at 63: "Any fact or circumstance reasonably susceptible of two interpretations must be resolved most favorably to the accused."

In this case, we have apparently concluded that because an accident occurred, the driver must have failed to exercise due care. That conclusion is not justified in a criminal matter. "'If circumstantial evidence is relied upon in a criminal prosecution, proof of a few facts or of a multitude of facts all consistent with the supposition of guilt is not sufficient to warrant a verdict of guilty. In order to convict, it is necessary not only that the circumstances all concur to show beyond a reasonable doubt that the defendant committed the crime and be consistent with the hypothesis of guilt, since that is to be compared with all the facts proved, but that they be inconsistent with any other rational conclusion and exclude every other reasonable theory or hypothesis except that of guilt. The facts proved must be consistent with each other and with the main fact sought to be established.'" See *Jeppesen v. State*, 154 Neb. 765, 776, 49 N.W.2d 611, 617 (1951). On the basis of the record before us, I would have reversed and dismissed.

McCOWN, J., dissenting.

The majority opinion holds that in the event the driver of a motor vehicle is negligent in any respect and collides with a pedestrian and death results, the driver is guilty of motor vehicle homicide because he has violated a statute requiring him to use due care in the operation of a motor vehicle.

The motor vehicle homicide section, Neb. Rev. Stat. § 28-306(1) (Reissue 1979), under which the defendant

was charged, defines motor vehicle homicide as causing the death of another unintentionally while engaged in the operation of a motor vehicle in violation of the law of the State of Nebraska, or in violation of any city or village ordinance. Any violation is classified a misdemeanor, except that if the proximate cause of the death is the operation of a motor vehicle in violation of the reckless driving, willful reckless driving, or driving under the influence statutes, the motor vehicle homicide is a felony.

The particular statute relied on in this case, and the only statute found to have been violated, is Neb. Rev. Stat. § 39-644 (Reissue 1978), which provides: "Notwithstanding the other provisions of sections 39-601 to 39-6,122, every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway and shall give an audible signal when necessary and shall exercise proper precaution upon observing any child or obviously confused or incapacitated person upon a roadway." The only part of that statute relevant here is the portion which requires every driver to exercise due care to avoid colliding with a pedestrian. This is simply a codification of the common law requiring the use of due care.

The problem here is that the majority opinion treats a legislative codification of the common law rule of negligence as creating a separate and distinct statutory criminal liability which can arise from any unspecified breach of the general common law duty to use due care in the operation of a motor vehicle. The clear thrust of the majority opinion is that any driver who fails to see a pedestrian on a roadway, even under very poor conditions of visibility, is guilty of motor vehicle homicide if he collides with the pedestrian and the pedestrian dies as a result. See my dissenting opinion in *State v. Otto*, 184 Neb. 597, 169 N.W.2d 612 (1969).

Our motor vehicle homicide statute is simply a specialized version of a manslaughter statute applied to the operation of motor vehicles. Where criminal liability

rests on common law negligence alone, the same principles which apply to manslaughter should also apply to motor vehicle homicide. In manslaughter cases we have consistently held that ordinary negligence is simply not enough to convict someone of manslaughter. "Obviously, it is not any slight breach of duty but rather a gross failure to do what is required of one." *Delay v. Brainard*, 182 Neb. 509, 514, 156 N.W.2d 14, 19 (1968). The Legislature may clearly transform specific acts of negligence into appropriate foundation for criminal liability, but not the broad unlimited concept of negligence in the operation of a motor vehicle. See *State v. Huffman*, 202 Neb. 434, 275 N.W.2d 838 (1979).

The statutory codification of the common law requirement of due care that has been approved in this case requires the use of due care "to avoid colliding with any pedestrian upon any roadway." If that is a valid legislative pronouncement of a statutory crime, then the Legislature may also extend the statute to require a driver to exercise due care "to avoid colliding with any vehicle lawfully on the roadway." In such a case, any driver who failed to see another vehicle before a collision would be guilty of motor vehicle homicide if a death resulted from the accident, regardless of the negligence or comparative negligence of the driver of the other vehicle.

We have consistently held that a crime must be defined with sufficient definiteness and there must be ascertainable standards of guilt to inform those subject thereto as to what conduct will render them liable to punishment. The dividing line between what is lawful and unlawful cannot be left to conjecture. See *State v. Adams*, 180 Neb. 542, 143 N.W.2d 920 (1966).

The conduct of the defendant in the present case did not establish a reckless or careless disregard of or indifference to the rights and lives of other persons. His only violation of law, if there was a violation, was that he failed to see a pedestrian, who was not in a crosswalk but in the middle of a multilane street under

conditions of poor visibility. Obviously, the negligence or comparative negligence of the pedestrian makes no difference whatever.

The majority opinion holds that any breach of the common law duty to use due care in the operation of a motor vehicle is sufficient to convict the operator of motor vehicle homicide if the vehicle collides with a pedestrian and death results. This has not been and should not be the law. As interpreted by the majority, § 39-644 is clearly unconstitutional. In my opinion the conviction should have been reversed.

STATE OF NEBRASKA, APPELLANT, V. DON HOCUTT, APPELLEE.

300 N.W.2d 198

Filed January 9, 1981. No. 43497.

1. **Constitutional Law.** Any legislation that makes it a crime for one to use his own money for any purpose other than the payment of his debts is violative of the Constitution of this state, which expressly prohibits imprisonment for debt except in cases of fraud.
2. **Statutes: Judicial Construction.** Although Neb. Rev. Stat. § 69-109 (Cum. Supp. 1980) does not expressly require fraud, judicial construction of that section has established that proof of fraud is required for a conviction thereunder.
3. ____:____. It is presumed that when a statute has been construed by the Supreme Court, and the same statute is substantially reenacted, the Legislature gave to the language the significance previously accorded to it by the Supreme Court.
4. **Security Interests: Transfer of Property: Intent to Defraud.** It is the intent to defraud that makes a transfer of personal property without the consent of the holder of a security interest both unlawful and yet not violative of Neb. Const. art. I, § 20. Payment of the secured debt with proceeds from the sale is not a defense to the crime; it is only evidence of lack of fraudulent intent.

Appeal from the District Court for Butler County: BRYCE BARTU, Judge. Reversed.

Paul L. Douglas, Attorney General, Patrick T.

O'Brien, and John G. Tomek, Butler County Attorney, for appellant.

Richard L. Kuhlman for appellee.

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

WHITE, J.

This is an appeal from a judgment of the District Court dismissing an information charging the appellee, Don Hocutt, with a violation of Neb. Rev. Stat. § 69-109 (Cum. Supp. 1980), sale or transfer of personal property, subject to a security interest, without consent. The court held the statute violated Neb. Const. art. I, § 20, which provides: "No person shall be imprisoned for debt in any civil action on mesne or final process, unless in cases of fraud." We reverse.

Appellee was charged with unlawfully and feloniously selling, transferring, or disposing of personal property, on which he had first placed a security interest, in violation of § 69-109: "Any person who, after having created any security interest in any article of personal property, either presently-owned or after-acquired, for the benefit of another, shall, during the existence of the security interest, sell, transfer, or in any manner dispose of the said personal property, or any part thereof so given as security, to any person or body corporate, without first procuring the consent, in writing, of the owner and holder of the security interest, to any such sale, transfer or disposal, shall be deemed guilty of a Class IV felony."

In his motion to quash, appellee contended that § 69-109 is unconstitutional because it provides for imprisonment for nonpayment of a debt without requiring proof of fraud. Appellee cites, as controlling, *State ex rel. Norton v. Janing*, 182 Neb. 539, 156 N.W.2d 9 (1968), in which this court held Neb. Rev. Stat. § 52-119 (Reissue 1968) unconstitutional as violative of art. I, § 20. Section 52-119 then provided, in part, that it was a criminal offense "for any person

. . . who has taken a contract for the erection . . . of any house . . . and has received payment . . . to fail to apply the money so received . . . in payment of the lawful claims of such laborers or materialmen . . . ." Noting the absence of a provision requiring that the failure of payment be fraudulent, the court, quoting with approval from *People v. Holder*, 53 Cal. App. 45, 199 P. 832 (1921), found the absence of such a requirement fatal: "'Any legislation that makes it a crime for one to use his own money for any purpose other than the payment of his debts is violative of section 15 of article I of the constitution of this state, which expressly inhibits imprisonment for debt except in cases of fraud. [Citing cases.] The provision in the California constitution inhibiting imprisonment for debt "in civil actions" cannot be evaded by making the non-payment of a debt a crime. [Citing cases.] In the Peonage Cases, Judge Jones, in a forceful opinion, very pertinently says that "when a man's liberties are taken from him because he does not pay a debt, and he is punished if he does not perform a civil contract, . . . he is put in prison bounds and is imprisoned for debt in the meaning of the constitution." (123 Fed. 686.)'" *State ex rel. Norton v. Janing, supra* at 541, 156 N.W.2d at 10.

Although § 69-109 itself is silent concerning a requirement of fraudulent intent, it has been established by judicial construction that such proof is required for a conviction under the statute. In *State v. Butcher*, 104 Neb. 380, 177 N.W. 184 (1920), and in *Pulliam v. State*, 167 Neb. 614, 94 N.W.2d 51 (1959), this court stated that § 69-109 was enacted to prevent the fraudulent transfer of mortgaged chattel property. With such a provision engrafted by judicial construction, § 69-109 is distinguished from the statute held unconstitutional in *State ex rel. Norton v. Janing, supra*, and does not constitute imprisonment for debt.

If there were no requirement that the transfer be made with an intent to defraud, the statute would

be unconstitutional. If this statute had no history of judicial interpretation supplying that requirement, it would be unconstitutional. However, § 69-109 is a reenactment, in substance, of laws existing since 1889, and this court has construed this provision as requiring proof of fraudulent intent.

Since *Pulliam v. State*, *supra*, § 69-109 has been amended to bring its terms into alignment with those of the Nebraska Uniform Commercial Code. The statute has not been changed substantively. It is presumed that when a statute has been construed by the Supreme Court, and the same is substantially reenacted, the Legislature gave to the language the significance previously accorded to it by the Supreme Court. *Gomez v. State ex rel. Larez*, 157 Neb. 738, 61 N.W.2d 345 (1953); *Misle v. Miller*, 176 Neb. 113, 125 N.W.2d 512 (1963).

Nothing in the legislative history of the present act suggests that the Legislature intended any meaning other than previously ascribed to it by this court, and § 69-109, being a substantial reenactment of a previous statute, does not fall for not requiring fraudulent intent. The previous case law by interpretation supplies that requirement.

We do not here rely on *State v. Heldenbrand*, 62 Neb. 136, 87 N.W. 25 (1901), as controlling, although that case held a similarly worded predecessor statute constitutional. The court did not there consider the effect at art. I, § 20, of our Constitution on the statute, which did not expressly require proof of fraudulent intent. The issue was not assigned as error and it was neither argued nor decided in that case.

However, consistent with our view that it is the intent to defraud that makes a transfer of personal property without the consent of the holder of a security interest both unlawful and not violative of art. I, § 20, the language of *Fiehn v. State*, 124 Neb. 16, 245 N.W. 6 (1932), which suggests that a subsequent payment of the proceeds of the sale of the secured

property or repayment in full of the secured debt is a defense to the crime and not merely evidence of lack of fraudulent intent, is disapproved; and to the extent that that case is inconsistent herewith, it is overruled.

This judgment is reversed.

REVERSED.

STATE OF NEBRASKA, APPELLEE, V.
MARK A. BOSAK, APPELLANT.

300 N.W.2d 201

Filed January 9, 1981. No. 43690.

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

Thomas B. Thomsen of Sidner, Svoboda, Schilke, Wiseman & Thomsen for appellant.

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

PER CURIAM.

The defendant herein pleaded guilty to a charge of possession of lysergic acid diethylamide in violation of Neb. Rev. Stat. § 28-416(1)(a) (Reissue 1979). Lysergic acid diethylamide is a nonnarcotic Schedule I drug. Neb. Rev. Stat. § 28-405 (Reissue 1979). As such, it is a Class IV felony. Neb. Rev. Stat. § 28-416(2)(b) (Reissue 1979). Punishment for a Class IV felony is a maximum sentence of 5 years imprisonment or $10,000 fine, or both, with no minimum. Neb. Rev. Stat. § 28-105 (Reissue 1979). The trial court sentenced the defendant to a term of imprisonment for not less than 2 years and not more than 5 years. On appeal, the State concedes that where an indeterminate sentence is pronounced, the minimum limit fixed by the court shall not be less

than the minimum provided by law nor more than one-third of the maximum term. Neb. Rev. Stat. § 83-1,105 (1) (Reissue 1976).

Insofar as any other errors, except the sentence, are concerned, no motion for new trial was filed in this case; therefore, the only issue before us is whether the sentence was excessive. *State v. Price*, 202 Neb. 308, 275 N.W.2d 82 (1979). The presentence report indicates that the trial court did not abuse its discretion when imposing imprisonment in lieu of probation. We have frequently held that, absent an abuse of discretion by the trial court in sentencing within statutory limits, this court will not disturb the action of the trial court on appeal. *State v. Hortman, ante* p. 393, 299 N.W.2d 187 (1980); *State v. Tweedy*, 197 Neb. 851, 251 N.W.2d 380 (1977). In view of the fact that the sentence was more than one-third of the maximum term, however, it must be reduced. The sentence is modified to provide that the defendant shall be confined to the Nebraska Penal and Correctional Complex for a term of not less than 1 year 8 months and not more than 5 years.

AFFIRMED AS MODIFIED.

HAROLD D. AMEN, APPELLANT, V. DESSIE W. AMEN, APPELLEE.

301 N.W.2d 74

Filed January 16, 1981. No. 42997.

1. **Divorce: Alimony: Property Division.** The general rule is that the fixing of alimony and distribution of property rest in the sound discretion of the District Court and, in the absence of an abuse of discretion, will not be disturbed on appeal.
2. ____: ____: ____. The rule for determining alimony or division of property in divorce actions provides no mathematical formula by which an award can be exactly determined.
3. ____: ____: ____. The award of alimony and the division of property are determined by the circumstances of the parties at the time of the

dissolution of the marriage, the length of the marriage, the health, relative earning power, and education of the parties, and whether there are unemancipated children.

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

John J. Battershell of Cunningham Law Office, P.C., for appellant.

Mousel & Burger, P.C., for appellee.

Heard before BOSLAUGH, BRODKEY, and WHITE, JJ., and CASE and GARDEN, District Judges.

CASE, District Judge.

This was an action for dissolution of marriage filed in the District Court for Red Willow County, that court entering its decree on August 14, 1979, which included an award of alimony in the sum of $60,000, payable at the rate of $10,000 per year over a period of 6 years.

A brief history of the events leading up to the action is as follows: The petitioner-appellant, Harold D. Amen, was 53 years of age at the time of the marriage on November 28, 1975; and the respondent-appellee, Dessie W. Amen, was 42 years of age at that time. The opinion hereafter will refer to them as Harold and Dessie.

Harold and Dessie began living together in about May of 1973 and gradually commingled their funds from that point. The ceremonial marriage existed for 3½ years and was marked by a succession of sharp conflicts between the parties.

The issues on appeal are the abuse of discretion in awarding alimony, excessiveness of the award, and that the award was contrary to law.

This is the second marriage for each of the parties and there are no children involved. Dessie brought into the marriage cash in the sum of $2,400, a checking account in the sum of $1,100, equity in a residential property in the sum of $3,500, a divorce settlement in the sum of $7,500, and a 1973 Chrysler which had

a lien against it and which was subsequently paid off by Harold. In addition to this, she had miscellaneous items of furniture and appliances.

Harold's property at the time of the marriage had an approximate worth of $393,925.75. Dessie's property at the time of the marriage had an approximate value of $19,000. The combined properties would approximate $411,000.

The net worth of the parties at the time of the dissolution had increased an approximate 23 percent; it being established by the trial court in the sum of $528,194. There was some disagreement as to the methods used in valuation, but we accept the above figures for the purpose of this opinion.

Each of the parties relies on Neb. Rev. Stat. § 42-365 (Cum. Supp. 1980) as controlling and supporting his or her position. The statute, in substance, provides for allowance of alimony from one party to the other based on the following considerations: (1) The circumstances of the parties; (2) The length of the marriage; (3) The contributions by the parties; and (4) The ability of the supported party to engage in gainful employment.

During the marriage the parties purchased and operated a liquor store. This was disposed of prior to the dissolution action. Both parties participated in the operation of the liquor store, and this venture realized an income of approximately $46,000 during the 1½-year period that they owned it. The increase in assets otherwise came about through appreciation of the assets of Harold.

In addition to the alimony award, the court awarded Dessie a Cadillac automobile with a value of $7,200, subject to a lien of $2,700; $10,000 worth of jewelry; fur coats purchased by Harold with the approximate value of $5,000; plus furniture of lesser values.

From other decisions made by this court, we have applied the following criteria as being applicable here.

In determining whether alimony should be awarded, the ultimate test is one of reasonableness. See *Baird v. Baird*, 196 Neb. 124, 241 N.W.2d 543 (1976); *Steele v. Steele*, 201 Neb. 549, 270 N.W.2d 903 (1978).

Although the rules for determining alimony or division of property in an action for dissolution of marriage provide no mathematical formula by which division can be determined, the decision rests on the facts in each case and the sound discretion of the trial court. See *Campbell v. Campbell*, 202 Neb. 575, 276 N.W.2d 220 (1979); *Matlock v. Matlock*, 205 Neb. 357, 287 N.W.2d 690 (1980); *Lockwood v. Lockwood*, 205 Neb. 818, 290 N.W.2d 636 (1980); *Chrisp v. Chrisp*, *ante* p. 348, 299 N.W.2d 162 (1980).

In an appeal of an action for the dissolution of marriage, the Supreme Court is required to try the case de novo and reach independent conclusions on the issues presented by the appeal without reference to the conclusion or judgment reached in the District Court. See Neb. Rev. Stat. § 25-1925 (Reissue 1979); *Schuller v. Schuller*, 191 Neb. 266, 214 N.W.2d 617 (1974); *Barnes v. Barnes*, 192 Neb. 295, 220 N.W.2d 22 (1974); *Campbell v. Campbell*, *supra*.

A judgment of the trial court fixing the amount of alimony or making distribution of the property will not be disturbed on appeal in the absence of an abuse of discretion. See, *Pfeiffer v. Pfeiffer*, 203 Neb. 137, 277 N.W.2d 575 (1979); *Ragains v. Ragains*, 204 Neb. 50, 281 N.W.2d 516 (1979).

We have examined closely the value of the properties at the time of the marriage, the increase and sources of the values at the time of the dissolution, and the circumstances of the parties. We are of the opinion that the disposition as made by the trial court should be affirmed; our scrutiny of the record failing to find any abuse of discretion, excessiveness of the award, or that the same was contrary to law.

The judgment of the trial court is herewith affirmed, with the costs of the appeal taxed to petitioner. In

addition thereto, we find that a reasonable allowance in the sum of $1,000 should be fixed for the services of the respondent's counsel in this court, the same to be taxed to the petitioner as a part of the costs.

AFFIRMED.

BETTY L. KINKENON, APPELLEE, V. PERCY L. HUE, APPELLANT.

301 N.W.2d 77

Filed January 16, 1981. No. 43071.

1. **Certificates of Title: Motor Vehicles: Evidence.** A certificate of title to a motor vehicle is generally conclusive evidence in this state of the ownership of the vehicle. Exceptions to this rule apply only to prevent fraud and coercion.
2. **Joint Tenancy.** Where an instrument is silent as to the interests taken by joint tenants, the presumption is that their interests are equal.
3. **Equity: Appeal and Error.** In appeals to this court in suits in equity, the trial shall be de novo on questions of fact preserved for review, and we must reach an independent conclusion in findings of fact without reference to the conclusion reached in the District Court.
4. ____: ____. Where 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 therefore must have accepted one version of the facts rather than the opposite.
5. **Contracts: Consideration.** Personal services are sufficient consideration to support an agreement. There is no more reason to presume that services are contributed as a gift than to presume that funds are contributed as a gift.
6. **Illegal Contracts: Sexual Misconduct: Contracts.** A bargain in whole or in part for, or in consideration of, illicit sexual intercourse or of a promise thereof, is illegal; but subject to this exception, such intercourse between parties to a bargain previously or subsequently formed does not invalidate it.
7. **Oral Contracts: Contracts.** The terms of an oral agreement are to be found in the parties' respective versions of the agreement, and their acts and conduct in light of the subject matter.
8. **Equity: Specific Performance: Oral Contracts.** Equity will grant specific performance of an oral agreement to transfer property to an-

other if it is proved by evidence convincing and satisfactory and if it has been wholly performed by one party and its nonperformance would be a fraud on him.

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

William J. Tighe for appellant.

Bernard T. Schafersman for appellee.

Heard before BOSLAUGH and WHITE, JJ., and COLWELL, RIST, and HOWARD, District Judges.

WHITE, J.

This case is on appeal from the District Court for Washington County, Nebraska. Appellee sought to recover from appellant property she alleged she was entitled to pursuant to an oral agreement between the parties. Appellant denied the existence of a contract, alleged that appellee is not entitled to the property, and asserted that, had there been a contract, the same would have been illegal and unenforceable. Appellee also alleged that appellant made a gift to her of property now in his possession and she requested return of that property. Appellant argued that no gift was intended or proved. Appellee's final cause of action alleged that she performed valuable services for appellant and she requested payment of the value thereof. Appellant contended that the benefits to appellee exceeded the value of her services. The trial court found generally for the appellee and awarded her one-half the value of the property titled in the parties' names as joint tenants, and $38,979.37 under the express oral agreement between the parties. Appellant appeals and assigns as error that the court erred by finding (1) That appellee had any interest in the jointly held property; and (2) That appellee had any interest in appellant's property by virtue of an oral agreement.

Appellant and appellee lived together from March 1972 until June 1978. Although they never married

each other, they did engage in sexual relations. At the time appellant invited appellee to live with him, he was 54 years old. His wife had predeceased him. He lived alone on a 185-acre farm near Herman, Nebraska, and cared for his father who lived nearby on a 160-acre farm. Appellee at the time was a 52-year-old woman whose husband had predeceased her, and she lived with her daughter in Fremont, Nebraska.

In January 1972, the appellant invited appellee to move onto his farm. In March 1972, appellee agreed. The record shows that appellant had asked appellee to marry him but that appellee declined. Between March 1972 and June 1973, appellant placed appellee's name as joint owner with rights of survivorship on three bank accounts, lockboxes, two automobiles, later a third automobile, and $24,000 of mutual funds, and made her the beneficiary of both of his life insurance policies. The evidence is not controverted that while appellee lived with appellant she cleaned the house, washed clothes, cooked the meals, ran errands for the appellant, cared for the lawns and garden, canned food, cared for appellant's father while he was alive, did the bookkeeping for appellant's business and farm operations, and provided nursing services to appellant while he was convalescing.

It was appellee's testimony that when she agreed to move onto the farm, she did so and agreed to perform the above services because appellant stated that he had the means and would take care of and provide for her for the rest of her life. Appellant agrees that the services were performed and accepted but denies that they were rendered pursuant to any agreement. In 1974, appellant and appellee began construction of a new house on one of appellant's farms. The house was completed in 1975. The testimony of both appellant and appellee established that appellant supplied the financial consideration for the house; both parties assisted in the planning, decorating, and furnish-

ing of the house. Appellee's testimony, corroborated by two other witnesses, was that appellant had built the house for appellee and that she was entitled to live in it for as long as she lived. Appellant testified that he had the house built for appellee and himself, but denied the existence of an agreement that appellee was entitled to it for the rest of her life.

The trial court found in favor of appellee, and the record is sufficient to support a finding that appellee agreed to provide homemaking and other domestic services, as well as business skills, in return for appellant providing for her daily needs and her future security. In 1978, appellee moved back into Fremont. Her testimony was that appellant had threatened her and she was concerned for her safety. She then brought this action to recover property titled in her name in appellant's possession and the value of a life estate in appellant's home.

Appellee asserted in her petition that appellant had made a gift to her of one-half the value of each of three cars which appellant had titled in his and appellee's names as joint tenants with rights of survivorship. On appeal, appellant argues that the trial court erred by applying to this situation the rule adopted by this court in *Hoover v. Haller*, 146 Neb. 697, 21 N.W.2d 450 (1946). In that case, we held that, between husband and wife, where the party who provided the consideration titles property in both names as joint tenants, the presumption is that one spouse has made a gift to the other and each has an equal interest in the property. The record in this case shows that the parties were not husband and wife. The Nebraska certificate of title act, Neb. Rev. Stat. §§ 60-101 to 117 (Reissue 1978), controls this situation. "A certificate of title to a motor vehicle is generally conclusive evidence in this state of the ownership of the vehicle." *Turpin v. Standard Reliance Ins. Co.*, 169 Neb. 233, 234, 99 N.W.2d 26, 28 (1959). The exceptions to this rule apply only to prevent fraud and coercion. *Forman*

v. Anderson, 183 Neb. 715, 163 N.W.2d 894 (1969). As in the *Forman* case, the act of the appellant in placing the title in the names of both himself and appellee was done freely and voluntarily. There was no showing of a mistake of fact, or of any coercion or fraud.

Where the instrument is silent as to the interests taken by joint tenants, the presumption is that their interests are equal. *Giles v. Sheridan*, 179 Neb. 257, 137 N.W.2d 828 (1965).

In view of the above, we conclude that there is no merit to appellant's first assignment of error.

Appellant's second assignment of error states that the trial court erred in finding that appellee was entitled to a life estate in the house built by appellant and appellee in 1974 on appellant's property. Appellee asserts, as the basis for her claim, an express oral agreement between the parties. She alleges that, in consideration for her moving into appellant's home, providing him with domestic services, business aid, and nursing skills, he promised to provide for her for the rest of her life. She now asks for specific performance of that contract. Appellant's position is that there was no such agreement, and had there been, it would be void and in violation of public policy and the statute of frauds.

In appeals to this court in suits in equity, the trial shall be de novo on questions of fact preserved for review, and we must reach an independent conclusion in findings of fact without reference to the conclusion reached in the District Court. Neb. Rev. Stat. § 25-1925 (Reissue 1979). "However, it is also the well-established rule that where the 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 therefore must have accepted one version of the facts rather than the opposite." *Edmunds v. Edwards*, 205 Neb. 255, 266, 287 N.W.2d 420, 426 (1980).

The trial court specifically found that appellee had proved the existence of an express oral agreement and established that, in exchange for her services, appellant was to provide her with the use of the home built in 1974 for the rest of her life. The testimony of the parties and their witnesses was sufficient to permit the trial court judge to find that the parties did have an agreement; that appellee did live with appellant because she believed he would provide for her for the rest of her life; and that appellant understood and agreed to this. It is clear that the trial court did not believe appellant's contention that these services were gratuitous, and "[t]here is no more reason to presume that services are contributed as a gift than to presume that funds are contributed as a gift . . . ." *Marvin v. Marvin*, 18 Cal. 3d 660, 683, 557 P.2d 106, 121, 134 Cal. Rptr. 815, 830 (1976). Personal services are sufficient consideration to support an agreement.

In *Taylor v. Frost*, 202 Neb. 652, 276 N.W.2d 656 (1979), we held that the testimony of the parties was sufficient to establish an agreement between them. The agreement was entered into while the parties were engaged in a nonmarital, although presumptively sexual, relationship. We then adopted the following rule: "'A bargain in whole or in part for or in consideration of illicit sexual intercourse or of a promise thereof is illegal; but subject to this exception such intercourse between parties to a bargain previously or subsequently formed does not invalidate it.'" *Id.* at 656, 276 N.W.2d at 658, quoting Restatement of Contracts § 589. The record shows that sexual services did not form the basis for the agreement between the parties. For that reason, this agreement does not violate public policy.

Despite conflicting evidence, the trial court judge did find that appellant expressly agreed that appellee could live in the house "for as long as she wanted." Although the contract was oral, it was an express

agreement. The terms of such agreement are to be found in the parties' respective versions of the agreement, and their acts and conduct in light of the subject matter. 1 Corbin on Contracts, § 18 (1963). See, also, *Dunmire v. Cool*, 195 Neb. 247, 237 N.W.2d 636 (1976). The trial court weighed the testimony of each party and believed the testimony of appellee, appellee's daughter, and appellant's cousin that appellee was entitled to live in the house as long as she lived. These findings are supported by the evidence.

The District Court also found that, although this contract was otherwise within the statute of frauds, appellee's part performance had taken it out and it was enforceable to the extent that she was entitled to life use of the house. "'Performance of personal services * * * in consideration of an oral contract for the conveyance of realty, by deed or will may be shown by evidence that the attendant was frequently observed at his duties, and that they were performed and that they were acknowledged by and accepted by the other party.'" *Dunmire v. Cool, supra* at 251, 237 N.W.2d at 639, quoting *Robinette v. Olsen*, 114 Neb. 728, 209 N.W. 614 (1926). The record clearly shows that appellee performed her homemaking, bookkeeping, and nursing services for appellant and that he knowingly accepted them.

Equity will grant specific performance of an oral agreement to transfer property to another if it is proved by evidence convincing and satisfactory and if it has been wholly performed by one party and its nonperformance would be a fraud on him. *Dunmire v. Cool, supra.* The evidence in this case is clear that appellee and appellant had entered into this personal services contract. "Its performance was referable solely to their existing understanding and the carrying out of its provisions was solely referable to their contract and not such as might reasonably be referable to some other or different contract or relationship." *Dunmire v. Cool, supra* at 251, 237 N.W.2d at 639.

The District Court did not specifically find, but we must assume its conclusion was, that appellant breached the agreement by threatening appellee and forcing her to leave his house. This conclusion is supported by the evidence. Appellee is entitled to relief on the basis of this breach. The trial court held that appellee is entitled to a life estate in the house built by the parties in 1974. The judgment required that appellant pay appellee the equivalent of the value of her life estate in the house and one-half the difference in the value of the automobiles awarded each party.

The judgment of the trial court is affirmed.

AFFIRMED.

HOWARD, District Judge, concurring in part and, in part, dissenting.

I concur in the majority's treatment of the jointly held property, but I can find no oral agreement supporting the award of the value of a life estate in the home. When plaintiff moved in with defendant in 1972, his only statement concerning her future was, "There is money enough out there to take care of all three of us for the rest of our lives." It was agreed that if plaintiff became unhappy with the situation, she could go back to Fremont and defendant would help her find a job. There was no discussion concerning plaintiff's life use of the new home until 1974, when it was under construction. The defendant, not the plaintiff, according to plaintiff's own testimony, introduced the idea that he would make a will leaving her a life use of the home and $1,000 or $1,200 per month, insurance proceeds, funds in the checking accounts, and the contents of the safe deposit boxes. Meanwhile, the parties were both performing and receiving consideration under their original arrangement. Plaintiff pressed defendant to proceed with making the will on several occasions, and he never declined to do so, according to plaintiff's testimony, until an altercation which occurred the day before she moved out.

This court has held that a declaration of intention to make a testamentary disposition of property does not tend to support the conclusion that any oral contract exists concerning the property or its disposition. *Diez v. Rosicky*, 145 Neb. 242, 16 N.W.2d 155 (1944); *Gerdes v. Omaha Home for Boys*, 166 Neb. 574, 89 N.W.2d 849 (1958). The existence of such a contract must be proved by clear, satisfactory, and convincing evidence, as this court has never failed to say. More to the point, such a contract is void as within the statute of frauds even though proved by such clear evidence, unless performance by the claimant is such as is referable solely to the contract sought to be enforced, and not such as might be referable to some other and different contract. *Gerard v. Steinbock*, 169 Neb. 828, 101 N.W.2d 194 (1960); *O'Neal v. First Trust Co.*, 160 Neb. 469, 70 N.W.2d 466 (1955). In my view, the plaintiff has failed to establish that her performance was referable solely to any agreement by defendant to make a will in her favor. And I cannot find in the evidence that any other bargain was struck for life use of the home, notwithstanding defendant's stated reasons for building it.

COLWELL, District Judge, joins in this concurrence and dissent.

IVA JONES V. CECIL JOHNSON, APPELLANT, V. GRETCHEN SWANSON PULLEN, APPELLEE.

300 N.W.2d 816

Filed January 16, 1981. No. 43138.

1. **Limitations of Actions.** A cause of action accrues and the statute of limitations begins to run when the aggrieved party has the right to institute and maintain a suit. Generally, this is true even though the plaintiff may be ignorant of the existence of the cause of action.
2. **Limitations of Actions: Pleadings.** A plaintiff who seeks to avoid the

bar of the statute of limitations must plead facts to show the statute was tolled.

3. **Limitations of Actions.** Generally, the statute of limitations in favor of a third party runs against the trustee from the date of the transfer.

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

Virgil J. Haggart, Jr. and Jonathan R. Breuning of Baird, Holm, McEachen, Pedersen, Hamann & Haggart for appellant.

T. Geoffrey Lieben of Fitzgerald, Brown, Leahy, Strom, Schorr and Barmettler for appellee.

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

BOSLAUGH, J.

This is an appeal from an order sustaining the demurrer filed by the third-party defendant to the second amended third-party complaint of the defendant and dismissing the complaint.

The action arises out of a controversy concerning the "Iva and Bill Jones Trust Fund" established by Gilbert C. Swanson on October 15, 1964. The trust indenture provided for the transfer of 3,000 shares of common stock of the Campbell Soup Company to the defendant, Cecil A. Johnson, as trustee, for a period of 11 years, the dividends from the stock, less expenses, to be accumulated in a dividend fund to be known as the Iva and Bill Jones Trust Fund. At the end of 11 years, or sooner upon the happening of certain contingencies, the stock was to be returned to Swanson, or his nominee, if he was living; transferred in accordance with the terms of his will if he was deceased; or transferred to a foundation.

Gilbert C. Swanson died on March 8, 1968. In 1969, at the request of the third-party defendant, Gretchen Swanson Pullen, executrix of the estate of Gilbert C. Swanson, deceased, the defendant sold the

stock. He deposited the proceeds in a checking account of the estate on May 2, 1969.

This action was commenced more than 10 years later, on August 27, 1979, by Iva Jones, the surviving beneficiary of the Iva and Bill Jones Trust Fund, for an accounting; the removal of the defendant Johnson as trustee; restoration to the trust of dividends and interest in the amount of $31,205.56; and costs and attorney fees.

On August 28, 1979, the defendant Johnson obtained leave to file a third-party complaint against Gretchen Swanson Pullen as executrix of the estate of Gilbert C. Swanson, deceased. The second amended third-party complaint was filed on October 17, 1979. The first cause of action, after alleging the basic facts concerning the trust, alleged that the appraiser appointed by the county court to determine the liability of the estate for inheritance tax determined that the Campbell Soup Company stock had reverted to the estate; and that the trustee, after careful and diligent examination of the trust instrument, determined that he was required to transfer the stock to the estate. The trustee prayed for judgment against the executrix on any part of the plaintiff's claim which might be adjudicated against him.

The second cause of action alleged the same facts as the first cause of action and that the transfer of the stock was made in good faith; that the trustee did not know that any person claimed the transfer was unauthorized; that there had been no formal judicial construction or interpretation of the trust indenture; and that if the transfer of trust assets had been made pursuant to a mistaken belief of the defendant, and the defendant was liable to the plaintiff, the executrix was liable for restitution to the trustee of the amount by which the trustee was liable to the plaintiff. The trustee again prayed for judgment against the executrix for any part of the plaintiff's claim which might be adjudicated against him.

The demurrer alleged that the complaint failed to state a cause of action and that the complaint was barred by the statute of limitations and laches. The principal issue upon the appeal is whether the complaint, on its face, shows that any recovery by the trustee against the executrix is barred by the statute of limitations. The parties are agreed that the applicable period of limitation is 4 years under either Neb. Rev. Stat. § 25-207(3) or § 25-212 (Reissue 1979).

A cause of action accrues and the statute of limitations begins to run when the aggrieved party has the right to institute and maintain a suit. *T. S. McShane Co., Inc. v. Dominion Constr. Co.*, 203 Neb. 318, 278 N.W.2d 596 (1979). Whenever a suit may be brought, the statute begins to run. *Bend v. Marsh*, 145 Neb. 780, 18 N.W.2d 106 (1945). Generally, this is true even though the plaintiff may be ignorant of the existence of the cause of action. *Grand Island School Dist. #2 v. Celotex Corp.*, 203 Neb. 559, 279 N.W.2d 603 (1979).

As to the first cause of action the defendant concedes that it accrued in 1969 at the date of the transfer. If the defendant had any right to recover the proceeds of the stock for the benefit of the trust, that right accrued immediately upon the transfer of the proceeds to the estate. The defendant attempts to avoid the bar of the statute by alleging a mistake. He argues that the statute was tolled because of his good faith, although perhaps mistaken, belief that the transfer was required by the terms of the trust indenture.

The defendant has alleged no facts which would operate to toll the statute in this case. There is no allegation of fraud or a mutual mistake of fact. A plaintiff who seeks to avoid the bar of the statute must plead facts to show the statute was tolled. *George P. Rose Sodding & Grading Co. v. Dennis*, 195 Neb. 221, 237 N.W.2d 418 (1976). Although in certain cases mistakes of fact may prevent the statute from running, a mistake of law ordinarily does not avoid the bar of the statute.

In his brief the defendant characterizes the second cause of action as a suit brought in his individual capacity to seek restitution from the estate of the fund for which he may be adjudged personally liable to the plaintiff. The defendant suggests that "it is clearly a cause of action which has not yet even accrued." In this respect we believe the defendant is mistaken in that his liability to the plaintiff, if any, arises from the alleged breach of trust and not from an adjudication to that effect. The defendant relies upon negligence cases involving claims of indemnity or contribution. Neither doctrine is applicable here.

The general rule appears to be that the statute of limitations in favor of a third party runs against the trustee from the date of the transfer. Bogert, *The Law of Trusts and Trustees* § 955 (2d ed. 1962); *Hamrick v. Indianapolis Humane Society, Inc.*, 174 F. Supp. 403 (S.D. Ind. 1959), *aff'd* 273 F.2d 7. See, also, Restatement (Second) of Trusts § 327 (1959); IV Scott on Trusts, § 327.2 (1967). The demurrer to the second amended third-party complaint was properly sustained and the complaint dismissed.

The judgment is affirmed.

AFFIRMED.

IN RE ESTATE OF C. E. WEINBERGER, DECEASED. EDWARD HOOKER ET AL., APPELLEES, V. RAYMOND P. MEDLIN, JR., EXECUTOR OF THE ESTATE OF C. E. WEINBERGER, DECEASED, ET AL., APPELLANTS.

EDWIN H. HEFT ET AL., APPELLEES, V. RAYMOND P. MEDLIN, JR., EXECUTOR OF THE ESTATE OF C. E. WEINBERGER, DECEASED, ET AL., APPELLANTS.

300 N.W.2d 818

Filed January 16, 1981. No. 43162.

1. **Courts: Inherent Powers: Appeal and Error: Time.** A litigant may always ask a court of general jurisdiction to exercise its inherent power. However, the filing of a document entitled "motion for rehearing" does not toll the time for appeal, and the time for appeal begins to run from the date the court enters the order overruling the motion for new trial, if such a motion has been timely filed.
2. **Terms of Court.** There is, at a minimum, a statutory requirement under Neb. Rev. Stat. § 24-303 (Reissue 1979) that there be at least one term of court each year, unless otherwise fixed by the District Court.
3. _____. Unless otherwise provided by order of the District Court, a term of court begins on January 1 of a given year and ends on December 31 of that same year.
4. **Courts: Judgments.** A judge of the District Court at chambers anywhere within his district, or anywhere within any district in which any case is filed as to which such judge is authorized to act, has the inherent power to modify or vacate any judgment rendered by such judge, if done within the term in which the judgment was rendered, and such action may be taken ex parte and without prior notice to the parties.

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

Deutsch & Hagen and Moyer, Moyer & Egley for appellants.

Brower, Treadway & Bird, P.C., for appellees.

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

KRIVOSHA, C.J.

The instant appeal arises out of two separate actions which were consolidated for trial. The only issue

presented to us at this time concerns certain procedural actions taken by the trial court, and for that reason we need not address the substantive issues involved in this case. For reasons which we will set out in greater detail hereafter, we affirm the action of the trial court.

On October 19, 1978, the District Court for Boone County, Nebraska, entered judgments for the appellants in both of the entitled cases. It appears from the record before us that the trial court had earlier advised the parties of its intention to enter judgment in each of these cases and, therefore, on October 13, 1978, prior to the date on which the judgments were formally entered, appellees filed their motions for new trial. Under the circumstances presented, such filing was effective. See *Pfeiffer v. Pfeiffer*, 203 Neb. 137, 277 N.W.2d 575 (1979). Appellants, nevertheless, maintain that the motions for new trial were defective in that they failed to set out specific grounds. However, in view of the actions taken by the trial court with regard to each of the motions for new trial, we need not decide that matter at this time.

On November 15, 1978, the trial court overruled both motions for new trial. The order overruling the motions for new trial had been orally conveyed to the parties at the regular session of the court on November 7, 1978, and was formally filed with the clerk of the District Court on November 16, 1978. Thereafter, on November 22, 1978, the appellees filed a document entitled "motion for rehearing." We are unable to find any provision, either by statute or case law, authorizing a "motion for rehearing" to be filed after the court overrules a motion for new trial.

Nevertheless, in civil cases a court of general jurisdiction has inherent power to vacate or modify its own judgments at any time during the term at which they are rendered. See, *Barney v. Platte Valley Public Power and Irrigation District*, 147 Neb. 375, 23 N.W.2d 335 (1946); *Lyman v. Dunn*, 125 Neb. 770, 252 N.W.

197 (1934); *County of Scotts Bluff v. Bristal*, 159 Neb. 634, 68 N.W.2d 197 (1955); *Jones v. Nebraska Blue Cross Hospital Service Assn.*, 175 Neb. 101, 120 N.W.2d 557 (1963); *Urwin v. Dickerson*, 185 Neb. 86, 173 N.W.2d 874 (1970). This action by the trial court prior to the termination of term may be either on the court's own motion or at the request of either party. We, therefore, consider the document filed by appellees entitled "motion for rehearing" to be nothing more than an invitation to the District Court to consider exercising its inherent power to vacate or modify its own judgment. A litigant may always ask a court of general jurisdiction to exercise its inherent power. However, the filing of a document entitled "motion for rehearing" does not toll the time for appeal, and the time for appeal begins to run from the date the court enters the order overruling the motion for new trial, if such a motion has been timely filed. This, obviously, imposes upon litigants a difficult choice, but one which, of necessity, must exist. If either party has requested the court to consider invoking its inherent power and the time for appeal expires before the court has exercised that inherent power, the parties may be left with no further relief should the trial court refuse to exercise its inherent power. That is simply a choice which the parties must make.

In the instant case the trial court did, in fact, on December 6, 1978, at chambers in Platte County, Nebraska, modify in part its previous order overruling the motions for new trial and granted a new trial in the action filed by the appellees against the estate of C. E. Weinberger. The order appears to have been filed in the District Court for Boone County, Nebraska, on December 12, 1978. At the same time, the trial court denied any further relief insofar as the action filed by the appellees against the estate of Viola Weinberger was concerned. Within 10 days of the entry of the court's order of December 6, 1978, in part granting a new trial and in part denying a new trial,

the appellants filed motions for new trial, which were overruled by the trial court on February 6, 1979. It is from those orders that appeal is brought to this court.

Appellants have assigned a number of errors, many of which appear to be duplicative of each other. The principal issues involved in this appeal, however, are twofold. First, did the court have jurisdiction on December 6, 1978, at chambers, to grant a new trial in the C. E. Weinberger case; and, second, could the court sign the order at chambers without the notice required by Neb. Rev. Stat. § 25-1329 (Reissue 1979)? We believe the answer to both questions must be answered in the affirmative.

As we have already indicated, a trial court has inherent power to modify or vacate its own judgment at any time during the term at which the judgment is rendered. Appellants argue that no term of court was set by the District Court for Boone County and that, therefore, we have no way of knowing whether the action of the trial court in part vacating and modifying its own judgment on December 6 was before or after term. We believe that not to be the case.

In the first place, Neb. Rev. Stat. § 24-303 (Reissue 1979) requires that "[t]he judges of the district court shall, the last two months in each year, fix the time of holding terms of court in the counties composing their respective districts during the ensuing year . . . ." We must, therefore, conclude that there is, at a minimum, a statutory requirement under § 24-303 that there be at least one term of court each year, unless otherwise fixed by the District Court. And in view of the fact that the judge is to fix the time during the last 2 months in each year, we must, likewise, conclude that unless otherwise provided by order of the District Court a term of court begins on January 1 of a given year and ends on December 31 of that same year. There is nothing in the record before us to rebut that presumption. We, therefore, must find that the action of the trial court in vacating its former

judgment and granting a new trial, insofar as the estate of C. E. Weinberger was concerned, was done during the term and pursuant to the court's inherent authority. The filing of the motion for new trial attacking that action was done within the statutory time and is properly before us.

With regard, however, to the matter of the Viola Weinberger estate, it is clear that the trial court did not take any action prior to the end of the term. Having not taken such action prior to the end of the term, the court was limited in what it could do. "'After the final adjournment of the term of court at which a judgment has been rendered, the court has no authority or power to vacate the judgment except for the reasons stated and within the time limited in what is now Chapter 25, article 20, R. R. S. 1943, § 25-2001 . . . .'" *Meier v. Nelsen*, 156 Neb. 666, 670, 57 N.W.2d 273, 275 (1953). But that fact is of no significance in this appeal because the trial court did not vacate or modify its earlier decision with regard to the Viola Weinberger estate. The time for appeal in the action involving the Viola Weinberger estate began to run on November 16, 1978, when the order overruling the motion for new trial was filed. The time for appeal, therefore, with regard to the Viola Weinberger estate, passed long before an appeal of that judgment was filed in this court, and the judgment with regard to the Viola Weinberger estate is final and binding. All that remains is the new trial with regard to the estate of C. E. Weinberger.

Turning then to appellants' contention that the court could not enter the order vacating or modifying its judgment without first giving 10 days' notice to the parties pursuant to Neb. Rev. Stat. § 24-317 (Reissue 1979), we believe that we must reject that argument. Section 24-317 specifically provides as follows: "A judge of the district court at chambers anywhere within his district, or anywhere within any district in which any case is filed as to which such judge is

authorized to act, shall have power [to]: . . . (3) Without notice, make any order and perform any act which may lawfully be made or performed by him ex parte in open court in any action or proceedings which is on file in any district of this state." Certainly, the inherent jurisdiction of the trial court to modify or vacate its own judgment during term is an ex parte order and may be made by the trial court absent a request by either party. That being the case, no notice was required to be given as urged by appellants. The rule seems reasonable in view of the fact that the trial court was not required, in the first instance, to give notice prior to the entry of its original judgment. A party's right of action following either the entry of the judgment or the vacation or modification of the judgment is the same — the filing of a motion for new trial in the District Court or a notice of appeal in this court. It, therefore, appears to us that insofar as the C. E. Weinberger estate is concerned, the trial court acted well within its authority and its order granting a new trial is valid and binding. Insofar as the Viola Weinberger estate is concerned, the parties having failed to appeal within time, that judgment, likewise, is final and binding. For the reasons therefore set out above, the judgment of the trial court with regard to both cases is affirmed.

AFFIRMED.

BOSLAUGH, J., concurs in result.

STATE OF NEBRASKA, APPELLEE, V. VICTOR JOURNEY, APPELLANT.

301 N.W.2d 82

Filed January 16, 1981. No. 43255.

1. **Criminal Defendants: Right to Counsel.** The two-part test to determine whether an attorney has effectively counseled a criminal defendant is that counsel must perform at least as well as one with ordinary criminal law skill and training in his or her region and must also conscientiously protect his client's interests.
2. **Criminal Defendants: Right to Counsel: Proof.** A defendant challenging competency of counsel has the burden to establish it. In addition, defendant must show that he suffered prejudice in the defense of his case as a result of his attorney's actions or inactions.
3. **Jury Trials: Waiver: Right to Counsel.** Requiring a waiver of jury trial to be intelligently waived does not mean that all of defense counsel's advice must withstand retrospective examination on post conviction hearing.
4. **Jury Trials: Waiver: Right to Counsel: Appeal and Error.** If an attorney's advice is within the range of competence required for attorneys in criminal cases and does not induce defendant to waive a jury trial by threats or promises, a defendant may not attack his jury trial waiver on appeal.
5. **Jury Trials: Waiver.** Because the decision to waive a jury trial is ultimately and solely the defendant's, a defendant must bear the responsibility for that decision. Counsel's advice to waive a jury trial can be the source of a valid claim of ineffective assistance of counsel only when (1) counsel interferes with his client's freedom to decide to waive a jury trial, or (2) defendant can point to specific advice of counsel so unreasonable as to vitiate the knowing and intelligent waiver of the right.
6. **Criminal Defendants: Right to Counsel.** Where a defendant merely claims that his decision was a strategic error, and can point to no specific incidents of counsel impropriety, he must bear the responsibility for that decision and cannot shift the blame to counsel.
7. _____: _____. Defense counsel's advice to his client not to testify, after discussing it with his client, is not ineffective counsel where defendant's prior criminal record could have been used against him.
8. **Right to Counsel.** The fact that a calculated trial tactic or strategy fails to work out as planned will not establish that counsel was ineffective.
9. **Attorney-Client Privilege.** There is no attorney-client privilege under Neb. Rev. Stat. § 27-503 (Reissue 1979) as to a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer.

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

Wesley C. Mues for appellant.

Paul L. Douglas, Attorney General, and Shanler D. Cronk for appellee.

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

BURKHARD, District Judge.

The defendant, Victor Journey, has appealed to this court from a denial of his motion to vacate and set aside judgment of conviction and sentence filed pursuant to the Nebraska Post Conviction Act. We affirm.

Defendant was sentenced by the District Court for Buffalo County on January 23, 1978, having been found guilty on January 5, 1978, of three counts of a four-count amended information, and guilty of the fourth count on January 23, 1978. The information charged him with separate counts of robbery, shooting with intent to kill, using a firearm in the commission of a felony, and being a habitual criminal. The sentences imposed by the court are to run consecutively — for robbery, a term of 3 to 5 years; for shooting with intent to kill, a term of 15 to 25 years; and for use of a firearm in the commission of a felony, a term of 3 to 5 years.

The charges arose out of a complaint filed by the State on July 26, 1977, alleging defendant's commission of the aforementioned crimes on July 25, 1977, along with a codefendant, Vernon Ellmers. On July 26, 1977, defendant first appeared in court on the charges, and bond was set at $100,000 with the 10 percent provision. On August 2, 1977, the Buffalo County Court appointed Mr. Kent A. Schroeder, Kearney, Nebraska, to represent the defendant in those criminal proceedings. Mr. Schroeder represented the defendant from that date forward through the sentencing hearing on January 23, 1978. In addi-

tion, Mr. Schroeder continued on as court-appointed counsel for the defendant in his appeal to this court. That appeal resulted in an affirmance of the trial court's judgment. *State v. Journey*, 201 Neb. 607, 271 N.W.2d 320 (1978). The facts surrounding the commission of the offenses for which defendant was convicted are found in the *Journey* case at 609-12.

Defendant testified at the post conviction hearing that he told Mr. Schroeder he was not involved in the crimes, and that on the evening of the alleged crimes, he had been at Gary Steinmark's residence in Kearney visiting with Mr. Steinmark in his backyard; that Mr. Ellmers had picked him up at Mr. Steinmark's residence late that evening, put his wheelchair in the back of a pickup; and that they then proceeded to ride around. The pickup in which Mr. Ellmers initially picked up the defendant was the same one in which they were both arrested some time later and which turned out to be the pickup belonging to Jack Muller, the victim of the crime. Defendant further testified that, although they did go to the vicinity where the shooting took place after Ellmers had picked him up on the evening of July 25, 1977, Mr. Ellmers turned the pickup around as they approached the gravel pit area and headed north, away from what he later found out to be the scene of the crime. Mr. Schroeder was informed by defendant, according to the defendant, that this would have been his testimony if he had been allowed to testify. Defendant stated he never told Schroeder that he was at the scene of the crime at the time of the shooting incident, and said that at all times he informed Schroeder of the alibi defense of being with Mr. Steinmark at the time the crimes occurred.

Defendant asked Mr. Schroeder "almost every time" he saw him about getting the bond reduced, but Schroeder failed to apply for a bond reduction, according to the defendant.

Following arrest, the defendant and his codefend-

ant, Mr. Ellmers, were both incarcerated in the county jail, but were separated. Prior to trial, Mr. Ellmers committed suicide and defendant was informed of some potential suicide notes left by Ellmers. Although defendant asked his counsel to check into the existence and contents of such alleged notes, he stated he was given no idea of their existence or nonexistence prior to trial. Mr. Schroeder claimed he was not made aware of any such notes before trial, and he could not recall whether defendant had mentioned them to him.

The primary defense that defendant conveyed to his counsel was that he was with friends the evening of July 25, 1977, the night the crimes occurred. The friends were Gary and Ginger Steinmark. Defendant claims he was in their yard at their residence that evening until later on when Mr. Ellmers picked him up. Defendant said he informed his counsel of Mr. Steinmark as an alibi witness shortly after he was appointed to represent the defendant. He said that he and Mr. Schroeder discussed using Mr. Steinmark as a defense witness several times, specifically with reference to his being able to furnish an alibi for the defendant. They discussed the pros and cons of Mr. Steinmark testifying, but the defendant "figured that Mr. Schroeder was the attorney, that he knew best." Mr. Steinmark was not called as a witness, nor was Ginger Steinmark. The defendant called only one witness, his family physician, Dr. S. O. Staley. The defendant said he did not know before the trial that Mr. Steinmark was not going to be called as a witness and was never made aware of that fact.

Both Gary and Ginger Steinmark testified at the evidentiary hearing. No one, according to Mr. Steinmark, had ever called or talked to him about his having seen the defendant at or about the time of the shooting incident, until an associate of defendant's counsel on the motion to vacate sought him out approximately a week before the evidentiary hearing

on December 31, 1979. Mr. Steinmark knew the defendant quite well, and during the month of July 1977 he had talked to the defendant approximately four different times in the yard of his (Steinmark's) home at Kearney. He recalled the day of the shooting, and when asked to recall as to whether one of those July visits may have been on the evening of July 25, 1977, he said, "I really don't know. I truthfully can't answer that because I don't know. I thought I did but my wife said it was the evening before. I don't know truthfully. I don't know myself. . . .Well, it's possible that him and Elmers [sic] could have been. It is possible, yes, but I'm not for sure."

Similarly, Ginger Steinmark had not been contacted by Mr. Schroeder or his associate at any time with reference to the evening of July 25, 1977. Her testimony was also vague in terms of her recollection of the events some 2½ years prior, although she recalled defendant coming to their home and visiting with Gary in the backyard on a number of occasions. Part of her testimony is as follows: "Q- Were there ever any occasions where before July 25th of '77, Mr. Vic Journey would come over and visit your husband and talk to him in the yard? A- I've seen him out there a couple times in the yard. Q- Were there any occasions where you would bring them out a beer and sandwiches? A- One time my husband came in and got sandwiches for them. Q- Do you recall whether or not that was the evening of the date of the shooting or can you recall? A- It was around there. I couldn't tell you if it was the day or day before. Q- You just can't remember? A- I can't. Q- But you do remember that it was around that time? A- It was close; it was the day before maybe. Q- Or maybe the day of? A- Yeah; I don't know."

Mr. Schroeder could not recall whether defendant had mentioned the names of Gary or Ginger Steinmark to him before trial as potential alibi witnesses, but stated that it was possible he may have.

Defendant waived a jury trial, and stated that he

did so because of advice of counsel that it would cost less for the county and that his counsel thought the judge would be more lenient with him. Another reason given by Mr. Schroeder, according to the defendant, was his past history of criminal background in the community. During conferences with Mr. Schroeder, the defendant said he was also persuaded to refrain from testifying on his own behalf.

During the evidentiary hearing, the State's attorney asked Mr. Schroeder whether the subject of defendant's own guilt or innocence was ever discussed with him, to which Mr. Schroeder responded in the affirmative. The county attorney then sought the specific conversation which Mr. Schroeder had with the defendant with reference to his guilt or innocence. Objection was made and overruled. The court then inquired of the defendant as to what his position was with regard to a waiver of his attorney-client privilege with Mr. Schroeder. Defendant responded that he was waiving the privilege as to any communication which may be relevant to the hearing. The district judge rejected the condition of the waiver and insisted that the privilege be either unconditionally waived or he would dismiss the petition.

Defendant claims that he was deprived of his constitutional right to effective counsel in his original trial. As his assignments of error, defendant contends that at the post conviction hearing the trial court erred in finding that the following did not constitute ineffective assistance of counsel: (1) Failure to contact and/or interview witnesses; (2) Failure to seek a reduction in defendant's bond; (3) Failure to investigate the existence and/or contents of a potential suicide note of Vernon Ellmers; (4) Waiver of a jury trial; and (5) Advice to defendant not to testify in his own behalf. Defendant also claims that the court erred in forcing the defendant at the evidentiary hearing to elect between a blanket waiver of his attorney-client

privilege or a summary dismissal of his motion for post conviction relief.

Nebraska employs a two-part test for determining whether an attorney has effectively counseled a criminal defendant. First, counsel must perform at least as well as one with ordinary criminal law skill and training in his or her region. Counsel must also conscientiously protect his client's interests. *State v. Leadinghorse*, 192 Neb. 485, 222 N.W.2d 573 (1974); *State v. Lang*, 202 Neb. 9, 272 N.W.2d 775 (1978). A defendant challenging competency of counsel has the burden to establish it. *State v. Auger & Uitts*, 200 Neb. 53, 262 N.W.2d 187 (1978). In addition, defendant must show that he suffered prejudice in the defense of his case as a result of his attorney's actions or inactions. *State v. Mays*, 203 Neb. 487, 279 N.W.2d 146 (1979); *State v. Lang, supra; State v. Bartlett*, 199 Neb. 471, 259 N.W.2d 917 (1977).

The assignments of error will be discussed in the above order.

Does the record show that defendant's alibi witnesses, Gary and Ginger Steinmark, would have benefited his defense, and, if so, did his attorney know about them and ineffectively represent his client by failing to interview and call them?

Defendant could offer at his evidentiary hearing only his own uncorroborated testimony that he had informed his attorney before his trial that he was at the Steinmarks' the night of the shooting, for which he was convicted. His trial attorney testified that he could not recall mention of any such possible alibi.

At best, the District Court was faced with a swearing match, but a closer examination of all the testimony presented during the evidentiary hearing lends additional support to the testimony of defendant's trial attorney. As the District Court specifically found, defendant did take the stand during his original trial and testified that he could think of no other witnesses who might have been called in his behalf.

The Steinmarks were unable to recall whether the defendant had been with them at their residence, as he contends, a short time before his arrest. Further, if defendant had indeed been with the Steinmarks at the time of the shooting, it is most unusual that, once they had learned he had been arrested for a crime committed at a time when he was supposedly with them, they failed to voluntarily come forward in his behalf.

For the above reasons, the failure to interview or call the Steinmarks during the defendant's trial was not constitutionally ineffective legal counsel.

There is no evidence to demonstrate that the failure to procure a reduction in bond prejudiced defendant's case. Defendant failed to establish that he could have posted bond even if it had been reduced.

It is not contended that there is no situation where the failure of a defense attorney to seek a reduction in bond would not be ineffective legal representation. The case of *Kinney v. Lenon*, 425 F.2d 209 (9th Cir. 1970), cited by defendant, is such a case, but it is readily distinguishable from that at hand. In *Kinney*, the defendant was uniquely and solely able to discover witnesses essential for the investigation and preparation of his defense because, while not knowing them by name, he did know them by sight. This certainly is not the case in the matter before the court here. In fact, defendant himself, in support of his other arguments, contends that he revealed all the information he had about his case to his attorney.

Defendant says, in essence, that had he been released on bond, it is uncontrovertible that admissible evidence helpful to his cause would have resulted therefrom. Obviously, this court cannot presume such a result, for that is the very showing defendant is required to make to substantiate his claim of ineffective counsel, a showing which he clearly has failed to make.

Defendant testified that he learned of the possibility of the alleged suicide note or notes, informed his attorney of the same, and asked him to check into it. The testimony of his attorney is that, before his client's trial, he was not aware of any such suicide note from conversations with defendant or otherwise.

During the post conviction hearing, defendant successfully objected to the introduction of a document or paper produced by the State that he admits in his brief might have had some relevance to the codefendant's suicide, for the reason that no proper foundation had been laid for the introduction of same. Thus, the District Court lost, at defendant's choosing, an opportunity to discover additional evidence which might have established not only the existence of a suicide note but also possible prejudice to defendant's case during trial.

The District Court, therefore, had before it only conflicting testimony as to whether the existence of a suicide note could have been discovered during the course of a reasonably competent investigation by counsel, and no evidence that the failure to investigate the matter prejudiced defendant's case. Thus, the District Court had no choice but to find against defendant on this particular claim.

No Nebraska criminal cases have dealt directly with ineffective representation of counsel in connection with jury trial waiver. However, this court has rendered several decisions in cases involving waiver of trial itself, i.e., guilty pleas, where issues of inadequate counsel were raised.

In *State v. Ford*, 200 Neb. 779, 265 N.W.2d 456 (1978), this court adopted the general principle that requiring guilty pleas to be intelligently waived does not mean that all of defense counsel's advice must withstand retrospective examination on post conviction hearing. So long as counsel's advice was within the range of competence required for attorneys in criminal cases and does not induce defendant to plead

guilty by threats or promises, a defendant may not attack his guilty plea on appeal. *Ford, supra.* Both the *Ford* case and *State v. Grayer*, 191 Neb. 523, 215 N.W.2d 859 (1974), indicate that the evidence must show that the plea was involuntary or counsel's advice inadequate before the court will reverse.

In the present case, the same principles would seem to apply. Defendant's defense attorney testified about discussions with defendant relative to the waiver of a jury trial, recalling that he emphasized the advantages of having the judge serve as the factfinder in cases where the defenses are technical and complex, and where defendant has a serious past criminal record. Defendant recalls his attorney mentioning something to the effect that because they cost less, judges favor nonjury trials, but also admitted that his attorney discussed the problems of his criminal background relative to the question of a jury trial.

Mr. Schroeder did relate to defendant his understanding that some lawyers do feel judges favor nonjury trials for certain practical reasons, but also explained that he believed this theory to be an "old wives' tale."

In *Commonwealth v. Boyd*, 461 Pa. 17, 29-30, 334 A.2d 610, 616-17 (1975), the Pennsylvania court noted: "Because 'the decision to waive a jury trial is ultimately and solely the defendant's,' [citation omitted] a defendant must bear the responsibility for that decision. Counsel's advice to waive a jury trial can be the source of a valid claim of ineffective assistance of counsel only when 1) counsel interferes with his client's freedom to decide to waive a jury trial [citation omitted] or 2) appellant can point to specific advice of counsel so unreasonable as to vitiate the knowing and intelligent waiver of the right. Where an appellant merely claims, as in the present case, that his decision was a strategic error, and can point to no specific incidents of counsel impropriety, he must

bear the responsibility for that decision and cannot shift the blame to counsel."

The evidence in the case at bar does not support a finding of any specific, unreasonable advice relative to said waiver which would amount to ineffective assistance of counsel.

This court has held that defense counsel's advice not to testify, after discussing it with his client as counsel did with defendant in the instant case, was not ineffective counsel where defendant's prior criminal record, as in this case, could have been used against him. In such a situation, the advice was merely reasonable trial strategy. *State v. Fowler*, 201 Neb. 647, 271 N.W.2d 341 (1978). The fact that a calculated trial tactic or strategy fails to work out as planned will not establish that counsel was ineffective. *State v. Holtan*, 205 Neb. 314, 287 N.W.2d 671 (1980).

This court cannot presume that had defendant testified as to his alibi, with or without corroboration by the Steinmarks, his case would have been more believable.

Defendant himself admits that the compelling advice of his trial attorney, upon which he relied in deciding not to take the stand, was the harmful consequences of his past criminal record. It is obvious that defendant simply raises a question of trial tactics and seeks to relitigate his case. This he cannot do.

The trial judge demanded that defendant either waive his attorney-client privilege at the evidentiary hearing or suffer dismissal of his petition for post conviction relief. Defendant claims that Neb. Rev. Stat. § 27-503(4) (Reissue 1979) allows him to waive the privilege, with reservations. He wanted to waive it only for communications relevant to the issues raised in his motion for post conviction relief.

Section 27-503(4) provides: "There is no [attorney-client] privilege under this rule:

. . . .

"(c) As to a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer . . . ." This does not address waiver; it defines the scope of the attorney-client privilege. Accepting defendant's premise, we can conclude that defendant had no privilege concerning communications relevant to breach of duty by defense counsel. Hence, there was no waiver problem concerning relevant communication because defendant could not be forced to waive a privilege which he did not have.

The underlying problem seems to be who determines what communications are relevant to the issue of inadequate representation. Making evidentiary rulings, after objections, are part of the judge's function. The record seems to show that this was actually what occurred. Both counsel and the court assumed there was a waiver problem even though the judge remarked that his concern was as to who would determine relevancy. Testimony concerning communication, objections on the basis of relevancy, and rulings as to relevancy followed. Defendant does not challenge any of those rulings. This assignment is therefore without merit.

No error in the proceedings having been demonstrated, the order of the District Court denying post conviction relief must be affirmed.

AFFIRMED.

WILLIAM GLENN SHANKS, JR., APPELLANT, V. BEVERLY ANN SHANKS, APPELLEE.

300 N.W.2d 822

Filed January 16, 1981. No. 43264.

1. **Divorce: Property Division.** This court is not inclined to disturb the division of property made by the trial court unless it is patently unfair on the record.

2. **Divorce: Property Division: Alimony.** 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.

Appeal from the District Court for Lancaster County: SAMUEL VAN PELT, Judge. Affirmed in part, and in part reversed and remanded with directions.

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

John R. Doyle for appellee.

Heard before KRIVOSHA, C.J., MCCOWN, and WHITE, JJ., and COLWELL and HUBER, District Judges.

HUBER, District Judge.

The appellant, William Glenn Shanks, Jr., filed a petition for the dissolution of his marriage from Beverly Ann Shanks. The parties presented evidence relative to their employment, the division of marital property, payment of debts, child support, and alimony. In the decree entered on November 14, 1979, the court awarded custody of the parties' minor son to Beverly, divided the marital property, and directed William to pay child support of $270 per month and alimony in the nominal sum of $1 per year for a period of 10 years.

William alleges that the trial court erred in awarding Beverly 77 percent of the marital estate. Beverly alleges that she received only 52 percent. The issue revolves primarily around the value which the parties placed on the appellant's retirement fund, to wit: (1) Whether the District Court erred in including the parties' retirement funds in the division of the property award; and (2) If the funds are to be held to be divisible property, whether appellant's funds should be computed at $13,000, as alleged by appellant, or $28,000, as alleged by appellee. Appellant's primary premise is that all such funds should be excluded from consideration; whereas appellee's contention is that all such

funds should be included. We hold that the decision of the District Court is correct as far as division of property is concerned, but should be reversed and remanded only in holding that appellee should receive alimony, and that the District Court's decree should be modified so as to provide for no alimony from the time of its inception under the decree.

First of all, it is necessary to find the amount of property which can be considered marital property for division between the parties. We find this to be $60,082.19, of which appellant received $22,849, or 38 percent, and well within proper guidelines for a marriage having lasted well over 20 years. By the same token, appellee received $37,233.91, or 62 percent. We arrive at these figures by taking the agreed-upon values of the parties, including the value of appellant's pension at $13,000 and appellee's pension at $4,860. These pension values represent each party's own contribution to the various pension funds and represent the amounts each would have been permitted to withdraw had they terminated their respective employments at the time of the trial.

This court is not inclined to disturb the division of property made by the trial court unless it is patently unfair on the record. *Blome v. Blome*, 201 Neb. 687, 271 N.W.2d 466 (1978). Relative to the $15,000 retirement fund exclusion, compare *Andersen v. Andersen*, 204 Neb. 796, 285 N.W.2d 692 (1979), holding that the unearned income of the husband in the form of accounts receivable due from certain clients was improperly considered in dividing property of the parties where its receipt was contingent on whether the husband was retained in the employ of his various clients and whether the husband actually accomplished the work. We need not consider the amendment in what is now Neb. Rev. Stat. § 42-366 (Cum. Supp. 1980). This added a provision setting out that the court shall include, as a part of the marital estate, pension plans.

It was not in effect at the time of trial. The effect of this decision, therefore, may be limited in scope.

Having come to the conclusion that the property division of the trial court was proper, we now deal with whether the court was in error in allowing alimony. We find that it was. 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). The decree should be modified to remove any provision for alimony, and the appellee should be ordered to refund any alimony which she has heretofore received.

AFFIRMED IN PART AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

COLWELL, District Judge, concurs in result.

STATE OF NEBRASKA, APPELLANT, V. CLAYTON KOCK, APPELLEE.

300 N.W.2d 824

Filed January 16, 1981. No. 43498.

1. **Statutes: Judicial Construction.** When the Legislature subsequently enacts legislation making related preexisting laws applicable thereto, it would be presumed that it did so with full knowledge of such preexisting legislation and judicial decisions of the Supreme Court construing and applying it.
2. ____: ____. An interpretation which gives effect to a statute will be chosen over one which defeats the statute, and an interpretation which gives effect to the entire language of the statute will be selected as against one which does not.
3. **Statutes: Intent to Defraud: Proof.** By its terms, Neb. Rev. Stat. § 28-611(1) (Reissue 1979) requires proof that one intended to defraud by obtaining property, services, or present value of any kind in exchange for a check or other order, knowing at the time of issuing such check or order that he has no account with the drawee, or, if he has such an ac-

count, knowing that he does not have sufficient funds in, or credit with, the drawee for the payment of such check or order in full upon its presentation.

Appeal from the District Court for Butler County: BRYCE BARTU, Judge. Reversed.

Paul L. Douglas, Attorney General, Patrick T. O'Brien, and John G. Tomek, Butler County Attorney, for appellant.

Richard L. Kuhlman for appellee.

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

KRIVOSHA, C.J.

On September 13, 1979, the State of Nebraska filed a multicount complaint against Clayton Kock charging him with having violated the provisions of Neb. Rev. Stat. § 28-611(1) (Reissue 1979), which reads as follows: "(1) Whoever obtains property, services, or present value of any kind by issuing or passing a check or similar signed order for the payment of money, knowing that he has no account with the drawee at the time the check or order is issued, or, if he has such an account, knowing that he does not have sufficient funds in, or credit with, the drawee for the payment of such check or order in full upon its presentation, commits the offense of issuing a bad check." The degree of the offense varies, depending upon the amount of the check or order written. The county court found probable cause and bound the appellee over to stand trial in the District Court. Appellee then filed a motion to quash, contending that the offense charged violated various provisions of the Nebraska Constitution; and in particular, Neb. Const. art. I, § 20, which provides: "No person shall be imprisoned for debt in any civil action on mesne or final process, unless in cases of fraud."

Following hearing, the trial court sustained the motion to quash, finding that in its present form the

"bad-check statute" allows for the imprisonment for debt without the element of fraud or fraudulent intent, contrary to art. I, § 20. The State filed an application for leave to docket error proceedings pursuant to Neb. Rev. Stat. §§ 29-2315.01 and 2319(3) (Reissue 1979), which application was granted by this court. We have now reviewed the matter and conclude that the trial court was in error in finding that the provisions of § 28-611(1) violate art. I, § 20. Pursuant to the provisions of Neb. Rev. Stat. § 29-2316, we declare that the provisions of § 28-611(1) do not violate art. I, § 20.

The trial court was correct insofar as it determined that for a statute such as § 28-611(1) to withstand a constitutional attack, an intent to defraud must be an element of the crime. In *White v. State*, 135 Neb. 154, 280 N.W. 433 (1938), we had occasion to examine Neb. Rev. Stat. § 28-1212 (Reissue 1975), the forerunner of the present statute under question. Section 28-1212 specifically provided, in part, as follows: "Any person who, *with intent to defraud*, shall make or draw, utter or deliver any check, draft, assignment of funds, or order for the payment of money upon any bank, cooperative credit association, or other depository knowing, at the time of such making, drawing, uttering, or delivering, that the maker or drawer has no account or deposit in such bank, cooperative credit association, or depository, upon conviction thereof, shall be punished as follows: . . . ." (Emphasis supplied.) It was argued that the above statute violated art. I, § 20. In holding that such was not the case, this court, in *White*, *supra* at 158, 280 N.W. at 435, said: "The principal ingredient of the offense is the intent to defraud."

In rejecting the claim that the criminal act sought to imprison was one for debt, we further said in *White:* "Inasmuch as an intent to defraud must be shown in this action if the defendant is to be found guilty, the provision of the above act we believe is sufficient to preclude the contention that the provision of the Con-

stitution, above quoted, has been violated." *Id.* at 159, 280 N.W. at 436. The question which we, therefore, must now determine is whether or not the provisions of § 28-611(1) require, as one of its essential elements, a fraudulent intent. Before proceeding to analyze that fact it would be beneficial to review the rules of construction under which such an examination must be conducted. We have frequently held that when the Legislature subsequently enacts legislation making related preexisting laws applicable thereto, it would be presumed that it did so with full knowledge of such preexisting legislation and judicial decisions of the Supreme Court construing and applying it. See, *Sidney Education Assn. v. School Dist. of Sidney*, 189 Neb. 540, 203 N.W.2d 762 (1973); *Airport Authority of City of Millard v. City of Omaha*, 185 Neb. 623, 177 N.W.2d 603 (1970); *Lang v. Sanitary District*, 160 Neb. 754, 71 N.W.2d 608 (1955). We must, therefore, presume that in enacting § 28-611(1) the Legislature was mindful of our decision in *White v. State, supra*, and acted accordingly.

Likewise, we have said that an interpretation which gives effect to a statute will be chosen over one which defeats the statute, and an interpretation which gives effect to the entire language of the statute will be selected as against one which does not. *City of Seward v. Gruntorad*, 158 Neb. 143, 62 N.W.2d 537 (1954).

The trial court reached its conclusion based upon the fact that the former statute, § 28-1212, specifically contained the words "with intent to defraud," while the current statute, § 28-611(1), has no such specific language. We do not think that that difference is significant when all of § 28-611(1) is read in its entirety. The mere drawing of a check is not sufficient to constitute a violation of § 28-611(1). For one to be guilty of the crime as charged, certain elements must be proven. They are: (1) That the individual issued or passed a check or similar signed order for the

payment of money, knowing that he had no account, or, if he had an account, knowing that he did not have sufficient funds in, or credit with, the drawee for the payment of said check or order upon presentment; and (2) That in return for the check, the maker of the check obtained property, services, or present value of any kind. That is to say, one of the key elements of this particular crime is that someone parted with goods, services, or present value of any kind as a result of, and in reliance upon, a check or order given by the maker which could not be honored when presented for payment. In our view, the act constituting the second necessary element is descriptive of an intent to defraud and sufficiently satisfies the constitutional requirement. In *Gillan v. Equitable Life Assurance Society*, 143 Neb. 647, 653, 10 N.W.2d 693, 697 (1943), we had occasion to define fraud, saying: "Fraud has been defined as follows:

. . . .

"'Deception practiced in order to induce another to part with property or surrender some legal right . . . .'" Likewise, Black's Law Dictionary defines fraud as "[a]n intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right." Black's Law Dictionary 594 (5th ed. 1979). Section 28-611(1) contains the element of fraud by its very definition and, therefore, is not in violation of art. I, § 20.

The intention of the Legislature to include the element of fraud by description becomes even more apparent when one compares § 28-611(1) with the Model Penal Code from which the section was, in part, taken. It is the difference between the Nebraska statute and the Model Penal Code which makes it clear that the Legislature of the State of Nebraska intended to include intent to defraud when enacting § 28-611(1). The model code simply provides: "A person who issues or passes a check or similar sight order for the pay-

ment of money, knowing that it will not be honored by the drawee, commits a misdemeanor." ALI Model Penal Code and Commentaries, Part II, § 224.5 (1980). The difference between the Model Penal Code and the Nebraska statute is immediately apparent. The Legislature, apparently recognizing that the language of the Model Penal Code might be in violation of art. I, § 20, modified the Model Penal Code to include the words "[w]hoever obtains property, services, or present value of any kind by issuing or passing a check or similar signed order. . . ." That distinction makes a significant difference. For that reason, we hold that the language of § 28-611(1) requires a finding of intent to defraud by obtaining property, services, or present value of any kind and does not, therefore, violate the provisions of art. I, § 20. We are not called upon to, nor do we, consider any other portion of § 28-611 except subsection

The judgment is reversed.

REVERSED.

MARY A. LAYHER, APPELLANT, V.
EARL W. DOVE ET AL., APPELLEES.

301 N.W.2d 90

Filed January 23, 1981. No. 42984.

1. **Adverse Possession.** One who claims title by adverse possession must prove by a preponderance of the evidence that he has been in actual, continuous, exclusive, notorious, and adverse possession under claim of ownership for a full period of 10 years.
2. ____. A claimant of title by adverse possession must show the extent of his possession, the exact property which was the subject of the claim of ownership, that his entry covered the land up to the line of his claim, and that he occupied adversely a definite area sufficiently described to found a verdict upon the description.

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

Donald H. Weaver of Anderson, Vipperman, Weaver, Hinman and Hall for appellant.

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

Heard before KRIVOSHA, C.J., MCCOWN, and WHITE, JJ., and COLWELL and HUBER, District Judges.

MCCOWN, J.

The plaintiff brought this action to quiet title to the south half of a quarter section of farmland and to restrain the defendants from encroaching upon plaintiff's land. The defendants, who were owners of the north half of the quarter section, denied that they had encroached upon plaintiff's land and, by cross-petition, prayed that the boundary line between plaintiff's and defendants' land be established pursuant to Neb. Rev. Stat. § 34-301 (Reissue 1978). The District Court dismissed plaintiff's cause of action and established the boundary line on the line of a survey dated May 2, 1979. Plaintiff has appealed.

The plaintiff is the record owner of the south half of the southwest quarter of Section 7, Township 11 North, Range 11 West of the 6th P.M., in Hall County, Nebraska. The defendants Dove are the record owners of the north half of the same quarter section. Both parties have owned their respective tracts of land for many years. The quarter section involved lies along the east side of Highway 11, a north-south highway. A creek traverses the quarter section, running generally from the southwest to the northeast. There is an entrance to the land from Highway 11 on the west line of the quarter section approximately midway between its north and south boundaries, which has been used as an entrance and driveway for vehicles and machinery entering both plaintiff's and defendants' tracts. The driveway has been located at slightly different places over the years and the location at any specific time or for any specific period of time is uncer-

tain. For some period of time there was a barbed-wire fence which divided the two tracts and ran from the highway easterly to the creek. While the fence was in existence, all parties accepted it as the boundary line, but there is considerable dispute over the exact location of the fence. All that is left of the fence are a few posts on the west bank of the creek. The rest of the fence has decomposed and there was no evidence of it at other places after 1969. There is a direct controversy in the evidence as to whether the fence ran along the north or the south side of the driveway in the western portion of the premises.

In the late 1950's the plaintiff's land west of the creek was leveled and there is testimony that the land was leveled to within 1 or 2 feet south of the old fence. At a point some 100 to 300 feet west of the creek there is a ridge on the defendants' land and the difference in elevation caused by the leveling of plaintiff's land is visible in some places. There is little serious conflict in the evidence regarding the boundary in this area. West of that point the parties each assert that the other has encroached.

In later years, whichever tenant planted first was often charged with encroachment by the other party. There is little apparent difference in elevation in the westerly portion of the land and the evidence fails to support any claim of continuous or exclusive possession of any specific area by either party for the necessary period of time to establish adverse possession.

On May 2, 1979, the defendants had the property surveyed and the surveyors set out lath markers on the boundary line between the north half and the south half of the quarter section. The plaintiff contends that the survey line encroached upon her property and this action followed. The District Court established the boundary line on the line of the survey dated May 2, 1979, and dismissed plaintiff's cause of action.

The basis of plaintiff's claim of title seems to rest on the assertion that the original government survey

boundary was different from the boundary fixed by the survey of May 2, 1979, or that the 1979 survey was somehow improper, incorrect, or defective. The evidence in the record does not support either assertion. The plaintiff failed to introduce any testimony to contradict the survey of May 2, 1979. Neither did the plaintiff's evidence establish any specific boundary line different from the May 2, 1979, survey line, nor establish the boundaries of any area assertedly possessed adversely and exclusively.

One who claims title by adverse possession must prove by a preponderance of the evidence that he has been in actual, continuous, exclusive, notorious, and adverse possession under claim of ownership for a full period of 10 years. A claimant of title by adverse possession must show the extent of his possession, the exact property which was the subject of the claim of ownership, that his entry covered the land up to the line of his claim, and that he occupied adversely a definite area sufficiently described to found a verdict upon the description. *Pokorski v. McAdams*, 204 Neb. 725, 285 N.W.2d 824 (1979). In the present case, no area claimed by adverse possession is sufficiently described to found any verdict upon such a claim.

Section 34-301 authorizes actions in equity to determine boundaries of real estate, the ownership of which is in whole or in part in dispute. When properly pleaded, the theory of adverse possession, as well as the theory of mutual recognition and acquiescence, may be raised under § 34-301. In actions in equity, it is the duty of the Supreme Court to try the issues of fact de novo on the record and to reach an independent conclusion thereon without reference to the findings of the District Court. *Shirk v. Schmunk*, 192 Neb. 25, 218 N.W.2d 433 (1974).

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

AFFIRMED.

LAURENCE BALTES AND LYDIA BALTES, HUSBAND AND WIFE, APPELLANTS, V. WARREN C. HODGES ET AL., APPELLEES.

301 N.W.2d 92

Filed January 23, 1981. No. 43063.

1. **Restrictive Covenants: Injunctive Relief.** Broadly speaking, the enforcement of building restrictions is governed by equitable principles, and will not be decreed if, under the facts of the particular case, it would be inequitable and unjust, or not in furtherance of public interest. Whether injunctive relief will be granted to restrain the violation of such restrictions is a matter within the sound discretion of the trial court, to be determined in the light of all the facts and circumstances.
2. **Restrictive Covenants.** A restrictive covenant is to be construed in connection with the surrounding circumstances, which the parties are supposed to have had in mind at the time they made it; the location and character of the entire tract of land; the purpose of the restriction; whether it was for the sole benefit of the grantor, or for the benefit of the grantee and subsequent purchasers; and whether it was in pursuance of a general building plan for the development of the property.
3. **Contracts: Intent.** An unambiguous contract is not subject to interpretation or construction, and the intent of the parties must be determined from its contents. A contract will be construed most strongly against the party preparing it when there is a question as to its meaning.

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

Wright & Simmons for appellants.

Raymond, Olsen & Coll, P.C., for appellees.

Heard before KRIVOSHA, C.J., MCCOWN, and HASTINGS, JJ., and COLWELL and CANIGLIA, District Judges.

COLWELL, District Judge.

Plaintiffs appeal from a judgment denying a mandatory injunction to enforce restrictive covenants they imposed in their sale of commercial lots to defendants. Plaintiffs claim defendants constructed parking areas at excessive elevations. We affirm.

In 1959, Laurence and Lydia Baltes, plaintiffs, platted a 48-acre tract of land on the edge of Scotts-

bluff, Nebraska; piecemeal development followed. They leased an area (now Lot 1, Block 5, Baltes Second Addition) to Big John's Bar-B-Q Pit on which the lessee constructed a building and paved parking lot.

On October 5, 1977, plaintiffs granted an option to defendants Warren C. Hodges, Harry E. Palmer, Robert R. Kanard, and Francis Ferguson to buy a small tract of land, later replatted by plaintiffs, described as Lots 2, 3, 4, and 5, Baltes Second Addition, Scottsbluff, Nebraska. The five lots in Block 5 run north and south, fronting 27th Street on the south, and are numbered from east to west as Lots 1 through 5. Lots 2, 3, 4, and 5 are smaller than Lot 1, each being 50 feet wide east and west and 300 feet long north and south. Lots 2, 3, 4, and 5 at the time of the option were in their natural state, not level. The water drained naturally from west to east and generally in a southeasterly direction. Twenty-seventh Street on the south drained from west to east.

Plaintiffs had their attorney prepare an instrument entitled "Restrictive and Protective Covenants to Baltes Second Addition to the City of Scottsbluff, Scotts Bluff County, Nebraska," which generally restricted and regulated the lots in that addition as commercial lots; prohibited subdividing; restricted long-term parking; restricted location of buildings to setback lines; required building plans submitted to plaintiffs, including a "site plan"; limited advertising signs; prohibited noxious activities and the maintaining of livestock; and regulated garbage and trash. The instrument also provided that the covenants are to run with the land until October 1, 1990, and thereafter automatically extended. Particularly important to this action is a part of paragraph 5: "A grade plan shall be submitted showing lot surface drainage containment with all drainage exiting to the public street. Lots abutting on 27th Street shall be filled and graded so that all surface drainage shall flow south to curb and gutters on 27th Street. *All lot surfaces shall be*

of approximate equal elevation so that they shall meet common grade at each property line." (Emphasis supplied.) A part of paragraph 7 provides: "A vehicular service access lane shall be provided, paved and maintained open at all times, east and west across the full width of each lot to provide customer vehicular service access to each lot within the subdivision. Such service lane shall be provided within the 100 foot building setback area, and shall be continuous ACROSS all lots within the subdivision." This instrument was recorded in the office of the county Register of Deeds.

On November 6, 1977, the original parties executed a "Modification of Option," which further defined the terms of the original option and, particularly, the following: "Buyers consent to the Sellers adopting Restrictive and Protective Covenants, a copy of which is attached hereto to be applicable to lands described on the condition that the land immediately to the west thereof, when platted and annexed to the City of Scottsbluff by Sellers, have the same Restrictive Covenants.

"It is further agreed that Buyers shall bring the areas described, when a parking area is created and paved, *to the same elevation* as the parking lot on Lot One (1), Block Five (5), as it now exists." (Emphasis supplied.)

The option was exercised on November 17, 1977. For convenience two deeds were delivered: (1) Plaintiffs conveyed Lots 2 and 3, Block 5, Baltes Second Addition, to Donuts West, a partnership consisting of Warren C. Hodges, Harry E. Palmer, and Francis Ferguson; and (2) Plaintiffs conveyed Lots 4 and 5, Block 5, Baltes Second Addition, to Wyoming Fish and Chips, a partnership consisting of Robert R. Kanard, Harry E. Palmer, and Warren C. Hodges. Both conveyances were subject to easements, rights-of-way, and restrictions of record. Work on all lots began; construction on Lots 4 and 5 was completed, including leveling, dirt fill, a building for a fast-food business, and a hard-surface parking area. Work

on Lots 2 and 3 was limited to leveling and dirt fill. At the boundaries between Lots 1 and 2 and between Lots 3 and 4, the dirt level of Lots 2 and 3 was 3 inches lower, pending construction of the parking area.

All the lots were surveyed by defendants and elevation marks established along all the boundary lines and at midpoints. The midpoint elevations in feet were: Lot 1, 58.24; Lot 2, 58.45; Lot 3, 58.85; Lot 4, 59.85; and Lot 5, 59.71 (.25 must be added to Lots 2 and 3 to reflect elevation when hard surface added). Defendants admit that the overall parking elevation of the lots is not level with Lot 1. The evidence is that the elevations at the boundaries are approximately the same. Plaintiffs were particularly concerned about the elevations on the west side of Lot 5 for the reason that they still own that land, and they claim that the higher elevations would require more fill dirt when improved.

Prior to construction, defendants had plans and blueprints prepared which were submitted to plaintiffs. Defendants complied with all building codes and obtained all required permits. From the time construction began, plaintiffs complained to defendants concerning the elevations of the parking areas.

At the close of the trial, the trial judge made a personal inspection of the construction site.

"Broadly speaking, the enforcement of building restrictions is governed by equitable principles, and will not be decreed if, under the facts of the particular case, it would be inequitable and unjust, or not in furtherance of public interest. Whether injunctive relief will be granted to restrain the violation of such restrictions is a matter within the sound discretion of the trial court, to be determined in the light of all the facts and circumstances . . . ." 20 Am. Jur. 2d *Covenants* § 313 (1965). A mandatory injunction is a harsh remedy and it is not favored by the courts. See 42 Am. Jur. 2d *Injunctions* § 16 (1969).

"A restrictive covenant is to be construed in con-

nection with the surrounding circumstances, which the parties are supposed to have had in mind at the time they made it; the location and character of the entire tract of land; the purpose of the restriction; whether it was for the sole benefit of the grantor or for the benefit of the grantee and subsequent purchasers; and whether it was in pursuance of a general building plan for the development of the property." *Lund v. Orr*, 181 Neb. 361, 363, 148 N.W.2d 309, 310-11 (1967).

Plaintiffs assign as error that defendants were permitted over objection to adduce expert evidence that it was either impossible or very difficult to construct parking areas at exactly the same elevations on Lots 2, 3, 4, and 5. They argue that a strict interpretation of the restrictive covenants is required and that such evidence was not relevant. Such evidence was given by the experts, taking into consideration the circumstances existing at the time of the transaction, including restrictive covenants, natural contour of the land and its physical characteristics, natural drainage, required drainage, required building setback distances, proposed building plans, and governmental codes and regulations. By the very nature of this equitable action, such evidence was relevant to the claims of all parties.

Plaintiffs also assign as error that the trial judge wrongfully decided the case on such evidence. Such was not the record. He did make the following detailed findings reflecting the evidence and his personal inspection. "That while variations exist in elevations between Lots 1, 2, 3, 4 and 5, such variations are not readily ascertainable to the naked eye. That the lots herein are of approximate equal elevation at the line where each lot joins the adjoining lot. That it is presently possible and will be possible in the future upon the paving of Lots 2 and 3 to pass or drive among and to and from Lots 1, 2, 3, 4 and 5 without obstruction or without any significant change in grade or level.

"That while it is theoretically possible to have all

the lots at exactly the same elevation and comply with the drainage provisions of all drainage south to 27th Street, the evidence is clear that such construction is not practical from an engineering standpoint and that severe physical distortion of the Lots 2, 3, 4 and 5 would be the result of such efforts." Those findings were proper under the evidence and his personal inspection.

Plaintiffs also assign as error that the trial judge failed to allow them to cross-examine a witness following an interrogation by the judge, all being contrary to Neb. Rev. Stat. § 27-614 (Reissue 1979). The record shows that at the conclusion of all the evidence the trial judge asked the last witness several questions. Thereafter, plaintiffs' counsel asked one question and then stated: "Okay. The floor is what confused me, I guess." This was followed by the judge saying, "I'm not opening this up for further cross-examination." This, then, concluded the evidentiary record. Plaintiffs made no objection to the record as made and they made no request to further interrogate the witness. There is no prejudicial error in that part of the record.

The other assigned errors are without merit. We now consider the merits de novo.

"An unambiguous contract is not subject to interpretation or construction, and the intent of the parties must be determined from its contents. . . . A contract will be construed most strongly against the party preparing it when there is a question as to its meaning." *Timmerman Bros., Inc. v. Quigley*, 198 Neb. 129, 132, 251 N.W.2d 877, 879 (1977). See, also, 20 Am. Jur. 2d *Covenants* §§ 5, 185, 186 (1965).

The restrictive covenants were imposed upon the land by plaintiffs with knowledge of the conditions and circumstances then existing, as heretofore discussed, which are to be considered in construing the restrictive covenants.

We find no ambiguity in the restrictive and protec-

tive covenants and the evidence does not support plaintiffs' theory of strict interpretation that overall level parking was required. We believe that the intent of the parties can be determined from the covenants, to the end that the defendants have complied with them as they relate to the parking area common grade at the property lines on Lots 2, 3, 4, and 5. The phrase "approximate equal elevation," as contained in paragraph 5 of the covenants, means more or less, about, or near to the elevation of abutting lots so that they provide free and normal pedestrian and vehicular traffic across all lots. There was no error in denying a mandatory injunction.

There being no evidence to support plaintiffs' allegation and prayer for a reformation of agreements, their petition was properly dismissed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. KENNETH D. HITT, APPELLANT.

301 N.W.2d 96

Filed January 23, 1981. No. 43084.

1. **Criminal Law: Evidence.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.
2. ____: ____. Evidence of other criminal acts which involve or explain the circumstances of the crime charged, or are integral parts of an overall occurrence or transaction, may be admissible.
3. ____: ____. It is competent for the prosecution to put in evidence all relevant facts and circumstances which tend to establish any of the constituent elements of the crime with which the accused is charged, even though such facts and circumstances may prove or tend to prove that the defendant committed other crimes.
4. **Witnesses: Appeal and Error.** The question of the competency of a witness to testify rests largely in the sound discretion of the trial court and the court's determination will not be disturbed in the absence of a clear abuse of discretion.

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

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

Paul L. Douglas, Attorney General, and Judy K. Hoffman for appellee.

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

MCCOWN, J.

The defendant was found guilty by a jury of first degree sexual assault and sentenced to imprisonment for 1 year.

The defendant had custody of his two sons for a period of several months in 1978 and 1979 by arrangement with his divorced wife. The defendant was charged with first degree sexual assault on his 11-year-old son, which allegedly occurred on or about March 27, 1979. The victim testified that he was forced to engage in oral sex acts with the defendant. The boy testified that such acts had occurred repeatedly over a long period of time and that he never complained to anyone because he was afraid of his father, who had threatened him with physical harm if he told anyone. The victim's 8-year-old brother also testified that he had been present when the defendant had forced his brother to engage in sexual conduct. He also testified that the defendant had engaged in the same conduct with him on at least one occasion. The younger boy was also afraid of his father, but he did ultimately complain to his schoolteacher and his grandmother.

The schoolteacher testified that on March 27, 1979, she noticed burn marks on the younger boy's face and that his knees were swollen and black and blue. The boy's explanation was that his father had burned him with a match, hit him on the knees with a hammer,

and engaged in sexual conduct with him. The boy testified to the same effect at trial. The teacher's complaint to the police led to the investigation which resulted in the charge.

The defendant testified and denied any sexual misconduct with either of the boys and denied ever striking either boy on the knees or in the face, but admitted striking them with a belt and a paddle. The jury found the defendant guilty. He was sentenced to 1 year imprisonment, with credit for extended jail time, and this appeal followed.

Initially, the defendant asserts that evidence that he struck his older son with a paddle and hit his younger son on the knees with a hammer and burned him with a match constituted evidence of other crimes or acts which should have been excluded. In this case the evidence was offered to corroborate the testimony that the boys were afraid of their father, and to establish the fact that their fears were real and not imaginary. It was also offered to explain the failure to make a prompt complaint. While evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith, it may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. See Neb. Rev. Stat. § 27-404(2) (Reissue 1979). The responsibility for maintaining the delicate balance between the probative and prejudicial effect of evidence lies largely within the discretion of the trial court. *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979).

The defendant also contends that in sexual assault cases evidence of similar sexual acts with third persons other than the complaining witness is not admissible. Evidence of other crimes may be admitted in a criminal prosecution where the evidence is so related in time, place, and circumstances to the offense or offenses charged so as to have substantial

probative value in determining the guilt of the accused. The balancing of the need for other-crimes evidence against the possible prejudice to the defendant is within the appropriate discretion of the trial court. *State v. Williams, supra.*

This court has also held that evidence of other criminal acts which involve or explain the circumstances of the crime charged, or are integral parts of an overall occurrence or transaction, may be admissible. It is competent for the prosecution to put in evidence all relevant facts and circumstances which tend to establish any of the constituent elements of the crime with which the accused is charged, even though such facts and circumstances may prove or tend to prove that the defendant committed other crimes. See, *State v. Williams, supra; State v. Nielsen,* 203 Neb. 847, 280 N.W.2d 904 (1979). In the present case the evidence of sexual conduct with the younger son was, in effect, part of a continuous pattern of conduct by the defendant toward both of his sons and tended to establish motive, opportunity, intent, preparation, plan, and knowledge. See, for example, *Onstott v. State,* 156 Neb. 55, 54 N.W.2d 380 (1952).

Sexual crimes have consistently been classified as those in which evidence of other similar sexual conduct has been recognized as having independent relevancy, and courts generally hold that evidence of other sex offenses by the defendant may be admissible, whether the other offense involves the complaining witness or third parties. See, Annot., 167 A.L.R. 565 (1947); Annot., 77 A.L.R.2d 841 (1961); McCormick on Evidence § 190(c)(4) (2d ed. 1972); *State v. Williams, supra.* The District Court did not abuse its discretion in admitting evidence of sexual conduct with the younger son.

Finally, the defendant contends that the testimony of the younger boy should have been excluded because he was only 8 years old and his functional mental age was estimated to be from 3 to 5 years. It

is well established in this state that the competency of a child to act as a witness depends upon his capabilities and intelligence and his understanding of the difference between truth and falsehood. In the case at bar the trial court, out of the presence of the jury, questioned the boy at length in order to ascertain his capabilities, intelligence, and understanding. The record is persuasive that the boy had sufficient intelligence and understanding to act as a witness, and understood the difference between truth and falsehood and the importance of telling the truth. The question of the competency of a witness to testify rests largely in the sound discretion of the trial court and the court's determination will not be disturbed in the absence of a clear abuse of discretion. *Skelton v. State*, 148 Neb. 30, 26 N.W.2d 378 (1947). There was no abuse of discretion in the case now before us.

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

AFFIRMED.

KRIVOSHA, C.J., concurs in result.

CLEARWATER CORPORATION, A NEBRASKA CORPORATION, APPELLANT, V. CITY OF LINCOLN, NEBRASKA, A MUNICIPAL CORPORATION OF THE STATE OF NEBRASKA, APPELLEE.

301 N.W.2d 328

Filed January 23, 1981. No. 43106.

1. **Eminent Domain: Evidence.** In an eminent domain proceeding, in order for evidence of the price at which other lands have been sold to be admissible, it must appear that such lands are similar or similarly situated in comparison with the lands condemned, and that the sales were made at about the same time as the particular taking involved.
2. ____: ____. In an eminent domain proceeding, a wide discretion must be granted the trial judge in determining the admissibility of evidence of other sales, and the evidence should not be admitted where there is a marked difference in the situation of the properties.

3. **Eminent Domain: Damages.** Where a jury's final award covering all damages sustained by reason of the taking is less than the amount awarded by the appraisers and deposited with the court by the condemnor, the condemnor is entitled to be reimbursed by the condemnee for the difference, plus interest from the date of withdrawal of the deposit by the condemnee.

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

Thomas F. Dowd, P.C., for appellant.

Dixon G. Adams for appellee.

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

HASTINGS, J.

This was an eminent domain action brought by the City of Lincoln, Nebraska, to acquire certain lands of the defendant, Clearwater Corporation, in Sarpy County, to be used as a water well field by the City. This is the second time we have had occasion to review this case. The original appeal appears at 202 Neb. 796, 277 N.W.2d 236 (1979). However, a brief history of the litigation will be helpful to a resolution of this case.

The original action was commenced on December 8, 1976, by the City when it filed its petition to condemn in the county court of Sarpy County against Clearwater, as the fee owner, and Glessie May and Frank T. Short, as mortgagees, of the property involved. Following the appointment of appraisers and a hearing, the appraisers issued a report on January 12, 1977, assessing total damages of $442,800 for the taking, $395,235.50 of which was allocated to Clearwater, and $47,564.50 to the Shorts. On February 10, 1977, the City filed a notice of appeal to the District Court for Sarpy County from the appraisers' award of $395,235.50 to Clearwater. The appeal did not mention the award to the Shorts. The City, upon in-

stituting the appeal, deposited the total amount of the award of $442,800 with the county court.

After trial to a jury in the District Court, a verdict was returned in favor of Clearwater, in the sum of $522,700. The City appealed, and we reversed and remanded the cause for a new trial. The second trial resulted in a verdict in favor of Clearwater in the sum of $244,074. Clearwater filed a motion for a new trial, which was overruled, and it now appeals to this court.

Clearwater assigns as error that the District Court failed to allow certain testimony by its expert appraiser, Joseph Strawn, regarding three real estate transactions which he claimed to be comparable properties to that of Clearwater's, and which he took into consideration in arriving at his opinion of damages. Further assigned as error is the manner in which the District Court computed the amount of credit to be given to the City from the amount already paid into county court pursuant to the appraisers' report. We affirm the judgment of the District Court.

The first assignment of error involves portions of testimony by the appellant's expert, Joseph Strawn. Strawn testified that in appraising the fair market value of the property condemned, he must first determine what was the highest and best use that the property could be put to. He concluded that such use was for sand and gravel excavation, followed by recreational development. The excluded testimony related to three separate real estate transactions which Strawn used as comparables. They comprised: (1) The sale of nearby farmland that has as its highest and best use commercial development; (2) The sales price of developed lots at Villa Springs; and (3) The sale of a lease on existing recreational lands at Willow Point. The trial court accepted an offer of proof on all three sales.

The appellant argues on appeal that it is error for the trial court to refuse to permit an expert witness the

opportunity to state facts upon which he bases his opinion, citing Neb. Rev. Stat. § 27-705 (Reissue 1979). Clearwater further argues that where the value of real estate is an issue, evidence of particular sales of other lands is admissible as independent proof on the question of value.

Section 27-705 states that an expert may testify as to his opinion without prior disclosure of the underlying facts and data. The statute further requires him to disclose such data if required to by the court. However, that statute does not require the court to allow testimony as to all underlying factors. In fact, § 27-705 allows an expert to base his opinion upon facts or data that are not necessarily admissible in evidence. Simply because such evidence is relied upon does not affect its admissibility.

However, Clearwater maintains that by not allowing the expert to testify to the underlying data, the court prejudiced Clearwater's case by weakening the opinion of its expert in the eyes of the jury.

It is well settled that evidence of the price at which other lands have been sold is admissible in evidence in condemnation proceedings on the question of damages where such evidence is predicated upon sufficient foundation to furnish a criterion for market or going value of land condemned. *O'Neill v. State*, 174 Neb. 540, 118 N.W.2d 616 (1962). However, it is equally clear that such land must be similar or similarly situated land sold at about the same time, especially when the price paid depends upon the market or going value rather than other considerations. *Lynn v. City of Omaha*, 153 Neb. 193, 43 N.W.2d 527 (1950).

"In an eminent domain proceeding, a wide discretion must be granted the trial judge in determining the admissibility of evidence in other sales, and the evidence should not be admitted where there is a marked difference in the situation of the properties . . . ." *Swanson v. State*, 178 Neb. 671, 678, 134 N.W.2d 810, 815 (1965).

We recognize that recent and comparable sales of real estate may be admissible as evidence in condemnation cases for two different purposes. They may be admitted as substantive proof of value of the condemned property or as foundation and background for an expert's opinion of value. *State Highway Comm. v. Hayes Estate*, 82 S.D. 27, 140 N.W.2d 680 (1966). The rule on comparability is not as strict for foundational purposes as it is when the comparable is used as direct and independent proof of value. However, there still must be a certain degree of similarity for both purposes, and the trial court is vested with wide discretion in ruling on admissibility for either purpose.

We agree with the South Dakota court which takes the position that to warrant a reversal on either the admission or exclusion of this type of evidence requires a clear abuse of discretion.

"Whether the properties are sufficiently similar to have some bearing on the value under consideration, and to be of any aid to the jury, must necessarily rest largely in the sound discretion of the trial court, which will not be interfered with unless abused. The exact limits, either of similarity or difference, or of nearness or remoteness in point of time, is difficult, if not impossible, to prescribe by any arbitrary rule, but must to a large extent depend on the location and the character of the property and the circumstances of the case." 5 Nichols on Eminent Domain § 21.31 (1979).

We have reviewed the record below and find that Clearwater's expert was allowed to testify to his ultimate opinion of value of the condemned tract, and was allowed to state the basis for this opinion, as well as the fact that he relied on three comparables. The only thing that was excluded was the actual sale price of the three transactions. It should be noted that one of the comparables was approximately half the size of the Clearwater tract, was not located along

the river as was Clearwater's, was rolling land as opposed to being flat, was on the interchange of Highway 31 and Interstate 80, and had a potential for commercial use. The Clearwater tract was not located on any highway, and had as its potential sand and gravel excavation followed by recreational development. The only real factor in common was that they presently were both used as farmland. The District Court clearly did not abuse its discretion in refusing to allow testimony of the sale value of this land.

The second "comparable transaction" involved the sale of developed lots at Villa Springs in 1974. The Villa Springs lots were geographically proximate to the Clearwater tract and comparable in size to the proposed Clearwater lots. However, Villa Springs was fully developed at the time, as opposed to a totally undeveloped Clearwater tract. As a matter of fact, Mr. Strawn testified that it would take 20 years to fully develop the Clearwater tract. As we stated in the first opinion, *Clearwater Corp. v. City of Lincoln*, 202 Neb. 796, 277 N.W.2d 236 (1979), evidence of the market value of lots in developed recreational areas has but a remote connection to the value of land in its undeveloped state. Although, if used as foundation only for the expert's final opinion, such evidence could have some probative value, we cannot say that the exclusion of it either was prejudicial or clearly wrong.

The third transaction that was excluded was the sale of a lease of a developed lot at Willow Point. There was testimony that the proposed lots at Clearwater would either be leased or sold. What relevance the price for the privilege of taking over a lease would have to the value of the condemned property is not shown. The court was clearly correct in excluding this testimony.

The second assignment of error relates to the amount of refund the City of Lincoln is entitled to receive from the $442,800 deposited with the county court of Sarpy County. Clearwater argues that since

the City appealed only from that portion of the appraisers' award made to Clearwater in the sum of $395,235.50, and not from the total amount, the refund should be calculated by subtracting the jury award from the $395,235.50 figure. What the District Court did do was to credit to the City the difference between the jury award of $244,074 and the total deposit of $442,800 made in county court.

Of the initial award of $442,800 made by the appraisers in county court, $47,564.50 was allocated to Glessie May Short and Frank T. Short, holders of the purchase money mortgage. The City did not appeal from the amount set off to the Shorts, since this constituted the balance remaining unpaid on the mortgage. Irrespective of the manner in which the allocation was made, there is no doubt that Clearwater was the beneficiary of the entire amount awarded and paid, and that amount covered all damages occasioned by the fee taking as well as the severance.

In the trial to the jury, the amount of $244,074 was returned as a verdict for Clearwater. It is clear from the record that the jury was instructed to find the amount of damages created by the taking in total without regard to any underlying mortgage or other interest. Instruction No. 1 to the jury states in part: "By the respective pleadings and stipulations, the only issues presented for consideration and determination by the jury is the fair and reasonable market value of the tract of land taken by the City of Lincoln as of December 8, 1976, and the damages, if any, to the property remaining after said taking."

The appraisers' award of $442,800 and the jury's verdict of $244,074 embraced exactly the same interest; i.e., the fair market value of the land taken, plus the severance damage to the remainder. Neb. Rev. Stat. § 76-719.01 (Reissue 1976) states that if the compensation finally awarded is less than the amount of money received by the condemnee, the court shall enter judgment against the condemnee for the amount

that it has been overpaid, together with interest from the date of withdrawal.

The order of the District Court directing the return to the City of $237,981.27, representing the overpayment of $198,726 plus interest, was correctly calculated.

The judgment and order of the District Court are affirmed.

AFFIRMED.

SANDRA KAY MICHAL, APPELLANT, V. ROBERT LEE MICHAL, APPELLEE.

301 N.W.2d 100

Filed January 23, 1981. No. 43148.

Divorce: Property Division. In an action for dissolution of marriage, the property should be divided, if possible, in such a manner as to permit the husband to retain the means for payment of any judgment awarded to the wife.

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

Philip M. Kelly of Winner, Nichols, Meister and Douglas for appellant.

James R. Hancock of Hancock & Kleager for appellee.

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

BOSLAUGH, J.

This is an appeal by the plaintiff, Sandra Kay Michal, in a proceeding for dissolution of a marriage. The trial court dissolved the marriage of the parties; divided the property; and awarded custody and child support for the minor children to the plaintiff.

The parties were married on November 19, 1960. The plaintiff was 18 and defendant was 22 at the time of the marriage. Two children were born to the parties, Rhonda on September 14, 1962, and Renea on February 2, 1965. Custody of the children was determined by a stipulation approved by the trial court.

At the time of the marriage, the parties had relatively few assets. At the time of the dissolution, the marital property amounted to $406,750, subject to debts of $148,930. The net marital assets thus were valued at $257,820.

The defendant operates a 170-acre farm near Lyman, Nebraska. The farm is located in a sparsely populated area about ½ mile from the Wyoming border. One hundred forty-four acres are irrigated; 25 acres are pasture. In 1967, the defendant purchased the farm from his father for $47,000 at 4 percent interest. The actual value of the farm was much greater than the agreed price.

During the marriage, the plaintiff cared for the children, took care of the home, and occasionally helped with the farmwork. She also worked as a bank teller for 14 years, her income being used for family purposes.

In October of 1977, the parties built a new home on the farm at a cost of $73,000. The defendant testified the home was built in an attempt to settle the problems in the marriage. Six months after the home was completed, the plaintiff left the family. The defendant was left to provide and care for the children.

The trial court awarded child support to the plaintiff in the amount of $175 per month per child, together with personal property valued at $16,000, consisting of savings accounts, household goods, furniture, a 1974 Oldsmobile, and a 1972 MG automobile. The plaintiff was also awarded $84,000 as a property settlement which bears interest at 8 percent until paid. The defendant was awarded the farm, valued at $260,000, the crops on hand, farm machinery,

cattle, vehicles, and furniture and other miscellaneous items in his possession, valued at $130,750. The defendant was ordered to pay the debts, consisting of $84,000 due the Federal Land Bank, $63,600 due the Western National Bank, and $1,330 in accounts payable.

The plaintiff contends the property division was inequitable and that the trial court made a number of errors in the division of the property.

Specifically, the plaintiff contends the farm trucks and other vehicles awarded to the defendant were undervalued by $9,350; the crops were undervalued by $7,273.65; and the cattle by $2,000. While the evidence will sustain a higher value on the farm trucks and other vehicles awarded to the defendant, all of these items were used and the trial court may well have concluded that some of the values suggested by the defendant for these items were excessive. The crop values were in part based on estimates of unharvested crops. The disparity in the values of these items was not great enough to render the decision of the trial court erroneous.

The court found that the total debt responsibility was $158,930. The amount of the debts listed in the judgment is $148,930. There is, however, evidence of other expenses which the defendant will be required to pay which are in excess of $10,000.

We find that the values which were determined by the trial court are supported by the record and are correct. The trial court's determination on these matters will not be disturbed.

The trial court awarded approximately 60 percent of the marital estate to the defendant and approximately 40 percent to the plaintiff. We believe this was a fair division of the property.

The plaintiff in this case received a substantial award for child support and a substantial lump-sum property settlement. In an action for dissolution of marriage, the property should be divided, if possible,

in such a manner as to permit the husband to retain the means for payment of any judgment awarded to the wife. We find nothing in the record to justify an increase in the plaintiff's share of the property or an award of alimony.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES L. BUTLER, APPELLANT.

301 N.W.2d 332

Filed January 23, 1981. No. 43308.

1. **Informants.** An informant's detailed eyewitness report of a crime may be self-corroborating; it supplies its own indicia of reliability; and an untested citizen informant who has personally observed the commission of a crime is presumptively reliable.
2. ____. The statement of an eyewitness to a crime supplies its own indicia of reliability as a statement of facts rather than conclusions which must be tested to determine their factual basis.
3. ____. The inquiry which should be made is whether the information furnished by the informant taken as a whole in light of the underlying circumstances can be said to be reliable.
4. **Informants: Search and Seizure: Probable Cause.** When the issue is not guilt or innocence but the question of probable cause for arrest or search, police officers need not invariably be required to disclose an informant's identity if the trial judge is convinced, by evidence submitted in open court and subject to cross-examination, that the officers did rely in good faith upon credible information supplied by a reliable informant.

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, Mel Kammerlohr, and Brian Bennett for appellee.

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

KRIVOSHA, C.J.

Appellant, James L. Butler, was convicted of violating Neb. Rev. Stat. § 28-202(1) (Reissue 1979) which provides that a person shall be guilty of a criminal conspiracy if, with intent to promote or facilitate the commission of a felony, he agrees with one or more persons that they or one or more of them shall engage in or solicit the conduct or shall cause or solicit the result specified by the definition of the offense, and he or another person with whom he conspired commits an overt act in pursuance of the conspiracy. Specifically, the conspiracy involved herein was to rob the Bank of Valley, Nebraska.

Butler confessed to the crime and, after being found guilty, was sentenced to imprisonment in the Nebraska Penal and Correctional Complex for an indeterminate period of not less than 8 years nor more than 10 years. Butler concedes that his confession was voluntarily given. The basis of his appeal in this case, however, is that the trial court erred in finding that probable cause existed to justify his arrest in the first instance and that, therefore, any evidence obtained as a result of the unlawful arrest, including the confession, must be suppressed as "fruit of the poisonous tree." See, *State v. Tipton*, 206 Neb. 731, 294 N.W.2d 869 (1980); *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1962). In addition, Butler maintains that the trial court erred in not requiring that the identity of two informants be disclosed so that they could be summoned and examined. We believe that both assignments of error must be rejected and, therefore, we affirm the judgment and sentence of the trial court.

The evidence in this case was received virtually without dispute. On August 23, 1979, Omaha Police Lt. Robert K. Olson received a call from Douglas

County Deputy County Attorney Samuel W. Cooper, advising Olson that Cooper had received a phone call from a person (informant No. 1) who advised Cooper that there were four parties that were planning a bank robbery somewhere in the Omaha area. On the same day, Olson received a further call from Omaha Police Sgt. Bob Thorson, advising him that a second informant (informant No. 2) had advised Thorson about a bank robbery that was going to happen in the Omaha area.

Olson thereafter met with both informant No. 1 and informant No. 2 and received information from both of them concerning the fact that four individuals, including Butler, were planning to rob the Bank of Valley on Tuesday, August 28, 1979, at 2 p.m. The evidence indicates that both informants were citizen informants and received no compensation or other consideration from the police department for providing the information.

The police further pursued the information given them by the informants and established the identity of the four coconspirators, including Butler. They then obtained photographs of the coconspirators and displayed them to informant No. 2 who identified the four photographs as the persons he had overheard conspiring to rob the Bank of Valley. Informant No. 2 further identified the Buick automobile which Butler was to drive in the bank robbery and advised the police where the vehicle was located and where the parties were located.

On the afternoon of August 28, law enforcement officers located themselves in the area of the Bank of Valley, and at approximately 2 p.m. the previously identified Buick automobile, then being driven by Butler, appeared in the vicinity of the Valley bank. The vehicle displayed two different license plates, one on the front and another on the rear of the vehicle.

After waiting a few minutes to observe what more, if anything, the parties intended to do, the law en-

forcement officers became concerned that innocent bystanders in the area might be injured if Butler and his coconspirator were permitted to complete the robbery and, therefore, approached the vehicle and placed the appellant and his coconspirator under arrest. Although the temperature at the time of the arrest was in the mid-80's, the appellant and his coconspirator had on two pairs of clothing. There was likewise found in the automobile a roll of tape and a sack with two guns in it. Somewhat later, after having been fully advised of all of his *Miranda* rights, Butler confessed to the crime.

Butler's first assignment of error, to the effect that the arrest was unlawful because of an absence of probable cause, is premised principally upon a claim that the police did not have sufficient proof that the information given by the informants was reliable. Therefore, he argues, they could not make the arrest prior to the commission of the robbery. We believe, however, that there are several facts involved herein that compel us to reject that argument. In the first instance, it must be kept in mind that, at least with regard to informant No. 2, the record is clear that the informant actually overheard the parties conspiring to rob the bank. As we noted in *State v. Payne*, 201 Neb. 665, 670, 271 N.W.2d 350, 352 (1978), "An informant's detailed eyewitness report of a crime may be self-corroborating; it supplies its own indicia of reliability; and an untested citizen informant who has personally observed the commission of a crime is presumptively reliable." Likewise, see, *United States v. Simmons*, 444 F. Supp. 500 (E.D. Pa. 1978); *People v. Schulle*, 51 Cal. App. 3d 809, 124 Cal. Rptr. 585 (1975); *State v. Drake*, 224 N.W.2d 476 (Iowa 1974).

Likewise, in *United States v. Sellaro*, 514 F.2d 114, 124 (8th Cir. 1973), *cert. denied*, 421 U.S. 1013, 95 S. Ct. 2419, 44 L. Ed. 2d 681 (1975), the U.S. Court of Appeals for the Eighth Circuit said: "This Court

has held that the statement of an eyewitness to a crime supplies its own indicia of reliability as a statement of facts rather than conclusions which must be tested to determine their factual basis." There are a number of other cases supporting that view. See *State v. King*, *ante* p. 270, 298 N.W.2d 168 (1980).

In *State v. Drake*, *supra*, the Iowa court noted: "When considering the sufficiency of probable cause based on information supplied by an informant, it is important to distinguish the police tipster, who acts for money, leniency, or some other selfish purpose, from the citizen informer, whose only motive is to help law officers in the suppression of crime.

. . . .

"In the latter the rule of prior reliability is considerably relaxed for several reasons. In the first place the citizen informer has rarely had any earlier experience in reporting suspected criminal activity. Furthermore, unlike the professional informant, he is without motive to exaggerate, falsify or distort the facts to serve his own ends.

"Reliability still must be shown, but it may appear by the very nature of the circumstances under which the incriminating information became known. Any other rule would lead to the totally unacceptable result that public-spirited citizens interested only in law enforcement could seldom furnish information sufficient to establish probable cause." *Id.* at 478. We believe the reasoning of the Iowa court to be valid and we would adopt such a rule for our own jurisdiction.

In the instant case, not only do we have information provided by citizen informants who are presumed to be reliable but we have the fact that certain of the information given to the police was corroborated by events prior to the arrest, including the appearance of the appellant in the previously identified automobile in front of the previously identified bank. We

concur with the State's position that the inquiry which should be made is "whether the information furnished by the informant, taken as a whole in light of the underlying circumstances, can be said to be reliable." See *United States v. Smith*, 462 F.2d 456, 460 (8th Cir. 1972). We believe that in the instant case the information furnished by the informants, when taken as a whole in light of the underlying circumstances, must be said to have been reliable so as to create sufficient probable cause and justify the arrests made by the officers. Butler was arrested for conspiring to rob a bank. The underlying evidence was, in our opinion, sufficient to constitute probable cause.

With regard to appellant's second contention that the names of the informants should have been disclosed, we can, likewise, easily dispose of that matter. In view of the fact that the trial court correctly found that the arrest was valid and the confession given was proper, it was apparent that the identity of the informants was of no material significance. In the case of *McCray v. Illinois*, 386 U.S. 300, 305, 87 S. Ct. 1056, 18 L. Ed. 2d 62 (1967), the U.S. Supreme Court said: "When the issue is not guilt or innocence, but, as here, the question of probable cause for arrest or search . . . police officers need not invariably be required to disclose an informant's identity if the trial judge is convinced, by evidence submitted in open court and subject to cross-examination, that the officers did rely in good faith upon credible information supplied by a reliable informant." In light of what we have found herein we can perceive of no way in which identifying the informants would have aided Butler in proving that the arrest was without probable cause. We, therefore, believe that the trial court did not err in refusing to require the identity of the informants to be made.

Having so concluded that the trial court did not commit error with regard to the matters assigned

by appellant, we accordingly affirm both the judgment and the sentence.

AFFIRMED.

DANIEL DOVEL, APPELLANT, V.
DALE ADAMS, APPELLEE.

301 N.W.2d 102

Filed January 23, 1981. No. 43378.

1. **Habeas Corpus: Extradition: Burden of Proof.** In an action for a writ of habeas corpus, including one which challenges extradition proceedings, the burden of proof is upon the petitioner to establish his claim that his detention is illegal.
2. **Extradition: Rules of Evidence.** The statutory rules of evidence, except those as to privilege, do not apply to, among other things, proceedings for extradition.
3. **Habeas Corpus: Extradition.** In extradition proceedings, tested by habeas corpus, the respondent establishes a prima facie case of identity from the recital of the name in the Governor's warrant and the corresponding name of the person in custody.

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

Robert B. Creager of Berry, Anderson & Creager for appellant.

Ron Lahners, Lancaster County Attorney, and Robert R. Gibson for appellee.

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

CLINTON, J.

This is a habeas corpus action commenced in the District Court for Lancaster County, Nebraska, against the sheriff of that county. The action is in resistance to a warrant of extradition issued by the Governor of the State of Nebraska upon a requisition by the Gov-

ernor of Florida. The requisition is based upon a Florida information charging Daniel Dovel with conspiracy to import a controlled substance. After the introduction of evidence and hearing, the District Court denied the relief requested by the petitioner and dismissed his petition, and he appeals to this court.

The sole issue raised in the District Court and in this court is the sufficiency of the evidence to identify the petitioner as the person named in the extradition warrant and proceedings.

The issues which a court of the asylum state may consider in an extradition proceeding are limited. *West v. Janing*, 202 Neb. 141, 274 N.W.2d 161 (1979). One of the issues which the court may consider is whether the petitioner is the person named in the request for extradition. In his petition for the writ of habeas corpus, the petitioner raised that issue in the following language: "9. That there is insufficient or no evidence demonstrating that this Petitioner is the same individual as the one who is alleged to have committed the alleged violations of Florida law as set forth in the Governors warrant and supporting papers."

The person named in the authenticated extradition proceedings is Daniel Dovel. The petitioner used the name Daniel Dovel in the caption of his petition and affixed thereto the verified signature, Daniel Dovel. Petitioner did not testify, as a witness, to establish the various allegations in his petition, nor deny under oath, as a witness, that he is the Daniel Dovel named in the authenticated extradition papers and in the Governor's warrant.

The respondent, in his return to the order to show cause, alleged that he had Daniel Dovel in custody; that the authority and cause for the custody were the extradition proceedings which were attached to the return. The respondent specifically denied the allegation in the petition attacking the extradition proceed-

ings, including that numbered 9 which we have earlier quoted.

The respondent introduced the authenticated extradition proceedings into evidence, together with testimony by a member of his staff who was charged with serving extradition warrants and other duties related to extradition proceedings. This individual caused photographs of the petitioner to be taken. He then sent these photographs and a request for identification to the Florida law enforcement department which held the warrant for Dovel's arrest on the conspiracy charge. In response to this request, the witness received from the sheriff of Pinellas County, Florida, copies of the photographs which the witness had sent, together with an affidavit in the following form: "The attached photo has been identified as DANIEL DOVAL by Detective Robert Clark of the Clearwater Police Department who was actively involved in the Conspiracy case of which we hold outstanding warrant #79-4789, in the name of Daniel Dovel.

/s/ Det Robert Clark
Robert Clark, Detective
Clearwater Police Department"

It is a reasonable inference from the record that the district judge looked at the photographs and at the petitioner and concluded that the petitioner was the person named in the warrant. He thereupon dismissed the petition.

The following principles govern: In an action for a writ of habeas corpus, including one which challenges extradition proceedings, the burden of proof is upon the petitioner to establish his claim that his detention is illegal. *Hoagland v. State*, 129 Neb. 6, 260 N.W. 695 (1935); *Austin v. Brumbaugh*, 186 Neb. 815, 186 N.W.2d 723 (1971). Once the petitioner has established his claim, the burden to introduce contrary evidence may, under some circumstances, shift to the state. 39A C.J.S. *Habeas Corpus* § 194, p. 112.

The statutory rules of evidence, except those as to privilege, do not apply to, among other things, proceedings for extradition. Neb. Rev. Stat. § 27-1101(4)(b) (Reissue 1979). In extradition proceedings, tested by habeas corpus, the respondent establishes a prima facie case of identity from the recital of the name in the Governor's warrant and the corresponding name of the person in custody. *Ex Parte Freeman*, 80 Ariz. 21, 291 P.2d 795 (1955).

In this case, the petitioner did not carry his initial burden. There was no evidence that he was not the identical Daniel Dovel named in the extradition proceedings. The respondent did introduce admissible evidence tending to establish the identity of the petitioner as the person named in the authenticated proceedings and the warrant.

The petitioner's argument is that the photographic evidence and the affidavit should have been included in the authenticated extradition proceedings. He cites no authority for this proposition. We have found none.

AFFIRMED.

IN RE CONTEMPT OF P. STEPHEN POTTER. STATE OF NEBRASKA, APPELLEE, V. P. STEPHEN POTTER, APPELLANT.

301 N.W.2d 560

Filed January 23, 1981. No. 43580.

1. **Contempt: Courts: Powers.** The power to punish for contempt does not depend upon statute. It is incident to every tribunal from its very constitution and may be generally exercised only by that tribunal whose order has been violated or proceedings interfered with.
2. **Contempt: Attorneys at Law.** Willful failure by an attorney without excuse to appear in court at the appointed time, of which he has notice, thereby delaying the business of the court, is contempt.
3. **Contempt: Courts.** Actions which constitute direct contempt occur in the presence of the court so that the court has personal knowledge of the

facts and has no need to inform itself of them by using witnesses or other evidence; the events constituting indirect or constructive contempt occur outside the presence of the court and the court must inform itself of the facts through the use of witnesses or other evidence.

4. **Contempt: Attorneys at Law.** When the failure of an attorney to appear at the announced time for resumption of judicial proceedings occurs in the presence of the court and is shown by its records, there is no reason to require the judge to file an affidavit or statement of facts setting forth the basis of the charge of contempt or to require him to give or obtain testimony establishing the facts. The rights of the attorney will be fully protected by an order to show cause apprising him of the charge against him, followed by an opportunity to be heard. If the attorney claims his conduct is excusable, he is entitled to a hearing where he may offer evidence.

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

John Story for appellant.

Donald H. Weaver for appellee.

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

CLINTON, J.

The appellant, P. Stephen Potter, a lawyer and deputy county attorney of Hall County, Nebraska, was found guilty of contempt by the Honorable L. W. Kelly, Jr., District Judge of the Eleventh Judicial District. The court adjudged that Potter could purge himself of the contempt by paying a fine of $50 and costs of the action and by making an apology to the court. The court further suspended Potter from practicing law before Judge Kelly until he complied with the conditions of the purge. Potter appealed to this court and the order imposing the penalties was suspended pending the outcome of the appeal. We affirm.

The issues raised by Potter's numerous, overlapping assignments of error on appeal are what might loosely be described as technical ones, and we summarize the issues made in the following categories: (1) The

contempt in question was constructive rather than direct contempt, and punishment could not be imposed without hearing and the production of evidence; (2) The prosecution for contempt should have been brought in the name of the State and prosecuted by the county attorney; and (3) The prosecution should have been founded upon an information filed, setting forth the facts relied upon and not merely upon an order to show cause.

The contempt proceedings arose under the circumstances described hereafter and there is no dispute concerning the essential facts.

On June 30, 1980, Potter was prosecuting a criminal case before Judge Kelly and a jury. At 11:55 a.m. the court adjourned for the noon recess, at which time the court twice announced that the court would reconvene at 1:15 p.m. and that the jury and all others should be present at that time. The jury and all others except Potter appeared and were ready at 1:15 p.m. Potter did not appear until 1:25 p.m. At 1:30 p.m. the court, outside the presence of the jury, said: "Mr. Potter, last week you were the attorney of record in two cases in my Court. You failed to appear in both of those cases. Other counsel had to be secured from the County Attorney's Office, and this caused a great deal of delay, and I can't let these things continue.

"I asked you to be back here at 1:15. All of the jurors were here, the defendant, the defendant's attorney, all of the court personnel, and your witnesses; everyone was here but you.

"I'm going to make a finding that you're in contempt of court and will set a hearing for tomorrow morning at 9:A.M. to determine what is going to happen." Potter responded: "Yes, Your Honor," but offered no explanation for his tardiness.

On July 1, 1980, Potter appeared before the court at the designated hour, with the county attorney as his counsel. The court had, by that time, entered an order to show cause which was in the following form:

"IN THE MATTER OF)
THE CONTEMPT OF) ORDER TO SHOW
P. STEPHEN POTTER.) CAUSE

"It coming to the attention of the Court that you were tardy for court on Monday, June 30th, 1980, and that said tardiness was not an isolated instance. It further being shown to the Court that your tardiness caused delay in a jury trial in progress and inconvenienced the Court, the court personnel, opposing counsel, defendant and jury.

"NOW, THEREFORE, you are ordered to show cause at 9:00 a.m., July 1, 1980, why you should not be held in contempt of court for said tardiness and punished according to law.

BY THE COURT:
/s/ L. W. Kelly, Jr.
District Judge"

A continuance of 1 week was requested by Potter's counsel and was granted. Potter thereafter filed various motions, including a motion for the appointment of a special prosecutor; a motion to disqualify the judge; and a motion attacking the sufficiency of the order to show cause, asserting that, as a pleading, it was not sufficient to support the contempt proceedings.

On the day and at the time to which the cause was continued, Potter again appeared with the county attorney as his counsel. Argument was made to the court by counsel. It centered upon the question of whether the contempt was direct or indirect or constructive and the difference of procedures applicable in each case. The court overruled the motions to which we earlier referred. It afforded Potter an opportunity to explain his tardiness. Potter's counsel first indicated that Potter would testify, and then withdrew that proposal. Potter did not take the stand or otherwise offer an explanation for his tardiness.

We will now discuss the principles which we believe govern. Neb. Rev. Stat. § 25-2122 (Reissue 1979) pro-

vides: "Contempts committed in the presence of the court may be punished summarily; in other cases the party upon being brought before the court, shall be notified of the accusation against him, and have a reasonable time to make his defense." The power to punish for contempt does not, however, depend upon statute. It is incident to every tribunal from its very constitution and may be generally exercised only by that tribunal whose order has been violated or proceedings interfered with. *Nebraska Children's Home Society v. State*, 57 Neb. 765, 78 N.W. 267 (1899); *State v. Rhodes*, 192 Neb. 557, 222 N.W.2d 837 (1974). Willful failure by an attorney without excuse to appear in court at the appointed time of which he has notice, thereby delaying the business of the court, is contempt. *Chula v. Superior Court*, 57 Cal. 2d 199, 18 Cal. Rptr. 507, 368 P.2d 107 (1962); *Harthun v. Dist. Ct.*, 178 Colo. 118, 495 P.2d 539 (1972).

The distinction between direct contempt and indirect, or constructive, contempt is: The actions which constitute the former occur in the presence of the court so that the court has personal knowledge of the facts and has no need to inform itself of them by using witnesses or other evidence; the events constituting the latter occur outside the presence of the court and the court must inform itself of the facts through the use of witnesses or other evidence. *Gordon v. State*, 73 Neb. 221, 102 N.W. 458 (1905); *Leeman v. Vocelka*, 149 Neb. 702, 32 N.W. 2d 274 (1948). Direct contempt may be punished summarily. Indirect or constructive contempt requires some notice of the facts allegedly constituting the contempt and a hearing or opportunity to be heard. *Leeman v. Vocelka, supra;* Neb. Rev. Stat. § 25-2122; *In re Application of Niklaus, Niklaus v. Holloway*, 144 Neb. 503, 13 N.W.2d 655 (1944). There is a split of authority on the question of whether tardiness or failure to appear constitutes direct or constructive contempt. Annot., 97 A.L.R.2d 457 et seq. (1964); *In re Farquhar*, 492 F.2d 561 (D.C. Cir. 1973); *Chula v. Superior Court, supra.*

Some courts have referred to tardiness or failure to appear as a "hybrid," since the tardiness or failure to appear may, and usually is, within the court's personal knowledge although determining whether the failure is willful and without excuse may require the production of evidence. 97 A.L.R.2d 457 et seq. (1964); *Chula v. Superior Court, supra.*

In the case before us, the court had personal knowledge of the tardiness. It had personal knowledge, apparently, about previous instances of tardiness where no excuse was proffered.

In this case the court did not proceed summarily. It entered a show cause order which informed Potter generally of the facts allegedly constituting the contempt. The court set the matter for hearing and gave Potter adequate time to prepare. Potter was represented by counsel. He was given an opportunity to offer any excuse he had and to show the state of his mind.

We have held that before punishment for indirect contempt may be imposed, there must be an accusation in some form, notice, and an opportunity for defense. *Muffly v. State*, 129 Neb. 334, 261 N.W. 560 (1935).

We adopt the reasoning of Gibson, Chief Justice, as stated by his concurring opinion in *Chula v. Superior Court, supra* at 206-08, 368 P.2d at 112-13. We quote it directly: "In the usual case of direct contempt all the relevant events occur in the immediate view and presence of the court, whereas indirect contempt ordinarily consists of acts out of the presence of the court. In the present case we have what might be termed a hybrid situation; the charge of contempt arose from events occurring in the presence of the court which it is claimed should be excused by matters taking place outside the courtroom.

"It is obvious that the disruption of judicial proceedings caused by the absence of an attorney occurs in the immediate view and presence of the court. The burden of excusing the obstruction must, of course, be

placed upon the attorney. (*Lyons v. Superior Court*, 43 Cal. 2d 755, [278 P.2d 681].) Where the attorney, although notified by the court to appear at a specific time, fails to do so and does not offer an excuse, all matters relevant to the determination of contempt happen in court. In those cases where the attorney seeks to excuse his conduct, the excuse ordinarily will be based on matters occurring out of court. However, the contingency that an attorney who is absent may later offer an excuse should not compel a judge, when instituting proceedings, to treat the conduct as indirect rather than direct contempt.

"Much of the procedure required by statute with respect to a charge of indirect contempt (see Code Civ. Proc., §§ 1211, 1212, 1217) would be pointless in a situation like the one before us and is unnecessary for the protection of the rights of attorneys or for the orderly administration of justice. When it is considered that the failure of an attorney to appear at the announced time for resumption of judicial proceedings occurs in the presence of the court and is shown by its records, there is no reason to require the judge to file an affidavit or statement of facts setting forth the basis of the charge of contempt or to require him to give or obtain testimony establishing the facts. The rights of the attorney will be fully protected by an order to show cause apprising him of the charge against him followed by an opportunity to be heard. If the attorney claims that his conduct is excusable, he is entitled to a hearing where he may offer evidence.

"Petitioner was apprised of the charge against him by the order to show cause, and he was given a full opportunity to present evidence in support of his claim that his conduct was excusable. Under all the circumstances, the court was justified in concluding that petitioner did not show a satisfactory excuse for his failure to appear as directed."

We take judicial notice of the fact that Judge Kelly is no longer a judge of the Eleventh Judicial District.

The portion of the order denying Potter the right to practice before Judge Kelly is, therefore, moot.

We remand the cause to the District Court for Hall County for implementation of Judge Kelly's order. The apology may be made to any of the district judges of the Eleventh Judicial District at the first opportunity.

AFFIRMED AND REMANDED FOR FURTHER PROCEEDINGS.

KRIVOSHA, C.J., BRODKEY, WHITE, and HASTINGS, JJ., concur in result.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL V. STUTZMAN, APPELLANT.

301 N.W.2d 104

Filed January 23, 1981. No. 43606.

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

Douglas D. DeLair for appellant.

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

WHITE, J.

Pursuant to the rules of the court, this case was assigned for disposition without oral argument. The sole assignment of error is an allegation that the sentence was excessive. For error plain on the face of the record, we reverse and remand.

The defendant was charged in the county court of Otoe County, Nebraska, on two counts: speeding and operating a motor vehicle while his driver's license was suspended. He appeals from the sentence on the driving while suspended charge, contending it was excessive. The entire dialogue between the court and the defendant as to his constitutional rights, at the

time of his appearance in the county court, is the following: "THE COURT: And, do you understand your constitutional rights, sir? MR. STUTZMAN: Yes, I do." The defendant thereupon pled no contest to the speeding charge, and the offense of operating a motor vehicle while the license was suspended was continued. The defendant appeared at a later time, again without counsel, and, on questioning by the trial court, waived counsel. The defendant was not advised of his right to appointed counsel if he was indigent. The defendant thereupon pled no contest and was sentenced to a term of 15 days in the county jail. On appeal to the District Court, the judgment of the county court was affirmed.

In *State v. Moore*, 203 Neb. 94, 277 N.W.2d 554 (1979), the defendant, who had appeared in the municipal court of the city of Omaha and was advised of his right to counsel, indicated, as here, that he might wish to contact private counsel and who appeared later at trial without counsel was nonetheless held not to have waived his right to counsel.

The record is absolutely silent and shows no attempt to comply with the standards required by our decision in *State v. Turner*, 186 Neb. 424, 183 N.W.2d 763 (1971), with respect to pleas of guilty.

In *State v. Moore, supra* at 98, 277 N.W.2d at 557, we quoted with approval from *Argersinger v. Hamlin*, 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530: "'We hold, therefore, that absent a knowing and intelligent waiver, no person may be imprisoned for any offense . . . unless he was represented by counsel at his trial.'" It was further stated in the dissent: "The court now holds that it was the duty of the trial court . . . to inquire into the financial circumstances of the defendant and ascertain whether the defendant could afford a lawyer." *Id.* at 100, 277 N.W.2d at 558. Such was the effect of the holding in that case.

The acceptance of the plea in the driving while suspended case was improper and void. The judgment of conviction is set aside and the case remanded.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLANT, V.
LEROY L. SUTTON, APPELLEE.

301 N.W.2d 335

Filed January 26, 1981. No. 43854.

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

Vincent Valentino, York County Attorney, for appellant.

Larry R. Baumann for appellee.

Heard before MCCOWN, J.

MCCOWN, J.

This is an appeal by the State pursuant to Neb. Rev. Stat. § 29-824 (Reissue 1979) from an order of the District Court for York County, Nebraska, suppressing a statement made by the defendant to a sergeant of the York police department. The statement was made in connection with a charge of burglary and another charge of unauthorized operation of a propelled vehicle.

The record shows that on June 3, 1980, at approximately 3 a.m., the defendant was arrested in York, Nebraska, and taken to the police station. Shortly after the defendant arrived at the police station, Sgt. Cobb gave him the *Miranda* warnings and told the defendant he wished to conduct an interview with him. The defendant refused to make a statement and requested an attorney. The defendant testified that while he was at the police station Sgt. Cobb pointed to some items of property and told the defendant that was the evidence he would use to charge the defendant's girl friend. Early on the morning of June 3 the defendant was taken to the sheriff's office and placed in a cell. He remained in jail until sometime in the late morning or early afternoon of June 4, 1980, when he was taken to the York County Court for bond setting.

At that time he again requested that counsel be appointed for him, and the county court entered an order appointing counsel for the defendant. The appointed counsel was not notified of the appointment until the next day.

The defendant was permitted to have visitors on the afternoon of June 4. When the defendant's girl friend arrived to visit him, she was arrested. When her parents arrived to make bond for her, they were also permitted to talk to the defendant and argued with him extensively during the visit. Following these events the defendant became upset about his girl friend and asked to speak with Sgt. Cobb. The sergeant came to defendant's cell and the defendant told Sgt. Cobb that he was concerned that his girl friend had been arrested and that he wanted to make a statement. The defendant asked the sergeant why his girl friend had been arrested, and the sergeant advised him that it was with reference to the incidents that the defendant was involved in and that if he wanted to make a statement it was entirely up to him, even if his girl friend might lie for him. Sgt. Cobb told the defendant that he did not want to play games with him and that he would come back later if the defendant wanted to give a statement.

When Sgt. Cobb returned at approximately 4:30 p. m. on the afternoon of June 4, he took the defendant to the sheriff's office where he again advised him of his *Miranda* rights. The defendant's testimony was that Cobb told him that if he gave a full statement they would go easier on his girl friend if he confessed and that it was these statements which induced defendant to make the statement. The defendant also testified that he would not have given the statement if they had not arrested his girl friend. Sgt. Cobb denied that he made any statements to the defendant promising to go easier on the defendant's girl friend and essentially denied making any promises of any kind to the defendant. Following the discussion be-

tween Sgt. Cobb and the defendant, the statement involved here was given.

Motion to suppress was filed and evidence was introduced and received at the hearing on the motion. On October 28, 1980, the District Court found that in consideration of the totality of the circumstances surrounding the statement given by the defendant on June 4, 1980, that statement was not the product of a free and rational choice, and that the State had failed to show beyond a reasonable doubt that the defendant made the statement freely and voluntarily. The motion to suppress was sustained and the State has appealed.

In determining whether the State has shown the admissibility of custodial statements by the requisite degree of proof, this court will accept the factual determination and credibility choices made by the trial judge unless they are clearly erroneous and in so doing will look to the totality of the circumstances. *State v. Irwin*, 191 Neb. 169, 214 N.W.2d 595 (1974).

Although the District Court stated incorrectly the standard of proof imposed upon the State, it clearly made its determination of voluntariness in consideration of the totality of the circumstances. There can be no doubt that after a defendant has invoked his right to remain silent and has requested counsel, the State bears a heavy burden of proving that the defendant thereafter knowingly, intelligently, and voluntarily waived his constitutional rights. Once the right to remain silent has been invoked, not only interrogation but its functional equivalent must cease. See *Rhode Island v. Innis*, 446 U.S. 291, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980). As the Supreme Court said in that case: "We conclude that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part

of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Id.* at 1689.

This court has held that showing the defendant police reports of other crimes was the functional equivalent of questioning if it occurred after the defendant had requested an attorney and invoked his right to remain silent. See *State v. Durand*, 206 Neb. 415, 293 N.W.2d 383 (1980).

In the present case the police officers could be said to have known that their actions, reflected by the evidence here, were likely to elicit an incriminating response from the defendant, and if they did, such actions might well be found to be the functional equivalent of interrogation. If inducements were offered to the defendant to make the statement, as he testified they were, that fact in itself would prevent the statement from being voluntary under any standard of proof. *State v. Smith*, 203 Neb. 64, 277 N.W.2d 441 (1979). In the totality of the circumstances the fact that the defendant first requested counsel and refused to make a statement more than 30 hours before these climactic events occurred, and that the events and discussions occurred several hours after counsel had been appointed for the defendant but before defendant had had any opportunity to talk to counsel, obviously compounds the State's already heavy burden of proving that the defendant's constitutional rights had been knowingly, intelligently, and voluntarily waived.

Whether the trial court determines that a statement was voluntary or involuntary, this court will accept the factual determination and credibility choices made by the trial court and that finding will not be set aside on appeal unless the finding is clearly erroneous. *State v. Irwin, supra; State v. Prim*, 201 Neb. 279, 267 N.W.2d 193 (1978).

The action of the District Court in finding that the

statement of June 4, 1980, was involuntarily given was not clearly erroneous and the order suppressing the statement is affirmed.

AFFIRMED.

OMAHA BANK FOR COOPERATIVES, A FEDERALLY CHARTERED INSTRUMENTALITY, APPELLANT, V. THE AETNA CASUALTY AND SURETY COMPANY, A CORPORATION, APPELLEE.

301 N.W.2d 564

Filed January 30, 1981. No. 42981.

1. **Bonds: Liability.** Generally a banker's blanket bond does not insure against legal liability of the named insured to a third party; the fact that the insured has not yet paid its third-party liability is not at all significant.
2. **Bonds: Torts.** The coverage of a banker's blanket bond, indemnifying against dishonest, fraudulent acts or failure to perform faithfully, does not insure the insured against the consequences of its own torts.
3. **Bonds: Liability: Attorney Fees.** The obligation of the insurer to indemnify the insured for court costs and reasonable attorney fees incurred and paid by the insured in defending a suit relates only to any suit or legal proceedings brought against the insured to enforce insured's liability or alleged liability on account of any loss, claim, or damage which, if established against the insured, would constitute a valid and collectible loss sustained by the insured under the terms of the bond.

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

Gerald P. Laughlin and Robert J. Banta of Baird, Holm, McEachen, Pedersen, Hamann & Haggart for appellant.

John R. Douglas and Ronald F. Krause of Cassem, Tierney, Adams, Gotch and Douglas for appellee.

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

PER CURIAM.

This is an action by plaintiff, Omaha Bank for Cooperatives (hereinafter Bank), for a declaratory judgment to determine the liability, if any, of the defendant, The Aetna Casualty and Surety Company (Aetna), under a banker's blanket bond written by Aetna to insure a group of farm credit banks, including the plaintiff Bank. Aetna filed a motion for summary judgment; the Bank filed a motion for partial summary judgment. Evidence was introduced. The District Court for Douglas County, Nebraska, found there was no issue as to any material fact, that Aetna had no liability for the Bank's claim, and rendered judgment accordingly. The Bank then appealed to this court.

There is no dispute on the facts, and the Bank's various assignments of error raise only one issue: whether the trial court wrongly interpreted the provisions of the bond.

The evidence shows that the Bank was sued in the courts of Iowa by one of its borrowers, Siouxland Cattle Cooperative, for damages allegedly caused by false representations made by one of the Bank's lending officers to Siouxland in connection with a loan. The executive committee of the Bank had agreed to make Siouxland loans not exceeding $1.4 million, the proceeds of which would be used to construct and commence operation of a 3,500-head feedlot. Robert Zuber, a Bank officer, allegedly promised Siouxland that the Bank would, in the future, make such additional loans to Siouxland as were necessary for expanding its feedlot to a 5,000-head capacity. Siouxland allegedly accepted the $1.4 million commitment in reliance on Zuber's promises. When Siouxland requested the Bank to make the future loans promised by Zuber, the Bank refused to make such loans. Siouxland asserted it was unable to repay its loan from the Bank because the 3,500-head feedlot was not economically viable. Siouxland claimed to have incurred

damages as a result of its reliance upon Zuber's promises. The Bank's executive committee had not approved any further financing and expansion of the feedlot; it would not have loaned the $1.4 million if it had known that additional money was, as alleged, required to make the feedlot economically feasible and thus enable Siouxland to repay.

The cause in Iowa was submitted to the jury on the bases of Zuber's alleged misrepresentations and promise of future loans. It was instructed on the elements of fraud and that the Bank was legally responsible for Zuber's conduct. The jury rendered a verdict for Siouxland. Upon appeal to the Iowa Court of Appeals, the jury was found to have been erroneously instructed in some respect and the case was remanded for a new trial. The case is still pending.

In the present declaratory judgment action, the Bank sought a declaration that in the event Siouxland secured a final judgment on the underlying claim, the Bank's satisfaction of such judgment would constitute a valid and collectible loss under the bond involved here, and that the Bank would be entitled to indemnification for all reasonable attorney fees and court costs incurred and paid in defense of the underlying claim.

The bond provided coverage for various types of losses. Coverage provision A, involved in this action, is: "Any financial loss through any dishonest, fraudulent or criminal act of any Employee, as hereinafter defined, wherever committed, or through the failure of any Employee to properly or faithfully perform the duties imposed upon or entrusted to such Employee under any act of Congress or rules and regulations of the Farm Credit Administration, or imposed upon or entrusted to such Employee by the Farm Credit Administration or any of the above named Insured or by the Chairman of the Presidents Committee of the Farm Credit Banks of Omaha, or the Farm Credit Board of the Omaha District; and also any loss of

Property as hereinafter defined, through any dishonest, fraudulent or criminal act of any Employee, wherever committed."

The bond also contained the following provision, which we refer to at this time because of contentions the Bank makes founded on the language of that provision: "The Underwriter will indemnify the Insured against court costs and reasonable attorneys' fees incurred and paid by the Insured in defending any suit or legal proceeding brought against the Insured to enforce the Insured's liability or alleged liability on account of any loss, claim or damage which, if established against the Insured, would constitute a valid and collectible loss sustained by the Insured under the terms of this bond. Such indemnity, shall be in addition to the amount of this bond."

Although the trial court did not issue a memorandum opinion stating the reasons for its determinations, both parties agree that the court founded its decision upon our holdings in *KAMI Kountry Broadcasting Co. v. United States F. & G. Co.*, 190 Neb. 330, 208 N.W.2d 254 (1973); *Foxley Cattle Co. v. Bank of Mead*, 196 Neb. 587, 244 N.W.2d 205 (1976); and *Bank of Mead v. St. Paul Fire & Marine Ins. Co.*, 202 Neb. 403, 275 N.W.2d 822 (1979).

The basic issue in this appeal is whether the quoted coverage under the banker's bond provides indemnity to the insured Bank for a judgment obtained against the Bank because of alleged fraud and misrepresentation by a Bank employee while dealing with a third party. Stated in another way, the question is whether or not the bond insured the Bank against the consequences of its own fraud.

The Bank, in its brief, asserts that our holdings in the above-cited cases are distinguishable from the present case and also cites a line of authority apparently contradictory to our holdings in the above cases. Aetna maintains that our holdings cited above are not distinguishable and govern the outcome in this case.

We will first discuss the Bank's assertion that the cases are distinguishable and not controlling here and the Bank's other contentions.

In *Foxley Cattle Co. v. Bank of Mead, supra*, Foxley obtained a judgment against the bank, founded upon a fraudulent representation made by one of the bank's employees which caused loss to Foxley. After obtaining the judgment, it brought garnishment proceedings against the Bank of Mead and St. Paul Fire & Marine Insurance Company as garnishee. Bond provisions in that case were, with one exception which we will mention later, virtually identical to the provisions here. We held that the legal liability of a named insured to a third party does not create legal liability of the insurer under a blanket honesty bond to such third party. For precedent, we relied upon *Ronnau v. Caravan International Corporation*, 205 Kan. 154, 468 P.2d 118 (1970), just as we did in deciding the earlier case of *KAMI Kountry Broadcasting Co. v. United States F. & G. Co., supra. Bank of Mead v. St. Paul Fire & Marine Ins. Co., supra*, involved essentially the same question as the Foxley case, except in that case the Bank of Mead, against whom the judgment had been obtained, brought the action to recover directly against St. Paul on the bond.

The differences which the Bank relies upon to distinguish this case from our above-mentioned prior decisions and make them inapplicable are the following: (1) In *Foxley Cattle Co. v. Bank of Mead, supra*, the Bank of Mead had not satisfied the judgment and therefore it had as yet suffered no loss. The Bank asserts, therefore, that Foxley merely stands for the proposition that the insured could not recover on the bond until it had paid the judgment. The Bank argues further that, as a result of the fraudulent transaction which gave rise to the judgment, the Bank of Mead had received money, thus the Bank of Mead had no actual loss but would be merely returning money it had fraudulently obtained from Foxley. The Bank

concludes that if the Bank of Mead had satisfied the tort liability to the third party, it could have recovered under the bond. (2) The bond in the present case contains the provision, which we earlier mentioned, that Aetna will indemnify the Bank against "court costs and reasonable attorneys' fees incurred and paid by the Insured in defending any suit . . . brought against the Insured to enforce the Insured's liability or alleged liability on account of any loss, claim or damage" which, if established, would constitute a valid and collectible loss sustained by the Bank under the bond. The Bank, with reference thereto, says, and we quote from the brief: "If that provision does not contemplate that the Bank may incur a loss covered by the Bond by reason of defending and satisfying a liability to a third party, it has absolutely no meaning or application at all." (Emphasized in brief.) (3) The faithful performance provision of the bond in the case at hand covers this claim because the alleged misrepresentation and false promise to the borrower was not only a fraud on the borrower, it was a breach of the employee's duty to the Bank and thus a fraud on the Bank. Therefore, the Bank argues, the faithful performance provision of the insuring clause earlier quoted (and not included in the insuring clause in *Foxley*) covers the losses resulting from any judgment against the Bank. The Bank cites three cases which it claims support the proposition.

An analysis of our opinions in the two *Bank of Mead* cases and the *KAMI* case demonstrate the claimed differences either do not exist or are not differences which make the case holdings inapplicable.

One of the specific holdings in *Foxley Cattle Co. v. Bank of Mead, supra,* was that legal liability of a named insured to a third party does not create legal liability of the insurer under a blanket bond to such third party. In so saying, we were referring to a specific part of the bond coverage which indemnified the insured for any loss through any "dishonest, fraudulent

or criminal act" by any employee. We cited and relied upon our prior holding in *KAMI Kountry Broadcasting Co. v. United States F. & G. Co.*, *supra*, and, as already noted, the Kansas case of *Ronnau v. Caravan International Corporation*, *supra*. We specifically quoted and relied upon language in *Ronnau*, saying: "'Under no reasonable construction of the bond can it be said to insure against Caravan's liability to third persons, nor can it be considered to be a third-party beneficiary contract. It was a contract designed solely for the benefit of the formal parties thereto, insuring against loss to Caravan of the described money or property due to the fraudulent or dishonest acts of its employees. . . . The protection of the bond was for the protection of Caravan alone. It was in the nature of a personal insurance contract. The appellant was not a party to the contract, was not named or referred to therein, and had no legal rights thereunder.'" *Foxley*, *supra* at 594, 244 N.W.2d at 209. We denied the garnishment.

The fact that the Bank of Mead had not, in fact, paid its third-party liability was not at all significant. This was made clear by the sequela to that case, *Bank of Mead v. St. Paul Fire & Marine Ins. Co.*, *supra*, in which St. Paul asserted the defense of res judicata. We noted the bank's response to that defense in these words: "The Bank of Mead contends that the judgment in the garnishment action only adjudicated the question of the liability of St. Paul to the bank's judgment creditor Foxley Cattle Company as a third-party beneficiary, and not the question of the liability of St. Paul to its own insured on the fidelity bonds." This court went on to state: "We do not agree with this contention. The basic and underlying issue involved in the garnishment action was whether the judgment obtained by the Foxley Cattle Company against the Bank of Mead constituted a loss of the nature insured against." *Bank of Mead v. St. Paul Fire & Marine Ins. Co.*, *supra* at 405, 275 N.W.2d at 824.

In *KAMI Kountry Broadcasting Co. v. United States F. & G. Co., supra*, the insured had paid the defrauded party its claim. We decided that case on alternative grounds, saying not only had KAMI paid a claim which it was not legally obligated to pay but even if it had been liable there was no coverage of the third-party claim. We said (after quoting from *Ronnau v. Caravan International Corporation, supra*): "It is true that in this case the action is brought by the indemnitee. However, the reasoning in the cited case applies and the situation here would be the same had the bank not been paid by KAMI and the bank sought recovery on the bond." *KAMI, supra* at 334-35, 208 N.W.2d at 256. In *KAMI*, we also cited a decision by the Supreme Court of Indiana, *National Surety Co. v. Fletcher Sav. & Tr. Co.*, 201 Ind. 631, 169 N.E. 524 (1930). Referring to the Indiana case, we noted: "In that case, insofar as it is applicable here, the Indiana court held the conduct of the manager of a corporation in making false representations to banks as to the financial condition of the corporation in order to secure corporate loans did not afford a basis for the bank to recover from the insurance company on the fidelity bond since the loss was not sustained by the corporation." *KAMI, supra* at 335, 208 N.W.2d at 257. Two of our judges dissented in the *KAMI* case. They raised exactly the same argument which the Bank makes in this case. It appears that we rejected that position. In both of the *Bank of Mead* cases which followed, the opinion was unanimous.

The Bank's second claimed distinction arises from the provision of the bond providing for payment of costs and attorney fees in defending third-party claims. It argues that this provision is meaningless unless there can be liability to a third party. There are a number of responses to this contention. First, the coverage involved here is that under coverage provision A which we have previously quoted. There are provisions in the bond at issue under which the insured

would be liable to third parties. These are indicated in the portion of the bond which defines the term "property." The term property, in addition to other things, includes: "[A]nd other similar instruments, documents or securities, in which the Insured has a pecuniary interest, *or which are held by the Insured as collateral or as bailee, trustee, custodian, agent, or in any other capacity, and whether or not the Insured is liable therefore* [sic]." (Emphasis supplied.) Second, the bond involved in the *Bank of Mead* cases contained the same provision relative to payment of attorney fees and costs as the bond here. We noted this in *Bank of Mead v. St. Paul Fire & Marine Ins. Co., supra,* where we said at 406-07, 275 N.W.2d at 825: "The Bank of Mead attempts to raise a new issue by alleging that although it has not paid the Foxley Cattle Company judgment, it has paid costs and expenses of $25,000 in defending the various suits resulting from the fraudulent misrepresentations of its bank president. The obligation of St. Paul to indemnify the insured for court costs and reasonable attorney's fees incurred and paid by the bank in defending a suit relates only to: '* * * any suit or legal proceedings brought against the insured to enforce insured's liability or alleged liability on account of any loss, claim or damage which, if established against the insured would constitute a valid and collectible loss sustained by the insured under the terms of this bond.'" We then said: "The trial court correctly held that since this court has previously determined that the Foxley Cattle Company judgment was not a 'valid and collectible loss sustained by the insured under the terms of the bond,' St. Paul is not obligated to pay costs or attorney's fees expended by the Bank of Mead in the defense of the prior actions."

The third distinction raised by the Bank relates to the provision for faithful performance. The bond in question does afford added coverage to the insured, i.e., it covers direct losses to the insured not only from

dishonest and fraudulent acts of its employees but also direct losses for failure to faithfully perform duties, but not involving fraud or dishonesty. The language from *Ronnau v. Caravan International Corporation, supra,* which we quoted with approval, indicates that faithful performance provisions were involved in that case. We have examined the three cases cited by the Bank in connection with this contention. They are: *Thurston County v. Chmelka,* 138 Neb. 696, 294 N.W. 857 (1940); *Castetter v. Barnard,* 98 Ind. App. 210, 183 N.E. 681 (1932); and *National Surety Co. v. State, ex rel.,* 90 Ind. App. 524, 161 N.E. 832 (1928). None of these cases held that the surety was liable, under this type of bond, to third parties because of unfaithful performance of duty by the insured's employee. None involved or covered losses sustained by the insured because of its tort liability to third parties. When we adopted the reasoning in *Ronnau v. Caravan International Corporation, supra,* we implicitly rejected the few cases to the contrary.

We hold that coverage provision A of the banker's bond, indemnifying against dishonest, fraudulent acts or failure to perform faithfully, does not insure the Bank against the consequences of its own torts.

In passing, we note that coverage provision A contains provisions requiring the employee to faithfully perform duties imposed or entrusted to such employee under any act of Congress or rules and regulations of the Farm Credit Administration, or entrusted to the employee by the Farm Credit Administration, or any of the named insureds as well as certain other identifiable entities. Those provisions are not involved in this case and, of course, we have no occasion to determine the effects of such provisions.

AFFIRMED.

McCOWN, J., dissenting.

The majority opinion holds that the coverage of a banker's blanket bond indemnifying the insured bank

against any financial loss through any dishonest, fraudulent, or criminal act of any employee or through the failure of any employee to properly or faithfully perform the duties imposed upon or entrusted to such employee by the named insured does not insure against the consequences of its own torts.

The majority opinion now extends that rule to a case in which the employee's representations which constituted the tort were made knowingly and intentionally; were fraudulent as to the employer insured as well as the third party; were unauthorized and beyond the scope of the employee's actual authority and in violation of the employer's specific policy; and where the conduct of the employee constituted a failure to properly and faithfully perform the duties imposed upon him by the insured. Any tort liability to the third party in this case rests solely on the knowing, willful, fraudulent, unauthorized, and unfaithful actions of the individual employee, and the tort liability of the insured is strictly vicarious because of the employee-employer relationship. The trial court specifically found that the employee failed to faithfully perform his duties and the majority opinion does not dispute the finding but simply holds that a loss resulting through a failure of an employee to faithfully perform duties is not a loss covered by the policy if it is based on a tort liability to a third party, whether the liability is vicarious or otherwise.

The majority opinion rests that holding upon the cases of *KAMI Kountry Broadcasting Co. v. United States F. & G. Co.*, 190 Neb. 330, 208 N.W.2d 254 (1973); *Foxley Cattle Co. v. Bank of Mead*, 196 Neb. 587, 244 N.W.2d 205 (1976); and *Bank of Mead v. St. Paul Fire & Marine Ins. Co.*, 202 Neb. 403, 275 N.W.2d 822 (1979). Those cases do not support the conclusion. In *KAMI* this court said: "The pleadings present the concise issue of whether the defendant is liable on the bond because KAMI, in order to avoid the loss of a customer, paid the note forged by its manager and

on which it was not legally liable and from which it did not receive the proceeds." *Id.* at 332, 208 N.W.2d at 255. The final paragraph of that case reads: "The original loss suffered by the bank in this case is not, under the facts alleged, converted into a direct loss by the insured because it determined to pay the bank on an obligation for which it was not liable." *Id.* at 335, 208 N.W.2d at 257.

In the present case there can be no doubt that legal liability on the bank arose from the judgment, and the trial court specifically found that if any judgment on Siouxland's claim becomes final and is paid by the bank, the bank will sustain a financial loss. The record supports those findings.

The *Bank of Mead* cases are clearly distinguishable. In the *Bank of Mead* cases the fraudulent representations made by the bank officer were fraudulent only with respect to the third party but were not fraudulent with respect to the employer bank and the bank received the proceeds resulting from the misrepresentations. In fact, the parties in the *Bank of Mead* cases stipulated that at the time the representations were made the officer was acting within the scope of his employment with the bank. There was no evidence that the officer did not have actual authority to do what he did nor that he knowingly exceeded his actual authority.

Courts have held that under a blanket indemnity bond against loss sustained due to dishonest, fraudulent, or criminal acts of employees, an employer insured may recover where the fraudulent misrepresentations made by its employee to a third party were fraudulent as to the employer insured as well as to the third party. See *National Surety Corporation v. Rauscher, Pierce & Co.*, 369 F.2d 572 (5th Cir. 1966).

An analysis of the cases indicates that where the dishonest or fraudulent acts of an employee as to a third party are authorized or permitted by the employer, and the loss arises out of the employer's liability to the

third party created by the acts, indemnity is not allowed. The cases also indicate that where unauthorized acts of an employee are dishonest or fraudulent as to a third party and such acts are also dishonest or fraudulent as to the employer insured, and loss results, indemnity may be allowed, even in the absence of a faithful performance provision.

Typical of similar statements elsewhere, Couch on Insurance § 46:101 at 190 (2d ed. 1965) states: "The loss covered by an employee's fidelity bond is not necessarily limited to loss directly resulting from the employee's act, such as embezzlement. To the contrary, it may include liability on the part of the insured resulting from the application of the principles of vicarious liability. In other words, a bond insuring against loss sustained by reason of dishonesty, fraud, embezzlement, etc., covers losses imposed by the creation of liability to third persons. To illustrate, it has been held that a loss may be suffered by the insured through being required to make good an obligation to a third person created by the fraud of its employee perpetrated on such third person."

In addition to all of the foregoing, in the *KAMI* and the *Bank of Mead* cases there was no policy coverage for losses resulting through the failure of an employee to properly or faithfully perform the duties imposed on or entrusted to such employee by his employer. The majority opinion does not dispute the finding but dismisses the issue on the ground that cases cited by the appellant "did not hold that the surety was liable to third parties because of unfaithful performance of duty by the insured's employee." Neither does the present case involve an attempt to hold the surety liable to a third party because of unfaithful performance of duty by the insured's employee. The present case is simply a declaratory judgment action by the insured against the insurance company to determine whether or not the insured has coverage if a loss is finally incurred in this case. In

addition, it should be reiterated that the trial court specifically found that Zuber not only committed fraudulent acts but that he specifically failed to faithfully perform his duties.

Fidelity bonds conditioned upon the faithful performance of duties by a bank officer have been held to be broken by his violation of any valid bylaw which the bank may adopt, and has also been held not only to guarantee the personal honesty of the officer but also his competency, efficiency, and diligence in the discharge of his duties. See, 10 Am. Jur. 2d *Banks* § 87 (1963); 35 Am. Jur. 2d *Fidelity Bonds and Insurance* § 21 (1967). See, also, *Thurston County v. Chmelka*, 138 Neb. 696, 294 N.W. 857 (1940); *Fiala v. Ainsworth*, 63 Neb. 1, 88 N.W. 135 (1901).

Finally, the majority opinion holds that an indemnity insurance policy in which any ambiguity is to be construed against the insurer which provides coverage for "any financial loss through any dishonest, fraudulent, or criminal act of any employee . . . or through the failure of any employee to properly or faithfully perform the duties imposed upon or entrusted to such employee by . . . the named insured . . ." does not insure against the consequences of the insured's own vicarious tort liability in any case. The bank paid an additional premium for the faithful performance coverage; there was an indisputable failure to perform; and the insured had reasonable expectations of coverage under such circumstances. "The contract of a surety for compensation receives an interpretation in favor of objectively reasonable expectations of the obligee." *Cornett v. White Motor Corp.*, 190 Neb. 496, 501, 209 N.W.2d 341, 344 (1973). The interpretation in this case was quite the contrary.

The District Court's order granting summary judgment to the defendant insurance company should have been reversed.

WHITE, J., joins in this dissent.

RONALD L. REED, APPELLANT, V. ROBERT PARRATT ET AL., APPELLEES.

301 N.W.2d 343

Filed January 30, 1981. No. 42991.

1. **Statutes.** Specific statutory provisions relating to a particular subject control over general provisions.
2. **Administrative Law: Prisons: Disciplinary Proceedings.** The Nebraska Administrative Procedure Act has no application to prison disciplinary proceedings under Neb. Rev. Stat. §§ 83-4,109 to 83-4,123 (Reissue 1976).
3. **Prisons: Disciplinary Proceedings.** Disciplinary procedures in penal institutions are summary in nature and the full panoply of rights due a defendant in a criminal prosecution are not applicable to a prison disciplinary proceeding. Only the minimum requirements of procedural due process appropriate for the circumstances must be observed.
4. **Administrative Law: Prisons: Disciplinary Proceedings.** A prison disciplinary proceeding under Neb. Rev. Stat. §§ 83-4,109 to 83-4,123 (Reissue 1976) is not a contested case under the Nebraska Administrative Procedure Act.

Appeal from the District Court for Lancaster County: HERBERT A. RONIN, Judge. Reversed and remanded.

Dennis R. Keefe, Lancaster County Public Defender, and Richard L. Goos, for appellant.

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

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

BOSLAUGH, J.

The petitioner, Ronald L. Reed, escaped from the Lincoln Work Release Center on October 26, 1976. The facts relating to the escape are set out in *State v. Reed*, 205 Neb. 45, 286 N.W.2d 111 (1979), in which the conviction and sentence for the escape were affirmed.

On February 28, 1978, after a hearing before the Nebraska Penal Complex Adjustment Committee,

the petitioner was ordered to spend 6 months in the Nebraska Penal Complex Adjustment Center and all of his accumulated good time was forfeited. Upon appeal to the Nebraska Penal Complex Appeal Board, the decision of the disciplinary committee was affirmed.

On May 8, 1978, the petitioner commenced this action in the District Court against the warden of the penitentiary, seeking a review of the decision of the disciplinary committee and a declaratory judgment that the respondents had violated the petitioner's constitutional rights and the rules and regulations of the Department of Correctional Services. The petitioner also sought injunctive relief to restore his good time and expunge matters relating to his escape from the prison records. The petition alleged the District Court had jurisdiction of the action under "section 84-917 to 84-919 of Nebraska Revised Statutes, 1943." The statute referred to is the Nebraska Administrative Procedure Act.

The respondents moved to dismiss the action on the ground that the District Court had no jurisdiction of the subject matter of the action.

The trial court found that the petitioner had no right to relief under the Nebraska Administrative Procedure Act and dismissed the petition. The petitioner has appealed.

In 1976, the Legislature enacted a statute providing for disciplinary procedures in adult institutions administered by the Department of Correctional Services. See Neb. Rev. Stat. §§ 83-4,109 to 83-4,123 (Reissue 1976). Section 83-4,109 provides specifically: "Disciplinary procedures in adult institutions administered by the Department of Correctional Services shall be governed by the provisions of sections 83-4,109 to 83-4,123."

The act provides that the department shall promulgate rules and regulations relating to disciplinary matters and grievance procedures. Section 83-4,115

provides that "Any review of disciplinary action imposed upon any person shall be pursuant to the provisions of sections 83-4,109 to 83-4,123." There is no provision in the act for direct judicial review of disciplinary action imposed pursuant to the act, but § 83-4,123 provides that an inmate's right of free access to the courts in any cause of action arising under §§ 83-4,109 to 83-4,123 shall not be impaired or restricted.

It is a general principle that specific statutory provisions relating to a particular subject control over general provisions. *Lentz v. Saunders*, 199 Neb. 3, 255 N.W.2d 853 (1977). Sections 83-4,109 to 83-4,123 constitute a special act relating to disciplinary procedures in adult correctional institutions and control over the more general provisions which are found in the Administrative Procedure Act.

The Administrative Procedure Act is a general act which prescribes procedures for proceedings before many state agencies. Generally, these proceedings involve the rights or privileges of members of the general public and are not related to the internal operation of an institution. Although there is general language in the Administrative Procedure Act upon which an argument may be based that the act is applicable in cases such as this, we do not find the argument persuasive.

It has been recognized that disciplinary procedures in penal institutions are summary in nature and the "full panoply of rights" due a defendant in a criminal prosecution are not applicable to a prison disciplinary proceeding. Only the minimum requirements of procedural due process appropriate for the circumstances must be observed. *Wolff v. McDonnell*, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974).

In the *Wolff* case, the U.S. Supreme Court further recognized that disciplinary proceedings are not adversary proceedings in the nature of a criminal trial and care must be taken to prevent such proceed-

ings from becoming unmanageable. In short, a prison disciplinary proceeding has but few of the characteristics of a "contested case" under the Administrative Procedure Act.

Although there appears to be little precedent in this area, so far as we have been able to determine there is no case which has held that administrative procedure laws are applicable to prison disciplinary proceedings.

A recent text, Hermann & Haft, Prisoners' Rights Sourcebook 248 (1973), states that no case has held the federal Administrative Procedure Act applicable to action taken by the federal Bureau of Prisons. In *Lesser v. Humphrey*, 89 F. Supp. 474 (M.D. Pa. 1950), the court held the Administrative Procedure Act was not applicable to a proceeding before the good time board at a federal correctional institution.

Although the District Court was correct in holding that the petitioner had no right to judicial review of the disciplinary proceeding under the Administrative Procedure Act, it is not clear from the record that the petitioner had no right to declaratory judgment relief. Such relief, if available at all, would necessarily be limited in nature since such an action is a collateral attack upon the decision of the disciplinary committee and any issue concerning the fact of the escape was fully litigated in the criminal prosecution.

We reverse the judgment of the District Court and remand the cause for the limited purpose of determining if the petitioner has any right to declaratory judgment relief.

REVERSED AND REMANDED.

WHITE, J., concurs in result.

KRIVOSHA, C.J., dissenting

I must respectfully dissent from the majority's opinion in its holding that the Nebraska Administrative Procedure Act, being Neb. Rev. Stat. §§ 84-901 to

84-919 (Reissue 1976), does not apply to a prisoner's appeal of disciplinary action taken by the Nebraska Penal Complex Appeal Board.

The majority suggests that while there is general language in the Administrative Procedure Act upon which an argument may be based that the act is applicable, the majority does not find the argument persuasive. I find that the argument is not only persuasive but the result required by the clear language of the act. The State conceded during oral argument before this court that the Department of Correctional Services was a state agency and that the rules promulgated by the Department of Correctional Services involved in this action had been filed with the Revisor of Regulations and Secretary of State, pursuant to Neb. Rev. Stat. § 84-902 (Reissue 1976).

Section 84-917(1) clearly and unequivocally provides: "*Any person* aggrieved by a final decision in a *contested case*, whether such decision is affirmative or negative in form, is entitled to judicial review under sections 84-917 to 84-919. Nothing in this section shall be deemed to prevent resort to other means of review, redress, or relief provided by law." (Emphasis supplied.) And § 84-901(2) defines rule to mean: "[a]ny rule, regulation, or standard issued by an agency, including the amendment or repeal thereof whether with or without prior hearing and designed to implement, interpret, or make specific the law enforced or administered by it or governing its organization or procedure but not including regulations concerning the internal management of the agency not affecting private rights, private interests, or procedures available to the public, and not including permits, certificates of public convenience and necessity, franchises, rate orders, and rate tariffs, and any rules of interpretation thereof, and for the purpose of this act *every rule which shall prescribe a penalty shall be presumed to have general applicability or to affect private rights and interests* . . . ." (Emphasis supplied.)

It seems clear beyond question that the order of the appeal board which found Reed guilty of escape and ordered that he lose all previously acquired good time and spend 6 months in the Nebraska Penal Complex Adjustment Center is a penalty and does, indeed, affect private rights.

The provisions of Neb. Rev. Stat. §§ 83-4,109 to 83-4,123 (Reissue 1976) do not in any manner affect the right of appeal. Those specific sections simply prescribe the procedures under which the hearings before the prison boards shall be conducted in the first instance. That is, in effect, no different than a host of other sections of our statutes prescribing procedures to be followed by various agencies in the first instance. The internal review of disciplinary action may very well, in the first instance, be pursuant to the provisions of §§ 83-4,109 to 83-4,123. One can very easily harmonize the provisions of §§ 83-4,109 to 83-4,123 and the provisions of §§ 84-901 to 84-919, the former applying to hearings before the agency and the latter applying to appeals before the court from the action of the agency. They are not in any manner inconsistent or contrary one to the other.

While it may very well be that no court has heretofore required that provisions of the Administrative Procedure Act be made available to prisoners, it seems clear to me that our Legislature has so provided and this court cannot take it away. If the right of a prisoner to appeal from the action of the disciplinary review board to the court pursuant to the Administrative Procedure Act is to be denied, it must be done so by the Legislature in providing a specific exception to the Nebraska Administrative Procedure Act.

I would have held that the act applied; that the court had jurisdiction of the matter; and the inmate was entitled to a verbatim transcript of the proceedings before the prison disciplinary committee.

BRODKEY, J., joins in this dissent.

STATE OF NEBRASKA EX REL. PAUL L. DOUGLAS ET AL., APPELLEES, V. FAITH BAPTIST CHURCH OF LOUISVILLE, NEBRASKA, A CORPORATION, ET AL., APPELLANTS.

301 N.W.2d 571

Filed January 30, 1981. No. 43029.

1. **Equity: Injunctive Relief.** A court of equity may properly afford injunctive relief where there has been a continuing and flagrant course of violations of the law, even though these acts may be subject to criminal sanctions.
2. **Schools and School Districts.** The mandate provided for in Neb. Rev. Stat. § 79-312 (Reissue 1976) that the State Department of Education prescribe a course of study for public schools is met when such department furnishes a list of subjects required to be taught, together with an explanation of the aims sought to be accomplished by the individual program.
3. ——. There is no absolute duty on the part of county superintendents to furnish written or printed questions to school districts to be used for review of the various courses of study. Neb. Rev. Stat. § 79-312 (Reissue 1976) leaves this decision up to the county superintendent as in his judgment may be necessary or expedient.
4. ——. A state agency which requires, as a minimum for certification of an individual, the maximum requirement permitted by statute does not violate the limiting terms of such statute.
5. ——. The State, having a high responsibility for the education of its citizens, has the power to impose reasonable regulations for the control and duration of basic education.
6. ——. A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations.
7. ——. A state always has a legitimate concern for maintaining minimum standards in all schools it allows to operate.
8. ——. The State has a compelling interest in the quality and ability of those who are employed to teach its young people, and a requirement that such teacher possess an appropriate baccalaureate degree is neither arbitrary nor unreasonable and is a reliable indicator of the probability of success as a teacher.
9. ——. Although parents have a right to send their children to schools other than public institutions, they do not have the right to be completely unfettered by reasonable government regulations as to the quality of the education furnished.

Appeal from the District Court for Cass County: RAYMOND J. CASE, Judge. Affirmed.

David C. Gibbs, Jr., and Charles E. Craze of Gibbs & Craze and Meyer Coren of Viren, Epstein, Leahy & Coren for appellants.

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

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

HASTINGS, J.

This was an action brought by the State of Nebraska on the relation of the Attorney General against Faith Baptist Church of Louisville, Nebraska, and certain individuals being officers and employees of the principal defendant. It sought to enjoin the operation of an elementary and secondary school by the defendants because there had been no compliance with the school laws of the State of Nebraska. From a judgment granting such relief, the defendants have appealed to this court. Upon consideration de novo on the record, we affirm.

The defendants claim that the trial court erred in granting the injunction because: (1) Criminal sanctions are the remedy prescribed by the applicable statutes rather than equitable relief; (2) The State of Nebraska through the State Department of Education has failed to abide by the same statutes and rules that it asks to be enforced against the defendants; (3) Enforcement of the school laws violates the defendants' ninth amendment rights to bear, raise, and educate their children as they see fit; and (4) Enforcement of the school laws violates the defendants' first amendment rights as to freedom of religion.

As a part of the factual background, it should be helpful to set out certain basic statutory provisions. Neb. Rev. Stat. § 79-201 (Reissue 1976) requires that every person having charge or control of any child between the ages of 7 and 16 "shall cause such child

to attend regularly the public, private, denominational, or parochial day schools each day that such schools are open and in session . . . ." Among other things, Neb. Rev. Stat. § 79-328 (Reissue 1976) requires that the State Board of Education shall have the power and duty to provide "supervision of the state school system"; to "establish . . . procedures for classifying, approving, and accrediting schools . . . for the continued legal operation of all schools"; and to "cause to be published laws and regulations governing the schools." In addition, the State Board of Education has caused to be promulgated and published Rule 14, which contains regulations and procedures for approving the continued legal operation of all schools. That rule provides: "Only school systems approved for continued legal operation by the State Board of Education are considered to be providing a program of instruction which is in compliance with the compulsory attendance laws." It goes on to set forth what the curriculum shall consist of, and prescribes for the use of necessary materials and equipment, the length of the school day and year, and requirements relating to health and safety. Additionally, it requires the filing of a "Fall Approval Report" and an "Annual Term Summary Report," and, in order for a school to become approved and remain so, it mandates that each professional staff member employed by the school must "hold a valid Nebraska certificate or permit issued by the State Board of Education legalizing him or her to teach the grades or subjects to which elected." Rule 21, also adopted by the State Board of Education, provides rules for the issuance of certificates and permits to teach in Nebraska schools. Generally speaking, in order to qualify for a regular certificate, it is necessary that the applicant have obtained a baccalaureate degree.

On August 29, 1977, the defendants began operating the Faith Christian School in Louisville, Nebraska. The curriculum employed by this school is that sup-

plied by Accelerated Christian Education (A.C.E.), and consists of a series of booklets called Packet of Accelerated Christian Education (PACE), which contain instructional information and self-test questions in various subjects and at different instructional levels. Each student works at his or her own speed, and, after completing each PACE and attaining a grade of at least 80 percent on the self test and the PACE test given under the supervision of the supervisor, moves on to the next sequentially numbered PACE. The teachers as such are supervisors who administer the tests and are available for helping a particular student who may be having difficulty. Their function is not to teach, but to monitor or supervise. The instruction is Bible-oriented. For example, PACE 25 in social studies is devoted to the first chapter of *Genesis*, and its outline topics include The Creation of the Heavens and the Earth, The Seven Days of Creation, and the Garden of Eden. PACE 7 in mathematics consists of problems in simple addition and subtraction, interspersed with biblical sayings and citations. One gets the impression that the method of instruction is not unlike a correspondence course, with the addition of helping supervisors.

In spite of requests from the various local and state school officials, the defendants have refused to furnish "third-day reports" containing the names and addresses of all students enrolled in their school, as required by Neb. Rev. Stat. § 79-207 (Reissue 1976). This is necessary so as to check parents' compliance with compulsory attendance laws. They have stated that they have not and will not request approval of their A.C.E. program, even though they have been told that it would be approved, and they have neglected and refused to employ accredited teachers and to seek approval from the State of Nebraska to operate their school. It is their position that the operation of the school is simply an extension of the ministry of the church, over which the State of Nebraska has no authority to approve or accredit.

According to the defendants, as expressed by defendant Everett Sileven, pastor of the defendant church, a Christian education is mandated by the Bible. He cites *Deuteronomy* 6:6,7, which, according to Today's English Version, states: "Never forget these commands that I am giving you today. Teach them to your children. Repeat them when you are at home and when you are away, when you are resting and when you are working." *Proverbs* 22:6 says: "Teach a child how he should live, and he will remember it all his life." And, although the record indicates a citation to *Ephesians* 5:4, undoubtedly the reference is to Chapter 6: "Parents, do not treat your children in such a way as to make them angry. Instead, raise them with Christian discipline and instruction." Their belief is that teaching is a way of life and not simply a 5-hours-a-day, 5-days-a-week proposition. It is the defendants' belief that the public schools of today are overrun with an increase in crime, drug and alcohol addiction, teacher assaults, vandalism, and disrespect for authority and property. Additionally, and basically, according to Mr. Sileven, secular humanism is the basic philosophy of the public educational system, which is in direct opposition to the defendants' belief in biblical Christianity. It is because of these beliefs that the Faith Christian School was organized. Defendants further maintain that, because their philosophy is Christian and that of the State Department of Education is not, the latter is not capable of judging the philosophy of the defendants' school. Finally, because the state school laws require inspection of the schools by the county superintendent, the defendants cannot submit to such control because the State has no right to inspect God's property.

According to the testimony of Stephen W. Sturtevant, a certified teacher currently employed by the Fletcher Christian Academy at Axtell, and a teacher for a total of 8½ years, he had examined the achievement tests administered to the Faith Christian School students.

Although there is no underlying basis in the record for any such conclusion, he stated as his opinion that the students at the defendant school were accomplishing the average amount of progress that most students probably were in Nebraska schools. Other witnesses, who qualified as experts in the field of education, ventured the opinion that the mere fact that a person held a baccalaureate degree did not mean that he or she would be a good teacher. Additional facts will be set forth throughout this opinion as may be required in discussing the various assignments of error.

Defendants' first assignment of error requires little comment. It is true that Neb. Rev. Stat. §§ 79-216 and 79-1707 (Reissue 1976) provide for penal sanctions in the event of violations of the various statutory provisions relating to compulsory education and operation of private, denominational, and parochial schools. However, that does not foreclose the possibility of injunctive relief. "[A] court of equity may properly afford injunctive relief where there has been a continuing and flagrant course of violations of the . . . law even though these acts may be subject to criminal prosecution." *State ex rel. Meyer v. Weiner*, 190 Neb. 30, 34, 205 N.W.2d 649, 651 (1973).

Defendants complain that the State of Nebraska has failed to abide by the same statutes and rules that it asks to be enforced against these defendants. Specifically, it alleges that the State Department of Education has neglected to supply county superintendents with a course of study as prescribed by Neb. Rev. Stat. § 79-312(6) (Reissue 1976), and has continued to increase the standards for teacher certification, contrary to Neb. Rev. Stat. § 79-1247.03 (Reissue 1976). Section 79-312 does provide, in part, that "The county superintendent shall: . . . (6) furnish to each district in the county a copy of the course of study for public schools, as prescribed by the State Department of Education . . . ." By Rule 14, the State Department of Education has set forth in detail the subjects re-

quired to be taught in both elementary and secondary schools, together with an explanation of the aims sought to be accomplished by each individual program. Implementation of the instructional program is left to the local school authorities to develop in order to meet the unique goals of the particular school community. The action of the state department seems to comply with the statutory mandate.

The standardized tests which the defendants complain have not been made available to all Nebraska students are actually the responsibility of the county superintendent to furnish, but are not mandatory. "The county superintendent shall: . . . furnish to each district . . . such written or printed questions for reviews based upon such course of study *as in his judgment are necessary or expedient.*" § 79-312(6) (emphasis supplied). The tests which the defendants complain have not been made available, contrary to law, are the responsibility of the county superintendent, to be guided by "as in his judgment are necessary or expedient."

As to teacher certification, the defendants point to § 79-1247.03, which states that the purpose of the so-called teacher certification law is "to provide more flexibility in the certification of qualified teachers . . . and not to increase any requirements for certificates to teach." Neb. Rev. Stat. § 1247.05 (Reissue 1976) then grants broad powers to the State Board of Education to adopt rules and regulations governing the issuance of teaching certificates to be based upon "earned college credit" as well as other factors deemed to be important to a determination of fitness to teach. Neb. Rev. Stat. § 79-1247.06 (Reissue 1976) mandates that the maximum educational requirement which the board may require for the first issuance of a teaching certificate shall be a baccalaureate degree. Interestingly enough, that section as originally enacted in 1963, along with the other sections pertaining to teacher certification, allowed as a maximum to teach

elementary grades in Class I and Class II schools the completion of 2 years of a 4-year program of college preparation. The section as it presently exists was enacted in 1976, which eliminated the reference to the 2-year requirement. To read the teacher certification law, as the defendants would have us do, would mean that the State Board of Education could never increase requirements for certification beyond that which it imposed in 1963. We reject that argument as wholly without foundation. The language in § 79-1247.03 was merely declarative of the Legislature's purpose in enacting the series of statutes. It has been modified by deletion of a portion of § 79-1247.06 as set out above. The state board, by enacting minimum requirements equal to, but not in excess of, the maximum provided by law has not violated that particular statute.

Defendants' contention as to violation of their first and ninth amendment rights will be considered together, because the question involved in both is the extent to which the State can, if at all, restrict these rights in the interest of assuring all children a quality basic education.

At first blush, it would appear that the case of *Meyerkorth v. State*, 173 Neb. 889, 115 N.W.2d 585 (1962), is squarely in point and dispositive of the case, to the prejudice of the defendants. There the issue involved was the constitutionality of various statutes of the State of Nebraska concerning compulsory school attendance, certification of teachers, and supervision of nonpublic schools, the forerunners of the statutes involved here. The plaintiffs there, seeking a declaration that those laws were unconstitutional as a violation of their first amendment rights, raised arguments similar to those with which we are here faced: "The plaintiffs argue that the certification of teachers . . . and the minimal school standards provided for . . . above set forth, and the regulations promulgated by the Nebraska Department of Education, have no relevance to the interests of the state in children not edu-

cated in public, tax-supported schools; that none of these . . . have any materiality to testing children educated in parochial schools to ascertain if they know the language of their country, understand its government, and are able to participate in the democratic process; and that the above-mentioned sections and regulations infringe upon the rights of the parent and the constitutional right guaranteed to the citizens of the State of Nebraska." *Meyerkorth* at 898, 115 N.W.2d at 590.

This court reviewed the holding of the U.S. Supreme Court in *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923), and cited the following language: "'The power of the State to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned.'" *Meyerkorth* at 900, 115 N.W.2d at 591. What the court, in *Meyer*, did hold was that the State of Nebraska could not prevent the teaching of the German language as an additional elective subject.

In *Meyerkorth*, we also cited *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925), which struck down an Oregon law requiring all children to attend a public school. We referred generally to certain language from that case which we now set forth verbatim directly from *Pierce:* "No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise, and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare." 268 U.S at 534.

This court concluded by saying: "As we view the statutes here involved, there is nothing arbitrary, unreasonable, or unconstitutional relating to the

qualifications of teachers to teach in the parochial, denominational, private, or public schools of this state or with the requirements of compulsory education and attendance at such schools." *Meyerkorth* at 904, 115 N.W.2d at 593.

However, it is the defendants' position that the test of reasonableness as declared in *Meyerkorth* must give way to one of compelling state interest, which, they allege, is the rule announced in *Wisconsin v. Yoder*, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972). In that case, the defendants were members of the Old Order Amish religion, and, as such, did not believe in conventional education for their children beyond the eighth grade. It was their contention that because the children would return to the isolated agrarian community of their families, additional formal education was to be supplanted by vocational instruction received "on the job." As a result, they were prosecuted for failure to comply with Wisconsin's compulsory school-attendance law, which required attendance by children until they reached the age of 16. The trial court, although finding that the law "'does interfere with the freedom of the Defendants to act in accordance with their sincere religious belief' it also concluded that the requirement of high school attendance until age 16 was a 'reasonable and constitutional' exercise of government power . . . ." 406 U.S. at 213. However, the convictions were reversed by the Wisconsin Supreme Court, which latter judgment was affirmed by the U.S. Supreme Court.

Nevertheless, the *Yoder* court did recognize the principle upon which our decision in *Meyerkorth* was based. "There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education." 406 U.S. at 213. However, it went on to say: "It follows that in order for Wisconsin to compel school attendance beyond the eighth grade against a claim that such attendance

interferes with the practice of a legitimate religious belief, it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause." 406 U.S. at 214.

In dealing with the question of the sincerity of the religious beliefs of the Amish, the *Yoder* court pointed out that "A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations . . . ." 406 U.S. at 215. Although it is always difficult and perhaps inappropriate to challenge what others say their religious beliefs may be (in the case under consideration the defendants simply state that they believe they are biblically mandated to teach their children themselves), the *Yoder* court then encountered no such problem. "In sum, the unchallenged testimony of acknowledged experts in education and religious history, almost *300 years* of consistent practice, and strong evidence of a sustained faith pervading and regulating respondents' entire mode of life support the claim that enforcement of the State's requirement of compulsory formal education after the eighth grade would gravely endanger if not destroy the free exercise of respondents' religious beliefs." 406 U.S. at 219 (emphasis supplied). Although the record in the case before us demonstrates an educational practice of less than 2 years' duration, for the sake of this decision we assume the sincerity of their religious beliefs.

The *Yoder* court then introduced the "compelling interest" standard. "We turn, then, to the State's broader contention that its interest in its system of compulsory education is so compelling that even the established religious practices of the Amish must give way. . . .

"The State advances two primary arguments in support of its system of compulsory education. It

notes . . . that some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence. Further, education prepares individuals to be self-reliant and self-sufficient participants in society. We accept these propositions." 406 U.S. at 221. But then the court reached the heart of the basis for its decision: "However, the evidence adduced by the Amish in this case is persuasively to the effect that an additional one or two years of formal high school for Amish children in place of their long-established program of informal vocational education would do little to serve those interests . . . . It is one thing to say that compulsory education for a year or two beyond the eighth grade may be necessary when its goal is the preparation of the child for life in modern society as the majority live, but it is quite another if the goal of education be viewed as the preparation of the child for life in the separated agrarian community that is the keystone of the Amish faith." 406 U.S. at 222.

The majority opinion in *Yoder*, then, although employing a "compelling interest" rule, nevertheless was greatly, if not completely, influenced by the process of balancing the specific interest of the state in 1 or 2 years of education beyond the eighth grade for students not expected to enter the mainstream of modern-day life against competing religious principles and practices nearly 3 centuries old. It is somewhat difficult to develop a generalized rule from the court's specific holding. The concurring opinion of Mr. Justice White, with whom, however, Mr. Justice Brennan and Mr. Justice Stewart joined, is more illuminating of the rule in its general application. "This would be a very different case for me if respondents' claim were that their religion forbade their children from attending any school at any time *and from complying in any way with the educational standards set by the State.*" 406 U.S. at 238 (emphasis sup-

plied). And continuing: "As recently as last Term, the Court re-emphasized the legitimacy of the State's concern for enforcing minimal educational standards, *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971)." (In *Lemon v. Kurtzman*, 403 U.S. 602, 613, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971), the court said: "A State always has a legitimate concern for maintaining minimum standards in all schools it allows to operate.") Mr. Justice White goes on to say in *Yoder*: "*Pierce v. Society of Sisters* [citations omitted] lends no support to the contention that parents may replace state educational requirements with their own idiosyncratic views of what knowledge a child needs to be a productive and happy member of society; in *Pierce*, both the parochial and military schools were in compliance with all the educational standards that the State had set, and the Court held simply that while a State may posit such standards, it may not pre-empt the educational process by requiring children to attend public schools." 406 U.S. at 239.

Defendants cite *State v. Whisner*, 47 Ohio St. 2nd 181, 351 N.E.2d 750 (1976), as supporting their position, an opinion by Celebrezze, J., who relies in no little measure upon the writings of Thoreau: "'If a man does not keep pace with his companions, Perhaps it is because he hears a different drummer. Let him step to the music which he hears, However measured or far away.'" *Id.* at 216, 351 N.E.2d at 771. Of course, it was just such philosophical prose which the *Yoder* court rejected as the basis for its judicial pronouncements: "Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses." 406 U.S. at 216. Also, the Ohio court

set forth phrase after phrase wherein it pointed out that the Board of Education recited how the inspections shall be conducted; not only how long the instructional day should be but what percentage shall be devoted to each particularized course, leaving no time for biblical and spiritual training; required a minimum number of pupils; required that "all activities *shall conform to policies adopted by the board of education*" (emphasis supplied); that there shall be cooperation and interaction between the school and the community; that each school shall give evidence of "cooperative assessment of community needs to determine the purposes . . . for future educational improvement"; that child study information shall not be released to the parents; and that organized group life shall act in accordance with established rules of social controls. We would be inclined to agree with the Ohio court's statement that "these standards are so pervasive and all-encompassing that total compliance with each and every standard by a non-public school would effectively eradicate the distinction between public and non-public education, and thereby deprive these appellants of their traditional interest as parents to direct the upbringing and education of their children." 47 Ohio St. 2d at 211-12, 351 N.E.2d at 768. However, such requirements are not found among the statutory mandates of our laws.

Finally, defendants refer us to *Kentucky State Bd., Etc. v. Rudasill*, 589 S.W.2d 877 (Ky. 1979), in which the author of that opinion, testing school certification statutes against a constitutional provision which provided that "nor shall any man be compelled to send his child to any school to which he may be conscientiously opposed," wrote the following: "Certainly, the receipt of 'a bachelor's degree from a standard college or university' is an indicator of the level of achievement, but it is not a sine qua non the absence of which establishes that private and parochial school teachers are unable to teach their students to intelli-

gently exercise the elective franchise." 589 S.W.2d at 884. However, to the contrary is an opinion from the Supreme Court of Alaska which held that a requirement that an applicant must have graduated from a law school accredited by the American Bar Association as a prerequisite for admission to the bar of Alaska did not deprive the applicant of his constitutional rights. "While there is some risk that a person could be deprived of the opportunity to practice law by reason of the bar rule, even though he is competent to practice law, we believe that such a risk is outweighed by the difficulty which would be presented by making a case-by-case determination of whether the education afforded by an unaccredited law school was comparable to that given by an accredited school. We have already noted the difficulty of employing such an alternative procedure.

"The ABA system of accreditation is sophisticated and time-consuming. We can think of no effective substitute which could be developed at the state level without diverting impractical amounts of manpower and money into such an inquiry. Given the strong state interest in assuring that those entering the practice of law have had suitable training in adequate institutions, and considering the precedent from other jurisdictions, we are of the opinion that the Alaska bar rule requirement is valid and does not violate the due process clause of either the Alaska Constitution or the United States Constitution." *Application of Urie*, 617 P.2d 505, 508 (Alaska 1980).

We are not suggesting as an absolute that every person who has earned a baccalaureate degree in teaching is going to become a good teacher, any more than one who has obtained the appropriate training and education will become a good engineer, lawyer, beauty operator, welder, or pipefitter. However, we think it cannot fairly be disputed that such a requirement is neither arbitrary nor unreasonable; additionally, we believe it is also a reliable indicator of the

probability of success in that particular field. We believe that it goes without saying that the State has a compelling interest in the quality and ability of those who are to teach its young people.

The cases we have cited from the Supreme Court of the United States should leave no doubt as to the critical interest which the State has in the quality of the education provided its youth. Although parents have a right to send their children to schools other than public institutions, they do not have the right to be completely unfettered by reasonable government regulations as to the quality of the education furnished. Defendants insist that this can be accomplished by annual comparative tests. The problem with testing is that it sometimes comes too late. If the deficiency of the education being afforded is not discovered until the end of the year, the child has wasted that year. The requirements as to curriculum as imposed by the state board appear to be very minimal in nature. All that is required is that certain subjects be taught. There is no effort to dictate in what manner that knowledge shall be imparted. As a matter of fact, the defendants have complained, in part, because no course of study has been prescribed by the State. This is not the type of regulation which the *Whisner* court found objectionable. The defendants concede, and the State confirms, that the curriculum utilized by the defendants, the A.C.E. program, is acceptable and approved and being used by other schools within the state. The refusal of the defendants to comply with the compulsory education laws of the State of Nebraska as applied in this case is an arbitrary and unreasonable attempt to thwart the legitimate, reasonable, and compelling interests of the State in carrying out its educational obligations, under a claim of religious freedom.

The judgment of the District Court is affirmed.

AFFIRMED.

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

I find that I must in part concur with, and in part dissent from, the majority opinion in this case.

I concur in that portion of the majority opinion which holds that the State, having a high responsibility for the education of its citizens, has the power to impose *"reasonable regulations"* for the control and duration of basic education. I believe that principle applies even though the reasonable regulations may, in some manner, affect what an individual or group maintains is their religious belief. Neither the U.S. Const. art. I nor art. IX, nor the corresponding sections of our own state Constitution, grants individuals or groups carte blanche authority to reject all State control over their activity in the name of religion.

Early in our nation's history, we were called upon to make such decisions. In 1878 the U.S. Supreme Court, in the case of *Reynolds v. United States*, 98 U.S. 145, 25 L. Ed. 244 (1878), was called upon to determine the validity of Utah's prohibition against polygamy, a practice of the Mormon religion. In upholding the Utah law against a claim that the prohibition violated the Mormons' freedom of religion, the U.S. Supreme Court reviewed the history of our Constitution, and in particular the first amendment. It concluded from that examination that while polygamy may have its basis in the Old Testament, it could, nevertheless, be outlawed in this country. In doing so, the U.S. Supreme Court held that a party's religious belief could not be accepted as a justification for his committing an overt act made criminal by the law of the land. That view has prevailed throughout the history of our country and was recently repeated in the case of *Wisconsin v. Yoder*, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15, 27-28 (1971), wherein Chief Justice Burger noted: "It is true that activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of

their undoubted power to promote the health, safety, and general welfare, or the Federal Government in the exercise of its delegated powers. See, *e.g.*, *Gillette v. United States*, 401 U.S. 437 [91 S. Ct. 828, 28 L. Ed. 2d 168] (1971); *Braunfeld v. Brown*, 366 U.S. 599 [81 S. Ct. 1144, 6 L. Ed. 2d 563] (1961); *Prince v. Massachusetts*, 321 U.S. 158 [64 S. Ct. 438, 88 L. Ed. 645] (1944); *Reynolds v. United States*, 98 U.S. 145 [25 L. Ed. 244] (1879)." *Id.* at 220. It would seem clear, beyond debate, that if a group claimed a first amendment right to reestablish the ancient Temple requirements of twice-daily animal sacrifices, the State, under proper conditions, could prohibit such act. The right of one's religious freedom does not totally eliminate the State's right to regulate the health, safety, and welfare of its citizens in an appropriate case.

Appellants' claim that the Bible prohibits them from permitting the State any supervisory right over the education of their children fails by reason of the very argument itself. Appellants contend their right to be exempt from all governmental supervision in regard to the education of their children stems from the biblical requirements concerning the education of children and, therefore, clearly falls within the protection granted by the first amendment. Appellants' biblical argument, however, fails to consider all of the requirements relating to their position. In particular, their position fails to recognize the ancient Rabbinic principle first laid down by the Babylonian Jewish Scholar Samuel, and known as *dina de-malkhuta dina*, a halakhic rule that the law of the country is binding and in certain cases is to be preferred. Under this doctrine, one may not ignore the secular law of the country in which one lives.

As noted by a host of decisions from various jurisdictions, a State, having a high responsibility for the education of its citizens, may impose reasonable regulations for the control and duration of basic education. See *Pierce v. Society of Sisters*, 268 U.S. 510,

534, 45 S. Ct. 571, 69 L. Ed. 1070 (1925). For that reason I, therefore, have no difficulty in agreeing with the majority opinion insofar as it holds that the State may adopt reasonable regulations which require a teaching institution, public or private, to submit its curriculum for examination and approval; or to disclose the attendance of its students; or even to subject its students to periodic testing. Such action would not, in my mind, constitute a violation of the religious clauses of either the United States Constitution or the Nebraska Constitution.

However, based upon the record in this case, I must respectfully dissent from that portion of the majority opinion which in effect upholds the State's requirement that all elementary and secondary teachers, public or private, hold a baccalaureate degree before a student's attendance at such school may satisfy the State's compulsory attendance laws. I do not believe either logic or experience, or current law, justifies such a conclusion.

Just as no group may obtain a first amendment exemption from all State regulations by merely asserting that the regulated activity has some basis in a religious belief, neither can the State regulate or control all action of a group under the bald assertion that such regulation is necessary to preserve and maintain the health, safety, or welfare of such group. We have traditionally attempted to balance those concepts and have diligently sought to find a reasonable middle ground. As Chief Justice Burger wrote in *Yoder*, *supra* at 214-15: "Thus, a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children so long as they, in the words of *Pierce*, 'prepare [them] for additional obligations.'

. . . .

"The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion. We can accept it as settled, therefore, that, however strong the State's interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests. *E. g., Sherbert v. Verner,* 374 U.S. 398 [83 S. Ct. 1790, 10 L. Ed. 2d 965] (1963); *McGowan v. Maryland,* 366 U.S. 420, 459 [81 S. Ct. 1101, 6 L. Ed. 2d 393] (1961) (separate opinion of Frankfurter, J.); *Prince v. Massachusetts,* 321 U.S. 158, 165 [64 S. Ct. 438, 88 L. Ed. 645] (1944)."

In this case, I believe that we have failed to bring about the necessary balance and have unnecessarily opted in favor of the State when such result is neither required nor justified.

Time has adequately disclosed to us the hazards of attempting to determine in the abstract what is necessary and proper in providing children with an eduation. It would not require a great deal of research to establish that whatever steps we have taken heretofore in our effort to ensure a meaningful education for our children have not accomplished our objectives.

Likewise, we may find examples in our own state which prove the hazards of attempting to determine what is truly necessary to ensure education. In 1919 the Legislature, in what it then believed to be its infinite wisdom, enacted a law making it unlawful to teach a foreign language to a student before the student attained and successfully passed the eighth grade. This court, in affirming the constitutionality of that act, finding it a valid exercise of the State's police power, wrote, in part, as follows: "The salutary purpose of the statute is clear. The legislature had seen the baneful effects of permitting foreigners, who had taken residence in this country, to rear and educate their children in the language of their native land. The result of that condition was found to be inimical

to our own safety. To allow the children of foreigners, who had emigrated here, to be taught from early childhood the language of the country of their parents was to rear them with that language as their mother tongue. It was to educate them so that they must always think in that language, and, as a consequence, naturally inculcate in them the ideas and sentiments foreign to the best interest of this country. The statute, therefore, was intended not only to require that the education of all children be conducted in the English language, but that, until they had grown into that language and until it had become a part of them, they should not in the schools be taught any other language. The obvious purpose of this statute was that the English language should be and become the mother tongue of all children reared in this state. The enactment of such a statute comes reasonably within the police power of the state." See *Meyer v. State*, 107 Neb. 657, 661-62, 187 N.W. 100, 102 (1922).

In striking down the law and rejecting the logic of our opinion, the U.S. Supreme Court, in the case of *Meyer v. Nebraska*, 262 U.S. 390, 400, 43 S. Ct. 625, 67 L. Ed. 1042 (1923), said: "The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted. . . . Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life; and nearly all the States, including Nebraska, enforce this obligation by compulsory laws."

"It is well known that proficiency in a foreign language seldom comes to one not instructed at an early age, and experience shows that this is not injurious to the health, morals or understanding of the ordinary child." *Id.* at 403.

That general notion was again approved in *Pierce v. Society of Sisters*, *supra*, wherein the U.S. Supreme Court was called upon to examine the Oregon compulsory education act. In striking down an Oregon law

requiring all children between the ages of 8 and 16 years to attend the public schools as an unlawful and unconstitutional interference with the liberty of parents and guardians to direct the upbringing and education of children under their control, the U.S. Supreme Court said at 534, in part: "Under the doctrine of *Meyer v. Nebraska*, 262 U. S. 390 [43 S. Ct. 625, 67 L. Ed. 1042], we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

While I recognize that we do not require attendance in a public school, but will certify a private school if its teachers all hold baccalaureate degrees, I find nothing either in our statutes or in logic which compels a conclusion that one may not teach in a private school without a baccalaureate degree if the children are to be properly educated. Under our holding today, Eric Hoffer could not teach philosophy in a grade school, public or private, and Thomas Edison could not teach the theories of electricity. While neither of them could teach in the primary or secondary grades, both of them could teach in college. I have some difficulty with a law which results in requiring that those who teach must have a baccalaureate degree, but those who teach those who teach need not. The logic of it escapes me. The experience of time has failed to establish that

requiring all teachers to earn a baccalaureate degree from anywhere results in providing children with a better education.

While it may be appropriate for a state to set such requirements in a public school where state funds are expended and, in effect, the state is the employer, I find no basis in law or fact for imposing a similar requirement in a private school. The failure of the private school to have as adequate and as trained teachers as the public school may be a factor which parents will take into account in deciding whether their children should be enrolled in that private school. I do not believe, however, that it should disqualify children from satisfying the compulsory attendance laws. I could accept a regulation which required instructors in such schools to satisfy the state that they were adequately trained to perform the functions they were hired to perform. I believe, however, that such functions may be adequately performed absent a baccalaureate degree.

I am of the opinion that our Legislature also holds that view. There are at least two specific statutory provisions concerning teachers which lead one to that conclusion. Neb. Rev. Stat. § 79-1247.05 (Reissue 1976) specifically provides that regulations with regard to the issuance of certificates shall be "based upon earned college credit, or *the equivalent thereto* . . . ." (Emphasis supplied.) It is difficult to imagine how "the equivalent thereto" can be satisfied if the college degree is the minimum requirement. Obviously, the Legislature concluded that something other than classroom attendance in a college would be sufficient to satisfy certain educational requirements of a teacher.

And, likewise, as argued by appellants, Neb. Rev. Stat. § 79-1247.06 (Reissue 1976) provides, in part, that the *"maximum"* requirement which the State Board of Education may impose on one seeking certification is a baccalaureate degree. Yet, by mere rule, the state board has converted the maximum require-

ment into a minimum requirement. This action taken by the state board in promulgating Rule 21 appears to me to constitute the exercise of undelegated legislative authority and may, therefore, be void. See *Lincoln Dairy Co. v. Finigan*, 170 Neb. 777, 104 N.W.2d 227 (1960).

The record in this case clearly establishes that the failure of all instructors in appellants' school to hold a baccalaureate degree has not in any manner detracted from the quality of the education being given its students. No evidence was offered that, absent a baccalaureate degree, one is not qualified to teach. Likewise, the State conceded at oral argument before this court that the program of instruction offered by appellant school was, indeed, satisfactory, and if submitted to the State for approval, would undoubtedly be approved. Yet that approval would not result in the school's being certified or in the students' status being such as to satisfy the compulsory attendance law. That defect could not be cured unless and until all instructors held a baccalaureate degree, as if the earning of such a degree somehow magically bestowed upon the recipient that knowledge which one without such a degree could not otherwise obtain.

Even the State Board of Education has recognized that the obtaining of a degree may, under certain circumstances, be waived. Rule 21-(70) of the rules adopted by the State of Nebraska Department of Education under date of July 8, 1977, provides for the issuance of an emergency teaching certificate. The bases upon which such certificate may be issued are, in part: "[T]o legalize the payment of a salary from tax sources to a person not fully qualified for a regular teaching certificate required for the position to be filled; or to legalize the employment in a private, parochial or denominational school of a person not fully qualified for a regular teaching certificate required for the position to be filled."

While it is true that there are further requirements

of that rule which ultimately may compel the individual to obtain a baccalaureate degree, one must ask the question: If the holding of such a degree is so critical as to affect the education of a child, why does the State Board of Education waive it under any circumstance? Obviously, the requirement of holding such a degree is not so indispensable to the providing of a good and sufficient education that it must be required under all circumstances and at all times.

It may be argued, as the State does, that any other requirements would impose a severe burden upon the State, in that it would then be required to conduct various tests of students in these schools in order to determine whether, in fact, they are receiving an adequate education. No one, however, has ever suggested that the mere fact that action required to be performed by the government may be difficult justifies the government's refusal to perform the required act.

The majority points out that to wait until after a period of time has expired before we test the students may be too late. If the holding of a baccalaureate degree by a teacher in and of itself ensured that students would thereby be educated and able to pass the test, that argument might wash. Experience, however, discloses that students taught by teachers holding baccalaureate degrees do not necessarily receive an adequate education in each and every instance. The record in this case supports that view. Witnesses who qualified as experts in the field of education ventured the opinion that the mere fact that a person held a baccalaureate degree did not mean that he or she would be a good teacher.

In my view, attempting to strike a balance between the various interests of the parties herein does not justify requiring that all persons teaching in appellants' school can qualify as a teacher only by holding a baccalaureate degree. I believe there are other reasonable regulations which can be adopted for private

schools that would permit these schools to continue, thereby striking the necessary balance between the two competing interests. I would have so held.

NEMAHA NATURAL RESOURCES DISTRICT, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLANT, V. THE VILLAGE OF ADAMS, GAGE COUNTY, NEBRASKA, ET AL., APPELLEES.

301 N.W.2d 346

Filed January 30, 1981. No. 43201.

1. **Easements.** Generally, the grant of an easement over land does not preclude the grantor from using the land in any manner which does not unreasonably interfere with the special use for which the easement was acquired. This includes the granting of additional easements in the same land.
2. ____. The creation of an easement carries with it by implication only such incidents as are necessary for its reasonable enjoyment.
3. ____. The owner of the servient tenement may use the land for any purpose which does not unreasonably interfere with the rights of the owner of the dominant tenement.

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

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

James G. Sharp of Everson, Noble, Wullschleger, Sutter, Sharp & Korslund for appellees.

Heard before BOSLAUGH, MCCOWN, CLINTON, and BRODKEY, JJ., and COADY, District Judge.

BOSLAUGH, J.

The plaintiff is a natural resources district. In 1969 its predecessor, a conservancy district, constructed a dam, described as a floodwater retarding structure, "Structure 7A," near the Village of Adams, Nebraska. As a part of the project, the district acquired from the

owners of the land lying north of the dam an easement for the flowage, storage, and temporary detention of waters flowing over or through the dam.

In 1978 the defendent Village constructed a waterline across the land lying north of the dam. As a part of this project, the Village acquired from the landowners a 15-foot easement across the property.

The District commenced this action to enjoin the Village from wrongfully interfering with its easement. The trial court found that the easement of the Village did not constitute an unreasonable interference with the prior easement of the District and dismissed the petition. The District has appealed.

The dam, Structure 7A, is constructed of rolled earth and is approximately 36 feet high, 14 feet wide, and 843 feet long at the crest of the embankment. The centerline of the dam runs to the southeast at an angle of approximately 24 degrees from an east-west line. The dam itself has an estimated life expectancy of 50 years.

The reservoir has a drainage area of 1.74 square miles. The dam was designed to contain a 100-year storm. Water is discharged from the reservoir through a drain when the water level in the reservoir reaches 1,288 feet. An emergency spillway located at the western edge of the dam has an elevation of 1,298 feet at the crest.

The waterline constructed by the Village runs in an east-west direction through the spillway area north of the dam. At its closest point, the waterline is approximately 60 feet downstream from the toe of the dam. The waterline consists of 6-inch plastic pipe buried approximately 5½ feet below the surface of the ground. The line is equipped with a shutoff valve so the line near the dam can be isolated in the event of a break. The pipe is designed to withstand an internal pressure of 200 pounds per square inch and was tested for leakage at a pressure of 120 pounds per square inch after installation.

The pipe was installed by digging a trench 10 inches

wide and approximately 5½ to 6 feet deep. The pipe was assembled at the surface and lowered into the trench. There is evidence that the contractor did not backfill the trench according to the specifications of the contract, and was required to do additional work to remedy settling and erosion in the area of the trench. The evidence is in conflict as to whether the compaction of the backfill of the trench is satisfactory at this time.

The District's theory of the case is that the waterline constitutes a hazard to the dam and should be removed and relaid in a different area. The District argues that in the event of a heavy discharge of water through the emergency spillway of the dam, erosion in the area of the waterline trench might spread and endanger the dam itself, particularly if the waterline should rupture at the same time. The District produced expert witnesses whose testimony tended to support this theory. Expert testimony introduced by the Village tended to prove that no problem of a serious nature existed. At the conclusion of the evidence, the trial court viewed the premises.

Generally, the grant of an easement over land does not preclude the grantor from using the land in any manner which does not unreasonably interfere with the special use for which the easement was acquired. *Minneapolis Athletic Club v. Cohler*, 287 Minn. 254, 177 N.W.2d 786 (1970). This includes the granting of additional easements in the same land. See 25 Am. Jur. 2d *Easements and Licenses* § 89 (1966).

The creation of an easement carries with it by implication only such incidents as are necessary for its reasonable enjoyment. The owner of the servient tenement may use the land for any purpose which does not unreasonably interfere with the rights of the owner of the dominant tenement.

The trial court found specifically that the pipe used for the waterline was sufficient for such purpose with adequate safety factors; that the pipe had been properly assembled and installed; and that the pressure tests

were persuasive of the safety quality of the pipe and its installation. The trial court further found there had been no significant erosion in the area of the trench after the final covering of the waterline, even though the area had been subjected to heavy rainstorms from June through September 1978; that the soil above the pipe compared favorably with the soil used in construction of the spillway; that the ground cover in the trench area was developing satisfactorily; and that the use of the spillway used for overflow water was remote, and if it occurred, would be of short duration. The trial court concluded that the present location and condition of the waterline did not affect Structure 7A or its operation or use; that the waterline had not unreasonably burdened the plaintiff with the necessity for additional inspection and maintenance of Structure 7A; and that the likelihood of damage or danger to Structure 7A and its spillway was so remote as to not constitute an unreasonable interference with the use and safety of Structure 7A and the plaintiff's easement. These findings are fully supported by the record and we adopt them as our findings.

The judgment of the District Court is affirmed.

AFFIRMED.

IN RE APPLICATION OF ABDUL-QADIR GHOWRWAL FOR WRIT OF HABEAS CORPUS. ABDUL-QADIR GHOWRWAL, APPELLANT AND CROSS-APPELLEE, V. FATIMA L. HUSAIN, APPELLEE AND CROSS-APPELLANT.

301 N.W.2d 349

Filed January 30, 1981. No. 43216.

1. **Judgments:** The general rule is that a judgment of a state court which had jurisdiction has the same credit, validity, and effect in every other court in the United States which it had in the state where it was pronounced.
2. **Habeas Corpus: Child Custody.** It is the position of this court that when a court's jurisdiction is invoked by a habeas corpus petition seeking custody of a child, the child becomes a ward of the court and the prime consideration is the welfare of the child.
3. ____: ____. In a habeas corpus proceeding the court need not find a change in circumstances to modify the custody award. The best interests of the child are the primary concern of the court, and former adjudications between parents are evidentiary only, and not controlling.
4. **Habeas Corpus: Attorney Fees.** It is the practice in this state to allow recovery of attorney fees only in such cases as are provided for by statute. There is no statutory authority in this state for awarding attorney fees in a habeas corpus proceeding.

Appeal from the District Court for Lancaster County: SAMUEL VAN PELT, Judge. Affirmed in part, and in part reversed with directions.

C. Russell Mattson of Mattson, Ricketts, Davies, Stewart & Calkins for appellant.

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

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

WHITE, J.

This is an appeal from an order of the District Court granting in part and in part denying relator's petition for a writ of habeas corpus requesting that the respondent be ordered to give physical custody of the parties' minor child to relator. The District Court ordered that the respondent should have legal and

physical custody of the child, and that the relator should have visitation privileges but be required to post a $20,000 bond conditioned on the prompt return of the child as a prerequisite to exercising those visitation rights. The relator appeals and assigns as error that the District Court did not give full faith and credit to a prior judgment of the Ohio Court of Common Pleas; that the District Court found that there had been a change in circumstances since the Ohio order; and that the visitation schedule established by the Nebraska District Court is unreasonable and that the $20,000 bond requirement is excessive. These assignments are without merit. The judgment of the District Court is affirmed in part, and in part reversed with directions.

The parties were married in Indiana in July 1968. The respondent testified that when she first became pregnant with the child whose custody is at issue, relator abused her physically and verbally and stated that he wished the baby would die. She further testified that when she was 6½ months pregnant his abuse forced her to leave him and move home with her parents where the baby was born in August 1970. After the baby was born the relator visited respondent and the baby but refused to take them home with him. Several weeks later respondent went back to relator and lived with him until January 1971 when he went to Afghanistan. Respondent stated that when relator left he sold their belongings, and respondent and the child had to move in with respondent's parents because relator left her no money. Relator returned to the United States in August 1971 and lived with respondent and the child until the divorce in May 1976.

In November 1976 respondent took the child to a psychiatrist who diagnosed the child as being under a great deal of stress and having symptoms of anxiety and regressive behavior. He has been receiving psychiatric care since. The record shows that the child fears that the relator may try to kill the respondent and take him to Afghanistan. The child testified that his fears were

based on statements made to him by the relator. The psychiatric reports and the testimony of the psychiatrist indicate that the child's fear of relator has a substantial and negative effect on the child. During periods when the relator did not visit the child, the child made progress in overcoming his symptoms of anxiety, such as a vocal tic, chewing on his clothes, sucking his fingers, and fighting with other children. After seeing relator, however, he would regress. The child, the psychiatrist, and the respondent stated that the relator has adversely affected the child's attitude toward sexual behavior and physical aggression since the child was 6 years old. Because of the concern expressed by the child's psychiatrist regarding the negative effects of relator's visits on the child, respondent registered the Ohio judgment in Nebraska in February 1977. She also applied for a modification of the decree, requesting termination of relator's visitation rights until the child's emotional condition stabilized. In May of that year relator filed a motion with the Ohio court to find respondent in contempt of court for refusing to allow relator his visitation privileges. In March 1978 the Ohio court found respondent in contempt, and in May 1978 transferred permanent custody of the parties' minor child to the relator. Respondent has retained physical custody of the child since the divorce.

"The general rule is that a judgment of a state court which had jurisdiction has the same credit, validity, and effect in every other court in the United States which it had in the state where it was pronounced." *Miller v. Kingsley*, 194 Neb. 123, 125, 230 N.W.2d 472, 474 (1975). However, "[i]t is the position of this court that when a court's jurisdiction is invoked by a habeas corpus petition seeking custody of a child, the child becomes a ward of the court and the prime consideration is the welfare of the child." *Copple v. Copple*, 186 Neb. 696, 700, 185 N.W.2d 846, 849 (1971). Although the District Court found there had been a significant change in circumstances, in a habeas corpus proceeding the court is not

required to make such a finding. The best interests of the child at the time the inquiry is being made are the primary concern of the state, and former adjudications between parents are evidentiary only, and not controlling. *State ex. rel. Cochrane v. Blanco*, 177 Neb. 149, 128 N.W.2d 615 (1964); *Barnes v. Morash*, 156 Neb. 721, 57 N.W.2d 783 (1953); *Wear v. Wear*, 130 Kan. 205, 285 P. 606 (1930).

"'The welfare of minors is not to be determined by legal technicalities, or by adversary rights as between the parents or other custodians, or by contumacy or other reprehensible conduct of the parents which does not have a direct bearing on the children's welfare.'" *Copple v. Copple, supra* at 699-700, 185 N.W.2d at 849. The record shows that the best interests of this child require that his permanent custody be transferred to respondent. This portion of the District Court's judgment is affirmed.

Respondent filed a cross-appeal with this court assigning as error the following: That the trial court erred by finding that the Ohio court had jurisdiction to modify the custody provisions of the original decree; that the court erred in granting relator temporary custody for the purposes of visitation; and that the court erred in requiring respondent to pay the costs of the action, including $1,000 to be applied as relator's attorney fee, and not allowing respondent an attorney fee from relator. The matter of whether or not the Ohio court retained jurisdiction in this matter is moot. The record shows that in November 1977 respondent submitted to the jurisdiction of the Ohio court, and she will not now be heard to say that the court had no jurisdiction over her.

The record also establishes that any contact with the relator is harmful to the child. The child suffers from emotional and psychological disorders which worsen whenever the child is forced to see the relator. The child's performance in school and his relationships with others manifest the child's psychosis resulting from

visits with the relator. The District Court determined that it was in the best interests of the child to develop a relationship with his father. The evidence indicates otherwise. The psychiatrist's reports show that the child's fears and anxieties are genuine and that time spent with relator is a destructive element in the child's efforts to overcome them. The paramount issue in a habeas corpus proceeding for custody of a child between its natural parents is the best interests of the child. See *Copple v. Copple, supra.* The record in this case clearly shows that allowing relator to have visitation rights is not in the best interests of the child. That portion of the District Court judgment allowing relator visitation rights is reversed.

Respondent's assignment that it was error for the District Court to award relator $1,000 in attorney fees is well taken. "It is the practice in this state to allow recovery of attorneys' fees only in such cases as are provided for by law, or where the uniform course of procedure has been to allow such recovery. As a general rule of practice in this state, attorneys' fees are allowed to the successful party in litigation only where such allowance is provided by statute." *Higgins v. Case Threshing Machine Co.*, 95 Neb. 3, 7, 144 N.W. 1037, 1039 (1914); *Shepard v. Shepard*, 145 Neb. 12, 16, 15 N.W.2d 195, 198 (1944); *Hawkeye Casualty Co. v. Stoker*, 154 Neb. 466, 485, 48 N.W.2d 623, 634 (1951).

There is no statutory authority for awarding attorney fees in a habeas corpus proceeding in this state. Therefore, that portion of the judgment awarding to relator attorney fees is reversed with directions to enter a judgment that each party pay his own attorney fees.

AFFIRMED IN PART, AND IN PART REVERSED WITH DIRECTIONS.

DARRELL E. BEACH ET AL., APPELLEES AND CROSS-APPELLANTS, V. CITY OF FAIRBURY, NEBRASKA, A MUNICIPAL CORPORATION, APPELLANT AND CROSS-APPELLEE.

301 N.W.2d 584

Filed January 30, 1981. No. 43166.

1. **Property: Municipal Corporations.** Private sewers and drains may become the property of the municipal corporation in some cases merely through connection and integration into the latter.
2. **Easements.** The use and enjoyment which will give title by prescription to an easement is substantially the same in quality and characteristics as the adverse possession which will give title to real estate. It must be adverse, under a claim of right, continuous and uninterrupted, open and notorious, exclusive, with the knowledge and acquiescence of the owner for the full prescriptive period.
3. _____. An underground sewer line obtained by implication or by prescription is not extinguished by a subsequent sale of the servient estate to a bona fide purchaser without knowledge or actual or constructive notice. The grantor of the servient estate has no more right to convey the estate free from a nonapparent easement than he has to convey free from an apparent easement.
4. **Property: Damages.** When private property has been damaged for public use, the owner is entitled to compensation. Whatever reduces the market value of real estate by injuring it for public use may be considered in determining the just compensation to which the property owner is entitled. Where land is not taken, the measure of damages is the difference in market value before and after the damaging.

Appeal from the District Court for Jefferson County: WILLIAM B. RIST, Judge. Affirmed in part, and in part reversed.

Earl D. Ahlschwede and Douglas G. Rosener for appellant.

James G. Sharp of Everson, Noble, Wullschleger, Sutter, Sharp & Korslund for appellees.

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

WHITE, J.

Defendant, City of Fairbury (hereafter Fairbury), appeals from a judgment in favor of plaintiffs, resi-

dent landowners in Fairbury, Nebraska. On July 6, 1978, a storm sewer running beneath the surface across plaintiffs' land broke, causing the land in plaintiffs' backyard to collapse, resulting in a hole approximately 35 feet long, 10 feet wide, and 10 feet deep. After notifying representatives of Fairbury of the break and collapse, plaintiffs were informed that Fairbury would only supply the labor for repairs and that plaintiffs would have to supply the materials. Plaintiffs filed a claim with the city council, which was denied, and appealed that decision to the District Court. The court held in favor of plaintiffs on the causes of action and a jury awarded plaintiffs a total of $2,800 in damages. Fairbury makes the following assignments of error: (1) That the court determined the broken sewer was a public sewer; (2) That the court did not hold plaintiffs' first cause of action barred by the statute of limitations; (3) That plaintiffs were entitled to damages because of Fairbury's failure to repair the sewer; and (4) That the court overruled Fairbury's demurrer at the end of plaintiffs' case. The judgment of the District Court is reversed as to plaintiffs' first cause of action and that cause is dismissed. The remainder of the judgment is affirmed.

Plaintiffs' petition alleges two causes of action. The first alleges that Fairbury took an easement across plaintiffs' land without compensating plaintiffs, in violation of Neb. Const. art I, § 21, and that plaintiffs are entitled to damages therefor. The sewer on plaintiffs' property is part of a citywide system of storm sewers. It is not known when the sewer across plaintiffs' property was constructed or when it was connected to the city sewer system. The record clearly shows, however, that the sewer does not drain plaintiffs' property, but serves as a collector line for various other sewers in Fairbury. The line has broken in the past and Fairbury has supervised and directed repairs. The District Court determined that the sewer across plaintiffs' property was a public sewer, and we agree.

"'Private sewers and drains may become the property of the municipal corporation by purchase or by dedication . . . ; also by annexation, or prescription; and in some cases private sewer lines are regarded as becoming municipal lines merely through connection and integration in the latter . . . .'" *City of Omaha v. Matthews*, 197 Neb. 323, 326, 248 N.W.2d 761, 763 (1977).

Fairbury alleged in its answer that should it be determined that the sewer was public, plaintiffs' first cause of action was barred because Fairbury had obtained an easement by prescription for the statutory period of 10 years. The District Court held that plaintiffs had no notice of the easement until the drain collapsed and, therefore, Fairbury failed to prove its defense. "'The use and enjoyment which will give title by prescription to an easement is substantially the same in quality and characteristics as the adverse possession which will give title to real estate. It must be adverse, under a claim of right, continuous and uninterrupted, open and notorious, exclusive, with the knowledge and acquiescence of the owner . . . for the full prescriptive period. . . . [A]ll the elements of prescriptive use must be generally established by clear, convincing, and satisfactory evidence.'" *Svoboda v. Johnson*, 204 Neb. 57, 62, 281 N.W.2d 892, 897 (1979). The record shows that in 1966 the sewer on this property collapsed. The owners of the property at that time were aware of the collapse and assisted in the repair. The record also shows that Fairbury has used the sewer continuously and exclusively since then until January 15, 1979, the date plaintiffs' claim was filed. The record clearly shows that the 10-year statutory period has run and plaintiffs' cause of action is barred. Plaintiffs' contention that they had no notice of the easement until after the collapse is not fatal to Fairbury's defense: "[A]n underground [sewer] line obtained by implication or by prescription is not extinguished by a subsequent sale of the servient estate to a bona fide purchaser without knowledge or actual or con-

structive notice . . . . 'The grantor of the servient estate has no more right to convey the estate free from a nonapparent easement than he has to convey free from an apparent easement.'" *Ricenbaw v. Kraus*, 157 Neb. 723, 728, 61 N.W. 2d 350, 355 (1953). That part of the District Court's decision in favor of plaintiffs and awarding plaintiffs damages on their first cause of action is reversed and plaintiffs' first cause of action is dismissed.

On their second cause of action, plaintiffs were awarded $1,000 for damages resulting from Fairbury's failure to repair the drain. When private "property has been damaged for public use, the owner is entitled to compensation." *Quest v. East Omaha Drainage Dist.*, 155 Neb. 538, 544, 52 N.W.2d 417, 421 (1952). In determining plaintiffs' damages, the jury was correctly instructed that "'Whatever reduces the market value of real estate by the injuring of it for public use may be considered in determining the just compensation to which the property owner is entitled.'" *Luchsinger v. Loup River Public Power District*, 140 Neb. 179, 183, 299 N.W. 549, 551 (1941). The record shows that plaintiffs are entitled to damages for Fairbury's failure to repair its drain and the resulting damage to plaintiffs' property. Fairbury did not assign the amount of damages awarded as error and the judgment of the trial court is affirmed. Plaintiffs cross-appealed, assigning as error that the date for computation of damages should have been the date their claim was filed, not the date of the collapse. This argument is without merit. "Where land is not taken, the measure of damages is the difference in market value before and after the damaging . . . ." *Quest v. East Omaha Drainage Dist.*, *supra* at 544, 52 N.W.2d at 421.

Plaintiffs' assignment that it was error not to award attorney fees is likewise without merit. "'It is the practice in this state to allow recovery of attorneys' fees only in such cases as are provided for by law . . . . As a general rule of practice in this state, attorneys' fees are

allowed to the successful party in litigation only where such allowance is provided by statute.'" *In re Application of Ghowrwal, ante* p. 831, 301 N.W.2d 349 (1981). The plaintiffs chose the form of action; there is no statutory authority for awarding attorney fees in direct actions under Neb. Const. art I, § 21. An analogy to the condemnation statutes is not applicable.

The judgment of the District Court is reversed as to plaintiffs' first cause of action and that cause of action is dismissed. The judgment of the District Court on plaintiffs' second cause of action is affirmed.

AFFIRMED IN PART, AND IN PART REVERSED.

ST. PAUL MERCURY INSURANCE COMPANY, AN INSURANCE CORPORATION, APPELLEE AND CROSS-APPELLANT, V. JOHN P. HURST AND WILLIAM A. MIMICK, APPELLANTS AND CROSS-APPELLEES, AND MARK BOETTCHER AND WEERTS-BOETTCHER COMPANY, APPELLEES AND CROSS-APPELLEES.

301 N.W.2d 352

Filed January 30, 1981. No. 43291.

1. **Insurance Contracts: Insurance Premiums.** The regular payment of premiums is of the very essence of an insurance contract. Ordinarily, therefore, a court will not grant relief against a forfeiture incurred by the nonpayment of a premium.
2. ____: ____. The continuance of the insurer's obligation is generally conditional upon the payment of premiums, so that no recovery can be had upon a lapsed policy, the contractual relation between the parties having ceased.

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

Michael C. Washburn of Erickson, Sederstrom, Leigh, Johnson, Koukol & Fortune, P.C., for appellant Hurst.

Frank J. Skorupa for appellant Mimick.

Jewell, Otte, Gatz, Collins & Domina for appellee St. Paul Mercury Ins. Co.

William H. Grant of Albert, Leininger & Grant for appellees Boettcher and Weerts-Boettcher Co.

Heard before KRIVOSHA, C.J., MCCOWN, WHITE, and HASTINGS, JJ., and MURPHY, District Judge.

KRIVOSHA, C.J.

The instant appeal arises out of a declaratory judgment action filed by the appellee St. Paul Mercury Insurance Company (St. Paul) to determine whether a policy of insurance sold to William A. Mimick (Mimick) was properly canceled for nonpayment of premium and therefore not in force and effect at the time Mimick was involved in an automobile accident with John P. Hurst (Hurst). Appellants Mimick and Hurst joined Mark Boettcher (Boettcher) and Weerts-Boettcher Company (Weerts Co.) as additional parties, claiming that if in fact the policy had been canceled, it was due to the negligence of the insuring agent, Weerts Co., and their employee, Boettcher. The trial court found generally for St. Paul and Boettcher and Weerts Co. We concur with the trial court's decision and affirm the judgment.

On February 27, 1976, Mimick's wife called Boettcher and asked to purchase a policy of insurance on a 1966 pickup her husband owned. There is some dispute as to whether Mrs. Mimick sufficiently advised Boettcher of Mimick's past driving record, including a conviction for driving while intoxicated. Boettcher then proceeded to complete an application with a company other than St. Paul, signing the application himself in the name of William Mimick and sending it to the company for processing. The company rejected the application because of Mimick's unsatisfactory past driving record. Boettcher proceeded then to fill out an application with St. Paul, once again signing the application himself in Mimick's name and sending the applica-

tion to St. Paul for processing. The initial premium of $146.40 was advanced by Boettcher on a check of Weerts Co. The rate as computed by Boettcher was for a classification which did not include a conviction for driving while intoxicated. Had there been such a conviction, the premium would have been higher. Thereafter, the policy was issued and sent to and received by Mimick. The policy covered a 6-month period from March 1, 1976, to September 1, 1976.

At the time the policy was sent to the Mimicks, St. Paul requested of the Department of Motor Vehicles the driving record of Mimick. Due to some confusion with regard to the correct driver's license number of Mimick, the information was not obtained immediately. After receiving a corrected driver's license number for Mimick, St. Paul ran a second record check and the motor vehicle report revealed the conviction of driving while intoxicated on November 9, 1974. As a result of that, St. Paul recomputed the premium based upon a rate which included a conviction for driving while intoxicated. The information was sent to Mimick by note dated June 9, 1976. Thereafter, on June 11, 1976, an amended declaration sheet was prepared by St. Paul, advising Mimick to make payment of an additional premium in the amount of $87.30 by July 1, 1976. When the additional premium was not received within 5 days after due, a followup notice was sent to the Mimicks. Mimick did not make any response and did not pay the additional premium.

A notice of cancellation was then sent by certified mail, return receipt requested, to the Mimicks on or about July 22, 1976. Again, no payment was made by the Mimicks. The notice of cancellation which was sent by certified mail, return receipt requested, signed by Constance Mimick, read as follows: "YOU ARE HEREBY NOTIFIED IN ACCORDANCE WITH TERMS AND CONDITIONS OF THE ABOVE MENTIONED POLICY THAT YOUR INSURANCE WILL CEASE EFFECTIVE AUG. 8, 1976 AT 12:01 AM

STANDARD TIME, BECAUSE OF NON-PAYMENT OF AN ADDITIONAL PREMIUM DUE. ANY PREMIUM REFUND WILL BE DELIVERED TO YOU THROUGH YOUR AGENT." The evidence discloses that notwithstanding all of the notices given by St. Paul to the Mimicks, including the notice of cancellation referred to above, the Mimicks made no effort to contact either St. Paul or Weerts Co. and made no effort to pay the additional premium or to determine from either St. Paul or Weerts Co. why the premium was required. Mimick simply ignored everyone and everything.

On August 26, 1976, Mimick had an accident with Hurst, and it is that accident for which Mimick sought coverage under the St. Paul policy.

Mimick and Hurst have assigned a number of errors. The principal errors, however, are that the trial court erred in finding that the failure of Mimick to pay the increased premium was the cause of the cancellation and in not finding that the negligence of Boettcher and Weerts Co. was the proximate cause of the cancellation of the insurance policy.

Their argument with regard to the negligence of Boettcher and Weerts Co. apparently is founded on the notion that if improper information was given to the company by the agent, the insured should not be held accountable for it, citing several Nebraska decisions, including *Roth v. Employers Fire Ins. Co.*, 123 Neb. 300, 242 N.W. 612 (1932). In making that argument, however, Mimick and Hurst fail to note several important factors. St. Paul did not attempt in this case to cancel the policy but only to collect the proper premium. There is no evidence to indicate that the premium as ultimately computed by St. Paul is not exactly the same premium which would have been due had the information correctly been given to St. Paul in the first instance. Moreover, St. Paul was not attempting to avoid liability and cancel the policy because of the absence of certain information. St. Paul was simply

attempting to collect the proper premium it would have charged all other persons under similar circumstances. Moreover, it attempted to collect that premium in advance of canceling the policy and well in advance of the date on which the accident occurred.

Also, Mimick and Hurst argue that St. Paul may not change the terms of a policy due to a misrepresentation or false statement in an application caused by its own agent. St. Paul here was not attempting to change the terms of the policy; the coverage remained the same, as did the premium due, under the admitted facts.

The evidence is without contradiction that the Mimicks knew and understood that the premium quoted was subject to verification. The evidence discloses the following testimony by Mrs. Mimick:

"Q. So that you generally knew that companies, after they agree to accept an insurance policy, they sometimes then, after they check the motor vehicle records, that they say they can't take the policy?

. . . .

"A. I know that because it happened to Bill before.

"Q. And you did know at the time of this request for insurance that insurance companies did check the motor vehicle records of applicants for insurance?

"A. Yes.

"Q. And you also knew that after checking the motor vehicle records of an applicant for insurance that they might increase the premium or lower the premium, didn't you?

"A. Yes.

"Q. And you knew this at the time you made this application for this insurance on the pickup?

"A. At the time I made the phone call, yes."

The simple fact of the matter is that the policy in this case was canceled because of the nonpayment of premium and for no other reason; and the evidence is without dispute that although the Mimicks knew they might be required to make an additional premium payment,

they took no action with regard to the notice, including contacting Boettcher. St. Paul had a right to collect the proper premium, and no one was entitled to insist on coverage absent the payment of a proper premium when called upon to make it in advance of cancellation. The consideration for St. Paul's providing coverage was the payment of the premium. Absent that payment, St. Paul was under no obligation to furnish coverage and was authorized to cancel the policy.

"The regular payment of premiums is of the very essence of an insurance contract. Such payment being of the very essence and substance of a policy, it has been stated that even a court of equity cannot grant relief for failure to comply with the explicit and stipulated requirements of the policy setting up conditions precedent to the granting of any relief. Ordinarily, therefore, a court of equity will not relieve against a forfeiture incurred by the nonpayment of a premium.

"The burden is on an insured to keep a policy in force by the payment of premiums, rather than on the insurer to exert every effort to prevent the insured from allowing a policy to lapse through a failure to make premium payments. The continuance of the insurer's obligation is conditional upon the payment of premiums, so that no recovery can be had upon a lapsed policy, the contractual relation between the parties having ceased." 14 Appleman, *Insurance Law and Practice*, § 8072 at 381 (1944). The trial court was correct in finding that St. Paul had properly notified the Mimicks of the requirement to pay an adjusted premium and, upon their failure to do so, was entitled to cancel the policy.

We must, likewise, reject the claim of Mimick and Hurst that if St. Paul was entitled to cancel the policy, Boettcher and Weerts Co. were then negligent in permitting the cancellation to occur, which negligence was the proximate cause of Mimick's loss. While it may be true that an appropriate premium would have been computed had Weerts Co. provided all of the necessary information to St. Paul in the first instance, it is clear

that the proximate cause of the policy being canceled in this instance was not any information given or not given by the agent to St. Paul but, rather, Mimick's failure to respond to the additional premium notice and to the subsequent notice of cancellation. As we noted in the case of *Travelers Indemnity Co. v. Center Bank*, 202 Neb. 294, 299, 275 N.W. 2d 73, 76 (1979): "For there to be an action for negligence, the alleged act must be the proximate cause of the injury suffered. 'Proximate cause,' as used in the law of negligence, is that cause which in the natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury and without which the injury would not have occurred. Warren v. Bostock, 170 Neb. 203, 102 N.W.2d 55. Even where conduct is negligent, it is still required that the conduct be a substantial factor in bringing about the harm. Causation in this sense inevitably involves the idea of responsibility. It is not enough that the harm would not have occurred had the individual defendant not been negligent. [Citation omitted.]"

While we make no determination as to whether Boettcher and Weerts Co. were negligent in failing to advise St. Paul about Mimick's conviction when the application was first sent in, even if we were to find them negligent we are unable to see how their negligence proximately caused Mimick's loss in the instant case.

It seems clear beyond question that the failure of Boettcher and Weerts Co. to provide St. Paul with information concerning Mimick's conviction of driving while intoxicated was not the proximate cause of the policy being canceled. The proximate cause of the cancellation was Mimick's failure to pay the premium after receiving repeated notices. Nothing more can be made of that fact. The trial court correctly viewed the situation in deciding the case. Having so disposed of the appeal, we need not consider any other assignments of error raised by Mimick and Hurst.

AFFIRMED.

LYDIA OKESON, APPELLEE, V. JACK DEMPSEY DRYWALL, INC., A NEBRASKA CORPORATION, AND DONALD D. GRAHAM, APPELLANTS.

301 N.W.2d 356

Filed January 30, 1981. No. 43346.

1. **Contracts: Fraud: Appeal and Error.** Value of property is always a matter of judgment, and a contract based upon inadequate consideration will not be set aside for that reason alone, unless the inadequacy is so great as to furnish of itself convincing evidence of fraud.
2. **Summary Judgment.** The primary purpose of the summary judgment statute is to pierce sham pleadings and to dispose of, without the necessity and expense and delay of trial, those cases where there is no genuine claim or defense.
3. ——. Summary judgment shall be rendered forthwith if the pleadings, depositions, and admissions are on file, together with the affidavit, if any, showing that 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: RONALD E. REAGAN, Judge. Affirmed.

James C. Cripe for appellants.

Ronald H. Stave and J. Michael Coffey of Sodoro, Johnson, Daly, Stave, Cavel & Coffey for appellee.

Heard before KRIVOSHA, C.J., MCCOWN, BRODKEY, and HASTINGS, JJ., and HICKMAN, District Judge.

KRIVOSHA, C.J.

The appellants, Jack Dempsey Drywall, Inc., a Nebraska corporation, and its president, Donald D. Graham, appeal from an order of the District Court for Sarpy County, Nebraska, sustaining a motion for summary judgment filed by the appellee, Lydia Okeson. The order specifically granted to appellee judgment against appellants for the sum of $80,711.40, plus costs. We believe the trial court was correct in its determination and, therefore, affirm the order of the trial court sustaining appellee's motion for summary judgment.

Appellee alleged in her first cause of action that the appellant Jack Dempsey Drywall, Inc., had executed and delivered to appellee a promissory note in the principal sum of $112,000, which provided for an initial payment of $30,000 and the balance of $82,000 payable in installments as set forth in the note. The petition further alleged that $45,000 of the principal balance due and owing had been paid, but that the appellant Jack Dempsey Drywall, Inc., failed and refused to pay an installment of $15,000 due on or before October 1, 1978, as a result of which the appellee elected to declare the entire note due and owing pursuant to the terms of the note. The petition further alleged that appellee had notified appellants of her election to exercise her option to declare the entire balance due and owing, but that appellant Jack Dempsey Drywall, Inc., nevertheless, failed and refused to pay said amount due and owing.

In a second cause of action, appellee alleged that, as part of the consideration for the promissory note, the appellant Graham executed a guarantee of the note set out in appellee's first cause of action. Appellee then alleged that by reason of the default of appellant Jack Dempsey Drywall, Inc., there was due and owing from the guarantor the balance due and owing on the note.

By their amended answer, the appellants admitted all the allegations of appellee's petition, including the allegations that there was due and owing from the appellants, and each of them, the sum of $67,000 plus interest. The appellants, however, further alleged by way of answer as follows: "That the value of the underlying assets received by Jack Dempsey Drywall, Inc. in exchange for the promissory note was grossly inadequate and the representative value was not present; that the defendants received insufficient consideration for the said note and guarantee." By reason thereof, appellants prayed that the petition of the appellee be dismissed.

The appellee served interrogatories upon the appellants, which were answered by the appellants. One of the interrogatories requested the appellants to set forth the names, addresses, and places of employment of all witnesses the appellants intended to call at the time of the trial. The appellants answered that they intended to call Donald D. Graham, Marvin Chesley, and Jack Dempsey.

Appellee then took the depositions of Donald D. Graham and Marvin Chesley and offered them in evidence in support of her motion for summary judgment. The deposition of Jack Dempsey was not taken by either party, nor did the appellants file, by way of affidavit, any showing as to what Jack Dempsey would testify to that would support appellants' alleged defense of insufficient consideration.

At the hearing on the motion for summary judgment, after the appellee offered the depositions of Donald D. Graham and Marvin Chesley, together with all of her other evidence, and rested, the court asked counsel for appellants whether he had any evidence to offer. Defendants' counsel answered, "Defendant would not submit any evidence. However, I would like to be heard." The record discloses that the appellants offered no evidence that would establish the existence of any genuine issue of a material fact.

It should be kept in mind that appellants do not maintain a failure of consideration, but, rather, that the consideration was insufficient. An examination of the depositions offered in this matter would seem to indicate that appellants' claim of "insufficiency of consideration" is based upon their belief that the property purchased from the appellee was not worth as much as they believed it to be, and not as much as they, in fact, paid. No claim, however, is made that there was any fraud involved in the transaction. Quite to the contrary, the evidence discloses that, prior to the purchase of the business, both the appellant Donald Graham, as the president of Jack Dempsey Drywall,

Inc., and Marvin Chesley, a certified public accountant, examined the inventory and equipment of the business, and that Chesley was familiar with the books of the business in his capacity as a certified public accountant. The record further establishes that Graham graduated from Creighton University with a B.S.-B.A., majoring in accounting, and was also a certified public accountant. Both individuals were competent to make whatever determination as to the value they did make.

The fact that the appellants may have misjudged the value of the property they were purchasing does not constitute insufficient consideration, absent a showing of fraud. In *Peters v. Woodman Accident & Life Co.*, 170 Neb. 861, 870, 104 N.W.2d 490, 497 (1960), this court said: "'Value of property is always a matter of judgment, and a contract based upon inadequate consideration will not be set aside for that reason alone, unless, as the rule is generally stated, the inadequacy is so great as to furnish of itself convincing evidence of fraud.'" See, also, *West Gate Bank v. Eberhardt*, 202 Neb. 762, 277 N.W.2d 104 (1979).

Neither of the appellants claim, nor does it appear they could claim, that they were in some manner defrauded. Absent that evidence, the unsupported allegation that the appellants received inadequate consideration for the execution of their note and guarantee is insufficient to create a genuine issue of a material fact.

We have frequently held that: "'The primary purpose of the summary judgment statute is to pierce sham pleadings and to dispose of, without the necessity and expense and delay of trial, those cases where there is no genuine claim or defense.'" *French v. Cornwell*, 202 Neb. 569, 575, 276 N.W.2d 216, 220 (1979); *Pfeifer v. Pfeifer*, 195 Neb. 369, 238 N.W.2d 451 (1976). Further, in *Negus-Sweenie, Inc. v. Beaver Lake Corp.*, 202 Neb. 671, 276 N.W.2d 668 (1979), we said: "Summary judgment shall be rendered forthwith if the pleadings,

depositions, and admissions are on file, together with the affidavit, if any, showing that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." (Syllabus of the court.) And in *Columbus Bank & Trust Co. v. High Country Stable*, 202 Neb. 724, 277 N.W.2d 81 (1979), we said: "When signatures are admitted and the defendant has failed to plead a defense, no fact issue is presented." (Syllabus of the court.) A similar situation exists in the instant case. The signatures are admitted, as are all the allegations of the appellee's petition. Likewise, there is no showing of any valid defense pleaded. The trial court, therefore, was entirely correct in sustaining the motion for summary judgment filed by the appellee.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CRAIG A. DUIS, APPELLANT.

301 N.W.2d 587

Filed January 30, 1981. No. 43400.

1. **Assault.** Assault with a dangerous instrument, like simple assault, is a general intent crime.
2. **Jury Instructions.** It is the duty of the trial court to instruct the jury on the law of the case whether requested to do so or not.
3. ——. The trial court, on request of the accused, must instruct the jury on the accused's theory of the case if there is any evidence to support it.
4. **Jury Instructions: Appeal and Error.** The failure to object to instructions after they have been submitted to counsel for review will preclude raising an objection on appeal.
5. **Jury Instructions.** Where an instruction is technically correct, and is couched in terms which in the opinion of a party are liable to be misunderstood or misapplied by the jury, it is the party's duty to call the court's attention to the supposed defect and present a suitable instruction.
6. **Records: Appeal and Error.** Where allegedly prejudicial remarks of counsel do not appear in the bill of exceptions, this court is precluded from considering an assigned error concerning such remarks.

7. **Miranda Rights.** A prosecutor's reference to the defendant's failure to make an exculpatory statement to the police before arrest or accusation does not violate the accused's right to remain silent under the *Miranda* doctrine.

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

Watts & Moran 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.

HASTINGS, J.

Defendant, Craig A. Duis, was convicted by a jury of assault in the second degree, a violation of Neb. Rev. Stat. § 28-309 (Reissue 1979), which is a Class IV felony. Specifically, he was charged under subsection (1) (a): "Intentionally or knowingly causes bodily injury to another person with a dangerous instrument." He was sentenced to a term of imprisonment of 1 year in the Nebraska Penal and Correctional Complex. His motion for a new trial was overruled and he has appealed to this court, assigning as errors that the District Court: (1) Failed to sustain his motion to dismiss because of insufficiency of the evidence; (2) Failed to grant a motion for a mistrial because of an inaccurate instruction on self-defense; and (3) Failed to grant a motion for a mistrial because of misconduct of the prosecuting attorney. We affirm.

Although varying in some minor details, the facts are not in great dispute. The incident occurred during the early morning hours of November 17, 1979, in the parking lot of Arby's, a restaurant located on Ames Street, between 40th and 42nd Streets, in Omaha, Nebraska. The defendant, driving his car and accompanied by Randy Dean Jorgensen, parked at Arby's, placed an order for food, picked up the order, and went back out to the car. In the meantime, the

victim, Allan Ray Veasley, accompanied David Moss in the latter's car to this same restaurant. They also went inside and ordered some food.

Although there is some disagreement as to who started the name calling, Moss contended that as he left the restaurant to return to his car, one or both of the occupants of defendant's car began calling him obscene names and started toward him as if to cause trouble. Moss claimed that he walked on to his car and made motions as if to take something out of the back seat and lay it up on top of the hood of the car as if it were a gun.

According to the defendant, it was Moss who started the name calling. When Moss proceeded over to his car, the defendant concluded that there was something about Moss' actions that made him suspicious, so he directed his companion, Jorgensen, to get into the car. The defendant then backed up his car and started forward to go out onto Ames Street. As the defendant was making this maneuver, he saw where Moss was standing and thought that he had a weapon in his hand. The defendant and his companion testified that defendant was in a hurry to leave the parking lot, that his car lights were not on, and that as they were either halfway onto or all the way onto Ames Street, both of them heard what they thought was a gunshot. While still driving forward, the defendant reached under his seat, picked up a .32-caliber handgun, and with his right hand fired three shots behind him in the direction of Moss' car. The defendant continued driving westbound on Ames Street to the top of a hill, where he saw a police cruiser and stopped.

As this episode was unfolding, the victim, Veasley, having picked up his food order, started outside and toward the Moss car. As he got to the car, he heard a series of shots, realized that he was struck, and climbed into the car for protection. Veasley was taken to Immanuel Hospital, where he was examined by Dr. Bechtel. The doctor found no bullet fragments, but

did observe a bullet wound that went completely through the thigh.

Defendant's complaint as to the insufficiency of the evidence involves the failure of the State to prove the specific intent of the defendant to assault the particular victim. However, the defendant was not charged with assault with intent to do great bodily harm, as argued by him at several places in his brief. Such a charge, according to some authorities, would necessitate proof of the defendant's intent to do some further act or achieve some additional consequence. Therefore, it is reasoned, specific rather than general intent must be shown in such case. *People v. Hood*, 1 Cal. 3d 444, 462 P.2d 370, 377, 82 Cal. Rptr. 618 (1969). Rather, defendant was charged with intentionally and knowingly causing bodily injury to another person with a dangerous instrument. Assault with a dangerous instrument, like simple assault, is a "general intent" crime. *People v. Rocha*, 3 Cal. 3d 893, 479 P.2d 372, 92 Cal. Rptr. 172 (1971); *People v. Richard Johnson*, 42 Mich. App. 544, 202 N.W.2d 340 (1972). It was only necessary to prove that defendant did the act of injuring another person with a dangerous instrument in an intentional manner. *Sall v. State*, 157 Neb. 688, 61 N.W.2d 256 (1953). This issue was correctly submitted to the jury by instruction No. 9, NJI 14.11, and was decided adversely to the defendant.

Defendant contends that the instruction on self-defense, instruction No. 10, which followed NJI 14.33, was incorrect under the circumstances of this case. Neb. Rev. Stat. § 28-1409 (Reissue 1979) provides that deadly force is not justifiable if "the actor knows that he can avoid the necessity of using such force with complete safety by retreating." Under the circumstances, we are not completely convinced that any instruction on self-defense was warranted. However, we are not prepared to say as a matter of law that the defendant was not entitled to have his theory of defense passed upon by the jury.

We have said that it is the duty of the trial court to instruct the jury on the law of the case whether requested to do so or not. *State v. Ross*, 183 Neb. 1, 157 N.W.2d 860 (1968). We have similarly stated the law to be that the trial court, on request of the accused, must instruct the jury on the accused's theory of the case if there is any evidence to support it. *State v. May*, 174 Neb. 717, 119 N.W.2d 307 (1963). At the instruction conference held immediately before charging the jury, the defendant's counsel stated that he had no instructions to request nor did he have any objections to those proposed by the court. "'The failure to object to instructions after they have been submitted to counsel for review will preclude raising an objection on appeal.'" *Haumont v. Alexander*, 190 Neb. 637, 640, 211 N.W.2d 119, 122 (1973).

The jury was instructed, and retired to deliberate at 3:02 p.m., March 7, 1980. On the same day at 4:25 p.m. the court received a request for clarification from the jury as to the meaning of "another person" as referred to in instruction No. 7. This instruction set forth the statutory description of the alleged offense, i.e., "causing bodily injury to another person . . . ." The court then prepared and read to the jury supplemental instruction No. 1 which states in pertinent part as follows: "The wording 'another person' as used in the Nebraska Criminal Code refers to the person injured. Instruction No. 7 should be read in conjunction with all the other instructions, but specifically with Instruction No. 2." Instruction No. 2 set forth the nature of the charges taken from the information, based upon the statutory language of § 28-309. At the conference held with counsel for both defendant and the State, before reading the supplemental instruction, defendant's attorney said: "I know it is difficult, but I interpret it to mean a different person and I think that the instructions are not clear as to the reason this note came out and as to the self defense instruction only, goes to Moss rather than to Veasley and con-

sequently there is a general misunderstanding, and I think the Court should clarify the self defense instruction to show that — anyway, it is my understanding that the Court is not going to do that and in view of the general confusion, I am going to move for a mistrial." The motion was overruled.

Although never specifically pointed out to the trial court, it is apparent that the language of instruction No. 10 claimed by the defendant to have been unclear is the following: "The use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such person on the present occasion." Undoubtedly, it would have been more precise had the instruction explained to the jury that if the defendant was justified in using force toward Moss, he was justified in the force employed, which mistakenly struck the actual victim. *Mayweather v. State*, 29 Ariz. 460, 242 P. 864 (1926). However, the instruction given by the court is a correct statement of the law. Nowhere does it appear in the record that the defendant's attorney ever tendered a "clarifying" instruction or that, if tendered, the trial court would have refused to consider it. As a matter of fact, even at this stage of the proceedings, defendant has not yet proposed such an instruction. "Where an instruction is technically correct, and is couched in terms which in the opinion of a party are liable to be misunderstood or misapplied by the jury, it is the party's duty to call the court's attention to the supposed defect and *present a suitable* instruction." (Emphasis supplied.) *State v. Siers*, 197 Neb. 51, 59, 248 N.W.2d 1, 6-7 (1976).

The last assignment of error relates to alleged comments made by the prosecuting attorney relating to the defendant's failure to disclose exculpatory information to the police. The record does show that immediately following closing arguments the defendant's attorney moved for a mistrial for the reason

that the "State of Nebraska . . . again commented on the Defendant's silence and that it should be used against him because he did not voluntarily tell the police he had just been in a shooting." However, no record was made of such arguments and, therefore, we do not know what was said. "It is the law in Nebraska that, where allegedly prejudicial remarks of counsel do not appear in the bill of exceptions, this court is precluded from considering an assigned error concerning such remarks." *State v. Harris*, 205 Neb. 844, 851, 290 N.W.2d 645, 650 (1980).

However, in fairness to the defendant, it should be pointed out that during the State's examination of police officer Larry Lutton, it was elicited that there had been a "response of silence" on the part of the defendant, which occurred prior to arrest. Lutton explained that an accident had occurred at 48th and Ames Streets and that he had used his cruiser car to block westbound traffic. He then heard a noise like a car accelerating, and saw a car being driven by defendant come over the hill and skid to a stop. The officer went up to the automobile and requested the defendant to get out of the car and display his license, and also asked defendant what he was trying to do, "kill us?" Lutton further testified that while the defendant was moving his car out of the street, at the officer's request, he heard a broadcast of the shooting incident, including a description of the defendant's car, so he went back to the defendant, placed him under arrest, and handcuffed him.

The prosecuting attorney twice asked the officer if the defendant had said anything when he was first stopped and asked to get out of the car. Lutton responded "no" to both questions. Defendant's lawyer made no objection to the questions by the prosecutor; however, after the last time, counsel did move for a mistrial. The defense argued that the prosecutor was, in effect, commenting by innuendo on the defendant's silence, in violation of his fifth amendment rights.

The motion for mistrial was overruled.

In support of his position, defendant relies on *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976). However, that case involved a situation wherein the defendant had been arrested, given his *Miranda* warnings, and then chose to remain silent. The Court, quoting from *United States v. Hale*, 422 U.S. 171, 95 S. Ct. 2133, 45 L. Ed. 2d 99 (1975), said: "'[W]hen a person under arrest is informed, as *Miranda* requires, that he may remain silent, that anything he says may be used against him, and that he may have an attorney if he wishes, it seems to me that it does not comport with due process to permit the prosecution during the trial to call attention to his silence at the time of arrest and to insist that because he did not speak about the facts of the case at that time, as he was told he need not do, an unfavorable inference might be drawn as to the truth of his trial testimony. . . .'" *Doyle* at 619.

In the present case, the defendant's silence occurred at a time before he was either arrested or suspected of the shooting. As a matter of fact, it was under a similar factual situation that the Court, in *United States v. Serrano*, 607 F.2d 1145 (5th Cir. 1979), had occasion to consider and reject the application of *Doyle*. "None of the case support adduced by defendants controls the question before us. In each of those cases, the prosecutor commented on a defendant's failure to exculpate himself after he had been arrested and given *Miranda* warnings. The *Doyle* opinion emphasizes the significance of *Miranda* warnings to the constitutional dimension of improper prosecutorial comment: . . . At the time of the boarding and general questioning, defendants were not subjected to coercive or custodial interrogation but only to those restrictions imposed by a routine Customs check." *Serrano* at 1151-52. There is no merit to this or any of the other of defendant's assignments of error.

The defendant raises no question as to excessiveness

of the sentence, and from an examination of the record, we agree that no evidence of the same appears. The judgment and sentence of the District Court were correct, and are affirmed.

AFFIRMED.

WHITE, J., concurs in result.

STATE OF NEBRASKA, APPELLEE, V. ROBERT E. WATKINS, APPELLANT.

301 N.W.2d 338

Filed January 30, 1981. No. 43531.

1. **Sexual Assault: Witnesses.** In a prosecution for sexual assault, the prosecutrix may testify on direct examination, if within a reasonable time under all the circumstances after the act was committed she made complaint to another, to the fact and nature of the complaint, but not as to its details. Others may likewise testify in chief to such fact and nature of the complaint, but not as to its details.
2. **Criminal Trials: Sexual Assault: Witnesses.** One to whom the complaining witness has complained may testify to the fact and nature of the complaint if the complaint was made voluntarily and without unreasonable or inconsistent delay.
3. **Sexual Assault: Corroboration.** With respect to corroboration, the rule is that it is not essential that the prosecutrix be corroborated by the testimony of other witnesses as to the particular act constituting the offense. It is sufficient if she is corroborated as to material facts and circumstances which tend to support her testimony and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn.
4. ____: ____. In a trial for statutory rape, sexual assault admissions by the defendant showing that he planned and procured an opportunity to commit the act charged, with evidence of familiarities between them, furnishes sufficient corroboration of the victim's positive testimony to support a judgment of conviction.
5. **Sexual Assault: Corroboration: Arrest.** While flight, in and of itself, is frequently ambiguous, when coupled with other facts and circumstances it may be sufficient to constitute corroboration of the testimony of the prosecutrix in cases involving sexual assault.
6. **Judgments: Juries: Appeal and Error.** In determining the sufficiency of the evidence corroborating the testimony of the prosecutrix, the reso-

lution of conflicts in the evidence, the credibility of the witnesses, and the determination of the plausibility of explanations or the weighing of such evidence are matters for the jury and must be sustained on appeal if, taking the view most favorable to the State, there is sufficient evidence to support the verdict.

Appeal from the District Court for Saline County: ORVILLE L. COADY, Judge. Affirmed.

Matthew Hanson for appellant.

Paul L. Douglas, Attorney General, and Shanler D. Cronk for appellee.

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

BRODKEY, J.

Robert E. Watkins, defendant and appellant herein, appeals to this court from his conviction by the District Court of Saline County, Nebraska, of first degree sexual assault in violation of Neb. Rev. Stat. § 28-319(1)(c) (Reissue 1979). The case was tried before a jury on March 20, 1980, which found the defendant guilty of the sexual assault of his stepdaughter, a minor child born December 28, 1968. The court sentenced him to a term of from 1 to 5 years, determined that the defendant was a mentally disordered sex offender, and committed him to the Lincoln Regional Center until such time as it is determined that the defendant is no longer a mentally disordered sex offender or until he has received the maximum benefit of treatment.

The defendant's principal assignments of error on appeal to this court are that the District Court erred in allowing the prosecutrix and her mother to testify as to the nature and details of the sexual assault complained; and by allowing the parties to testify to the facts and details of an alleged sexual assault which occurred on December 31, 1979.

At the trial the complaining witness testified as to her sexual molestation by the defendant, age 33, shortly after Thanksgiving of 1979. When asked why she did

not tell her mother about the assault until after Christmas, the witness replied: "... because he told me if I told, he would go to jail and I would go to a foster home and I'd never get to see my mother or speak to her again.

"Q. Were you afraid of going to a foster home?

"A. Yes, because I went to one before and I didn't like it."

She was also permitted to testify in detail as to a subsequent sexual assault by the defendant that occurred on the evening of December 31, 1979, which was the anniversary of the marriage of her mother and the defendant. The witness was asked whether she talked with her mother after the second assault, and she testified that the following conversation took place in the evening of January 1, 1980: "Well, that night, she was looking kind of sad and everything and I asked her what was wrong, and she goes, she just sits there and I said, is it about my brother and she said, no. Is it about my sister? And she goes no. Is it about me, no. Is it about my father, and she said that she didn't love him and I said, 'Are you going to get a divorce with him?' And she said, 'I don't know.' And I said, 'Well, if you are, I guess I will tell you,' and I told her what he did."

Mrs. Watkins testified that upon learning of the assault upon her daughter, she went to the Crete police station and filed a complaint against her husband. Upon her return home, the victim told her mother about the sexual assault which occurred shortly after Thanksgiving. Mrs. Watkins testified that she then confronted her husband:

"... I told him that he had been bothering [the victim] again, and that that was it. That I couldn't trust him anymore and that our marriage was over and I just, you know, and he started to deny it and then I started naming off to him the things that she told me he had done to her.

"Q. What did you name?

"A. Well the things that happened after Thanksgiving, [detailing the sexual acts performed upon her by the defendant].

"Q. You told him that?

"A. Yeah.

"Q. And then what happened?

"A. He didn't deny it anymore

"Q. Can you remember what he said, as close as you can remember, can you tell the Court what he said?

"*A. Well, he said that he shouldn't have done those things to* [the victim], *that he was sorry for them, and that he needed help, that he had been sick for a long time, and he didn't realize it, but that he needed help and for me not to throw him away but to stay beside him, stand beside him and try to work with him.*" (Emphasis supplied.)

Mrs. Watkins further testified that after she put the girls to bed in her room, she stayed up and talked with the defendant until about 2 a.m. The following morning, January 2, 1980, Chief James Roche of the Crete police department came to the Watkins house to inquire further as to Mrs. Watkins' complaint. Mrs. Watkins testified that when she went to look for her husband, he was not in the house and the car was missing.

Chief Roche testified that after his interview with the victim and Mrs. Watkins, he tried to locate the defendant at several locations throughout the city. He stated that the Watkins car was found abandoned several blocks from the defendant's residence. Chief Roche testified that he contacted the manager of the bus station in Crete, and was told that a man matching the defendant's description had departed on the morning bus en route to Denver, Colorado. He was asked by the prosecutor: "What did you do then?"

"A. I asked Mr. Hier to give me an itinerary or where the bus would be stopping at various locations throughout the state and he advised me that the bus was currently in Exeter or somewhere, and that the next scheduled stop would have been in Hastings, Nebraska, and

so I — the time was about 11:30 or in that neighborhood and I think the bus was to be in Hastings in about thirty or forty minutes. So I contacted Captain Lyle Dunham of the Hastings Police Department and advised him that I believed that Mr. Watkins was on the bus and that I had probable cause to believe that he had committed a crime of sexual assault and that I wished him to be arrested.

"Q. Did you receive a report back from Hastings at anytime?

"A. . . . about 1 p.m., I received a call back from the Hastings Police Department that they had Mr. Watkins in custody."

The rule is well established in this state that in a prosecution for sexual assault, the prosecutrix may testify in chief on direct examination, if within a reasonable time under all the circumstances after the act was committed she made complaint to another, to the fact and nature of the complaint, but not as to its details; and that others may likewise testify in chief to such fact and nature of the complaint, but not as to its details. *State v. Chaney*, 184 Neb. 734, 171 N.W.2d 787 (1969); *Sherrick v. State*, 157 Neb. 623, 61 N.W.2d 358 (1953).

This court has also stated that one to whom the complaining witness has complained may testify to the fact and nature of the complaint if the complaint was made voluntarily and without unreasonable or inconsistent delay. See, *State v. Deardurff*, 186 Neb. 92, 180 N.W.2d 890 (1970); *Texter v. State*, 170 Neb. 426, 102 N.W.2d 655 (1960). With respect to corroboration, however, the rule is that it is not essential that the prosecutrix be corroborated by the testimony of other witnesses as to the particular act constituting the offense. It is sufficient if she is corroborated as to material facts and circumstances which tend to support her testimony and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn. *State v. Garza*, 187 Neb. 407, 191 N.W.2d 454 (1971);

Onstott v. State, 156 Neb. 55, 54 N.W.2d 380 (1952).

The testimony, as presented by the victim and her mother on direct examination, went into detail as to the nature of the assault committed around Thanksgiving, and also a subsequent sexual assault which occurred on December 31, 1979. Defendant contends that these statements given by the victim to her mother were not "spontaneous, unpremeditated, or so closely connected with the act as to be part of the res gestae." See *State v. Chaney, supra.*

It is clear from the record that the defendant in this case had both the opportunity and inclination to commit the offense; and we have held that such opportunity and inclination on the part of the defendant may be considered in determining whether there has been sufficient corroboration. *Miller v. State*, 169 Neb. 737, 100 N.W.2d 876 (1960); *Onstott v. State, supra; Frank v. State*, 150 Neb. 745, 35 N.W.2d 816 (1949); *Pew v. State*, 164 Neb. 735, 83 N.W.2d 377 (1957).

In addition, we have present in this case the testimony of defendant's wife regarding the admission made by the defendant to her when she confronted him about his conduct with the victim: "[T]hat he shouldn't have done those things to [the victim], that he was sorry for them, and that he needed help, that he had been sick for a long time, and didn't realize it, but that he needed help . . . ." In *Miller v. State, supra*, at 740, 100 N.W.2d at 879, this court stated: "In truth the defendant himself furnished sufficient corroboration to sustain the charge. His own statements satisfied the requirement of corroboration. In Loar v. State, 76 Neb. 148, 107 N.W. 229, it was said: 'In a trial for statutory rape, admissions by the defendant showing that he planned and procured an opportunity to commit the act charged, with evidence of familiarities between them, furnishes sufficient corroboration of the girl's positive testimony to support a judgment of conviction.'" Likewise, in *Onstott v. State, supra*, the court admitted as evidence tending to corroborate the testimony of the

prosecutrix as to the offense charged, a letter written by the defendant which he had delivered to his brother. The court stated: "Her [the prosecutrix] story is further corroborated by other facts and circumstances in the record, particularly by the letter defendant wrote to his brother shortly after the offense was committed." *Id.* at 60, 54 N.W.2d at 383.

Finally, we have in evidence in this case the testimony, previously set out in some detail, that the defendant left the jurisdiction the morning after his confrontation by the wife and his admission that "he shouldn't have done those things to [the victim]." While flight, in and of itself, is frequently ambiguous, when coupled with other facts and circumstances it may be sufficient to constitute corroboration of the testimony of the prosecutrix in cases involving sexual assault. In *Salerno v. State*, 162 Neb. 99, 102, 75 N.W.2d 362, 364 (1956), the court stated: "The jury evidently believed the evidence of the prosecutrix and her corroborating witnesses, and gave consideration to the fact that defendant participated in the enterprise from its inception and sought to avoid punishment by flight into another state. The jury had a right to consider these matters." Likewise, in *State v. Gero*, 184 Neb. 107, 111, 165 N.W.2d 371, 373 (1969), this court stated: "The defendant fled from the scene of the crime and, although he claims he ran because he was shot at, it is clear that he ran and was then shot at in an attempt to halt his flight. The foregoing evidence corroborates the testimony of the prosecutrix that she was attacked and forcibly raped." See, also, *Williams v. State*, 69 Neb. 402, 95 N.W. 1014 (1903); McCormick on Evidence § 271, at 655-56 (2d ed. 1972).

Taken together, we conclude that testimony in the record with reference to the above matters was more than ample to corroborate the testimony of the prosecutrix in this case, even without a consideration of the testimony in the record with reference to the prosecutrix' subsequent complaint to her mother with regard

to the acts of the defendant made sometime thereafter.

We have held that in determining the sufficiency of the evidence corroborating the testimony of the prosecutrix, the resolution of conflicts in the evidence, the credibility of the witnesses, and the determination of the plausibility of explanations or the weighing of such evidence, are matters for the jury and must be sustained on appeal if, taking the view most favorable to the State, there is sufficient evidence to support the verdict. *State v. Tatum*, 206 Neb. 625, 294 N.W.2d 354 (1980); *State v. Pankey*, 202 Neb. 595, 276 N.W.2d 233 (1979). In this case, the evidence taken most favorably to the State supports the verdict returned in this case.

In view of what we have stated above, the verdict of the jury and the judgment entered thereon by the trial court must be affirmed.

AFFIRMED.

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2. Neb. Rev. Stat. § 25-854 (Reissue 1979) has been held by this court on several occasions to not provide an absolute right of amendment. Suzuki v. Gateway Realty 562
3. This court has previously stated that, before error can be predicated upon the refusal of the court to permit an amendment to a petition after demurrer thereto is sustained, the record must show that, under the circumstances, the ruling of the court was an abuse of discretion. Suzuki v. Gateway Realty 562

Appeal and Error.

1. A custody order of the trial court will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. Curfman v. Curfman 1
2. Although Neb. Rev. Stat. § 25-1925 (Reissue 1979) requires the Supreme Court to try issues de novo on appeal from judgments in an action in equity, this court will consider the fact that the trial court had the opportunity to examine the physical evidence and observe the witnesses and their manner of testifying where the evidence on material issues is conflicting.
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10. In reviewing the judgment of the compensation court, we are bound by the findings of fact made by that court after rehearing to the extent that the same have support in the evidence. Findings of fact made by the Workmen's Compensation Court after rehearing have the effect of a jury verdict and may not be set aside on appeal unless clearly wrong.
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11. While an action for dissolution of marriage is heard de novo in this court, 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.
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12. The trial court is afforded a large measure of discretion in deciding whether to accept plea bargain arrangements and the Supreme Court upon appeal will reverse the trial court's determination only in case of a clear abuse of judicial discretion. State v. Leisy 118

13. In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact, and the verdict must be sustained if, taking the view most favor-

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State v. Hortman 393
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State v. Janis 491
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27. The reception of evidence collateral to any issue in the case intended to affect the credibility of a witness falls within the discretion of the trial court, and, absent an abuse of discretion, it is not grounds for reversal. State v. Vicars 325
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33. Limiting the scope of a prosecutor's opening statement is largely within the trial court's discretion; its rulings will not be disturbed unless a prejudicial abuse of discretion occurred. State v. Wounded Arrow 544
34. This court has previously stated that, before error can be predicated upon the refusal of the court to permit an amendment to a petition after demurrer thereto is sustained, the record must show that, under the circumstances, the ruling of the court was an abuse of discretion. Suzuki v. Gateway Realty 562
35. This court will not disturb an order of the Public Service commission unless the commission's order is illegal, arbitrary, capricious, or unreasonable. Reis v. Glenwood Telephone Membership Corp. 575
36. The findings of fact made by the Nebraska Workmen's Compensation Court after rehearing shall have the same force and effect as a jury verdict in a civil case. A judgment, order, or award of the Nebraska Workmen's Compensation Court may be modified, reversed, or set aside only upon the grounds that (1) the court acted without or in excess of its powers, (2) the judgment, order, or award was procured by fraud, (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award, or (4) the findings of fact by the court do not support the order or award. Neb. Rev. Stat. § 48-185 (Reissue 1978). Goers v. Bud Irons Excavating 579
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39. In appeals to this court in suits in equity, the trial shall

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40. A litigant may always ask a court of general jurisdiction to exercise its inherent power. However, the filing of a document entitled "motion for rehearing" does not toll the time for appeal, and the time for appeal begins to run from the date the court enters the order overruling the motion for new trial, if such a motion has been timely filed. In re Estate of Weinberger 711

41. If an attorney's advice is within the range of competence required for attorneys in criminal cases and does not induce defendant to waive a jury trial by threats or promises, a defendant may not attack his jury trial waiver on appeal. State v. Journey 717

42. The question of the competency of a witness to testify rests largely in the sound discretion of the trial court and the court's determination will not be disturbed in the absence of a clear abuse of discretion. State v. Hitt 746

43. Value of property is always a matter of judgment, and a contract based upon inadequate consideration will not be set aside for that reason alone, unless the inadequacy is so great as to furnish of itself convincing evidence of fraud. Okeson v. Jack Dempsey Drywall, Inc. 847

44. Where allegedly prejudicial remarks of counsel do not appear in the bill of exceptions, this court is precluded from considering an assigned error concerning such remarks. State v. Duis 851

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1. The mere fact that there is an illegal arrest does not thereby cause all evidence otherwise lawfully obtained to be inadmissible "per se." State v. Smith 263

2. An illegal arrest of an accused, without more, does not bar the subsequent prosecution of the accused, and the illegality of the accused's detention by police does not deprive the government of the opportunity to prove the accused's guilt through the introduction of evidence wholly untainted by the police misconduct. State v. Smith 263

3. While flight, in and of itself, is frequently ambiguous, when coupled with other facts and circumstances it may be sufficient to constitute corroboration of the testimony of the prosecutrix in cases involving sexual assault. State v. Watkins 859

Assault.

Assault with a dangerous instrument, like simple assault, is a general intent crime. State v. Duis 851

Attorney and Client.

An agreement between an attorney and client that the attorney shall have a lien on the judgment is decisive as to the existence of the lien and its amount, and constitutes a valid equitable assignment of the judgment pro tanto which attaches to the judgment as soon as it is entered. Barber v. Barber 101

Attorney-Client Privilege.

There is no attorney-client privilege under Neb. Rev. Stat. § 27-503 (Reissue 1979) as to a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer. State v. Journey 717

Attorney Fees.

1. The general rule is that the allowance of attorney fees and suit money is ordinarily regarded to be for the wife and should be made to her, and not to the parties who perform services for her, or to whom she becomes indebted in connection with the litigation. Barber v. Barber 101
2. It is also generally held that unless the statute specifically provides that attorney fees allowable thereunder go to the attorney, they are an allowance to the party and not to the attorney. Barber v. Barber 101
3. An attorney has a lien for a general balance of compensation upon any papers of his client which have come into his possession in the course of his professional employment; and upon money in his hands belonging to his client, and in the hands of the adverse party in an action or proceeding in which the attorney was employed, from the time of giving notice of the lien to that party. Neb. Rev. Stat. § 7-108 (Reissue 1977). Barber v. Barber 101
4. The statutory and common law lien upon money in the hands of the adverse party in an action or proceeding in which the attorney was employed is a charging or specific lien, and is not perfected until notice has been given to the party in possession of the fund. Any notice of the existence of the claim, and that it will be asserted, is sufficient. The statute does not require that the notice shall be in any specific form, or that it shall be given in any particular way. Barber v. Barber 101
5. The award of attorney fees involves consideration of such factors as the nature of the case, the amount involved in the controversy, the services actually performed, the results obtained, the length of time required for preparation of the case, the skill devoted to preparation and presentation of the case, the novelty and difficulty of the questions raised, and the customary charges of the bar for similar services. Barber v. Barber 101

6. An insurer who is a subrogee and does not come into the action but accepts the avails of the litigation is liable for a proportionate share of the expenses of the litigation, including attorney fees. St. Paul Fire & Marine Ins. co. v. Truesdell Distributing Corp. 153
7. A party must plead and prove conditions precedent to be entitled to an allowance of an attorney fee under Neb. Rev. Stat. § 25-1801 (Reissue 1979). Guaranteed Foods v. Rison 400
8. In the event the employer files an application for a rehearing before a three-judge panel of the Workmen's Compensation Court from an award of a judge of the Workmen's Compensation Court and fails to obtain any reduction in the amount of such award, the Workmen's Compensation Court may allow the employee a reasonable attorney fee to be taxed as costs against the employer for such rehearing. Neb. Rev. Stat. § 48-125 (Reissue 1978). Goers v. Bud Irons Excavating 579
9. The obligation of the insurer to indemnify the insured for court costs and reasonable attorney fees incurred and paid by the insured in defending a suit relates only to any suit or legal proceedings brought against the insured to enforce insured's liability or alleged liability on account of any loss, claim, or damage which, if established against the insured, would constitute a valid and collectible loss sustained by the insured under the terms of the bond. Omaha Bank v. Aetna Cas. and Surety Co. 782
10. It is the practice in this state to allow recovery of attorney fees only in such cases as are provided for by statute. There is no statutory authority in this state for awarding attorney fees in a habeas corpus proceeding. In re Application of Ghowrwal 831

Attorneys.

Although lawyers may take acknowledgments in connection with their professional activities under Neb. Rev. Stat. § 64-211 (Reissue 1976), an officer who is an interested party is not authorized to take an acknowledgment. Nat. Bank of Commerce Trust & Savings Assn. v. Rhodes ... 44

Attorneys at Law.

1. Willful failure by an attorney without excuse to appear in court at the appointed time, of which he has notice, thereby delaying the business of the court, is contempt. In re Contempt of Potter 769
2. When the failure of an attorney to appear at the announced time for resumption of judicial proceedings occurs in the presence of the court and is shown by its records, there is

no reason to require the judge to file an affidavit or statement of facts setting forth the basis of the charge of contempt or to require him to give or obtain testimony establishing the facts. The rights of the attorney will be fully protected by an order to show cause apprising him of the charge against him, followed by an opportunity to be heard. If the attorney claims his conduct is excusable, he is entitled to a hearing where he may offer evidence. In re Contempt of Potter 769

Attorney's Liens.

1. An attorney has a lien for a general balance of compensation upon any papers of his client which have come into his possession in the course of his professional employment; and upon money in his hands belonging to his client, and in the hands of the adverse party in an action or proceeding in which the attorney was employed, from the time of giving notice of the lien to that party. Neb. Rev. Stat. § 7-108 (Reissue 1977). Barber v. Barber 101
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3. In equity actions, it is generally held that the proper method to enforce an attorney's lien is to file a petition in intervention in the original action. Barber v. Barber 101
4. An agreement between an attorney and client that the attorney shall have a lien on the judgment is decisive as to the existence of the lien and its amount, and constitutes a valid equitable assignment of the judgment pro tanto which attaches to the judgment as soon as it is entered. Barber v. Barber 101
5. When a charging lien is created by an agreement, an action to establish and enforce it is within the equity jurisdiction of the court. Barber v. Barber 101

Bonds.

1. Statutory provisions which require approval of bonds are for the protection of the public, not for the benefit of sureties; sureties cannot object that approval and acceptance were not within the prescribed time. State v. Easley 443
2. The liability of a surety on statutory undertakings is measured by the terms of the statute rather than by the terms

set forth in the agreement, where the two are in conflict. The statute forms a controlling part of every such agreement. State v. Easley 443
3. The law at the time of the execution of a statutory bond is a part of it; if it gives to the bond a certain legal effect, it is as much a part of the bond as if in terms incorporated therein. State v. Easley 443
4. Generally a banker's blanket bond does not insure against legal liability of the named insured to a third party; the fact that the insured has not yet paid its third-party liability is not at all significant. Omaha Bank v. Aetna Cas. and Surety Co. 782
5. The coverage of a banker's blanket bond, indemnifying against dishonest, fraudulent acts or failure to perform faithfully, does not insure the insured against the consequences of its own torts. Omaha Bank v. Aetna Cas. and Surety Co. 782
6. The obligation of the insurer to indemnify the insured for court costs and reasonable attorney fees incurred and paid by the insured in defending a suit relates only to any suit or legal proceedings brought against the insured to enforce insured's liability or alleged liability on account of any loss, claim, or damage which, if established against the insured, would constitute a valid and collectible loss sustained by the insured under the terms of the bond. Omaha Bank v. Aetna Cas. and Surety Co. 782

Breach of Contract.

1. In an action against a vendee to recover the damages resulting from a breach of a contract for the sale of real estate, the measure of damages is the difference between the agreed price and the market value of the property at the time of the breach. Hahn v. International Management Services, Inc. 229
2. A condition is excused if the occurrence of the condition is prevented by the party whose performance is dependent upon the condition. Hahn v. International Management Services, Inc. 229
3. The acceptance of rent after the lessee's breach or default in the terms of the lease generally constitutes a waiver of the default so as to entitle the lessee to enforce an option to purchase. Barber v. Raichart 278

Bridges.

1. It is the duty of a county to use reasonable and ordinary care in the construction, maintenance, and repair of its highways and bridges so that they will be reasonably safe for the traveler using them while he is in the exercise of

reasonable and ordinary care and prudence. Hansmann v. County of Gosper 659
2. Under Neb. Rev. Stat. § 23-2410 (Reissue 1977), a county is liable for damages caused by insufficiency or want of repair of a county bridge. Hansmann v. County of Gosper .. 659
3. A county is required to maintain bridges that are sufficient for the proper accommodation of the public at large in the various occupations which from time to time may be pursued in the locality where the bridge is situated. Hansmann v. County of Gosper 659
4. A person using a bridge has a right to assume that the bridge is sufficient in the absence of knowledge that it is unsafe. Hansmann v. County of Gosper 659
5. The county is not required to have actual notice of defects in a bridge. It is sufficient if the defect existed for such a length of time that, by the exercise of ordinary diligence, the defect would have been discovered and repaired. Hansmann v. County of Gosper 659
6. A failure to post a load limit on a bridge may be negligence or evidence of negligence. Hansmann v. County of Gosper .. 659

Burden of Proof.

1. The defendant has the burden of establishing a basis for relief in a post conviction proceeding, and the findings of the District Court in denying such relief will not be disturbed on appeal unless they are clearly erroneous. State v. Bishop, Davis, and Yates 10
2. It is the duty of one challenging a joint trial to demonstrate how and in what manner he is prejudiced. State v. Anderson and Hochstein 51
3. The burden of proof is upon the plaintiff to show by a preponderance of the evidence that the injury sustained was caused by, or related to, the accident and was not the result of the normal progression of the plaintiff's preexisting condition which would have been sustained in the absence of the accident. White v. Western Commodities, Inc. ... 75
4. 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. McDonald v. McDonald 217
5. In a workmen's compensation case, the burden is upon the claimant to establish that the accidental injury arose in the course of employment as well as out of the employment. Alcaraz v. Wilson & Co., Inc. 256

6. To challenge the veracity of an affidavit for a search warrant based upon allegations of false and misleading statements contained therein, there must be a showing of deliberate falsehood or of reckless disregard for the truth, accompanied by an offer of proof. State v. Stickelman 429
7. The person challenging the competency of counsel has the burden of proof to establish the counsel's incompetence. State v. Colgrove 496
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. White v. Father Flanagan's Boys' Home 528
9. A motion for summary judgment may be granted only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The burden is upon the party moving for the summary judgment to show no issue of fact exists, and unless he can conclusively do so, the motion must be overruled. Suzuki v. Gateway Realty 562
10. To establish an equitable estoppel the defendant consignee must prove: That the plaintiff made a false representation or concealment of material facts with actual or constructive knowledge of such false representation or concealment; that the defendant consignee did not have the knowledge or means of knowledge that such facts were misrepresented; and that the defendant consignee acted with reliance upon said facts to his prejudice. Hilt Truck Lines, Inc. v. House of Wines, Inc. 568
11. In an action for a writ of habeas corpus, including one which challenges extradition proceedings, the burden of proof is upon the petitioner to establish his claim that his detention is illegal. Dovel v. Adams 766

Causes of Action.

A cause of action consists of a primary right possessed by the plaintiff and a corresponding duty devolving upon the defendant, combined with a "delict" or wrong done by the defendant. Suhr v. City of Scribner 24

Caveat Emptor.

The rule of *caveat emptor* applies to leases of commercial real estate wherein control passes to the lessee. Absent fraud or concealment, it is the lessee's duty to examine the premises with respect to safety and suitability for his business. Gehrke v. General Theatre Corp. 301

Certificates of Title.

A certificate of title to a motor vehicle is generally conclusive evidence in this state of the ownership of the vehicle. Exceptions to this rule apply only to prevent fraud and coercion. Kinkenon v. Hue 698

Character Evidence.

1. In a criminal trial, a defendant may not offer evidence of his general character or reputation for truth and veracity until it has been attacked. State v. Hortman 393
2. In a criminal trial, a defendant may only offer character evidence under Neb. Rev. Stat. § 27-401(1)(a) (Reissue 1979) of a pertinent character trait. State v. Hortman 393

Child Custody.

1. In determining the question of who should have care and custody of minor children upon the dissolution of a marriage, the paramount consideration is the best interests and welfare of the children.
   Curfman v. Curfman 1
   Kringel v. Kringel 241
2. In any custody determination, the discretion of the trial court in such a situation is necessarily subjective and must be founded to a significant extent upon its observation of the parties and the review of all the minute details that affect the general welfare and the best interests of the children. It also must necessarily be prospective in nature. Curfman v. Curfman 1
3. A custody order of the trial court will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. Curfman v. Curfman 1
4. Where the custody of a minor child is involved in a habeas corpus action the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of a fit, proper, and suitable parent. Nielsen v. Nielsen 141
5. The courts may not properly deprive a parent of the custody of a minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship or has forfeited that right. Nielsen v. Nielsen ... 141
6. The right of the parent to the custody of his minor child is not lightly to be set aside in favor of more distant relatives or unrelated parties, and the courts may not deprive a parent of such custody unless he is shown to be unfit or to have forfeited his superior right to such custody.
   Nielsen v. Nielsen 141
   In re Interest of O'Donnell 367

7. The statements in *Eravi v. Bohnert*, 201 Neb. 99, 266 N.W.2d 228 (1978), and *Bigley v. Tibbs*, 193 Neb. 4, 225 N.W.2d 27 (1975), insofar as they intimated that the natural right of a parent is of no significance in determining child custody in controversies between a natural parent and other relatives or strangers, are disapproved. Nielsen v. Nielsen . 141
8. The District Court in its discretion may appoint an attorney to protect the interests of any minor child of the parties to an action to dissolve a marriage. The limits of discretion depend on the circumstances. Deacon v. Deacon 193
9. 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 parties at the trial. Kringel v. Kringel 241
10. Sexual misconduct is a factor which, although not necessarily determinative, may be properly considered in determining the best interests of the children. Kringel v. Kringel 241
11. When a controversy arises between the natural parents as to the custody of minor children, no presumption shall exist that one parent is more fit to have custody of the children than the other. Kringel v. Kringel 241
12. The decision of the trial court on the granting or changing of custody of minor children, while subject to review, will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. Kringel v. Kringel 241
13. It is the position of this court that when a court's jurisdiction is invoked by a habeas corpus petition seeking custody of a child, the child becomes a ward of the court and the prime consideration is the welfare of the child. In re Application of Ghowrwal 831
14. In a habeas corpus proceeding the court need not find a change in circumstances to modify the custody award. The best interests of the child are the primary concern of the court, and former adjudications between parents are evidentiary only, and not controlling. In re Application of Ghowrwal 831

Child Support.

1. Prosecution may be brought under Neb. Rev. Stat. § 28-449(1) (Reissue 1975), failure to support wife, child, or stepchild, even though a child support judgment, either incident to a decree of divorce or separation or otherwise, has been entered against the person charged. State v. Easley 443
2. Where a person prosecuted under Neb. Rev. Stat. § 28-

449(1) (Reissue 1975) has previously been ordered to pay child support in a divorce decree, the measure of his liability is the amount provided in the decree. State v. Easley .. 443

Circumstantial Evidence.

1. Pattern jury instruction NJI 14.50 correctly states the law in defining and applying direct and circumstantial evidence. State v. Leisy 118
2. In a sexual assault case, circumstantial evidence may be sufficient to present a jury question on consent. State v. Wounded Arrow 544

Collateral Attack.

1. Only a void judgment is subject to collateral attack. Schilke v. School Dist. No. 107 448
2. Where the court has jurisdiction of the parties and the subject matter, its judgment is not subject to collateral attack. Schilke v. School Dist. No. 107 448
3. The rule as to collateral attack is not limited to courts of general jurisdiction, but also applies to administrative boards and tribunals acting in a quasi-judicial capacity. Schilke v. School Dist. No. 107 448
4. Even though a judicial body errs in holding that a petition is sufficient, if it had jurisdiction, such holding will not subject the judgment rendered to collateral attack. Schilke v. School Dist. No. 107 448

Commercial Leases.

The rule of *caveat emptor* applies to leases of commercial real estate wherein control passes to the lessee. Absent fraud or concealment, it is the lessee's duty to examine the premises with respect to safety and suitability for his business. Gehrke v. General Theatre Corp. 301

Common Law.

The definition of an act forbidden by statute, but not defined by it, may be ascertained by reference to the common law. State v. Mattan 679

Comparative Negligence.

In a case where, under the law and facts, the submission of the issue of contributory negligence and a comparison thereof with negligence of the opposing party to ascertain what damages, if any, shall be allowed, is proper, the determination of the amount of the damages is for the jury. Nickal v. Phinney 281

Competence to Stand Trial.

1. Proceedings commenced pursuant to Neb. Rev. Stat. § 29-1823 (Reissue 1979) are special proceedings as referred to in Neb. Rev. Stat. § 25-1902 (Reissue 1979). State v. Guatney 501
2. A proceeding to determine the competency of an accused to stand trial is a special proceeding within the meaning of Neb. Rev. Stat. § 25-1902 (Reissue 1979), and an order finding the accused incompetent to stand trial and ordering him confined until such time as he is competent is a final order from which an appeal may be taken under Neb. Rev. Stat. § 25-1911 (Reissue 1979). State v. Guatney .. 501
3. The test of mental competency to stand trial is whether the defendant *now* has the capacity to understand the nature and object of the proceedings against him, to comprehend his own condition in reference to such proceedings, and to make a rational defense. State v. Guatney 501

Conflict of Interests.

1. If a conflict of interest arises in the representation of more than one defendant in a criminal trial, the mere existence of such conflict raises a presumption of prejudice and reversal is automatic. State v. Bishop, Davis, and Yates ... 10
2. A defendant in a criminal case is denied effective assistance of counsel whenever a trial court improperly requires joint representation over timely objections which are supported by representations which focus explicitly on the probable risk of a conflict of interest. State v. Bishop, Davis, and Yates 10
3. Permitting or requiring a single attorney to represent codefendants in a criminal trial is not per se violative of the right of effective assistance of counsel. State v. Bishop, Davis, and Yates 10
4. The *possibility* of conflict arising because of multiple representation by an attorney is insufficient to impugn a criminal conviction. In order to demonstrate a violation of his sixth amendment rights, a defendant must establish that an *actual* conflict of interest adversely affected his lawyer's performance. State v. Bishop, Davis, and Yates 10

Consent.

In a sexual assault case, circumstantial evidence may be sufficient to present a jury question on consent. State v. Wounded Arrow 544

Consideration.

1. Although mere inadequacy of consideration alone is gen-

erally not a ground upon which a release may be avoided, it is a factor which may be considered with other circumstances. Humber v. Gibreal Auto Sales, Inc. 286
2. Where a release has to be supported by a consideration, total failure of the consideration will enable the releasor to avoid the release. Humber v. Gibreal Auto Sales, Inc. 286
3. A failure of consideration of such a degree that the remaining consideration may be deemed to be no substantial consideration is an excuse for nonperformance of a promise. Humber v. Gibreal Auto Sales, Inc. 286
4. Personal services are sufficient consideration to support an agreement. There is no more reason to presume that services are contributed as a gift than to presume that funds are contributed as a gift. Kinkenon v. Hue 698

Consignee and Consignor.

To establish an equitable estoppel the defendant consignee must prove: That the plaintiff made a false representation or concealment of material facts with actual or constructive knowledge of such false representation or concealment; that the defendant consignee did not have the knowledge or means of knowledge that such facts were misrepresented; and that the defendant consignee acted with reliance upon said facts to his prejudice. Hilt Truck Lines, Inc. v. House of Wines, Inc. 568

Consignment.

1. The primary test of whether a transaction in the form of an agency to sell or a consignment created the relation of buyer and seller or one of principal and agent is the intention of the parties as gathered from the whole scope and effect of the language used. The label which the parties give to the transaction does not determine its character, and courts look beyond mere labels and examine the contract as a whole in order to ascertain the intention of the parties. Allen v. Dealer Assistance, Inc. 455
2. If a transferee acquires absolute dominion over goods, with the right to sell and dispose of goods at prices and upon terms as he sees fit, and becomes bound to pay a specified price for them, either at a specified time or upon occurrence of a specified future event, as when he resells them, he becomes the purchaser and title thereto passes to him at once. Allen v. Dealer Assistance, Inc. 455

Constitutional Amendments.

1. The adoption by the Legislature of a proposed amendment does not amend the Nebraska Constitution. Only the electorate can amend the Constitution by adopting the proposal by a majority vote. Cunningham v. Exon 513

2. A proposed amendment to the Nebraska Constitution must be expressly adopted by the voters, including a proposal to repeal existing language. Cunningham v. Exon 513
3. The Nebraska Constitution may be amended by implication only where language adopted by the voters conflicts with existing constitutional provisions. In that situation, the newer provisions control and the prior provisions are implicitly repealed. Cunningham v. Exon 513
4. A clause in a constitutional amendment will prevail over a provision in the original instrument inconsistent with the amendment only when they relate to the same subject, are adopted for the same purpose, and cannot be enforced without substantial conflict. Cunningham v. Exon 513

Constitutional Law.
1. The death penalty, when properly imposed by a state, does not violate either the eighth or fourteenth amendments of the United States Constitution or Neb. Const. art. 1, § 9. State v. Anderson and Hochstein 51
2. Jury sentencing in a capital case is not constitutionally required. State v. Anderson and Hochstein 51
3. In an action under the Post Conviction Act, the only errors cognizable are those which make the conviction void or voidable under the state or federal constitution. State v. Cole 318
4. The capacity to claim the protection of the fourth amendment as to unreasonable searches and seizures depends not upon a property right in the invaded place, but upon whether the person who claims the protection of the amendment has a legitimate expectation of privacy in the invaded place. State v. Vicars 325
5. Fourth amendment protection extends not only to one's home but also to one's curtilage, which is usually defined as a small piece of land, not necessarily enclosed, around a dwelling house and generally includes buildings used for domestic purposes in the conduct of family affairs. State v. Vicars 325
6. A public power district is a governmental subdivision of the state within the meaning of Neb. Const. art. VIII, § 2, and all of its property is exempt from taxation except as otherwise provided by the Constitution. Nebraska P. P. Dist. v. Hershey School Dist. 412
7. The provisions of the Constitution in relation to taxation are not grants of power but are limitations on the taxing power of the state. Nebraska P. P. Dist. v. Hershey School Dist. 412
8. The Legislature cannot circumvent an express provision of the Constitution by doing indirectly what it may not do directly. Nebraska P. P. Dist. v. Hershey School Dist. 412

9. Constitutional provisions should receive a broader and more liberal construction than statutes, and constitutions are not subject to the rules of strict construction. Nebraska P. P. Dist. v. Hershey School Dist. 412
10. Neb. Rev. Stat. § 79-1370 (Cum. Supp. 1980), by requiring public electric entities to make specific mandatory payments to school districts, violates the provisions of Neb. Const. art. VIII, § 11. Nebraska P. P. Dist. v. Hershey School Dist. 412
11. The adoption by the Legislature of a proposed amendment does not amend the Nebraska Constitution. Only the electorate can amend the Constitution by adopting the proposal by a majority vote. Cunningham v. Exon 513
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14. A clause in a constitutional amendment will prevail over a provision in the original instrument inconsistent with the amendment only when they relate to the same subject, are adopted for the same purpose, and cannot be enforced without substantial conflict. Cunningham v. Exon 513
15. The power of classification rests with the Legislature and cannot be interfered with by the courts unless it is clearly apparent that the Legislature has, by artificial and baseless classification, attempted to evade and violate provisions of the Constitution prohibiting local and special legislation. State ex rel. Douglas v. Marsh 598
16. A person to whom a statute may be constitutionally applied will not be heard to challenge the statute on the ground that it might conceivably be applied unconstitutionally to others in situations not before the court. State v. Greaser 668
17. Any legislation that makes it a crime for one to use his own money for any purpose other than the payment of his debts is violative of the Constitution of this state, which expressly prohibits imprisonment for debt except in cases of fraud. State v. Hocutt 689

Consumer Credit.

1. Under the federal Truth in Lending Act, the possibility of a mechanic's lien can be a security interest retained or to be required which must be disclosed to the obligor by his creditor in a home improvement contract. Anderson v. Wagner 87

2. In order for a materialman to become a "consumer creditor" of the homeowner under the federal Truth in Lending Act, there must be a credit agreement existing between the two parties. Anderson v. Wagner 87
3. The disclosure requirements of the Truth in Lending Act are imposed only upon creditors, or those who regularly extend or arrange for the extension of credit for which the payment of a finance charge is required. Anderson v. Wagner 87

Contempt.

1. The power to punish for contempt does not depend upon statute. It is incident to every tribunal from its very constitution and may be generally exercised only by that tribunal whose order has been violated or proceedings interfered with. In re Contempt of Potter 769
2. Willful failure by an attorney without excuse to appear in court at the appointed time, of which he has notice, thereby delaying the business of the court, is contempt. In re Contempt of Potter 769
3. Actions which constitute direct contempt occur in the presence of the court so that the court has personal knowledge of the facts and has no need to inform itself of them by using witnesses or other evidence; the events constituting indirect or constructive contempt occur outside the presence of the court and the court must inform itself of the facts through the use of witnesses or other evidence. In re Contempt of Potter 769
4. When the failure of an attorney to appear at the announced time for resumption of judicial proceedings occurs in the presence of the court and is shown by its records, there is no reason to require the judge to file an affidavit or statement of facts setting forth the basis of the charge of contempt or to require him to give or obtain testimony establishing the facts. The rights of the attorney will be fully protected by an order to show cause apprising him of the charge against him, followed by an opportunity to be heard. If the attorney claims his conduct is excusable, he is entitled to a hearing where he may offer evidence. In re Contempt of Potter 769

Contractors and Subcontractors

1. Under the provisions of Neb. Rev. Stat. § 48-116 (Reissue 1978), when a contractor fails to require a subcontractor to carry workmen's compensation insurance, and an employee of the latter sustains a job-related injury, the contractor shall be included within the term employer and, with the immediate employer-subcontractor, shall be jointly and

severally liable to pay compensation under the terms of the workmen's compensation act. Duffy Brothers Constr. Co. v. Pistone Builders, Inc. 360
2. The joint and several liability imposed by Neb. Rev. Stat. § 48-116 (Reissue 1978) is for the sole benefit of the injured workman; the statute in no way determines whether it is the statutory or actual employer who is primarily liable. Duffy Brothers Constr. Co. v. Pistone Builders, Inc. 360
3. Between the statutory employer and the actual employer, under the provisions of Neb. Rev. Stat. § 48-116 (Reissue 1978), the liability of the latter should be regarded as primary and that of the former as secondary. Duffy Brothers Constr. Co. v. Pistone Builders, Inc. 360
4. Under the Nebraska workmen's compensation act, a statutory employer is entitled to indemnity from the actual employer with the amount being limited to all sums which the former has paid in good faith upon a matured obligation, or has been forced to pay in satisfaction of a compensation award. Duffy Brothers Constr. Co. v. Pistone Builders, Inc. 360
5. Generally speaking, an employer paying an injured workman his wages in lieu of compensation is entitled to credit for such benefits computed by the number of weeks paid, rather than the dollar amount. Duffy Brothers Constr. Co. v. Pistone Builders, Inc. 360

Contracts.

1. Under the federal Truth in Lending Act, the possibility of a mechanic's lien can be a security interest retained or to be required which must be disclosed to the obligor by his creditor in a home improvement contract. Anderson v. Wagner 87
2. In order for a materialman to become a "consumer creditor" of the homeowner under the federal Truth in Lending Act, there must be a credit agreement existing between the two parties. Anderson v. Wagner 87
3. A written instrument which provides for payment of interest on an unpaid balance, but without specifying the rate, carries interest at the legal rate prescribed by law. Lovelace v. Stern 174
4. The interpretation given a contract by the parties themselves, while engaged in their performance of it, is one of the best indications of their true intent. Lovelace v. Stern 174
5. A written instrument is open to explanation by parol evidence where its terms are susceptible of two constructions or where the language employed is vague or ambiguous. Mahoney v. May 187
6. In an action against a vendee to recover the damages

resulting from a breach of a contract for the sale of real estate, the measure of damages is the difference between the agreed price and the market value of the property at the time of the breach. Hahn v. International Management Services, Inc. 229

7. A condition is excused if the occurrence of the condition is prevented by the party whose performance is dependent upon the condition. Hahn v. International Management Services, Inc. 229
8. A failure of consideration of such a degree that the remaining consideration may be deemed to be no substantial consideration is an excuse for nonperformance of a promise. Humber v. Gibreal Auto Sales, Inc. 286
9. Courts should be cautious in holding contracts void on public policy grounds; and before they do so, prejudice to the public interest should clearly be presented. Mau v. Omaha Nat. Bank 308
10. The general rule is that parties are bound by the agreement they have entered into, and the fact that the bargain is a hard one will not entitle a party to be relieved therefrom if he assumed it fairly and voluntarily. Guaranteed Foods v. Rison 400
11. Under the Nebraska U.C.C., if the court as a matter of law finds a contract or any clause therein to be unconscionable at the time it was made, the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result. Guaranteed Foods v. Rison 400
12. The issue of unconscionability must be pleaded in order to be considered by the court. Guaranteed Foods v. Rison .. 400
13. Under Neb. U.C.C. § 2-201(3) (Reissue 1971), a contract which does not satisfy the requirements of a writing as required by the statute of frauds for the sale of goods, but which is valid in other respects, is enforceable with respect to goods for which payment has been accepted or which have been received and accepted. Guaranteed Foods v. Rison 400
14. The primary test of whether a transaction in the form of an agency to sell or a consignment created the relation of buyer and seller or one of principal and agent is the intention of the parties as gathered from the whole scope and effect of the language used. The label which the parties give to the transaction does not determine its character, and courts look beyond mere labels and examine the contract as a whole in order to ascertain the intention of the parties. Allen v. Dealer Assistance, Inc. 455
15. Personal services are sufficient consideration to support

an agreement. There is no more reason to presume that services are contributed as a gift than to presume that funds are contributed as a gift. Kinkenon v. Hue 698
16. A bargain in whole or in part for, or in consideration of, illicit sexual intercourse or of a promise thereof, is illegal; but subject to this exception, such intercourse between parties to a bargain previously or subsequently formed does not invalidate it. Kinkenon v. Hue 698
17. The terms of an oral agreement are to be found in the parties' respective versions of the agreement, and their acts and conduct in light of the subject matter. Kinkenon v. Hue 698
18. An unambiguous contract is not subject to interpretation or construction, and the intent of the parties must be determined from its contents. A contract will be construed most strongly against the party preparing it when there is a question as to its meaning. Baltes v. Hodges 740
19. Value of property is always a matter of judgment, and a contract based upon inadequate consideration will not be set aside for that reason alone, unless the inadequacy is so great as to furnish of itself convincing evidence of fraud. Okeson v. Jack Dempsey Drywall, Inc. 847

Conversion.

1. Conversion is an unauthorized assumption and exercise of the right of ownership over goods or chattels belonging to another to the alteration of their condition or the exclusion of the owner's rights. Conversion may also be defined as any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein. Terra Western Corp. v. Berry and Co. 28
2. Although a mortgagor has, in the security instrument, contracted with the mortgagee to insure for the latter's benefit and insurance is procured, if the policy contains no loss payable clause covering the lienholder, an insurer who, acting in good faith and without actual knowledge of the mortgagee's interest, pays the insured for a loss, is not liable to the mortgagee for conversion of proceeds. Terra Western Corp. v. Berry and Co. 28
3. Conversion is any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein. Allen v. Dealer Assistance, Inc. 455
4. An action for conversion is not maintainable unless the plaintiff, at the time of the alleged conversion, was entitled to the immediate possession of the property. Allen v. Dealer Assistance, Inc. 455

5. In an action for damages alleged to have been sustained by reason of the conversion of personal property, the plaintiff must recover, if at all, upon the strength of his own title and not upon the weakness of the title of the defendant. Allen v. Dealer Assistance, Inc. 455

Conveyances to Defraud Creditors.

1. The uniform construction of Neb. Rev. Stat. § 36-401 (Reissue 1978), concerning conveyances to defraud creditors, has been that such a conveyance is good as between the parties and is void only as to such creditors as attack it. United States Nat. Bank of Omaha v. Rupe 131
2. A conveyance without or for inadequate consideration, made with the intent to delay or defraud creditors, is fraudulent. United States Nat. Bank of Omaha v. Rupe 131
3. A voluntary conveyance by one spouse to the other is presumptively fraudulent as to existing creditors unless the good faith of the transaction is established by a preponderance of the evidence. United States Nat. Bank of Omaha v. Rupe 131
4. A creditor whose debt did not exist at the date of the voluntary conveyance by the debtor cannot have the conveyance declared fraudulent unless he pleads and proves that the conveyance was made to defraud subsequent creditors whose debts were in contemplation at the time. United States Nat. Bank of Omaha v. Rupe 131

Corporations.

1. A corporation is a legal entity complete and separate from its shareholders and officers. United States Nat. Bank of Omaha v. Rupe 131
2. Generally, the shareholders of a corporation are not liable for its debts or other obligations. United States Nat. Bank of Omaha v. Rupe 131
3. In equity, the corporate entity may be disregarded and held to be the mere alter ego of a shareholder or shareholders in various circumstances where necessary to prevent fraud or other injustice. Some of the factors which are relevant in determining to disregard the corporate entity are: (1) Grossly inadequate capitalization: (2) Insolvency of the debtor corporation at the time the debt is incurred; (3) Diversion by the shareholder or shareholders of corporate funds or assets to their own or other improper uses; and (4) The fact that the corporation is a mere facade for the personal dealings of the shareholder and that the operations of the corporation are carried on by the shareholder in disregard of the corporate entity. United States Nat. Bank of Omaha v. Rupe 131

Corroboration.

1. In a sexual assault case, the victim need not be independently corroborated on the particular acts constituting sexual assault, but must be corroborated on the material facts and circumstances tending to support the victim's testimony about the principal fact in issue. State v. Wounded Arrow 544
2. 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. Wounded Arrow 544
3. With respect to corroboration, the rule is that it is not essential that the prosecutrix be corroborated by the testimony of other witnesses as to the particular act constituting the offense. It is sufficient if she is corroborated as to material facts and circumstances which tend to support her testimony and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn. State v. Watkins 859
4. In a trial for statutory rape, sexual assault admissions by the defendant showing that he planned and procured an opportunity to commit the act charged, with evidence of familiarities between them, furnishes sufficient corroboration of the victim's positive testimony to support a judgment of conviction. State v. Watkins 859
5. While flight, in and of itself, is frequently ambiguous, when coupled with other facts and circumstances it may be sufficient to constitute corroboration of the testimony of the prosecutrix in cases involving sexual assault. State v. Watkins 859

Costs of Litigation.

In the absence of a statute or a uniform course of procedure, a party may not recover the costs and expenses incident to litigation. Nat. Bank of Commerce Trust & Savings Assn. v. Rhodes 44

Counties.

1. It is the duty of a county to use reasonable and ordinary care in the construction, maintenance, and repair of its highways and bridges so that they will be reasonably safe for the traveler using them while he is in the exercise of reasonable and ordinary care and prudence. Hansmann v. County of Gosper 659
2. Under Neb. Rev. Stat. § 23-2410 (Reissue 1977), a county

is liable for damages caused by insufficiency or want of repair of a county bridge. Hansmann v. County of Gosper 659
3. A county is required to maintain bridges that are sufficient for the proper accommodation of the public at large in the various occupations which from time to time may be pursued in the locality where the bridge is situated. Hansmann v. County of Gosper 659
4. The county is not required to have actual notice of defects in a bridge. It is sufficient if the defect existed for such a length of time that, by the exercise of ordinary diligence, the defect would have been discovered and repaired. Hansmann v. County of Gosper 659

Courts.

1. It is the responsibility of the trial court to determine questions of custody and visitation of minor children according to their best interests. This is an independent responsibility and cannot be controlled by the agreement or stipulation of the parties themselves or by third parties. Deacon v. Deacon 193
2. It is an abuse of discretion for a trial court to delegate to a psychologist or third party the authority to determine when and if visitation can be had by the noncustodial parent. Deacon v. Deacon 193
3. Courts should be cautious in holding contracts void on public policy grounds; and before they do so, prejudice to the public interest should clearly be presented. Mau v. Omaha Nat. Bank 308
4. Where the facts adduced to sustain a finding are such that but one conclusion can be drawn when related to the applicable law, the court should decide the question as a matter of law. Mau v. Omaha Nat. Bank 308
5. In imposing sentences in criminal proceedings, the courts have a duty to consider protection of the public as well as the rehabilitative needs of the defendant. State v. Glover 487
6. One of the obligations of a sentencing judge after making a finding of guilt is to impose an appropriate sentence within fixed statutory and constitutional limits. State v. Janis 491
7. In imposing an appropriate sentence, a sentencing judge has wide discretion as to the type of information he may use to assist him in determining the kind and extent of punishment to be imposed within statutory and constitutional limits, including information concerning the defendant's life, character, and previous conduct. State v. Janis 491

8. The law invests the trial judge with a wide discretion as to the sources and types of information used to assist him in determining the sentence to be imposed within statutory limits. State v. Janis 491
9. Where the facts are conceded, undisputed, or are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question, as a matter of law, rather than submit it to a jury for determination. Johnson v. First Nat. Bank & Trust Co. 521
10. Once the parent has been shown to be unfit to have the care and custody of a minor child, the primary concern of the court is the best interests and welfare of the child. In re Interest of Carlson 540
11. There is no requirement that the court, having found a child to be within Neb. Rev. Stat. §§ 43-201 et seq. (Reissue 1978), must first implement a rehabilitation plan for the parents before terminating parental rights. In re Interest of Carlson 540
12. A litigant may always ask a court of general jurisdiction to exercise its inherent power. However, the filing of a document entitled "motion for rehearing" does not toll the time for appeal, and the time for appeal begins to run from the date the court enters the order overruling the motion for new trial, if such a motion has been timely filed. In re Estate of Weinberger 711
13. A judge of the District Court at chambers anywhere within his district, or anywhere within any district in which any case is filed as to which such judge is authorized to act, has the inherent power to modify or vacate any judgment rendered by such judge, if done within the term in which the judgment was rendered, and such action may be taken ex parte and without prior notice to the parties. In re Estate of Weinberger 711
14. The power to punish for contempt does not depend upon statute. It is incident to every tribunal from its very constitution and may be generally exercised only by that tribunal whose order has been violated or proceedings interfered with. In re Contempt of Potter 769
15. Actions which constitute direct contempt occur in the presence of the court so that the court has personal knowledge of the facts and has no need to inform itself of them by using witnesses or other evidence; the events constituting indirect or constructive contempt occur outside the presence of the court and the court must inform itself of the facts through the use of witnesses or other evidence. In re Contempt of Potter 769

Crimes and Punishment.

No act is criminal unless the Legislature has in express terms declared it to be so, and no person can be punished for any act or omission which is not made penal by the plain import of the written law. State v. Suhr 553

Criminal Convictions.

In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. State v. Leisy 118

Criminal Defendants.

1. An accused has the right to be present at all stages of the trial when his absence might frustrate the fairness of the proceedings. State v. Anderson and Hochstein 51
2. A defendant in a criminal case, by electing to act as his own counsel, is bound by his own acts and conduct and is held responsible for his own ineptness. State v. Mangelsen 213
3. The two-part test to determine whether an attorney has effectively counseled a criminal defendant is that counsel must perform at least as well as one with ordinary criminal law skill and training in his or her region and must also conscientiously protect his client's interest. State v. Journey 717
4. A defendant challenging competency of counsel has the burden to establish it. In addition, defendant must show that he suffered prejudice in the defense of his case as a result of his attorney's actions or inactions. State v. Journey 717
5. Where a defendant merely claims that his decision was a strategic error, and can point to no specific incidents of counsel impropriety, he must bear the responsibility for that decision and cannot shift the blame to counsel. State v. Journey 717
6. Defense counsel's advice to his client not to testify, after discussing it with his client, is not ineffective counsel where defendant's prior criminal record could have been used against him. State v. Journey 717

Criminal Law.

1. It is a fundamental principle of statutory construction that a penal statute is to be strictly construed. State v. Suhr 553

2. A person to whom a statute may be constitutionally applied will not be heard to challenge the statute on the ground that it might conceivably be applied unconstitutionally to others in situations not before the court. State v. Greaser 668
3. The definition of an act forbidden by statute, but not defined by it, may be ascertained by reference to the common law. State v. Mattan 679
4. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. State v. Hitt ... 746
5. Evidence of other criminal acts which involve or explain the circumstances of the crime charged, or are integral parts of an overall occurrence or transaction, may be admissible. State v. Hitt 746
6. It is competent for the prosecution to put in evidence all relevant facts and circumstances which tend to establish any of the constituent elements of the crime with which the accused is charged, even though such facts and circumstances may prove or tend to prove that the defendant committed other crimes. State v. Hitt 746

Criminal Trials.

1. If a conflict of interest arises in the representation of more than one defendant in a criminal trial, the mere existence of such conflict raises a presumption of prejudice and reversal is automatic. State v. Bishop, Davis, and Yates.... 10
2. A defendant in a criminal case is denied effective assistance of counsel whenever a trial court improperly requires joint representation over timely objections which are supported by representations which focus explicitly on the probable risk of a conflict of interest. State v. Bishop, Davis, and Yates 10
3. Permitting or requiring a single attorney to represent codefendants in a criminal trial is not per se violative of the right of effective assistance of counsel. State v. Bishop, Davis, and Yates 10
4. The *possibility* of conflict arising because of multiple representation by an attorney is insufficient to impugn a criminal conviction. In order to demonstrate a violation of his sixth amendment rights, a defendant must establish that an *actual* conflict of interest adversely affected his lawyer's performance. State v. Bishop, Davis, and Yates 10
5. In a criminal trial, a defendant may not offer evidence

of his general character or reputation for truth and veracity until it has been attacked. State v. Hortman 393
6. In a criminal trial, a defendant may only offer character evidence under Neb. Rev. Stat. § 27-404(1)(a)(Reissue 1979) of a pertinent character trait. State v. Hortman 393
7. In determining the sufficiency of evidence necessary to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
State v. Stickelman 429
State v. Wounded Arrow 544
8. In imposing sentences in criminal proceedings, the courts have a duty to consider protection of the public as well as the rehabilitative needs of the defendant. State v. Glover .. 487
9. The standard for determining whether counsel for defendant in a criminal prosecution has adequately represented his client is based upon a standard which requires that trial counsel perform at least as well as a lawyer with ordinary training and skill in the criminal law in his area and that he conscientiously protect the interests of his client. State v. Colgrove 496
10. Where one maintains that counsel was inadequate, one must likewise show how or in what manner the alleged inadequacy prejudiced the defendant. State v. Colgrove ... 496
11. Limiting the scope of a prosecutor's opening statement is largely within the trial court's discretion; its rulings will not be disturbed unless a prejudicial abuse of discretion occurred. State v. Wounded Arrow 544
12. Provided the prosecutor does not mislead the jury, he may make reasonable comments on the evidence and draw inferences from testimony to support his theory of the case. State v. Wounded Arrow 544
13. A party may not complain of misconduct of counsel if, with knowledge of such misconduct, he does not ask for a mistrial, but consents to take the chance of a favorable verdict. State v. Wounded Arrow 544
14. Alleged errors not raised in the trial court and not referred to in a motion for new trial will not be considered by this court on appeal. In order to obtain a review of alleged errors occurring during the trial, such errors must be pointed out to the trial court in a motion for new trial and a ruling thereon obtained. State v. Wounded Arrow ... 544
15. Before it is necessary to grant a mistrial due to prosecutorial misconduct, the defendant must show that a sub-

stantial miscarriage of justice has actually occurred. State v. Wounded Arrow 544
16. One to whom the complaining witness has complained may testify to the fact and nature of the complaint if the complaint was made voluntarily and without unreasonable or inconsistent delay. State v. Watkins 859

Damages.
1. In a case where, under the law and facts, the submission of the issue of contributory negligence and a comparison thereof with negligence of the opposing party to ascertain what damages, if any, shall be allowed, is proper, the determination of the amount of the damages is for the jury. Nickal v. Phinney 281
2. In an action for damages alleged to have been sustained by reason of the conversion of personal property, the plaintiff must recover, if at all, upon the strength of his own title and not upon the weakness of the title of the defendant. Allen v. Dealer Assistance, Inc. 455
3. Under Neb. Rev. Stat. § 23-2410 (Reissue 1977), a county is liable for damages caused by insufficiency or want of repair of a county bridge. Hansmann v. County of Gosper 659
4. Where a jury's final award covering all damages sustained by reason of the taking is less than the amount awarded by the appraisers and deposited with the court by the condemnor, the condemnor is entitled to be reimbursed by the condemnee for the difference, plus interest from the date of withdrawal of the deposit by the condemnee. Clearwater Corp. v. City of Lincoln 750
5. When private property has been damaged for public use, the owner is entitled to compensation. Whatever reduces the market value of real estate by injuring it for public use may be considered in determining the just compensation to which the property owner is entitled. Where land is not taken, the measure of damages is the difference in market value before and after the damaging. Beach v. City of Fairbury 836

Death Penalty.
1. The death penalty, when properly imposed by a state, does not violate either the eighth or fourteenth amendments of the United States Constitution or Neb. Const. art. 1, § 9. State v. Anderson and Hochstein 51
2. Jury sentencing in a capital case is not constitutionally required. State v. Anderson and Hochstein 51

Debtors and Creditors.

1. The uniform construction of Neb. Rev. Stat. § 36-401 (Reissue 1978), concerning conveyances to defraud creditors, has been that such a conveyance is good as between the parties and is void only as to such creditors as attack it. United States Nat. Bank of Omaha v. Rupe 131
2. A conveyance without or for inadequate consideration, made with the intent to delay or defraud creditors, is fraudulent. United States Nat. Bank of Omaha v. Rupe 131
3. A voluntary conveyance by one spouse to the other is presumptively fraudulent as to existing creditors unless the good faith of the transaction is established by a preponderance of the evidence. United States Nat. Bank of Omaha v. Rupe 131
4. A creditor whose debt did not exist at the date of the voluntary conveyance by the debtor cannot have the conveyance declared fraudulent unless he pleads and proves that the conveyance was made to defraud subsequent creditors whose debts were in contemplation at the time. United States Nat. Bank of Omaha v. Rupe 131

Decedents' Estates.

1. County courts have exclusive original jurisdiction of all matters related to decedents' estates, including the probate of wills and the construction thereof, and all other jurisdiction heretofore provided and not specifically repealed by 1972 Neb. Laws, L.B. 1032, and such other jurisdiction as thereafter provided by law. In re Estate of Layton 646
2. To the full extent permitted by the Constitution of Nebraska, the county courts have jurisdiction over all subject matter relating to estates of decedents, including construction of wills and determination of heirs and successors of decedents, and estates of protected persons; protection of minors and incapacitated persons; and trusts. Such courts have 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 them. In re Estate of Layton 646
3. County courts, in exercising exclusive original jurisdiction over estates, may apply equitable principles to matters within probate jurisdiction. In re Estate of Layton 646
4. Except as restricted or otherwise provided by the will or by an order in a formal proceeding and subject to the priorities stated in Neb. Rev. Stat. § 30-24,100 (Reissue 1979), a personal representative, acting reasonably for the benefit of the interested persons, may properly perform, compromise, or refuse performance of the decedent's

contracts that continue as obligations of the estate, as he may determine under the circumstances. In performing enforceable contracts by the decedent to convey or lease land, the personal representative, among other possible courses of action, may execute and deliver a deed of conveyance for cash payment of all sums remaining due or the purchaser's note for the sum remaining due secured by a mortgage or deed of trust on the land; or deliver a deed in escrow with directions that the proceeds, when paid in accordance with the escrow agreement, be paid to the successors of the decedent, as designated in the escrow agreement. In re Estate of Layton 646

Decrees.

The control of a divorce decree during the 6-month period pending finality is within the sound judicial discretion of the trial court. Howard v. Howard 468

Default Judgments.

1. Where a motion is made to open, modify, or vacate a judgment within the time in which the court has power to grant it, it is not indispensable that the motion be disposed of within the original term. In such case, the rights of a party seeking relief become fixed at the time the motion is filed, and not at the time of the disposition of the motion, even if that is in a subsequent term. To the extent that *Johnston Grain Co. v. Tridle*, 175 Neb. 859, 124 N.W.2d 463 (1963), is inconsistent with this holding, it is overruled. Moackler v. Finley 353
2. The setting aside of a default judgment is to a large extent within the discretion of the trial court, and it will be presumed, unless there is evidence to the contrary, that such discretion was properly exercised. Moackler v. Finley 353

Defense Counsel.

1. If a conflict of interest arises in the representation of more than one defendant in a criminal trial, the mere existence of such conflict raises a presumption of prejudice and reversal is automatic. State v. Bishop, Davis, and Yates 10
2. A defendant in a criminal case is denied effective assistance of counsel whenever a trial court improperly requires joint representation over timely objections which are supported by representations which focus explicitly on the probable risk of a conflict of interest. State v. Bishop, Davis, and Yates 10
3. Permitting or requiring a single attorney to represent codefendants in a criminal trial is not per se violative of the right of effective assistance of counsel. State v. Bishop, Davis, and Yates 10

4. The *possibility* of conflict arising because of multiple representation by an attorney is insufficient to impugn a criminal conviction. In order to demonstrate a violation of his sixth amendement rights, a defendant must establish that an *actual* conflict of interest adversely affected his lawyer's performance. State v. Bishop, Davis, and Yates ... 10

Demurrers.

An order sustaining a demurrer is not a final order and is not a final submission of the case. Koll v. Stanton-Pilger Drainage Dist. 425

Disciplinary Proceedings.

1. The Nebraska Administrative Procedure Act has no application to prison disciplinary proceedings under Neb. Rev. Stat. §§ 83-4,109 to 83-4,123 (Reissue 1976). Reed v. Parratt 796
2. Disciplinary procedures in penal institutions are summary in nature and the full panoply of rights due a defendant in a criminal prosecution are not applicable to a prison disciplinary proceeding. Only the minimum requirements of procedural due process appropriate for the circumstances must be observed. Reed v. Parratt 796
3. A prison disciplinary proceeding under Neb. Rev. Stat. §§ 83-4,109 to 83-4,123 (Reissue 1976) is not a contested case under the Nebraska Administrative Procedure Act. Reed v. Parratt 796

Dismissal and Nonsuit.

Plaintiff may dismiss an action without prejudice to a future action as a matter of right at any time before final submission of case. Koll v. Stanton-Pilger Drainage Dist. 425

Disqualification of Judges.

A party seeking to disqualify a trial judge must show that the motion comes within the provisions of Neb. Rev. Stat. § 24-315 (Reissue 1979). Deacon v. Deacon 193

Divorce.

1. In determining the question of who should have care and custody of minor children upon the dissolution of a marriage, the paramount consideration is the best interests and welfare of the children.
   Curfman v. Curfman 1
   Kringel v. Kringel 241
2. In any custody determination, the discretion of the trial court in such a situation is necessarily subjective and must be founded to a significant extent upon its observation of the parties and the review of all the minute details that affect the general welfare and the best interests of the

children. It also must necessarily be prospective in nature. Curfman v. Curfman 1
3. A custody order of the trial court will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. Curfman v. Curfman 1
4. Except as otherwise agreed by the parties in writing or by order of the court, alimony orders shall terminate upon the death of either party or the remarriage of the recipient. Neb. Rev. Stat. § 42-365 (Reissue 1978). Euler v. Euler 4
5. Except for terms concerning the custody or support of minor children, the decree in an action for dissolution of marriage may expressly preclude or limit modification of the terms set forth in the decree. Neb. Rev. Stat. § 42-366 (Reissue 1978). Euler v. Euler 4
6. Provisions for the payment of alimony contained in a property settlement agreement entered into between the parties, and approved by the court and incorporated into the decree of dissolution of marriage, may be terminated under Neb. Rev. Stat. § 42-365 (Reissue 1978) where neither the property settlement agreement nor the decree provides for termination of alimony upon the occurrence of a specified event, or provides that the agreement shall not be subject to amendment or revision. Euler v. Euler 4
7. The general rule is that the allowance of attorney fees and suit money is ordinarily regarded to be for the wife and should be made to her, and not to the parties who perform services for her, or to whom she becomes indebted in connection with the litigation. Barber v. Barber 101
8. As a general rule, intervention is not permitted in a divorce suit for the purpose of opposing a divorce, but intervention may be allowed where it is necessary to secure justice for third persons whose property interests may be adversely affected. Barber v. Barber 101
9. While an action for dissolution of marriage is heard de novo in this court, 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. Barber v. Barber 101
10. The District Court in its discretion may appoint an attorney to protect the interests of any minor child of the parties to an action to dissolve a marriage. The limits of discretion depend on the circumstances. Deacon v. Deacon 193
11. There is no mathematical formula by which property awards can be precisely determined, but they are to be determined by the facts in each case.
Chrisp v. Chrisp 348
Amen v. Amen 694

12. The spouse providing the financial consideration for property acquired during the marriage is not entitled to that property to the exclusion of the spouse providing consideration in the form of domestic support. Chrisp v. Chrisp 348
13. In a marriage of long duration, and where the parties were parents of all children involved, an award of one-third to one-half of the property is equitable. Chrisp v. Chrisp 348
14. Upon divorce, a division of property must take into consideration the circumstances of the parties, the duration of the marriage, contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities.
Chrisp v. Chrisp 348
Amen v. Amen 694
15. The control of a divorce decree during the 6-month period pending finality is within the sound judicial discretion of the trial court. Howard v. Howard 468
16. Neb. Rev. Stat. § 42-372 (Reissue 1978) does not bar modification of the divorce decree to include alimony, where none was awarded in the final decree, if such modification is sought within the 6-month period after the decree has been filed. Howard v. Howard 468
17. Permitting the trial court to modify its decree within 6 months impliedly requires a showing of good cause where the court vacates a decree on its own motion without opportunity to produce evidence with respect to the terms of the proposed modification. Howard v. Howard 468
18. The general rule is that the fixing of alimony and distribution of property rest in the sound discretion of the District Court and, in the absence of an abuse of discretion, will not be disturbed on appeal.
Amen v. Amen 694
Shanks v. Shanks 728
19. 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. Shanks v. Shanks 728
20. In an action for dissolution of marriage, the property should be divided, if possible, in such a manner as to permit the husband to retain the means for payment of any judgment awarded to the wife. Michal v. Michal 757

Drunk Driving.

In the absence of evidence as to the effect upon a driver of alcohol consumed by him, the issue of intoxication should not be submitted to the jury. Hoffman v. Crawford 380

Due Process.

1. A probationer is entitled to a preliminary hearing at or near the place of the alleged violation of probation or the arrest. State v. Ferree 593
2. At the preliminary hearing, the probationer is entitled to notice of the alleged violations of probation, an opportunity to appear and present evidence in his own behalf, a conditional right to confront adverse witnesses, an independent decisionmaker, and a written report of the hearing. State v. Ferree 593
3. Where evidence produced at the preliminary hearing does not support charges made in the State's amended complaint, the defendant must be given a second preliminary hearing on the new charges. State v. Ferree 593
4. A probationer does not waive his right to a preliminary hearing because he fails to request one. State v. Ferree 593
5. All the Due Process Clause requires is that the law give sufficient warning that men may conduct themselves so as to avoid that which is forbidden. State v. Mattan 679

Easements.

1. Generally, the grant of an easement over land does not preclude the grantor from using the land in any manner which does not unreasonably interfere with the special use for which the easement was acquired. This includes the granting of additional easements in the same land. Nemaha Nat. Resources Dist. v. Village of Adams 827
2. The creation of an easement carries with it by implication only such incidents as are necessary for its reasonable enjoyment. Nemaha Nat. Resources Dist. v. Village of Adams 827
3. The owner of the servient tenement may use the land for any purpose which does not unreasonably interfere with the rights of the owner of the dominant tenement. Nemaha Nat. Resources Dist. v. Village of Adams 827
4. The use and enjoyment which will give title by prescription to an easement is substantially the same in quality and characteristics as the adverse possession which will give title to real estate. It must be adverse, under a claim of right, continuous and uninterrupted, open and notorious, exclusive, with the knowledge and acquiescence of the owner for the full prescriptive period. Beach v. City of Fairbury 836
5. An underground sewer line obtained by implication or by prescription is not extinguished by a subsequent sale of the servient estate to a bona fide purchaser without knowledge or actual or constructive notice. The grantor of the servient estate has no more right to convey the

estate free from a nonapparent easement than he has to convey free from an apparent easement. Beach v. City of Fairbury 836

Eminent Domain.

1. In an eminent domain proceeding, in order for evidence of the price at which other lands have been sold to be admissible, it must appear that such lands are similar or similarly situated in comparison with the lands condemned, and that the sales were made at about the same time as the particular taking involved. Clearwater Corp. v. City of Lincoln 750
2. In an eminent domain proceeding, a wide discretion must be granted the trial judge in determining the admissibility of evidence of other sales, and the evidence should not be admitted where there is a marked difference in the situation of the properties. Clearwater Corp. v. City of Lincoln .. 750
3. Where a jury's final award covering all damages sustained by reason of the taking is less than the amount awarded by the appraisers and deposited with the court by the condemnor, the condemnor is entitled to be reimbursed by the condemnee for the difference, plus interest from the date of withdrawal of the deposit by the condemnee. Clearwater Corp. v. City of Lincoln 750

Employer and Employee.

There is no single test by which the determination of a workman as an employee may be made. This must be determined from all the facts in the case. Williams v. Williams Janitorial Service 344

Employment Contracts.

1. A contract to give permanent employment, in the absence of some further express or implied stipulation as to the duration of the employment or of a good consideration in addition to the services contracted to be rendered, is no more than an indefinite general hiring terminable at the will of either party. Mau v. Omaha Nat. Bank 308
2. An agreement to give permanent employment simply means to give a steady job of some permanence, as distinguished from a temporary job or temporary employment. Mau v. Omaha Nat. Bank 308
3. In the absence of a promise on the part of the employer that the employment should continue for a period of time that is definite or capable of determination, such employment relationship is terminable at the will of the employer as it constitutes an indefinite general hiring. Mau v. Omaha Nat. Bank 308

4. The general rule is that when the employment is not for a definite term, and there are no contractual or statutory restrictions upon the right of discharge, an employer may lawfully discharge an employee whenever and for whatever cause he chooses, without incurring liability. Mau v. Omaha Nat. Bank 308

Enhanced Penalties.

In order to warrant the imposition of the enhanced penalties for issuing a bad check under Neb. Rev. Stat. § 28-611(2) (Reissue 1979), effective January 1, 1979, prior convictions must have occurred under subdivision (1)(c) or (1)(d) of that section; and prior convictions under previous "bad check" statutes may not be used to enhance the penalties under the "bad check" statute currently in effect. State v. Suhr 553

Equitable Estoppel.

To establish an equitable estoppel the defendant consignee must prove: That the plaintiff made a false representation or concealment of material facts with actual or constructive knowledge of such false representation or concealment; that the defendant consignee did not have the knowledge or means of knowledge that such facts were misrepresented; and that the defendant consignee acted with reliance upon said facts to his prejudice. Hilt Truck Lines, Inc. v. House of Wines, Inc. 568

Equity.

1. Although Neb. Rev. Stat. § 25-1925 (Reissue 1979) requires the Supreme Court to try issues de novo on appeal from judgments in an action in equity, this court will consider the fact that the trial court had the opportunity to examine the physical evidence and observe the witnesses and their manner of testifying where the evidence on material issues is conflicting.
   Curfman v. Curfman 1
   St. Paul Fire & Marine Ins. Co. v. Truesdell Distributing Corp. 153
2. An action to quiet title to real estate is a suit in equity which is tried to the court without a jury. Nat. Bank of Commerce Trust & Savings Assn. v. Rhodes 44
3. In equity actions, it is generally held that the proper method to enforce an attorney's lien is to file a petition in intervention in the original action. Barber v. Barber 101
4. Where 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 in-

volved in the case and grant relief, legal or equitable, as may be required and thus avoid unnecessary litigation. Barber v. Barber 101

5. When a charging lien is created by an agreement, an action to establish and enforce it is within the equity jurisdiction of the court. Barber v. Barber 101
6. Actions in equity, on appeal to this court, are triable de novo subject, however, to the condition that when the 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.
   Sullivan v. Hoffman 166
   Lovelace v. Stern 174
   Kinkenon v. Hue 698
7. It is the duty of this court on review of the findings made by the trial court, when it has made an inspection of the premises and has given consideration to the competent and relevant facts revealed thereby, to give weight thereto. Sullivan v. Hoffman 166
8. County courts, in exercising exclusive original jurisdiction over estates, may apply equitable principles to matters within probate jurisdiction. In re Estate of Layton 646
9. In appeals to this court in suits in equity, the trial shall be de novo on questions of fact preserved for review, and we must reach an independent conclusion in findings of fact without reference to the conclusion reached in the District Court. Kinkenon v. Hue 698
10. Equity will grant specific performance of an oral agreement to transfer property to another if it is proved by evidence convincing and satisfactory and if it has been wholly performed by one party and its nonperformance would be a fraud on him. Kinkenon v. Hue 698
11. A court of equity may properly afford injunctive relief where there has been a continuing and flagrant course of violations of the law, even though these acts may be subject to criminal sanctions. State ex rel. Douglas v. Faith Baptist Church 802

Escape.

Under Neb. Rev. Stat. § 28-912 (Reissue 1979), punishing escape from official detention in a facility for custody of persons under charge of crime, it is no defense that the prisoner may be innocent of the offense for which he is being held. State v. Greaser 668

Estoppel.

1. A litigant who knowingly and deliberately assumes a particular position in a judicial proceeding is generally estopped to take a position inconsistent therewith to the prejudice of an adverse party. Nat. Bank of Commerce Trust & Savings Assn. v. Rhodes 44
2. A city or county is not estopped by the unauthorized conduct, representations, promises, or pledges of its officers and agents, absent official acquiescence in and approval of the same by such governmental unit. Schilke v. School Dist. No. 107 448

Evidence.

1. If it appears from the evidence that the identity of the witness was obtained from a legal source, the fact that the identity of the witness was also improperly acquired by illegal wiretapping does not render the witness' testimony inadmissible. State v. Anderson and Hochstein . 51
2. The use of an intercepted telephone message to induce witnesses to testify in a criminal prosecution, even though it may constitute a violation of a statute forbidding the use of intercepted communications, does not render such testimony inadmissible against a person not a party to the message where no use is made at the trial either of the message itself or of any information contained therein. State v. Anderson and Hochstein 51
3. A presumption arises that the trial court, in trying a case without a jury, will consider only such evidence as is competent and relevant and this court will not reverse a case so tried because evidence was erroneously admitted where there is other material, competent, and relevant evidence sufficient to sustain the trial court's judgment. Barber v. Barber 101
4. A trial court in a proceeding between the same parties is entitled to take judicial notice of a security agreement attached to a previously dismissed petition between the same parties in the same court. State Security Savings Co. v. Pelster 158
5. The mere fact that there is an illegal arrest does not thereby cause all evidence otherwise lawfully obtained to be inadmissible "per se." State v. Smith 263
6. The fruit of the poisonous tree doctrine excludes evidence obtained from or as a consequence of lawless official acts, not evidence obtained from an independent source. State v. Smith 263
7. An illegal arrest of an accused, without more, does not bar the subsequent prosecution of the accused, and the illegality of the accused's detention by police does not

deprive the government of the opportunity to prove the accused's guilt through the introduction of evidence wholly untainted by the police misconduct. State v. Smith 263
8. For a qualified expert to give an estimate of a minimum rate of speed, all necessary factors needed to suggest a reasonably accurate opinion should be supported by the evidence. Nickal v. Phinney 281
9. The reception of evidence collateral to any issue in the case intended to affect the credibility of a witness falls within the discretion of the trial court, and, absent an abuse of discretion, it is not grounds for reversal. State v. Vicars 325
10. A trial court's determination of the admissibility of physical evidence will not ordinarily be overturned except for a clear abuse of discretion. State v. Stickelman 429
11. Where the facts are conceded, undisputed, or are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question, as a matter of law, rather than submit it to a jury for determination. Johnson v. First Nat. Bank & Trust Co. 521
12. In testing the sufficiency of the evidence to support findings of fact made by the Workmen's Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor, and he should have the benefit of every inference that can be reasonably drawn therefrom. Goers v. Bud Irons Excavating 579
13. A certificate of title to a motor vehicle is generally conclusive evidence in this state of the ownership of the vehicle. Exceptions to this rule apply only to prevent fraud and coercion. Kinkenon v. Hue 698
14. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. State v. Hitt 746
15. Evidence of other criminal acts which involve or explain the circumstances of the crime charged, or are integral parts of an overall occurrence or transaction, may be admissible. State v. Hitt 746
16. It is competent for the prosecution to put in evidence all relevant facts and circumstances which tend to establish any of the constituent elements of the crime with which the accused is charged, even though such facts and circumstances may prove or tend to prove that the defendant committed other crimes. State v. Hitt 746
17. In an eminent domain proceeding, in order for evidence

of the price at which other lands have been sold to be admissible, it must appear that such lands are similar or similarly situated in comparison with the lands condemned, and that the sales were made at about the same time as the particular taking involved. Clearwater Corp. v. City of Lincoln 750

18. In an eminent domain proceeding, a wide discretion must be granted the trial judge in determining the admissibility of evidence of other sales, and the evidence should not be admitted where there is a marked difference in the situation of the properties. Clearwater Corp. v. City of Lincoln 750

Expert Witnesses.

For a qualified expert to give an estimate of a minimum rate of speed, all necessary factors needed to suggest a reasonably accurate opinion should be supported by the evidence. Nickal v. Phinney 281

Extradition.

1. A demand for extradition which includes a copy of a judgment of conviction or a sentence imposed thereon, together with a statement by the executive authority of the demanding state that the person claimed has broken the terms of his parole, is sufficient. Singleton and Anthony v. Adams 293
2. Generally, a claim by a petitioner that the demanding state has violated his constitutional right is a matter to be determined by the courts of the demanding state. Singleton and Anthony v. Adams 293
3. In an action for a writ of habeas corpus, including one which challenges extradition proceedings, the burden of proof is upon the petitioner to establish his claim that his detention is illegal. Dovel v. Adams 766
4. The statutory rules of evidence, except those as to privilege, do not apply to, among other things, proceedings for extradition. Dovel v. Adams 766
5. In extradition proceedings, tested by habeas corpus, the respondent establishes a prima facie case of identity from the recital of the name in the Governor's warrant and the corresponding name of the person in custody. Dovel v. Adams 766

Extrajudicial Statements.

Extrajudicial statements of fact made by a witness relating to matters material to issues in a controversy are available for impeachment, but such statements are not conclusive and may be explained, rebutted, or contradicted, and there-

after are to be given such weight as the trier of fact deems them entitled. Goers v. Bud Irons Excavating 579

False Imprisonment.

A private citizen who by affirmative direction, persuasion, or request procures an unlawful arrest and detention of another is liable for false imprisonment. If an informer merely states to a peace officer his knowledge of a supposed offense and the officer makes the arrest entirely upon his own judgment and discretion, the informer is not liable. Johnson v. First Nat. Bank & Trust Co. 521

Federal Acts.

In the administration and interpretation of federal legislative acts, pertinent opinions of the federal courts are binding upon the state courts. Anderson v. Wagner 87

Felonies.

In a sentencing for a felony not involving the death penalty, there is no requirement that the sentencing judge conduct a case-by-case review of similar sentencings in that jurisdiction. State v. Glover 487

Final Orders.

1. An order sustaining a demurrer is not a final order and is not a final submission of the case. Koll v. Stanton-Pilger Drainage Dist. 425
2. A proceeding to determine the competency of an accused to stand trial is a special proceeding within the meaning of Neb. Rev. Stat. § 25-1902 (Reissue 1979), and an order finding the accused incompetent to stand trial and ordering him confined until such time as he is competent is a final order from which an appeal may be taken under Neb. Rev. Stat. § 25-1911 (Reissue 1979). State v. Guatney 501

Foreclosure.

Foreclosure is not available where there has been no default on the part of the mortgagor. The right to accelerate maturity of indebtedness is limited to the grounds set forth in the instrument and if the maker is not in default so as to give rise to the right of acceleration, the maturity of the note cannot be accelerated. Weber v. Swenson 35

Fraud.

Value of property is always a matter of judgment, and a contract based upon inadequate consideration will not be set aside for that reason alone, unless the inadequacy is so great as to furnish of itself convincing evidence of fraud. Okeson v. Jack Dempsey Drywall, Inc. 847

Fraudulent Misrepresentation.

The essential elements required to sustain an action for fraudulent misrepresentation are, generally speaking, that a representation was made as a statement of fact, which was untrue or known to be untrue by the party making it, or else recklessly made; that it was made with the intent to deceive and for the purpose of inducing the other party to act upon it; and the injured party did in fact rely upon it and was induced thereby to act to his injury or damage. Suzuki v. Gateway Realty 562

Guilty Pleas.

1. A defendant in a criminal prosecution has no absolute right to have his plea of guilty or nolo contendere accepted even if the plea is voluntarily and intelligently entered. State v. Leisy 118
2. A plea of nolo contendere or guilty, voluntarily and intelligently made, may be accepted even though a defendant professes his innocence, provided there is a factual basis for a finding of guilty. State v. Leisy 118
3. A motion to withdraw a plea of guilty or nolo contendere should be sustained only if the defendant proves withdrawal is necessary to correct a manifest injustice and the grounds for withdrawal are established by clear and convincing evidence. State v. Hurley 321
4. When a plea of guilty or nolo contendere is made with full knowledge of the charge and the consequences of the plea, it will not be permitted to be withdrawn in the absence of fraud, mistake, or other improper means used in its procurement. State v. Hurley 321
5. A guilty plea or a plea of nolo contendere may not be withdrawn as a matter of right solely because the defendant chose to withhold facts from his attorney and the court which, if believed, might have prevented the attorney from recommending that the plea be entered or the court from accepting it. State v. Hurley 321

Habeas Corpus.

1. Where the custody of a minor child is involved in a habeas corpus action, the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of a fit, proper, and suitable parent. Nielsen v. Nielsen 141
2. In an action for a writ of habeas corpus, including one which challenges extradition proceedings, the burden of proof is upon the petitioner to establish his claim that his detention is illegal. Dovel v. Adams 766
3. In extradition proceedings, tested by habeas corpus, the

respondent establishes a prima facie case of identity from the recital of the name in the Governor's warrant and the corresponding name of the person in custody. Dovel v. Adams 766

4. It is the position of this court that when a court's jurisdiction is invoked by a habeas corpus petition seeking custody of a child, the child becomes a ward of the court and the prime consideration is the welfare of the child. In re Application of Ghowrwal 831
5. In a habeas corpus proceeding the court need not find a change in circumstances to modify the custody award. The best interests of the child are the primary concern of the court, and former adjudications between parents are evidentiary only, and not controlling. In re Application of Ghowrwal 831
6. It is the practice in this state to allow recovery of attorney fees only in such cases as are provided for by statute. There is no statutory authority in this state for awarding attorney fees in a habeas corpus proceeding. In re Application of Ghowrwal 831

Habitual Criminals.

A failure to challenge, during an habitual criminal hearing, the validity of a prior conviction offered for the purpose of enhancing punishment waives the issue of the validity of the previous conviction and the prior conviction cannot be challenged in a post conviction proceeding. State v. Cole. 318

Hearsay.

1. An out-of-court statement of an unavailable witness, as defined by Neb. Rev. Stat. § 27-804(1) (Reissue 1979), is admissible only upon a finding by the trial court that the pertinent provisions of § 27-804(2)(e) have been complied with, including notice to the adverse party of intention to use the out-of-court statement. State v. Leisy 118
2. Admissions by a party opponent are not hearsay and, if material, are competent evidence. State v. Leisy 118

Heart Disease.

In a workmen's compensation case, death or disability caused by (1) heart disease that was a personal risk and (2) emotional strain that was an employment risk is not compensable where the emotional strain is not greater than that of nonemployment life. The comparison is not with the employee's usual exertion in his employment but rather with the exertions present in the employee's normal nonemployment life. White v. Father Flanagan's Boys' Home 528

Highways.

It is the duty of a county to use reasonable and ordinary care in the construction, maintenance, and repair of its highways and bridges so that they will be reasonably safe for the traveler using them while he is in the exercise of reasonable and ordinary care and prudence. Hansmann v. County of Gosper 659

Illegal Contracts.

A bargain in whole or in part for, or in consideration of, illicit sexual intercourse or of a promise thereof, is illegal; but subject to this exception, such intercourse between parties to a bargain previously or subsequently formed does not invalidate it. Kinkenon v. Hue 698

Indemnity.

1. Under the Nebraska workmen's compensation act, a statutory employer is entitled to indemnity from the actual employer with the amount being limited to all sums which the former has paid in good faith upon a matured obligation, or has been forced to pay in satisfaction of a compensation award. Duffy Brothers Constr. Co. v. Pistone Builders, Inc. 360
2. Generally speaking, an employer paying an injured workman his wages in lieu of compensation is entitled to credit for such benefits computed by the number of weeks paid, rather than the dollar amount. Duffy Brothers Constr. Co. v. Pistone Builders, Inc. 360

Informants.

1. For an affidavit based on a tip from an informant to be sufficient, the affidavit must set out some of the underlying circumstances sufficient to enable the magistrate to independently judge the validity of the informant's conclusion that the criminal activities were being carried on where and as he said they were and some of the underlying circumstances from which the affiant concluded that the informant was credible or his information reliable. State v. Hinchion, DiBiase, Olsen, and Cullen 478
2. An informant's detailed eyewitness report of a crime may be self-corroborating; it supplies its own indicia of reliability; and an untested citizen informant who has personally observed the commission of a crime is presumptively reliable. State v. Butler 760
3. The statement of an eyewitness to a crime supplies its own indicia of reliability as a statement of facts rather than conclusions which must be tested to determine their factual basis. State v. Butler 760

4. The inquiry which should be made is whether the information furnished by the informant taken as a whole in light of the underlying circumstances can be said to be reliable. State v. Butler 760
5. When the issue is not guilt or innocence but the question of probable cause for arrest or search, police officers need not invariably be required to disclose an informant's identity if the trial judge is convinced, by evidence submitted in open court and subject to cross-examination, that the officers did rely in good faith upon credible information supplied by a reliable informant. State v. Butler 760

Inherent Powers.

A litigant may always ask a court of general jurisdiction to exercise its inherent power. However, the filing of a document entitled "motion for rehearing" does not toll the time for appeal, and the time for appeal begins to run from the date the court enters the order overruling the motion for new trial, if such a motion has been timely filed. In re Estate of Weinberger 711

Injunctive Relief.

1. Broadly speaking, the enforcement of building restrictions is governed by equitable principles, and will not be decreed if, under the facts of the particular case, it would be inequitable and unjust, or not in furtherance of public interest. Whether injunctive relief will be granted to restrain the violation of such restrictions is a matter within the sound discretion of the trial court, to be determined in the light of all the facts and circumstances. Baltes v. Hodges 740
2. A court of equity may properly afford injunctive relief where there has been a continuing and flagrant course of violations of the law, even though these acts may be subject to criminal sanctions. State ex rel. Douglas v. Faith Baptist Church 802

Insurance.

1. Under the provisions of Neb. U.C.C. § 9-306 (Cum. Supp. 1978), the term "proceeds" includes insurance proceeds representing destroyed collateral. Terra Western Corp. v. Berry and Co. 28
2. Although a mortgagor has, in the security instrument, contracted with the mortgagee to insure for the latter's benefit and insurance is procured, if the policy contains no loss payable clause covering the lienholder, an insurer who, acting in good faith and without actual knowledge of the mortgagee's interest, pays the insured for a loss,

is not liable to the mortgagee for conversion of proceeds. Terra Western Corp. v. Berry and Co. 28
3. The provisions of Neb. U.C.C. § 9-306 (Cum. Supp. 1978), including insurance proceeds representing destroyed collateral within the statutory definition of "proceeds," do not serve the function of giving the insurer notice of a mortgagee's equitable interest in the insurance policy and are not a substitute for either a loss payable clause or actual notice to the insurer of the equitable interest of the mortgagee. Terra Western Corp. v. Berry and Co. . 28
4. An insurer who is a subrogee and does not come into the action but accepts the avails of the litigation is liable for a proportionate share of the expenses of the litigation, including attorney fees. St. Paul Fire & Marine Ins. Co. v. Truesdell Distributing Corp. 153
5. Liability for workmen's compensation shall not be reduced or affected by any insurance of the injured employee or any contribution or other benefit whatsoever due to or received by the person entitled to such compensation. Novotny v. City of Omaha 535
6. No agreement by an employee to pay any portion of premium paid by his employer or to contribute to a benefit fund or department maintained by such employer for the purpose of providing compensation as required by the workmen's compensation act shall be valid. Novotny v. City of Omaha 535
7. The payment of disability retirement benefits to a civilian employee under Omaha, Neb., Code § 22-35 (1980) does not affect the right of the employee to claim and receive benefits under the workmen's compensation act. Novotny v. City of Omaha 535

Insurance Contracts.

1. The regular payment of premiums is of the very essence of an insurance contract. Ordinarily, therefore, a court will not grant relief against a forfeiture incurred by the nonpayment of a premium. St. Paul Mercury Ins. Co. v. Hurst 840
2. The continuance of the insurer's obligation is generally conditional upon the payment of premiums, so that no recovery can be had upon a lapsed policy, the contractual relation between the parties having ceased. St. Paul Mercury Ins. Co. v. Hurst 840

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Intent.
1. Intent is a mental process and intention must be determined from all the evidence, facts, and circumstances of the case, inclusive of the act, and is ordinarily for decision by the trier of the facts. State v. Welchel 337
2. An unambiguous contract is not subject to interpretation or construction, and the intent of the parties must be determined from its contents. A contract will be construed most strongly against the party preparing it when there is a question as to its meaning. Baltes v. Hodges 740

Intent of Parties.
1. The interpretation given a contract by the parties themselves, while engaged in their performance of it, is one of the best indications of their true intent. Lovelace v. Stern .. 174
2. The primary test of whether a transaction in the form of an agency to sell or a consignment created the relation of buyer and seller or one of principal and agent is the intention of the parties as gathered from the whole scope and effect of the language used. The label which the parties give to the transaction does not determine its character, and courts look beyond mere labels and examine the contract as a whole in order to ascertain the intention of the parties. Allen v. Dealer Assistance, Inc. 455

Intent to Defraud.
1. It is the intent to defraud that makes a transfer of personal property without the consent of the holder of a security interest both unlawful and yet not violative of Neb. Const. art. I, § 20. Payment of the secured debt with proceeds from the sale is not a defense to the crime; it is only evidence of lack of fraudulent intent. State v. Hocutt 689
2. By its terms, Neb. Rev. Stat. § 28-611(1) (Reissue 1979) requires proof that one intended to defraud by obtaining property, services, or present value of any kind in exchange for a check or other order, knowing at the time of issuing such check or order that he has no account with the drawee, or, if he has such an account, knowing that he does not have sufficient funds in, or credit with, the drawee for the payment of such check or order in full upon its presentation. State v. Kock 731

Interest Rates.

A written instrument which provides for payment of interest on an unpaid balance, but without specifying the rate, carries interest at the legal rate prescribed by law. Lovelace v. Stern 174

Interrogations.

1. In on-the-scene investigations, the law enforcement officers may interview any person not in custody and not subject to coercion, for the purpose of determining whether a crime has been committed and who committed it. State v. Mattan. 679
2. Generally, Miranda warnings are required only for custodial interrogation. State v. Mattan 679

Intervention.

1. As a general rule, intervention is not permitted in a divorce suit for the purpose of opposing a divorce, but intervention may be allowed where it is necessary to secure justice for third persons whose property interests may be adversely affected. Barber v. Barber 101
2. In equity actions, it is generally held that the proper method to enforce an attorney's lien is to file a petition in intervention in the original action. Barber v. Barber 101

Irrigation.

Waste irrigation waters are not surface waters which may be discharged into a drainway as a matter of right, and such waters may not be discharged in injurious quantities. Eunice Harrington Investments, Ltd. v. Wallace 373

Joinder of Actions.

1. In the absence of objection by the opposing party, there is nothing in the law that requires a party to join in one suit several distinct causes of action. Suhr v. City of Scribner 24
2. The ruling of a trial court upon a motion for consolidation of prosecutions properly joinable will not be disturbed in the absence of an abuse of discretion. State v. Anderson and Hochstein 51
3. It is the duty of one challenging a joint trial to demonstrate how and in what manner he is prejudiced. State v. Anderson and Hochstein 51

Joint and Several Liability.

1. Under the provisions of Neb. Rev. Stat. § 48-116 (Reissue 1978), when a contractor fails to require a subcontractor to carry workmen's compensation insurance, and an employee of the latter sustains a job-related injury, the contractor shall be included within the term employer and,

with the immediate employer-subcontractor, shall be jointly and severally liable to pay compensation under the terms of the workmen's compensation act. Duffy Brothers Constr. Co. v. Pistone Builders, Inc. 360
2. The joint and several liability imposed by Neb. Rev. Stat. § 48-116 (Reissue 1978) is for the sole benefit of the injured workman; the statute in no way determines whether it is the statutory or actual employer who is primarily liable. Duffy Brothers Constr. Co. v. Pistone Builders, Inc. 360
3. Between the statutory employer and the actual employer, under the provisions of Neb. Rev. Stat. § 48-116 (Reissue 1978), the liability of the latter should be regarded as primary and that of the former as secondary. Duffy Brothers Constr. Co. v. Pistone Builders, Inc. 360

Joint Tenancy.

Where an instrument is silent as to the interests taken by joint tenants, the presumption is that their interests are equal. Kinkenon v. Hue 698

Judgments.

1. The judgment of the trial court in an action at law where a jury has been waived has the effect of a verdict of a jury and it will not be set aside on appeal unless clearly wrong. Weber v. Swenson 35
2. On appeal from a judgment in equity when credible evidence on material questions of fact is in conflict, the Supreme Court will consider the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the other. Weber v. Swenson 35
3. Where 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. Barber v. Barber 101
4. Only a void judgment is subject to collateral attack. Schilke v. School Dist. No. 107 448
5. Where the court has jurisdiction of the parties and the subject matter, its judgment is not subject to collateral attack. Schilke v. School Dist. No. 107 448
6. Even though a judicial body errs in holding that a petition is sufficient, if it had jurisdiction, such holding will not subject the judgment rendered to collateral attack. Schilke v. School Dist. No. 107 448
7. A determination made by a trial court that a defendant is a mentally disordered sex offender under Neb. Rev.

Stat. § 29-2911 et seq. (Reissue 1979) is a question of fact to be determined by the trial court. State v. Glover 487
8. A judge of the District Court at chambers anywhere within his district, or anywhere within any district in which any case is filed as to which such judge is authorized to act, has the inherent power to modify or vacate any judgment rendered by such judge, if done within the term in which the judgment was rendered, and such action may be taken ex parte and without prior notice to the parties. In re Estate of Weinberger 711
9. The general rule is that a judgment of a state court which had jurisdiction has the same credit, validity, and effect in every other court in the United States which it had in the state where it was pronounced. In re Application of Ghowrwal 831
10. In determining the sufficiency of the evidence corroborating the testimony of the prosecutrix, the resolution of conflicts in the evidence, the credibility of the witnesses, and the determination of the plausibility of explanations or the weighing of such evidence are matters for the jury and must be sustained on appeal if, taking the view most favorable to the State, there is sufficient evidence to support the verdict. State v. Watkins 859

Judicial Construction.

1. Although Neb. Rev. Stat. § 69-109 (Cum. Supp. 1980) does not expressly require fraud, judicial construction of that section has established that proof of fraud is required for a conviction thereunder. State v. Hocutt 689
2. It is presumed that when a statute has been construed by the Supreme Court, and the same statute is substantially reenacted, the Legislature gave to the language the significance previously accorded to it by the Supreme Court. State v. Hocutt 689
3. When the Legislature subsequently enacts legislation making related preexisting laws applicable thereto, it would be presumed that it did so with full knowledge of such preexisting legislation and judicial decisions of the Supreme Court construing and applying it. State v. Kock 731
4. An interpretation which gives effect to a statute will be chosen over one which defeats the statute, and an interpretation which gives effect to the entire language of the statute will be selected as against one which does not. State v. Kock 731

Judicial Notice.

A trial court in a proceeding between the same parties is entitled to take judicial notice of a security agreement

attached to a previously dismissed petition between the same parties in the same court. State Security Savings Co. v. Pelster 158

Juries.

1. One who cannot subordinate his personal views to what he perceives to be his duty to abide by his oath as a juror and to obey the laws of the state must be excused for cause. State v. Anderson and Hochstein 51
2. A motion for change of venue or to sequester the jury is directed to the sound discretion of the trial court and, in the absence of an abuse of discretion, its ruling will not be disturbed on appeal. State v. Anderson and Hochstein 51
3. Jury sentencing in a capital case is not constitutionally required. State v. Anderson and Hochstein 51
4. In a case where, under the law and facts, the submission of the issue of contributory negligence and a comparison thereof with negligence of the opposing party to ascertain what damages, if any, shall be allowed, is proper, the determination of the amount of the damages is for the jury. Nickal v. Phinney 281
5. The obtaining of affidavits from jurors to determine whether there was improper conduct or communication with or by jurors during separation is an acceptable means of obtaining the necessary facts. State v. Robbins 439
6. The Nebraska system of selecting jurors by the use of voter registration lists is constitutionally permissible. State v. Wounded Arrow 544
7. The states are free to grant exemptions from jury service to individuals in case of special hardships or incapacity and to those engaged in particular occupations, the uninterrupted performance of which is critical to the community's welfare. Such exemptions do not pose substantial threats that the remaining pool of jurors would not be representative of the community. State v. Wounded Arrow 544
8. In determining the sufficiency of the evidence corroborating the testimony of the prosecutrix, the resolution of conflicts in the evidence, the credibility of the witnesses, and the determination of the plausibility of explanations or the weighing of such evidence are matters for the jury and must be sustained on appeal if, taking the view most favorable to the State, there is sufficient evidence to support the verdict. State v. Watkins 859

Jurisdiction of Courts.

1. The juvenile court in each county has exclusive original jurisdiction as to any child under the age of 18 years, who

is homeless or destitute, or without proper support through no fault of his parent, guardian, or custodian.
In re Interest of Morford 627
2. County courts have exclusive original jurisdiction of all matters related to decedents' estates, including the probate of wills and the construction thereof, and all other jurisdiction heretofore provided and not specifically repealed by 1972 Neb. Laws, L.B. 1032, and such other jurisdiction as thereafter provided by law. In re Estate of Layton 646
3. To the full extent permitted by the Constitution of Nebraska, the county courts have jurisdiction over all subject matter relating to estates of decedents, including construction of wills and determination of heirs and successors of decedents, and estates of protected persons; protection of minors and incapacitated persons; and trusts. Such courts have 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 them. In re Estate of Layton 646
4. County courts, in exercising exclusive original jurisdiction over estates, may apply equitable principles to matters within probate jurisdiction. In re Estate of Layton 646

Juror Misconduct.

1. The obtaining of affidavits from jurors to determine whether there was improper conduct or communication with or by jurors during separation is an acceptable means of obtaining the necessary facts. State v. Robbins 439
2. A motion for a new trial for alleged misconduct is addressed to the sound discretion of the trial court, and a ruling made thereon will not be disturbed on appeal unless an abuse of that discretion is shown. State v. Robbins 439

Jury Instructions.

1. Pattern jury instruction NJI 14.50 correctly states the law in defining and applying direct and circumstantial evidence. State v. Leisy 118
2. Ordinarily, the failure to object to instructions after they have been submitted to counsel for review will preclude raising an objection on appeal.
Mahoney v. May 187
State v. Duis 851
3. An inadvertent grammatical error in an instruction is harmless error if it is clear from the instruction itself and the other instructions given that the jury was not confused or misled by the error. Mahoney v. May 187
4. Where the State offers uncontroverted testimony on an

essential element of a crime, mere speculation that the jury may disbelieve the testimony does not entitle the defendant to an instruction on a lesser-included offense. State v. Packett 202
5. Instructions must be considered together and if, when considered as a whole, they state the law correctly, they are not erroneous. Gee v. Dinsdale Brothers, Inc. 224
6. Generally, the trial court is not required to instruct negatively. Gee v. Dinsdale Brothers, Inc. 224
7. Where the trial court has instructed the jury affirmatively upon the issues presented by the pleadings and the evidence, it is unnecessary to instruct in a negative form. Gee v. Dinsdale Brothers, Inc. 224
8. The court may properly refuse a requested instruction where the substance of the request is covered in those actually given. State v. Vicars 325
9. It is the duty of the trial court to instruct the jury on the law of the case whether requested to do so or not. State v. Duis 851
10. The trial court, on request of the accused, must instruct the jury on the accused's theory of the case if there is any evidence to support it. State v. Duis 851
11. Where an instruction is technically correct, and is couched in terms which in the opinion of a party are liable to be misunderstood or misapplied by the jury, it is the party's duty to call the court's attention to the supposed defect and present a suitable instruction. State v. Duis 851

Jury Selection.

1. The Nebraska system of selecting jurors by the use of voter registration lists is constitutionally permissible. State v. Wounded Arrow 544
2. The states are free to grant exemptions from jury service to individuals in case of special hardships or incapacity and to those engaged in particular occupations, the uninterrupted performance of which is critical to the community's welfare. Such exemptions do not pose substantial threats that the remaining pool of jurors would not be representative of the community. State v. Wounded Arrow 544

Jury Trials.

1. There is no constitutional right to trial by jury for petty offenses carrying a maximum sentence of 6 months or less. State v. Mangelsen 213
2. Requiring a waiver of jury trial to be intelligently waived does not mean that all of defense counsel's advice must withstand retrospective examination on post conviction hearing. State v. Journey 717

3. If an attorney's advice is within the range of competence required for attorneys in criminal cases and does not induce defendant to waive a jury trial by threats or promises, a defendant may not attack his jury trial waiver on appeal. State v. Journey 717
4. Because the decision to waive a jury trial is ultimately and solely the defendant's, a defendant must bear the responsibility for that decision. Counsel's advice to waive a jury trial can be the source of a valid claim of ineffective assistance of counsel only when (1) counsel interferes with his client's freedom to decide to waive a jury trial, or (2) defendant can point to specific advice of counsel so unreasonable as to vitiate the knowing and intelligent waiver of the right. State v. Journey 717

Juvenile Courts.

1. An appeal of a juvenile case is heard by trial de novo upon the record; and the findings of fact by the trial court will be accorded great weight because the trial court heard and observed the parties and witnesses, and those findings will not be set aside on appeal unless they are against the weight of the evidence or there is a clear abuse of discretion.
   In re Interest of Hill 233
   In re Interest of Morford 627
2. The juvenile court in each county has exclusive original jurisdiction as to any child under the age of 18 years, who is homeless or destitute, or without proper support through no fault of his parent, guardian, or custodian. In re Interest of Morford 627

Landlords and Tenants.

1. The acceptance of rent after the lessee's breach or default in the terms of the lease generally constitutes a waiver of the default so as to entitle the lessee to enforce an option to purchase. Barber v. Raichart 278
2. Where the option to purchase is duly exercised by an election to purchase, the relation of landlord and tenant ceases and that of vendor and purchaser arises. Barber v. Raichart 278
3. The rule of *caveat emptor* applies to leases of commercial real estate wherein control passes to the lessee. Absent fraud or concealment, it is the lessee's duty to examine the premises with respect to safety and suitability for his business. Gehrke v. General Theatre Corp. 301
4. Absent an express agreement to the contrary, a lessor is not bound to make any repairs. Gehrke v. General Theatre Corp. 301
5. A lessor's duty with respect to latent defects is only to advise

the prospective lessee of any such known defects, not to repair them. Gehrke v. General Theatre Corp. 301

Latent Defects.

A lessor's duty with respect to latent defects is only to advise the prospective lessee of any such known defects, not to repair them. Gehrke v. General Theatre Corp. 301

Legislature.

1. A newly created office which is not filled by the legislative act creating it, and for which no provision is made by the act to fill it, becomes vacant on the instant of its creation and remains so until it is filled by an incumbent. State ex rel. Redmond v. Smith 21
2. Absent constitutional direction, vacancies in office are filled in the manner provided by the Legislature. State ex rel. Redmond v. Smith 21
3. The Legislature cannot circumvent an express provision of the Constitution by doing indirectly what it may not do directly. Nebraska P. P. Dist. v. Hershey School Dist. 412
4. No act is criminal unless the Legislature has in express terms declared it to be so, and no person can be punished for any act or omission which is not made penal by the plain import of the written law. State v. Suhr 553
5. In enacting an amendatory statute, the Legislature is presumed to have known the preexisting law. State v. Suhr 553

Lesser-Included Offenses.

1. Where the State offers uncontroverted testimony on an essential element of a crime, mere speculation that the jury may disbelieve the testimony does not entitle the defendant to an instruction on a lesser-included offense. State v. Packett 202
2. Where the prosecution has offered uncontroverted evidence on an element necessary for conviction of the greater crime, but not necessary for the lesser offense, the defendant must offer at least some evidence to dispute the issue if he wishes to have the benefit of a lesser-included offense instruction. State v. Vicars 325

Liability.

1. Under Neb. Rev. Stat. § 23-2410 (Reissue 1977), a county is liable for damages caused by insufficiency or want of repair of a county bridge. Hansmann v. County of Gosper 659
2. Generally a banker's blanket bond does not insure against legal liability of the named insured to a third party; the

fact that the insured has not yet paid its third-party liability is not at all significant. Omaha Bank v. Aetna Cas. and Surety Co. 782
3. The obligation of the insurer to indemnify the insured for court costs and reasonable attorney fees incurred and paid by the insured in defending a suit relates only to any suit or legal proceedings brought against the insured to enforce insured's liability or alleged liability on account of any loss, claim, or damage which, if established against the insured, would constitute a valid and collectible loss sustained by the insured under the terms of the bond. Omaha Bank v. Aetna Cas. and Surety Co. 782

Licenses and Permits.

Proof of a prior conviction or convictions is not an essential element of the crime of operating a motor vehicle while an operator's license was suspended or revoked, second offense, but goes only to enhance the punishment for the primary offense charged. State v. Mangelsen 213

Limitations of Actions.

1. A proceeding under Neb. Rev. Stat. § 48-141 (Reissue 1978) to modify a previous award of the compensation court to recover additional compensation for an increase in incapacity can only be brought within 2 years of the time the employee knows or is chargeable with knowledge that his condition has materially changed, and there is such a substantial increase in his disability as to entitle him to additional compensation. O'Connor v. Anderson Bros. Plumbing & Heating 641
2. If an employee suffers an injury, which appears to be slight but which is progressive in its course, and which several physicians are unable to correctly diagnose, his failure to file claim or bring suit within the time limited by law will not defeat his right to recovery, if he gave notice and commenced action within the statutory period after he had knowledge that compensable disability resulted from the original accident. O'Connor v. Anderson Bros. Plumbing & Heating 641
3. A cause of action accrues and the statute of limitations begins to run when the aggrieved party has the right to institute and maintain a suit. Generally, this is true even though the plaintiff may be ignorant of the existence of the cause of action. Jones v. Johnson v. Pullen 706
4. A plaintiff who seeks to avoid the bar of the statute of limitations must plead facts to show the statute was tolled. Jones v. Johnson v. Pullen 706
5. Generally, the statute of limitations in favor of a third

party runs against the trustee from the date of the transfer. Jones v. Johnson v. Pullen 706

Malicious Prosecution.

In a malicious prosecution case, the necessary elements for the plaintiff to establish are: (1) The commencement or prosecution of the proceeding against him; (2) Its legal causation by the present defendant; (3) Its bona fide termination in favor of the present plaintiff; (4) The absence of probable cause for such proceeding; (5) The presence of malice therein; and (6) Damage conforming to legal standards resulting to plaintiff. All the above elements must coalesce, and if any of these elements are lacking, the result is fatal to the action. Its application, however, is not without limitations. Where the informant knowingly gives false or misleading information or in anywise directs or counsels officers in such a way as to actively persuade and induce an officer's decision, then the informant may still be held liable. Johnson v. First Nat. Bank & Trust Co. 521

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. McDonald v. McDonald 217

Miranda Rights.

1. The Miranda rules are not applicable to consent searches. State v. Packett 202
2. There is no requirement that a person asked to consent to a search be advised that he may refuse consent. State v. Packett 202
3. In on-the-scene investigations, the law enforcement officers may interview any person not in custody and not subject to coercion, for the purpose of determining whether a crime has been committed and who committed it. State v. Mattan 679
4. Generally, Miranda warnings are required only for custodial interrogation. State v. Mattan 679
5. A prosecutor's reference to the defendant's failure to make an exculpatory statement to the police before arrest or accusation does not violate the accused's right to remain silent under the Miranda doctrine. State v. Duis 851

Misdemeanors.

There is no constitutional right to trial by jury for petty offenses carrying a maximum sentence of 6 months or less. State v. Mangelsen 213

Modification of Decree.

1. Except for terms concerning the custody or support of minor children, the decree in an action for dissolution of marriage may expressly preclude or limit modification of terms set forth in the decree. Neb. Rev. Stat. § 42-366 (Reissue 1978). Euler v. Euler 4
2. Neb. Rev. Stat. § 42-372 (Reissue 1978) does not bar modification of the divorce decree to include alimony, where none was awarded in the final decree, if such modification is sought within the 6-month period after the decree has been filed. Howard v. Howard 468
3. Permitting the trial court to modify its decree within 6 months impliedly requires a showing of good cause where the court vacates a decree on its own motion without opportunity to produce evidence with respect to the terms of the proposed modification. Howard v. Howard 468

Mortgages.

1. Although a mortgagor has, in the security instrument, contracted with the mortgagee to insure for the latter's benefit and insurance is procured, if the policy contains no loss payable clause covering the lienholder, an insurer who, acting in good faith and without actual knowledge of the mortgagee's interest, pays the insured for a loss, is not liable to the mortgagee for conversion of proceeds. Terra Western Corp. v. Berry and Co. 28
2. The provisions of Neb. U.C.C. § 9-306 (Cum. Supp. 1978), including insurance proceeds representing destroyed collateral within the statutory definition of "proceeds," do not serve the function of giving the insurer notice of a mortgagee's equitable interest in the insurance policy and are not a substitute for either a loss payable clause or actual notice to the insurer of the equitable interest of the mortgagee. Terra Western Corp. v. Berry and Co. 28

Motions for New Trial.

1. Evidence of facts occurring after a trial ordinarily cannot be made the basis for a motion for a new trial on the ground of newly discovered evidence. Sullivan v. Hoffman 166
2. A new trial will not be granted on the ground of newly discovered evidence where it appears that such evidence was not available at the time of the trial, but rather the

result of changed conditions since. Sullivan v. Hoffman 166
3. In any but an extraordinary case in which an utter failure of justice will unequivocally result, evidence of facts occurring after the trial will not support a motion for a new trial as newly discovered evidence. Sullivan v. Hoffman 166
4. Alleged errors of the trial court in an action at law which are not referred to in a motion for new trial will not be considered on appeal in this court. Mahoney v. May 187
5. In a criminal case, a motion for new trial must be filed within 10 days after the verdict is rendered. State v. Kelly 295
6. Where a motion for new trial is based on newly discovered evidence, the rule is well established that the newly discovered evidence must be of such a nature that, if offered and admitted at the former trial, it probably would have produced a substantial difference in result. State v. Hortman 393
7. Newly discovered evidence concerning credibility of witnesses testifying at the former trial is not sufficient to support a motion for new trial on the basis of newly discovered evidence. State v. Hortman 393
8. A motion for a new trial for alleged misconduct is addressed to the sound discretion of the trial court, and a ruling made thereon will not be disturbed on appeal unless an abuse of that discretion is shown. State v. Robbins 439

Motions to Suppress.

The procedure for appealing from an order entered under either the provisions of Neb. Rev. Stat. § 29-824 (Reissue 1979) or Neb. Rev. Stat. § 86-705(12) (Reissue 1976) shall be in accordance with § 29-824 and shall be heard by a single judge sitting at chambers, provided, however, that upon ultimate appeal to the full Nebraska Supreme Court, the defendant may challenge the correctness of the order by the single judge by preserving the question in the motion for new trial, as prescribed in § 29-824. State v. Anderson and Hochstein 51

Motions to Vacate.

1. Where a motion is made to open, modify, or vacate a judgment within the time in which the court has power to grant it, it is not indispensable that the motion be disposed of within the original term. In such case, the rights of a party seeking relief become fixed at the time the motion is filed, and not at the time of the disposition of the motion, even if that is in a subsequent term. To the extent that *Johnston Grain Co. v. Tridle*, 175 Neb. 859, 124 N.W.2d

463 (1963), is inconsistent with this holding, it is overruled. Moackler v. Finley 353
2. The setting aside of a default judgment is to a large extent within the discretion of the trial court, and it will be presumed, unless there is evidence to the contrary, that such discretion was properly exercised. Moackler v. Finley 353

Motor Vehicles.
1. Proof of a prior conviction or convictions is not an essential element of the crime of operating a motor vehicle while an operator's license was suspended or revoked, second offense, but goes only to enhance the punishment for the primary offense charged. State v. Mangelsen 213
2. A driver who operates his vehicle at a speed in excess of the legal limit commits an offense in the presence of an officer observing the vehicle from an airplane and an officer on the ground who stops the vehicle at the direction of the officer in the airplane. State v. Chambers 611
3. Generally, it is negligence as a matter of law for a motorist to drive an automobile on the highway in such a manner that he is unable to stop in time to avoid a collision with an object within his range of vision. Maurer v. Harper ... 655
4. The applicability of the rule, as a matter of law, depends on the individual circumstances and is for the court's determination. Where an exception clearly applies, the general rule does not apply. Where the general rule does not apply as a matter of law, the determination of negligence is for the jury under the rules and standards of due care under the particular circumstances as applied in motor vehicle cases. Maurer v. Harper 655
5. The rule presupposes an obstruction discernible within the range of the driver's vision ahead. A following driver need not anticipate that a motorist will suddenly stop or slow on a highway, and where a dispute exists as to whether such a stop was made, the issue is for the jury. Maurer v. Harper 655
6. It is negligence for a motorist to stop on a highway in front of a following motorist without justification. Maurer v. Harper 655
7. The doctrine of sudden emergency may not be successfully invoked by a litigant unless there is evidence that such an emergency existed, that the party seeking the benefit of the doctrine did not cause the emergency, and that he used due care to avoid it. Maurer v. Harper 655
8. A certificate of title to a motor vehicle is generally conclusive evidence in this state of the ownership of the vehicle. Exceptions to this rule apply only to prevent fraud and coercion. Kinkenon v. Hue 698

Municipal Corporations.

1. A municipal corporation is not an insurer of those using its public sidewalks, but must use reasonable and ordinary care in the construction, maintenance, and repair thereof so that they will be safe for a traveler upon them who is using ordinary care and caution. Doht v. Village of Walthill 377
2. Slight holes or depressions in a sidewalk which are not in the nature of traps, and from which danger could not be reasonably anticipated, are not defects for which an action will lie against a municipality. Doht v. Village of Walthill 377
3. A city or county is not estopped by the unauthorized conduct, representations, promises, or pledges of its officers and agents, absent official acquiescence in and approval of the same by such governmental unit. Schilke v. School Dist. No. 107 448
4. Private sewers and drains may become the property of the municipal corporation in some cases merely through connection and integration into the latter. Beach v. City of Fairbury 836

Nebraska Constitution.

1. The adoption by the Legislature of a proposed amendment does not amend the Nebraska Constitution. Only the electorate can amend the Constitution by adopting the proposal by a majority vote. Cunningham v. Exon 513
2. A proposed amendment to the Nebraska Constitution must be expressly adopted by the voters, including a proposal to repeal existing language. Cunningham v. Exon 513
3. The Nebraska Constitution may be amended by implication only where language adopted by the voters conflicts with existing constitutional provisions. In that situation, the newer provisions control and the prior provisions are implicitly repealed. Cunningham v. Exon 513
4. A clause in a constitutional amendment will prevail over a provision in the original instrument inconsistent with the amendment only when they relate to the same subject, are adopted for the same purpose, and cannot be enforced without substantial conflict. Cunningham v. Exon 513

Nebraska Power Review Board.

1. The authority of the Nebraska Power Review Board to determine whether construction of a transmission line will serve the public convenience and necessity does not include the power to select the particular route the line must follow. Lincoln Electric System v. Terpsma 289

2. The Nebraska Power Review Board exists to avoid and eliminate conflict and competition among suppliers of electricity, to avoid and eliminate duplication of facilities' and resources, and to facilitate the settlement of rate disputes; all to the end of providing Nebraskans with adequate electric service at as low an overall cost as possible. Lincoln Electric System v. Terpsma 289
3. Determination of what is consistent with the public convenience and necessity is a question of fact peculiarly for the determination of the Nebraska Power Review Board. The only questions for this court are whether the Board acted within the scope of its authority and if the order complained of is supported by the evidence and is reasonable and not arbitrarily made. Lincoln Electric System v. Terpsma 289

Negligence.

1. Generally, it is negligence as a matter of law for a motorist to drive an automobile on the highway in such a manner that he is unable to stop in time to avoid a collision with an object within his range of vision. Maurer v. Harper ... 655
2. The applicability of the rule, as a matter of law, depends on the individual circumstances and is for the court's determination. Where an exception clearly applies, the general rule does not apply. Where the general rule does not apply as a matter of law, the determination of negligence is for the jury under the rules and standards of due care under the particular circumstances as applied in motor vehicle cases. Maurer v. Harper 655
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4. It is negligence for a motorist to stop on a highway in front of a following motorist without justification. Maurer v. Harper 655
5. The doctrine of sudden emergency may not be successfully invoked by a litigant unless there is evidence that such an emergency existed, that the party seeking the benefit of the doctrine did not cause the emergency, and that he used due care to avoid it. Maurer v. Harper 655
6. A failure to post a load limit on a bridge may be negligence or evidence of negligence. Hansmann v. County of Gosper 659

Notice.

1. The statutory and common law lien upon money in the hands of the adverse party in an action or proceeding in which the attorney was employed is a charging or specific lien, and is not perfected until notice has been given to the party in possession of the fund. Any notice of the existence of the claim, and that it will be asserted, is sufficient. The statute does not require that the notice shall be in any specific form, or that it shall be given in any particular way. Barber v. Barber 101
2. The option to implement an acceleration clause is effectively exercised by manifesting the fact in such a manner as to apprise the mortgagor of the mortgagee's intention. State Security Savings Co. v. Pelster 158

Nuisances.

1. A rural home and a rural family, within reason, are entitled to the same relative protection as others. Gee v. Dinsdale Brothers, Inc. 224
2. Even in an industrial or rural area, a business enterprise may not be conducted in such a manner as to materially prejudice a neighbor. Gee v. Dinsdale Brothers, Inc. ... 224

Option to Purchase.

1. The acceptance of rent after the lessee's breach or default in the terms of the lease generally constitutes a waiver of the default so as to entitle the lessee to enforce an option to purchase. Barber v. Raichart 278
2. Where the option to purchase is duly exercised by an election to purchase, the relation of landlord and tenant ceases and that of vendor and purchaser arises. Barber v. Raichart 278

Oral Contracts.

1. The terms of an oral agreement are to be found in the parties' respective versions of the agreement, and their acts and conduct in light of the subject matter. Kinkenon v. Hue 698
2. Equity will grant specific performance of an oral agreement to transfer property to another if it is proved by evidence convincing and satisfactory and if it has been wholly performed by one party and its nonperformance would be a fraud on him. Kinkenon v. Hue 698

Parental Duties.

1. Generally, both parents are obligated to perform the duties prescribed by Neb. Rev. Stat. §§ 43-201 et seq. (Reissue 1978), as well as those inherent in the parent-

child relationship, and the father cannot delegate those duties to the mother and expect to be held harmless if she neglects the children. In re Interest of O'Donnell 367
2. Prosecution may be brought under Neb. Rev. Stat. § 28-449(1) (Reissue 1975), failure to support wife, child, or stepchild, even though a child support judgment, either incident to a decree of divorce or separation or otherwise, has been entered against the person charged. State v. Easley 443
3. Where a person prosecuted under Neb. Rev. Stat. § 28-449(1) (Reissue 1975) has previously been ordered to pay child support in a divorce decree, the measure of his liability is the amount provided in the decree. State v. Easley .. 443

Parental Rights.
1. Where the custody of a minor child is involved in a habeas corpus action, the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of a fit, proper, and suitable parent. Nielsen v. Nielsen 141
2. The courts may not properly deprive a parent of the custody of a minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship or has forfeited that right. Nielsen v. Nielsen 141
3. The right of the parent to the custody of his minor child is not lightly to be set aside in favor of more distant relatives or unrelated parties, and the courts may not deprive a parent of such custody unless he is shown to be unfit or to have forfeited his superior right to such custody. Nielsen v. Nielsen 141
4. The statements in *Eravi v. Bohnert*, 201 Neb. 99, 266 N.W.2d 228 (1978), and *Bigley v. Tibbs*, 193 Neb. 4, 225 N.W.2d 27 (1975), insofar as they intimate that the natural right of a parent is of no significance in determining child custody in controversies between a natural parent and other relatives or strangers, are disapproved. Nielsen v. Nielsen 141
5. The mere fact that we conclude that adoptive parents with more education and more funds might, indeed, provide the children with a higher and better standard of living is not sufficient grounds to terminate the natural right which exists between a parent and her children. In re Interest of Hill 233
6. An order terminating parental rights under Neb. Rev. Stat. § 43-209 (Reissue 1978) must be supported by clear and convincing evidence.
In re Interest of Hill 233
In re Interest of Morford 627

7. A review of a juvenile case is by trial de novo in this court, and an order terminating parental rights must be supported by clear and convincing evidence.
In re Interest of O'Donnell 367
In re Interest of Carlson 540
In re Interest of Morford 627
8. Once the parent has been shown to be unfit to have the care and custody of a minor child, the primary concern of the court is the best interests and welfare of the child. In re Interest of Carlson 540
9. There is no requirement that the court, having found a child to be within Neb. Rev. Stat. §§ 43-201 et seq. (Reissue 1978), must first implement a rehabilitation plan for the parents before terminating parental rights. In re Interest of Carlson 540
10. The juvenile court may terminate all parental rights between the parents or the mother of a child born out of wedlock and such child when the court finds such action to be in the best interests of the child and it appears by the evidence that one or more of the following conditions exists: . . . (6) Following upon a determination that the child is one as described in subdivision (1) or (2) of Neb. Rev. Stat. § 43-202 (Reissue 1978), reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the determination. Parental rights may be terminated for any one of the six independent circumstances referred to in the above statute authorizing termination of parental rights. In re Interest of Morford 627

Parol Evidence Rule.

1. A written instrument is open to explanation by parol evidence when its terms are susceptible to two constructions, or where the language employed is vague or ambiguous.
Lovelace v. Stern 174
Mahoney v. May 187
2. A provision of the contract is ambiguous when, considered with other pertinent provisions as a whole, it is capable of being understood in more senses than one. Lovelace v. Stern 174

Penalties.

Where a reasonable controversy exists between an employer and employee as to the employer's liability under the workmen's compensation act, the employer is not liable for the penalty for waiting time or for the allowance of attorney fees. Novotny v. City of Omaha 535

Personal Representatives.

Except as restricted or otherwise provided by the will or by an order in a formal proceeding and subject to the priorities stated in Neb. Rev. Stat. § 30-24,100 (Reissue 1979), a personal representative, acting reasonably for the benefit of the interested persons, may properly perform, compromise, or refuse performance of the decedent's contracts that continue as obligations of the estate, as he may determine under the circumstances. In performing enforceable contracts by the decedent to convey or lease land, the personal representative, among other possible courses of action, may execute and deliver a deed of conveyance for cash payment of all sums remaining due or the purchaser's note for the sum remaining due secured by a mortgage or deed of trust on the land; or deliver a deed in escrow with directions that the proceeds, when paid in accordance with the escrow agreement, be paid to the successors of the decedent, as designated in the escrow agreement. In re Estate of Layton 646

Petitions.

An error in the description contained in a petition to alter a school district boundary under Neb. Rev. Stat. § 79-403 (Reissue 1976) will not invalidate the petition where it is clear from a reading of the entire petition what land is intended. Schilke v. School Dist. No. 107 448

Plea Bargains.

The trial court is afforded a large measure of discretion in deciding whether to accept plea bargain arrangements and the Supreme Court upon appeal will reverse the trial court's determination only in case of a clear abuse of judicial discretion. State v. Leisy 118

Pleadings.

1. The court, in furtherance of justice, may amend any pleading, when the amendment does not change substantially the claim or defense, by conforming the pleadings to the facts proved. The decision to allow or deny the proposed amendment rests in the sound discretion of the trial court. Mahoney v. May 187
2. The issue of unconscionability must be pleaded in order to be considered by the court. Guaranteed Foods v. Rison 400
3. A plaintiff who seeks to avoid the bar of the statute of limitations must plead facts to show the statute was tolled. Jones v. Johnson v. Pullen 706

Police Officers.

1. Statutory authorization is not required for law enforcement officers to use ordinary means of communication in carrying out their duties. State v. Chambers 611
2. An officer making an arrest may rely upon the collective knowledge of all the officers involved in the case. State v. Chambers 611

Political Subdivisions.

1. The trial of an appeal from a county board of equalization involving the valuation of real estate, both in the District Court and the Supreme Court, is de novo as an equitable proceeding. Gradoville v. Board of Equalization 615
2. There is a presumption that a board of equalization has faithfully performed its official duties, and such presumption remains until there is competent evidence to the contrary. The presumption obtains only while there is an absence of competent evidence to the contrary. It disappears when there is competent evidence on appeal to the contrary, and from that point on the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon evidence, unaided by presumption, with the burden of showing such value to be unreasonable resting upon the appellant on appeal from the action of the board. Gradoville v. Board of Equalization 615

Polygraph Tests.

The mere mention of the word "polygraph," absent more, does not constitute prejudicial error. State v. Anderson and Hochstein 51

Post Conviction Act.

1. In an action under the Post Conviction Act, the only errors cognizable are those which make the conviction void or voidable under the state or federal constitution. State v. Cole 318
2. Where an alleged error is known to the defendant at trial and he fails to raise it on direct appeal from the conviction, the issue is waived and may not be challenged in a later post conviction action to have the conviction and sentence vacated. State v. Cole 318
3. An issue already litigated on direct appeal from a conviction cannot again be raised in a post conviction review. State v. Cole 318
4. A failure to challenge, during an habitual criminal hearing, the validity of a prior conviction offered for the purpose of enhancing punishment waives the issue of the validity of the previous conviction and the prior conviction

cannot be challenged in a post conviction proceeding. State v. Cole 318

Post Conviction Relief.

The defendant has the burden of establishing a basis for relief in a post conviction proceeding, and the findings of the District Court in denying such relief will not be disturbed on appeal unless they are clearly erroneous. State v. Bishop, Davis, and Yates 10

Powers.

The power to punish for contempt does not depend upon statute. It is incident to every tribunal from its very constitution and may be generally exercised only by that tribunal whose order has been violated or proceedings interfered with. In re Contempt of Potter 769

Prejudicial Error.

1. The mere mention of the word "polygraph" absent more, does not constitute prejudicial error. State v. Anderson and Hochstein 51
2. An accused has the right to be present at all stages of the trial when his absence might frustrate the fairness of the proceedings. State v. Anderson and Hochstein 51

Presumptions.

1. A presumption arises that the trial court, in trying a case without a jury, will consider only such evidence as is competent and relevant and this court will not reverse a case so tried because evidence was erroneously admitted where there is other material, competent, and relevant evidence sufficient to sustain the trial court's judgment. Barber v. Barber 101
2. The setting aside of a default judgment is to a large extent within the discretion of the trial court, and it will be presumed, unless there is evidence to the contrary, that such discretion was properly exercised. Moackler v. Finley .. 353
3. There is a presumption that a board of equalization has faithfully performed its official duties, and such presumption remains until there is competent evidence to the contrary. The presumption obtains only while there is an absence of competent evidence to the contrary. It disappears when there is competent evidence on appeal to the contrary, and from that point on the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon evidence, unaided by presumption, with the burden of showing such value to be unreasonable resting upon the appellant on appeal from the action of

the board. Gradoville v. Board of Equalization 615
4. A person using a bridge has a right to assume that the bridge is sufficient in the absence of knowledge that it is unsafe. Hansmann v. County of Gosper 659

Pretrial Discovery.

Subsection (4) of Neb. Rev. Stat. § 29-1919 (Reissue 1979), which permits the trial court, upon ascertaining that a party to a proceeding has failed to comply with orders for discovery under the provisions of Neb. Rev. Stat. §§ 29-1912 to 1921 (Reissue 1979), to "[e]nter such other order as it deems just under the circumstances," gives the court broad discretion which, under the circumstances existing, may include the entry of no order at all. State v. Vicars 325

Principal and Agent.

1. A city or county is not estopped by the unauthorized conduct, representations, promises, or pledges of its officers and agents, absent official acquiescence in and approval of the same by such governmental unit. Schilke v. School Dist. No. 107 448
2. The primary test of whether a transaction in the form of an agency to sell or a consignment created the relation of buyer and seller or one of principal and agent is the intention of the parties as gathered from the whole scope and effect of the language used. The label which the parties give to the transaction does not determine its character, and courts look beyond mere labels and examine the contract as a whole in order to ascertain the intention of the parties. Allen v. Dealer Assistance, Inc. 455
3. If a transferee acquires absolute dominion over goods, with the right to sell and dispose of goods at prices and upon terms as he sees fit, and becomes bound to pay a specified price for them, either at a specified time or upon occurrence of a specified future event, as when he resells them, he becomes the purchaser and title thereto passes to him at once. Allen v. Dealer Assistance, Inc. 455
4. As a general rule, where an obligation is that of a principal, a court cannot enforce the obligation against the agent as long as he is merely acting as agent. Suzuki v. Gateway Realty 562
5. An agent can be held liable if he makes some representation or performs some act on his own responsibility, without authorization from his principal, but only where the unauthorized act of the agent leaves the third party with no claim against the principal, who is not bound by the transaction. Suzuki v. Gateway Realty 562

Prior Convictions.

1. Proof of a prior conviction or convictions is not an essential element of the crime of operating a motor vehicle while an operator's license was suspended or revoked, second offense, but goes only to enhance the punishment for the primary offense charged. State v. Mangelsen 213
2. In order to warrant the imposition of the enhanced penalties for issuing a bad check under Neb. Rev. Stat. § 28-611(2) (Reissue 1979), effective January 1, 1979, prior convictions must have occurred under subdivision (1)(c) or (1)(d) of that section; and prior convictions under previous "bad check" statutes may not be used to enhance the penalties under the "bad check" statute currently in effect. State v. Suhr 553

Prisons.

1. The Nebraska Administrative Procedure Act has no application to prison disciplinary proceedings under Neb. Rev. Stat. §§ 83-4,109 to 83-4,123 (Reissue 1976). Reed v. Parratt 796
2. Disciplinary procedures in penal institutions are summary in nature and the full panoply of rights due a defendant in a criminal prosecution are not applicable to a prison disciplinary proceeding. Only the minimum requirements of procedural due process appropriate for the circumstances must be observed. Reed v. Parratt 796
3. A prison disciplinary proceeding under Neb. Rev. Stat. §§ 83-4,109 to 83-4,123 (Reissue 1976) is not a contested case under the Nebraska Administrative Procedure Act. Reed v. Parratt 796

Probable Cause.

1. In evaluating the showing of probable cause necessary to support a search warrant, only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause. State v. Stickelman 429
2. Observations by fellow officers engaged in a common investigation are a reliable basis for a warrant and probable cause is to be evaluated by the collective information of the police as reflected in the affidavit, and is not limited to the firsthand knowledge of the officer who executes the affidavit. State v. Stickelman 429
3. When the issue is not guilt or innocence but the question of probable cause for arrest or search, police officers need not invariably be required to disclose an informant's identity if the trial judge is convinced, by evidence submitted in open court and subject to cross-examination, that the officers did rely in good faith upon credible

information supplied by a reliable informant. State v. Butler 760

Probation and Parole.

1. A probationer is entitled to a preliminary hearing at or near the place of the alleged violation of probation or the arrest. State v. Ferree 593
2. At the preliminary hearing, the probationer is entitled to notice of the alleged violations of probation, an opportunity to appear and present evidence in his own behalf, a conditional right to confront adverse witnesses, an independent decisionmaker, and a written report of the hearing. State v. Ferree 593
3. Where evidence produced at the preliminary hearing does not support charges made in the State's amended complaint, the defendant must be given a second preliminary hearing on the new charges. State v. Ferree 593
4. A probationer does not waive his right to a preliminary hearing because he fails to request one. State v. Ferree 593

Proof.

1. A defendant challenging competency of counsel has the burden to establish it. In addition, defendant must show that he suffered prejudice in the defense of his case as a result of his attorney's actions or inactions. State v. Journey 717
2. By its terms, Neb. Rev. Stat. § 28-611(1) (Reissue 1979) requires proof that one intended to defraud by obtaining property, services, or present value of any kind in exchange for a check or other order, knowing at the time of issuing such check or order that he has no account with the drawee, or, if he has such an account, knowing that he does not have sufficient funds in, or credit with, the drawee for the payment of such check or order in full upon its presentation. State v. Kock 731

Property.

1. Private sewers and drains may become the property of the municipal corporation in some cases merely through connection and integration into the latter. Beach v. City of Fairbury 836
2. When private property has been damaged for public use, the owner is entitled to compensation. Whatever reduces the market value of real estate by injuring it for public use may be considered in determining the just compensation to which the property owner is entitled. Where land is not taken, the measure of damages is the difference in market value before and after the damaging. Beach v. City of Fairbury 836

Property Division.

1. A division of property during marriage between husband and wife that is equitable and fair will not be nullified in a court of equity. Chrisp v. Chrisp 348
2. There is no mathematical formula by which property awards can be precisely determined, but they are to be determined by the facts in each case.
   Chrisp v. Chrisp 348
   Amen v. Amen 694
3. The spouse providing the financial consideration for property acquired during the marriage is not entitled to that property to the exclusion of the spouse providing consideration in the form of domestic support. Chrisp v. Chrisp 348
4. In a marriage of long duration, and where the parties were parents of all children involved, an award of one-third to one-half of the property is equitable. Chrisp v. Chrisp 348
5. Upon divorce, a division of property must take into consideration the circumstances of the parties, the duration of the marriage, contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities.
   Chrisp v. Chrisp 348
   Amen v. Amen 694
6. The general rule is that the fixing of alimony and distribution of property rest in the sound discretion of the District Court and, in the absence of an abuse of discretion, will not be disturbed on appeal.
   Amen v. Amen 694
   Shanks v. Shanks 728
7. 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. Shanks v. Shanks 728
8. In an action for dissolution of marriage, the property should be divided, if possible, in such a manner as to permit the husband to retain the means for payment of any judgment awarded to the wife. Michal v. Michal 757

Property Taxes.

1. An exemption from property taxes granted under Neb. Rev. Stat. § 77-202 (Reissue 1976) may continue for 4 years unless a change in the use of the property occurs. Ross v. Governors of the Knights of Ak-Sar-Ben 305
2. In order to continue a property tax exemption during the intervening years, the owner is required annually to

file an affidavit certifying that no change in the use of the property has occurred since the exemption was granted. Ross v. Governors of the Knights of Ak-Sar-Ben 305
3. During intervening years, the county assessor or the County Board of Equalization may cause a property tax exemption to be reviewed even though no change in the use of the property has occurred. Ross v. Governors of the Knights of Ak-Sar-Ben 305
4. In the absence of conclusive evidence that a change in the use of the property has occurred, the County Board of Equalization is not required to review property tax exemptions during intervening years. Ross v. Governors of the Knights of Ak-Sar-Ben 305

Prosecutor Misconduct.
1. A party may not raise alleged misconduct of adverse counsel on appeal where, despite knowledge of the alleged misconduct, the party claiming the misconduct failed to request a mistrial and instead agreed to take the chances of a favorable verdict. State v. Anderson and Hochstein 51
2. A party may not complain of misconduct of counsel if, with knowledge of such misconduct, he does not ask for a mistrial, but consents to take the chance of a favorable verdict. State v. Wounded Arrow 544
3. Before it is necessary to grant a mistrial due to prosecutorial misconduct, the defendant must show that a substantial miscarriage of justice has actually occurred. State v. Wounded Arrow 544

Public Policy.
Courts should be cautious in holding contracts void on public policy grounds; and before they do so, prejudice to the public interest should clearly be presented. Mau v. Omaha Nat. Bank 308

Public Service Commission.
1. In determining "economic soundness" under Neb. Rev. Stat. § 75-613(2) (Reissue 1976), the Nebraska Public Service Commission must consider the financial condition of the protestant telephone company, the effect of the revision on its income and ability to service its debt, the likelihood that the revision will require future rate increases by the affected company, the fact that subscribers other than the applicants may have equally meritorious claims, and the general effect of gradual erosion. Reis v. Glenwood Telephone Membership Corp. 575
2. This court will not disturb an order of the Public Service

Commission unless the commission's order is illegal, arbitrary, capricious, or unreasonable. Reis v. Glenwood Telephone Membership Corp. 575
3. The determination of what is economically sound under Neb. Rev. Stat. § 75-613(2) (Reissue 1976) is peculiarly within the discretion and expertise of the Public Service Commission. Reis v. Glenwood Telephone Membership Corp. 575

Public Utilities.
1. The authority of the Nebraska Power Review Board to determine whether construction of a transmission line will serve the public convenience and necessity does not include the power to select the particular route the line must follow. Lincoln Electric System v. Terpsma 289
2. The Nebraska Power Review Board exists to avoid and eliminate conflict and competition among suppliers of electricity, to avoid and eliminate duplication of facilities and resources, and to facilitate the settlement of rate disputes; all to the end of providing Nebraskans with adequate electric service at as low an overall cost as possible. Lincoln Electric System v. Terpsma 289
3. An administrative agency charged with the responsibility of regulating a utility is not the owner of the property of the utility and may not exercise the general power of management incident to ownership. Lincoln Electric System v. Terpsma 289
4. A public power district is a governmental subdivision of the state within the meaning of Neb. Const. art. VIII, § 2, and all of its property is exempt from taxation except as otherwise provided by the Constitution. Nebraska P. P. Dist. v. Hershey School Dist. 412
5. Neb. Rev. Stat. § 79-1370 (Cum. Supp. 1980), by requiring public electric entities to make specific mandatory payments to school districts, violates the provisions of Neb. Const. art. VIII, § 11. Nebraska P. P. Dist. v. Hershey School Dist. 412
6. In determining "economic soundness" under Neb. Rev. Stat. § 75-613(2) (Reissue 1976), the Nebraska Public Service Commission must consider the financial condition of the protestant telephone company, the effect of the revision on its income and ability to service its debt, the likelihood that the revision will require future rate increases by the affected company, the fact that subscribers other than the applicants may have equally meritorious claims, and the general effect of gradual erosion. Reis v. Glenwood Telephone Membership Corp. 575
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8. The determination of what is economically sound under Neb. Rev. Stat. § 75-613(2) (Reissue 1976) is peculiarly within the discretion and expertise of the Public Service Commission. Reis v. Glenwood Telephone Membership Corp. 575

Questions of Fact.
1. When undisputed facts require the exercise of reason and judgment so that one reasonable mind may infer that a controlling fact exists and another that it does not exist, there is a question of fact. Metro. Tech. Community College v. South Omaha Industrial Park 472
2. Whether an injury results in an unusual or extraordinary condition affecting other parts of the body ordinarily presents a question of fact. Goers v. Bud Irons Excavating 579

Questions of Law.
Where the facts adduced to sustain a finding are such that but one conclusion can be drawn when related to the applicable law, the court should decide the question as a matter of law. Mau v. Omaha Nat. Bank 308

Real Estate Contracts.
In an action against a vendee to recover the damages resulting from a breach of a contract for the sale of real estate, the measure of damages is the difference between the agreed price and the market value of the property at the time of the breach. Hahn v. International Management Services, Inc. 229

Rebuttal Evidence.
The admission of rebuttal testimony is largely within the discretion of the trial court. Gee v. Dinsdale Brothers, Inc. 224

Records.
Where allegedly prejudical remarks of counsel do not appear in the bill of exceptions, this court is precluded from considering an assigned error concerning such remarks. State v. Duis 851

Release of Claims.
1. Although mere inadequacy of consideration alone is generally not a ground upon which a release may be

avoided, it is a factor which may be considered with other circumstances. Humber v. Gibreal Auto Sales, Inc. 286
2. Where a release has to be supported by a consideration, total failure of the consideration will enable the releasor to avoid the release. Humber v. Gibreal Auto Sales, Inc.... 286

Res Judicata.
1. A former verdict and judgment are conclusive only as to the facts directly in issue and do not extend to facts which may be in controversy, but which rest on evidence and are merely collateral. Suhr v. City of Scribner 24
2. The test as to whether the former judgment is a bar to a later judgment generally is whether or not the same evidence will sustain both the present and the former action. Suhr v. City of Scribner 24
3. Res Judicata is an affirmative defense which must ordinarily be pleaded to be available. United States Nat. Bank of Omaha v. Rupe 131

Restrictive Covenants.
1. Broadly speaking, the enforcement of building restrictions is governed by equitable principles, and will not be decreed if, under the facts of the particular case, it would be inequitable and unjust, or not in furtherance of public interest. Whether injunctive relief will be granted to restrain the violation of such restrictions is a matter within the sound discretion of the trial court, to be determined in the light of all the facts and circumstances. Baltes v. Hodges 740
2. A restrictive covenant is to be construed in connection with the surrounding circumstances, which the parties are supposed to have had in mind at the time they made it; the location and character of the entire tract of land; the purpose of the restriction; whether it was for the sole benefit of the grantor, or for the benefit of the grantee and subsequent purchasers; and whether it was in pursuance of a general building plan for the development of the property. Baltes v. Hodges 740

Right to Counsel.
1. The District Court in its discretion may appoint an attorney to protect the interests of any minor child of the parties to an action to dissolve a marriage. The limits of discretion depend on the circumstances. Deacon v. Deacon 193
2. A defendant in a criminal case, by electing to act as his own counsel, is bound by his own acts and conduct and is held responsible for his own ineptness. State v. Mangelsen 213

3. The two-part test to determine whether an attorney has effectively counseled a criminal defendant is that counsel must perform at least as well as one with ordinary criminal law skill and training in his or her region and must also conscientiously protect his client's interests.
State v. Colgrove 496
State v. Journey 717
4. A defendant challenging competency of counsel has the burden to establish it. In addition, defendant must show that he suffered prejudice in the defense of his case as a result of his attorney's actions or inactions.
State v. Colgrove 496
State v. Journey 717
5. The person challenging the competency of counsel has the burden of proof to establish the counsel's incompetence. State v. Colgrove 496
6. Requiring a waiver of jury trial to be intelligently waived does not mean that all of defense counsel's advice must withstand retrospective examination on post conviction hearing. State v. Journey 717
7. If an attorney's advice is within the range of competence required for attorneys in criminal cases and does not induce defendant to waive a jury trial by threats or promises, a defendant may not attack his jury trial waiver on appeal. State v. Journey 717
8. Where a defendant merely claims that his decision was a strategic error, and can point to no specific incidents of counsel impropriety, he must bear the responsibility for that decision and cannot shift the blame to counsel. State v. Journey 717
9. Defense counsel's advice to his client not to testify, after discussing it with his client, is not ineffective counsel where defendant's prior criminal record could have been used against him. State v. Journey 717
10. The fact that a calculated trial tactic or strategy fails to work out as planned will not establish that counsel was ineffective. State v. Journey 717

Right to Hearing.
1. A probationer is entitled to a preliminary hearing at or near the place of the alleged violation of probation or the arrest. State v. Ferree 593
2. At the preliminary hearing, the probationer is entitled to notice of the alleged violations of probation, an opportunity to appear and present evidence in his own behalf, a conditional right to confront adverse witnesses, an independent decisionmaker, and a written report of the hearing. State v. Ferree 593
3. Where evidence produced at the preliminary hearing

does not support charges made in the State's amended complaint, the defendant must be given a second preliminary hearing on the new charges. State v. Ferree 593
4. A probationer does not waive his right to a preliminary hearing because he fails to request one. State v. Ferree 593

Robbery.

1. An essential element of the crime of robbery is that the theft be accomplished by the use of force, violence, or intimidation. Force relied upon must be sufficient to effect a transfer of the property from the victim to the robber and, if it is sufficient to overcome resistance, the degree is immaterial. State v. Welchel 337
2. The taking of the property under the provisions of Neb. Rev. Stat. § 28-324 (Reissue 1979) need not be from the "person." It is sufficient if it is taken from the individual's personal presence, protection, or control. The essence of the statute is that the money or property must be in the possession or under the control of the victim and that violence or putting in fear was the means used by the robber to take it. State v. Welchel 337

Rules of Evidence.

The statutory rules of evidence, except those as to privilege, do not apply to, among other things, proceedings for extradition. Dovel v. Adams 766

Sales of Goods.

1. Article 2 of the Nebraska Uniform Commercial Code applies only to transactions in goods. Guaranteed Foods v. Rison 400
2. The term "goods," as used in article 2, means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (covered by article 8) and things in action. "Goods" also includes the unborn of young animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (Neb. U.C.C. § 2-107 (Cum. Supp. 1980)). Guaranteed Foods v. Rison 400
3. If a transferee acquires absolute dominion over goods, with the right to sell and dispose of goods at prices and upon terms as he sees fit, and becomes bound to pay a specified price for them, either at a specified time or upon occurrence of a specified future event, as when he resells them, he becomes the purchaser and title thereto passes to him at once. Allen v. Dealer Assistance, Inc. . 455

Schools and School Districts.

1. The mandate provided for in Neb. Rev. Stat. § 79-312 (Reissue 1976) that the State Department of Education prescribe a course of study for public schools is met when such department furnishes a list of subjects required to be taught, together with an explanation of the aims sought to be accomplished by the individual program. State ex rel. Douglas v. Faith Baptist Church 802
2. There is no absolute duty on the part of county superintendents to furnish written or printed questions to school districts to be used for review of the various courses of study. Neb. Rev. Stat. § 79-312 (Reissue 1976) leaves this decision up to the county superintendent as in his judgment may be necessary or expedient. State ex rel. Douglas v. Faith Baptist Church 802
3. A state agency which requires, as a minimum for certification of an individual, the maximum requirement permitted by statute does not violate the limiting terms of such statute. State ex rel. Douglas v. Faith Baptist Church . 802
4. The State, having a high responsibility for the education of its citizens, has the power to impose reasonable regulations for the control and duration of basic education. State ex rel. Douglas v. Faith Baptist Church 802
5. A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations. State ex rel. Douglas v. Faith Baptist Church 802
6. A state always has a legitimate concern for maintaining minimum standards in all schools it allows to operate. State ex rel. Douglas v. Faith Baptist Church 802
7. The State has a compelling interest in the quality and ability of those who are employed to teach its young people, and a requirement that such teacher possess an appropriate baccalaureate degree is neither arbitrary nor unreasonable and is a reliable indicator of the probability of success as a teacher. State ex rel. Douglas v. Faith Baptist Church . 802
8. Although parents have a right to send their children to schools other than public institutions, they do not have the right to be completely unfettered by reasonable government regulations as to the quality of the education furnished. State ex rel. Douglas v. Faith Baptist Church . 802

Search and Seizure.

1. The Miranda rules are not applicable to consent searches. State v. Packett 202
2. There is no requirement that a person asked to consent to a search be advised that he may refuse consent. State v. Packett 202

3. The fruit of the poisonous tree doctrine excludes evidence obtained from or as a consequence of lawless official acts, not evidence obtained from an independent source. State v. Smith 263
4. When a search is based upon a magistrate's, rather than a police officer's, determination of probable cause, the reviewing courts will accept evidence of a less judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant, and will sustain the judicial determination so long as there was substantial basis for the magistrate to conclude that narcotics were probably present. State v. King 270
5. An informant's detailed eyewitness report of a crime may be self-corroborating; it supplies its own indicia of reliability; and an untested citizen informant who has personally observed the commission of a crime is presumptively reliable. State v. King 270
6. The statement of an eyewitness to a crime supplies its own indicia of reliability as a statement of facts rather than conclusions which must be tested to determine their factual basis. State v. King 270
7. Information supplied by a citizen who voluntarily comes forward to aid law enforcement officers is presumed to be reliable. State v. King 270
8. An example of the application of the "plain view" doctrine is the situation in which the police have a warrant to search a given area for specified objects, and in the course of the search, come across some other article of incriminating character. State v. King 270
9. The capacity to claim the protection of the fourth amendment as to unreasonable searches and seizures depends not upon a property right in the invaded place, but upon whether the person who claims the protection of the amendment has a legitimate expectation of privacy in the invaded place. State v. Vicars 325
10. Fourth amendment protection extends not only to one's home but also to one's curtilage, which is usually defined as a small piece of land, not necessarily enclosed, around a dwelling house and generally includes buildings used for domestic purposes in the conduct of family affairs. State v. Vicars 325
11. A search warrant which directs that a search be made of a specific dwelling house also authorizes the search of outbuildings included within the curtilage, although not described specifically. State v. Vicars 325
12. In evaluating the showing of probable cause necessary to support a search warrant, only the probability, and not a prima facie showing, of criminal activity is the standard

of probable cause. State v. Stickelman 429
13. Affidavits for search warrants must be tested and interpreted in a commonsense and realistic fashion; where the circumstances are detailed, where reasons for crediting the source of information is given, and when the magistrate has found probable cause to exist, the court should not invalidate the warrant by interpreting the affidavit in a hyper-technical manner. State v. Stickelman 429
14. Observations by fellow officers engaged in a common investigation are a reliable basis for a warrant and probable cause is to be evaluated by the collective information of the police as reflected in the affidavit, and is not limited to the firsthand knowledge of the officer who executes the affidavit. State v. Stickelman 429
15. There is a presumption of validity with respect to the affidavit supporting the search warrant. State v. Stickelman 429
16. To challenge the veracity of an affidavit for a search warrant based upon allegations of false and misleading statements contained therein, there must be a showing of deliberate falsehood or of reckless disregard for the truth, accompanied by an offer of proof. State v. Stickelman . 429
17. When the issue is not guilt or innocence but the question of probable cause for arrest or search, police officers need not invariably be required to disclose an informant's identity if the trial judge is convinced, by evidence submitted in open court and subject to cross-examination, that the officers did rely in good faith upon credible information supplied by a reliable informant. State v. Butler ... 760

Search Warrants.

1. When a search is based upon a magistrate's, rather than a police officer's, determination of probable cause, the reviewing courts will accept evidence of a less judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant, and will sustain the judicial determination so long as there was substantial basis for the magistrate to conclude that narcotics were probably present. State v. King 270
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10. To challenge the veracity of an affidavit for a search warrant based upon allegations of false and misleading statements contained therein, there must be a showing of deliberate falsehood or of reckless disregard for the truth, accompanied by an offer of proof. State v. Stickelman . 429

Secured Transactions.

1. An acceleration provision in a security agreement securing a promissory note enters into and becomes a part of the note so that the maturity of the note is advanced in the same manner as the maturity of the security agreement. State Security Savings Co. v. Pelster 158
2. Where the acceleration of the maturity of a security agreement and note is made optional with the holder of the security agreement, some affirmative action must be taken by the holder evidencing his election to take advantage of the acceleration provision, and until such action, the acceleration provision has no operation. State Security Savings Co. v. Pelster 158
3. The exercise of the option to accelerate the maturity of a debt provided for in an acceleration clause must be made

in a clear and unequivocal manner. State Security Savings Co. v. Pelster 158
4. The option to implement an acceleration clause is effectively exercised by manifesting the fact in such a manner as to apprise the mortgagor of the mortgagee's intention. State Security Savings Co. v. Pelster 158

Security Interest.

It is the intent to defraud that makes a transfer of personal property without the consent of the holder of a security interest both unlawful and yet not violative of Neb. Const. art. I, § 20. Payment of the secured debt with proceeds from the sale is not a defense to the crime; it is only evidence of lack of fraudulent intent. State v. Hocutt 689

Sentences.

1. A sentence imposed by the trial court within statutory limits will not be disturbed on appeal unless there has been an abuse of discretion.
   State v. Kelly 295
   State v. Hortman 393
   State v. Glover 487
   State v. Janis 491
2. In a sentencing for a felony not involving the death penalty, there is no requirement that the sentencing judge conduct a case-by-case review of similar sentencings in that jurisdiction. State v. Glover 487
3. In imposing sentences in criminal proceedings, the courts have a duty to consider protection of the public as well as the rehabilitative needs of the defendant. State v. Glover ... 487
4. One of the obligations of a sentencing judge after making a finding of guilt is to impose an appropriate sentence within fixed statutory and constitutional limits. State v. Janis 491
5. In imposing an appropriate sentence, a sentencing judge has wide discretion as to the type of information he may use to assist him in determining the kind and extent of punishment to be imposed within statutory and constitutional limits, including information concerning the defendant's life, character, and previous conduct. State v. Janis 491
6. The law invests the trial judge with a wide discretion as to the sources and types of information used to assist him in determining the sentence to be imposed within statutory limits. State v. Janis 491

Sexual Assault.

1. First degree sexual assault under the terms of Neb. Rev.

Stat. § 28-319(1)(c) (Reissue 1979), which involves an actor who is 19 years of age or older and a victim who is less than 16 years of age, comes within the meaning of "rape" as contained in Neb. Rev. Stat. § 27-505(3)(a) (Reissue 1979), which prevents the claim of the husband-wife privilege. State v. Vicars 325

2. A determination made by a trial court that a defendant is a mentally disordered sex offender under Neb. Rev. Stat. § 29-2911 et seq. (Reissue 1979) is a question of fact to be determined by the trial court. State v. Glover 487
3. In a sexual assault case, the victim need not be independently corroborated on the particular acts constituting sexual assault, but must be corroborated on the material facts and circumstances tending to support the victim's testimony about the principal fact in issue.
   State v. Wounded Arrow 544
   State v. Watkins 859
4. In a sexual assault case, circumstantial evidence may be sufficient to present a jury question on consent. State v. Wounded Arrow 544
5. 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. Wounded Arrow 544
6. It is not necessary that the victim of the assault make the complaint at the first available opportunity, especially if the victim is afraid and ashamed of what has happened. It is only necessary that the complaint be within a reasonable amount of time following the assault. State v. Wounded Arrow 544
7. In a prosecution for sexual assault, the prosecutrix may testify on direct examination, if within a reasonable time under all the circumstances after the act was committed she made complaint to another, to the fact and nature of the complaint, but not as to its details. Others may likewise testify in chief to such fact and nature of the complaint, but not as to its details. State v. Watkins 859
8. One to whom the complaining witness has complained may testify to the fact and nature of the complaint if the complaint was made voluntarily and without unreasonable or inconsistent delay. State v. Watkins 859
9. In a trial for statutory rape, sexual assault admissions by the defendant showing that he planned and procured an opportunity to commit the act charged, with evidence of familiarities between them, furnishes sufficient corrob-

oration of the victim's positive testimony to support a judgment of conviction. State v. Watkins 859
10. While flight, in and of itself, is frequently ambiguous, when coupled with other facts and circumstances it may be sufficient to constitute corroboration of the testimony of the prosecutrix in cases involving sexual assault. State v. Watkins 859

Sexual Misconduct.

1. Sexual misconduct is a factor which, although not necessarily determinative, may be properly considered in determining the best interests of the children. Kringel v. Kringel 241
2. A bargain in whole or in part for, or in consideration of, illicit sexual intercourse or of a promise thereof, is illegal; but subject to this exception, such intercourse between parties to a bargain previously or subsequently formed does not invalidate it. Kinkenon v. Hue 698

Special Legislation.

1. While the question of classification is one primarily for the Legislature and in the exercise of this power the Legislature possesses a wide discretion, there must, nevertheless, be some rational basis for the classification. State ex rel. Douglas v. Marsh 598
2. A classification which limits the application of the law to a presently existing class, and leaves no room or opportunity for an increase in the numbers of the class by future growth or development, is special, and a violation of the Constitution of the State of Nebraska. State ex rel. Douglas v. Marsh 598
3. It is competent for the Legislature to classify objects of legislation, and if the classification is reasonable and not arbitrary, it is a legitimate exercise of legislative power. State ex rel. Douglas v. Marsh 598
4. The power of classification rests with the Legislature and cannot be interfered with by the courts unless it is clearly apparent that the Legislature has, by artificial and baseless classification, attempted to evade and violate provisions of the Constitution prohibiting local and special legislation. State ex rel. Douglas v. Marsh 598
5. A legislative classification, in order to be valid, must be based upon some reason of public policy, some substantial difference of situation or circumstances, that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified. Classifications for the purpose of legislation must be real and not illusive; they cannot be based upon distinctions

without a substantial difference. State ex rel. Douglas v. Marsh 598

Special Proceedings.

1. A special proceeding may be said to include every special statutory remedy which is not in itself an action. State v. Guatney 501
2. Where the law confers a right, and authorizes a special application to a court to enforce it, the proceeding is special, within the ordinary meaning of the term "special proceeding." State v. Guatney 501
3. Proceedings commenced pursuant to Neb. Rev. Stat. § 29-1823 (Reissue 1979) are special proceedings as referred to in Neb. Rev. Stat. § 25-1902 (Reissue 1979). State v. Guatney ... 501
4. A proceeding to determine the competency of an accused to stand trial is a special proceeding within the meaning of Neb. Rev. Stat. § 25-1902 (Reissue 1979), and an order finding the accused incompetent to stand trial and ordering him confined until such time as he is competent is a final order from which an appeal may be taken under Neb. Rev. Stat. § 25-1911 (Reissue 1979). State v. Guatney 501

Specific Performance.

Equity will grant specific performance of an oral agreement to transfer property to another if it is proved by evidence convincing and satisfactory and if it has been wholly performed by one party and its nonperformance would be a fraud on him. Kinkenon v. Hue 698

Speeding.

A driver who operates his vehicle at a speed in excess of the legal limit commits an offense in the presence of an officer observing the vehicle from an airplane and an officer on the ground who stops the vehicle at the direction of the officer in the airplane. State v. Chambers 611

Speedy Trial.

1. The primary burden is upon the State to bring the accused person to trial within the time provided by law and if he is not brought to trial within that time, he is entitled to an absolute discharge from the offense alleged in the absence of an express waiver or waiver as provided by statute. State v. Kinstler 386
2. The failure of the accused to object at the time the trial court enters an order setting the trial at a date after the 6-month period does not constitute a waiver of his statutory right to a speedy trial. State v. Kinstler 386
3. If a trial court relies on Neb. Rev. Stat. § 29-1207(4)(f)

(Reissue 1979) in excluding a period of delay from the 6-month computation, a general finding of "good cause" will not suffice and the trial court must make specific findings as to the good cause or causes which resulted in the extensions of time. State v. Kinstler 386

Spousal Privilege.

First degree sexual assault under the terms of Neb. Rev. Stat. § 28-319(1)(c) (Reissue 1979), which involves an actor who is 19 years of age or older and a victim who is less than 16 years of age, comes within the meaning of "rape" as contained in Neb. Rev. Stat. § 27-505(3)(a) (Reissue 1979), which prevents the claim of the husband-wife privilege. State v. Vicars 325

State Courts.

In the administration and interpretation of federal legislative acts, pertinent opinions of the federal courts are binding upon the state courts. Anderson v. Wagner 87

Statute of Frauds.

Under Neb. U.C.C. § 2-201 (3) (Reissue 1971), a contract which does not satisfy the requirements of a writing as required by the statute of frauds for the sale of goods, but which is valid in other respects, is enforceable with respect to goods for which payment has been accepted or which have been received and accepted. Guaranteed Foods v. Rison 400

Statutes.

1. Constitutional provisions should receive a broader and more liberal construction than statutes, and constitutions are not subject to the rules of strict construction. Nebraska P. P. Dist. v. Hershey School Dist. 412
2. Neb. Rev. Stat. § 79-1370 (Cum. Supp. 1980), by requiring public electric entities to make specific mandatory payments to school districts, violates the provisions of Neb. Const. art. VIII, § 11. Nebraska P. P. Dist. v. Hershey School Dist. 412
3. It is a fundamental principle of statutory construction that a penal statute is to be strictly construed. State v. Suhr 553
4. Where the language of a statute is plain and unambiguous, no interpretation is needed and the court is without authority to change the language. State v. Suhr 553
5. In enacting an amendatory statute, the Legislature is presumed to have known the preexisting law. State v. Suhr . 553
6. A person to whom a statute may be constitutionally applied

will not be heard to challenge the statute on the ground that it might conceivably be applied unconstitutionally to others in situations not before the court. State v. Greaser . 668
7. The definition of an act forbidden by statute, but not defined by it, may be ascertained by reference to the common law. State v. Mattan 679
8. Although Neb. Rev. Stat. § 69-109 (Cum. Supp. 1980) does not expressly require fraud, judicial construction of that section has established that proof of fraud is required for a conviction thereunder. State v. Hocutt 689
9. It is presumed that when a statute has been construed by the Supreme Court, and the same statute is substantially reenacted, the Legislature gave to the language the significance previously accorded to it by the Supreme Court. State v. Hocutt 689
10. When the Legislature subsequently enacts legislation making related preexisting laws applicable thereto, it would be presumed that it did so with full knowledge of such preexisting legislation and judicial decisions of the Supreme Court construing and applying it. State v. Kock .. 731
11. An interpretation which gives effect to a statute will be chosen over one which defeats the statute, and an interpretation which gives effect to the entire language of the statute will be selected as against one which does not. State v. Kock 731
12. By its terms, Neb. Rev. Stat. § 28-611(1) (Reissue 1979) requires proof that one intended to defraud by obtaining property, services, or present value of any kind in exchange for a check or other order, knowing at the time of issuing such check or order that he has no account with the drawee, or, if he has such an account, knowing that he does not have sufficient funds in, or credit with, the drawee for the payment of such check or order in full upon its presentation. State v. Kock 731
13. Specific statutory provisions relating to a particular subject control over general provisions. Reed v. Parratt 796

Stipulations.

It is the responsibility of the trial court to determine questions of custody and vistation of minor children according to their best interests. This is an independent responsibility and cannot be controlled by the agreement or stipulation of the parties themselves or by third parties. Deacon v. Deacon 193

Streets and Sidewalks.

1. A municipal corporation is not an insurer of those using its public sidewalks, but must use reasonable and ordinary

care in the construction, maintenance, and repair thereof so that they will be safe for a traveler upon them who is using ordinary care and caution. Doht v. Village of Walthill 377

2. Slight holes or depressions in a sidewalk which are not in the nature of traps, and from which danger could not be reasonably anticipated, are not defects for which an action will lie against a municipality. Doht v. Village of Walthill 377

Subrogation.

An insurer who is a subrogee and does not come into the action but accepts the avails of the litigation is liable for a proportionate share of the expenses of the litigation, including attorney fees. St. Paul Fire & Marine Ins. Co. v. Truesdell Distributing Corp. 153

Subsequent Claim.

If an employee suffers an injury, which appears to be slight but which is progressive in its course, and which several physicians are unable to correctly diagnose, his failure to file claim or bring suit within the time limited by law will not defeat his right to recovery, if he gave notice and commenced action within the statutory period after he had knowledge that compensable disability resulted from the original accident. O'Connor v. Anderson Bros. Plumbing & Heating 641

Sudden Emergency.

The doctrine of sudden emergency may not be successfully invoked by a litigant unless there is evidence that such an emergency existed, that the party seeking the benefit of the doctrine did not cause the emergency, and that he used due care to avoid it. Maurer v. Harper 655

Summary Judgments.

1. The primary purpose of the summary judgment statute is to pierce sham pleadings and to dispose of, without the necessity of expense and delay of trial, those cases where there is no genuine claim or defense.
   Viles v. Old Security Life Ins. Co. 463
   Okeson v. Jack Dempsey Drywall, Inc. 847
2. Where the allegations of the pleadings have been pierced by a motion for summary judgment and the resistance to the motion fails to show that a genuine issue of fact exists, summary judgment should be granted. Viles v. Old Security Life Ins. Co. 463
3. The moving party is not entitled to summary judgment

except where there exists no genuine issue as to any material fact in the case and where, under the facts, he is entitled to judgment as a matter of law.
Metro. Tech. Community College v. South Omaha Industrial Park 472
Suzuki v. Gateway Realty 562
Okeson v. Jack Dempsey Drywall, Inc. 847
4. The issue on a motion for summary judgment is whether or not there is a genuine issue as to any material fact and not how that issue should be determined. In considering such a motion, the trial court must take the view of the evidence most favorable to the party against whom the summary judgment motion is directed, giving to that party the benefit of all favorable inferences that may be reasonably drawn from the evidence. Metro. Tech. Community College v. South Omaha Industrial Park 472
5. Summary judgment is not appropriate, even where there are no conflicting evidentiary facts, if the ultimate inferences to be drawn from those facts are not clear. Metro. Tech. Community College v. South Omaha Industrial Park. 472
6. Neb. Rev. Stat. § 25-854 (Reissue 1979) provides that, if a demurrer be sustained, the adverse party may amend, if the defect can be remedied by way of amendment, with or without costs, as the court in its discretion shall direct. Suzuki v. Gateway Realty 562
7. Neb. Rev. Stat. § 25-854 (Reissue 1979) has been held by this court on several occasions to not provide an absolute right of amendment. Suzuki v. Gateway Realty 562
8. This court has previously stated that, before error can be predicated upon the refusal of the court to permit an amendment to a petition after demurrer thereto is sustained, the record must show that, under the circumstances, the ruling of the court was an abuse of discretion. Suzuki v. Gateway Realty 562

Sureties.

1. Statutory provisions which require approval of bonds are for the protection of the public, not for the benefit of sureties; sureties cannot object that approval and acceptance were not within the prescribed time. State v. Easley 443
2. The liability of a surety on statutory undertakings is measured by the terms of the statute rather than by the terms set forth in the agreement, where the two are in conflict. The statute forms a controlling part of every such agreement. State v. Easley 443
3. The law at the time of the execution of a statutory bond is a part of it; if it gives to the bond a certain legal effect, it is as much a part of the bond as if in terms incorporated

therein. State v. Easley 443

Surface Waters.

1. Surface waters comprehend waters from rains, springs, or melting snows which lie or flow on the surface of the earth but which do not form part of a watercourse or lake. Sullivan v. Hoffman 166
2. Surface waters cease to be such when they empty into and become part of a natural stream or lake, but they do not lose their character as such by reason of their flowing from the land on which they first make their appearance onto lower land in obedience to the law of gravity, or by flowing into a natural basin from which they normally disappear through evaporation or percolation. Sullivan v. Hoffman .. 166
3. The owner of a lake wherein the surface water from the surrounding land accumulates, and from which it has no means of escape except by evaporation or percolation, cannot lawfully, by means of a ditch or dike, discharge such water upon the land of his neighbor without his consent, to his injury. Sullivan v. Hoffman 166
4. Surface waters are waters which appear upon the surface of the ground in a diffused state, with no permanent source of supply or regular course, which ordinarily result from rainfall or melting snow. Sullivan v. Hoffman 166
5. Diffused surface waters, which ordinarily result from rainfall and melting snow and having no permanent source of supply or regular course, may be dammed, diverted, or otherwise repelled by an adjoining landowner without liability, if it is necessary and done without negligence. Sullivan v. Hoffman 166
6. Lower lands are under a natural servitude to receive the surface water of higher lands flowing along accustomed and natural drainways. Eunice Harrington Investments, Ltd. v. Wallace 373
7. Waters flowing along accustomed and natural drainways are not diffused surface waters and may not be dammed, repelled, or diverted without liability. Eunice Harrington Investments, Ltd. v. Wallace 373
8. A lower landowner who builds a structure across a natural drainway must provide for the natural passage through such obstruction of all the water which may be reasonably anticipated to drain therein. Eunice Harrington Investments, Ltd. v. Wallace 373
9. The owner of the higher land may not collect waters upon his land and discharge them in greater quantity than what would have reached the lower land by natural drainage. Eunice Harrington Investments, Ltd. v. Wallace .. 373
10. Waste irrigation waters are not surface waters which

may be discharged into a drainway as a matter of right, and such waters may not be discharged in injurious quantities. Eunice Harrington Investments, Ltd. v. Wallace . 373

Tax Exemptions.

1. An exemption from property taxes granted under Neb. Rev. Stat. § 77-202 (Reissue 1976) may continue for 4 years unless a change in the use of the property occurs. Ross v. Governors of the Knights of Ak-Sar-Ben 305
2. In order to continue a property tax exemption during the intervening years, the owner is required annually to file an affidavit certifying that no change in the use of the property has occurred since the exemption was granted. Ross v. Governors of the Knights of Ak-Sar-Ben 305
3. During intervening years, the county assessor or the County Board of Equalization may cause a property tax exemption to be reviewed even though no change in the use of the property has occurred. Ross v. Governors of the Knights of Ak-Sar-Ben 305
4. In the absence of conclusive evidence that a change in the use of the property has occurred, the County Board of Equalization is not required to review property tax exemptions during intervening years. Ross v. Governors of the Knights of Ak-Sar-Ben 305

Taxation.

1. A public power district is a governmental subdivision of the state within the meaning of Neb. Const. art. VIII, § 2, and all of its property is exempt from taxation except as otherwise provided by the Constitution. Nebraska P. P. Dist. v. Hershey School Dist. 412
2. The provisions of the Constitution in relation to taxation are not grants of power but are limitations on the taxing power of the state. Nebraska P. P. Dist. v. Hershey School Dist. 412
3. The trial of an appeal from a county board of equalization involving the valuation of real estate, both in the District Court and the Supreme Court, is de novo as an equitable proceeding. Gradoville v. Board of Equalization 615
4. There is a presumption that a board of equalization has faithfully performed its official duties, and such presumption remains until there is competent evidence to the contrary. The presumption obtains only while there is an absence of competent evidence to the contrary. It disappears when there is competent evidence on appeal to the contrary, and from that point on the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon evidence, unaided by presumption, with

the burden of showing such value to be unreasonable resting upon the appellant on appeal from the action of the board. Gradoville v. Board of Equalization 615

Termination of Employment.

1. A contract to give permanent employment, in the absence of some further express or implied stipulation as to the duration of the employment or of a good consideration in addition to the services contracted to be rendered, is no more than an indefinite general hiring terminable at the will of either party. Mau v. Omaha Nat. Bank 308
2. In the absence of a promise on the part of the employer that the employment should continue for a period of time that is definite or capable of determination, such employment relationship is terminable at the will of the employer as it constitutes an indefinite general hiring. Mau v. Omaha Nat. Bank 308
3. The general rule is that when the employment is not for a definite term, and there are no contractual or statutory restrictions upon the right of discharge, an employer may lawfully discharge an employee whenever and for whatever cause he chooses, without incurring liability. Mau v. Omaha Nat. Bank 308

Terms of Court.

1. There is, at a minimum, a statutory requirement under Neb. Rev. Stat. § 24-303 (Reissue 1979) that there be at least one term of court each year, unless otherwise fixed by the District Court. In re Estate of Weinberger 711
2. Unless otherwise provided by order of the District Court, a term of court begins on January 1 of a given year and ends on December 31 of that same year. In re Estate of Weinberger 711

Time.

A litigant may always ask a court of general jurisdiction to exercise its inherent power. However, the filing of a document entitled "motion for rehearing" does not toll the time for appeal, and the time for appeal begins to run from the date the court enters the order overruling the motion for new trial, if such a motion has been timely filed. In re Estate of Weinberger 711

Torts.

The coverage of a banker's blanket bond, indemnifying against dishonest, fraudulent acts or failure to perform faithfully, does not insure the insured against the con-

sequences of its own torts. Omaha Bank v. Aetna Cas. and Surety Co. 782

Transfer of Property.

It is the intent to defraud that makes a transfer of personal property without the consent of the holder of a security interest both unlawful and yet not violative of Neb. Const. art. I, § 20. Payment of the secured debt with proceeds from the sale is not a defense to the crime; it is only evidence of lack of fraudulent intent. State v. Hocutt 689

Trials.

1. The ruling of a trial court upon a motion for consolidation of prosecutions properly joinable will not be disturbed in the absence of an abuse of discretion. State v. Anderson and Hochstein 51
2. It is the duty of one challenging a joint trial to demonstrate how and in what manner he is prejudiced. State v. Anderson and Hochstein 51
3. The court, in furtherance of justice, may amend any pleading, when the amendment does not change substantially the claim or defense, by conforming the pleadings to the facts proved. The decision to allow or deny the proposed amendment rests in the sound discretion of the trial court. Mahoney v. May 187

Unconscionability.

1. Under the Nebraska U.C.C., if the court as a matter of law finds a contract or any clause therein to be unconscionable at the time it was made, the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result. Guaranteed Foods v. Rison 400
2. The issue of unconscionability must be pleaded in order to be considered by the court. Guaranteed Foods v. Rison .. 400

Undue Influence.

1. 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. McDonald v. McDonald 217
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. McDonald v. McDonald .. 217

3. The court, in examining the matter of whether a deed is 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. McDonald v. McDonald 217
4. Mere suspicion, surmise, or conjecture does not warrant a finding of undue influence, but there must be a solid foundation of established facts on which to rest the inference of its existence. This is particularly true where the parties are well aware of the existence of the contested deed shortly after its execution. McDonald v. McDonald 217
5. The fact that a grantee procured the attorney who prepared the challenged deed does not, standing alone, establish "undue influence." McDonald v. McDonald 217

Uniform Commercial Code.

1. Under the provisions of Neb. U.C.C. § 9-306 (Cum. Supp. 1978), the term "proceeds" includes insurance proceeds representing destroyed collateral. Terra Western Corp. v. Berry and Co. 28
2. The provisions of Neb. U.C.C. § 9-306 (Cum. Supp. 1978), including insurance proceeds representing destroyed collateral within the statutory definition of "proceeds," do not serve the function of giving the insurer notice of a mortgagee's equitable interest in the insurance policy and are not a substitute for either a loss payable clause or actual notice to the insurer of the equitable interest of the mortgagee. Terra Western Corp. v. Berry and Co. ... 28
3. Under the Nebraska U.C.C., if the court as a matter of law finds a contract or any clause therein to be unconscionable at the time it was made, the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result. Guaranteed Foods v. Rison 400
4. Article 2 of the Nebraska Uniform Commercial Code applies only to transactions in goods. Guaranteed Foods v. Rison 400
5. The term "goods," as used in article 2, means all things (including specially manufactured goods) which are mov-

able at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (covered by article 8) and things in action. "Goods" also includes the unborn of young animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (Neb. U.C.C. § 2-107 (Cum. Supp. 1980)). Guaranteed Foods v. Rison 400

6. Under Neb. U.C.C. § 2-201(3) (Reissue 1971), a contract which does not satisfy the requirements of a writing as required by the statute of frauds for the sale of goods, but which is valid in other respects, is enforceable with respect to goods for which payment has been accepted or which have been received and accepted. Guaranteed Foods v. Rison ... 400

Vacancies in Office.

1. A newly created office which is not filled by the legislative act creating it, and for which no provision is made by the act to fill it, becomes vacant on the instant of its creation and remains so until it is filled by an incumbent. State ex rel. Redmond v. Smith 21
2. Absent constitutional direction, vacancies in office are filled in the manner provided by the Legislature. State ex rel. Redmond v. Smith 21

Venue.

A motion for change of venue or to sequester the jury is directed to the sound discretion of the trial court and, in the absence of an abuse of discretion, its ruling will not be disturbed on appeal. State v. Anderson and Hochstein .. 51

Visitation.

1. It is the responsibility of the trial court to determine questions of custody and visitation of minor children according to their best interests. This is an independent responsibility and cannot be controlled by the agreement or stipulation of the parties themselves or by third parties. Deacon v. Deacon 193
2. It is an abuse of discretion for a trial court to delegate to a psychologist or third party the authority to determine when and if visitation can be had by the noncustodial parent. Deacon v. Deacon 193

Void Judgments.

Only a void judgment is subject to collateral attack. Schilke v. School Dist. No. 107 448

Waiver.

1. The failure of the accused to object at the time the trial court enters an order setting the trial at a date after the 6-month period does not constitute a waiver of his statutory right to a speedy trial. State v. Kinstler 386
2. A probationer does not waive his right to a preliminary hearing because he fails to request one. State v. Ferree 593
3. Requiring a waiver of jury trial to be intelligently waived does not mean that all of defense counsel's advice must withstand retrospective examination on post conviction hearing. State v. Journey 717
4. If an attorney's advice is within the range of competence required for attorneys in criminal cases and does not induce defendant to waive a jury trial by threats or promises, a defendant may not attack his jury trial waiver on appeal. State v. Journey 717
5. Because the decision to waive a jury trial is ultimately and solely the defendant's, a defendant must bear the responsibility for that decision. Counsel's advice to waive a jury trial can be the source of a valid claim of ineffective assistance of counsel only when (1) counsel interferes with his client's freedom to decide to waive a jury trial, or (2) defendant can point to specific advice of counsel so unreasonable as to vitiate the knowing and intelligent waiver of the right. State v. Journey 717

Warrantless Searches.

An example of the application of the "plain view" doctrine is the situation in which the police have a warrant to search a given area for specified objects, and in the course of the search, come across some other article of incriminating character. State v. King 270

Water Law.

1. Surface waters comprehend waters from rains, springs, or melting snows which lie or flow on the surface of the earth but which do not form part of a watercourse or lake. Sullivan v. Hoffman 166
2. Surface waters cease to be such when they empty into and become part of a natural stream or lake, but they do not lose their character as such by reason of their flowing from the land on which they first make their appearance onto lower land in obedience to the law of gravity, or by flowing into a natural basin from which they normally disappear through evaporation or percolation. Sullivan v. Hoffman .. 166
3. The owner of a lake wherein the surface water from the surrounding land accumulates, and from which it has no means of escape except by evaporation or percolation,

cannot lawfully, by means of a ditch or dike, discharge such water upon the land of his neighbor without his consent, to his injury. Sullivan v. Hoffman 166
4. Surface waters are waters which appear upon the surface of the ground in a diffused state, with no permanent source of supply or regular course, which ordinarily result from rainfall or melting snow. Sullivan v. Hoffman 166
5. Diffused surface waters, which ordinarily result from rainfall and melting snow and having no permanent source of supply or regular course, may be dammed, diverted, or otherwise repelled by an adjoining landowner without liability, if it is necessary and done without negligence. Sullivan v. Hoffman 166
6. Lower lands are under a natural servitude to receive the surface water of higher lands flowing along accustomed and natural drainways. Eunice Harrington Investments, Ltd. v. Wallace 373
7. Waters flowing along accustomed and natural drainways are not diffused surface waters and may not be dammed, repelled, or diverted without liability. Eunice Harrington Investments, Ltd. v. Wallace 373
8. A lower landowner who builds a structure across a natural drainway must provide for the natural passage through such obstruction of all the water which may be reasonably anticipated to drain therein. Eunice Harrington Investments, Ltd. v. Wallace 373
9. The owner of the higher land may not collect waters upon his land and discharge them in greater quantity than what would have reached the lower land by natural drainage. Eunice Harrington Investments, Ltd. v. Wallace 373
10. Waste irrigation waters are not surface waters which may be discharged into a drainway as a matter of right, and such waters may not be discharged in injurious quantities. Eunice Harrington Investments, Ltd. v. Wallace 373

Wiretaps.

1. If it appears from the evidence that the identity of the witness was obtained from a legal source, the fact that the identity of the witness was also improperly acquired by illegal wiretapping does not render the witness' testimony inadmissible. State v. Anderson and Hochstein 51
2. The use of an intercepted telephone message to induce witnesses to testify in a criminal prosecution, even though it may constitute a violation of a statute forbidding the use of intercepted communications, does not render such testimony inadmissible against a person not a party to the message where no use is made at the trial either of the message itself or of any information contained therein. State v. Anderson and Hochstein 51

3. In passing on the validity of an order to intercept wire or oral communications, the court may consider only information brought to the attention of the magistrate. State v. Hinchion, DiBiase, Olsen, and Cullen 478
4. For an affidavit based on a tip from an informant to be sufficient, the affidavit must set out some of the underlying circumstances sufficient to enable the magistrate to independently judge the validity of the informant's conclusion that the criminal activities were being carried on where and as he said they were and some of the underlying circumstances from which the affiant concluded that the informant was credible or his information reliable. State v. Hinchion, DiBiase, Olsen, and Cullen 478

Witnesses.

1. If it appears from the evidence that the identity of the witness was obtained from a legal source, the fact that the identity of the witness was also improperly acquired by illegal wiretapping does not render the witness' testimony inadmissible. State v. Anderson and Hochstein 51
2. The use of an intercepted telephone message to induce witnesses to testify in a criminal prosecution, even though it may constitute a violation of a statute forbidding the use of intercepted communications, does not render such testimony inadmissible against a person not a party to the message where no use is made at the trial either of the message itself or of any information contained therein. State v. Anderson and Hochstein 51
3. The question of the competency of a witness to testify rests largely in the sound discretion of the trial court and the court's determination will not be disturbed in the absence of a clear abuse of discretion. State v. Hitt 746
4. In a prosecution for sexual assault, the prosecutrix may testify on direct examination, if within a reasonable time under all the circumstances after the act was committed she made complaint to another, to the fact and nature of the complaint, but not as to its details. Others may likewise testify in chief to such fact and nature of the complaint, but not as to its details. State v. Watkins 859
5. One to whom the complaining witness has complained may testify to the fact and nature of the complaint if the complaint was made voluntarily and without unreasonable or inconsistent delay. State v. Watkins 859

Words and Phrases.

1. Under the provisions of Neb. U.C.C. § 9-306 (Cum. Supp. 1978), the term "proceeds" includes insurance proceeds representing destroyed collateral. Terra Western Corp. v. Berry and Co. 28

2. Conversion is an unauthorized assumption and exercise of the right of ownership over goods or chattels belonging to another to the alteration of their condition or the exclusion of the owner's rights. Conversion may also be defined as any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein. Terra Western Corp. v. Berry and Co. ... 28
3. The workmen's compensation act defines "accident" as an unexpected or unforeseen injury happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury. Neb. Rev. Stat. § 48-151(2) (Reissue 1978). Crosby v. American Stores 251
4. The workmen's compensation act defines occupational disease as a disease which is due only "to causes and conditions which are characteristic of and peculiar to a particular trade, occupation, process or employment and shall exclude all ordinary diseases of life to which the general public are exposed." Neb. Rev. Stat. § 48-151(3) (Reissue 1978). Crosby v. American Stores 251
5. The term "goods," as used in article 2, means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (covered by article 8) and things in action. "Goods" also includes the unborn of young animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (Neb. U.C.C. § 2-107 (Cum. Supp. 1980)). Guaranteed Foods v. Rison 400

Workmen's Compensation.

1. In reviewing the judgment of the compensation court, we are bound by the findings of fact made by that court after rehearing to the extent that the same have support in the evidence. Findings of fact made by the Workmen's Compensation Court after rehearing have the effect of a jury verdict and may not be set aside on appeal unless clearly wrong.
   White v. Western Commodities, Inc. 75
   B & C Excavating Co. v. Hiner 248
   Alcaraz v. Wilson & Co., Inc. 256
   Mohr v. Soil Mover Mfg. Co. 261
   Williams v. Williams Janitorial Service 344
   Douglas v. Pizza Hut of Crete 383
   White v. Father Flanagan's Boys' Home 528
2. In the absence of any showing that there was any joint arrangement as to salary, wages, hours of employment,

or term of service, there cannot be any joint employment. White v. Western Commodities, Inc. 75

3. The burden of proof is upon the plaintiff to show by a preponderance of the evidence that the injury sustained was caused by, or related to, the accident and was not the result of the normal progression of the plaintiff's pre-existing condition which would have been sustained in the absence of the accident. White v. Western Commodities, Inc. 75
4. There must be some consensual relationship between the loaned employee and the employer whose service he enters, sufficient to create a new employer-employee relationship. Where an employee enters the service of another at the command and pursuant to the direction of the master, no new relationship is created. B & C Excavating Co. v. Hiner 248
5. When a general employer lends an employee to a special employer, the special employer becomes liable for workmen's compensation only if (a) The employee has made a contract of hire, express or implied, with the special employer; (b) The work being done is essentially that of the special employer; and (c) The special employer has the right to control the details of the work. B & C Excavating Co. v. Hiner 248
6. The workmen's compensation act defines "accident" as an unexpected or unforeseen injury happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury. Neb. Rev. Stat. § 48-151(2) (Reissue 1978). Crosby v. American Stores 251
7. The accident requirement of the act is satisfied if the cause of the injury is of accidental character or the effect is unexpected or unforeseen, and happened suddenly and violently. Crosby v. American Stores 251
8. It is no longer necessary that the injury be caused by a single traumatic event, but the exertion in the employment must contribute in some material and substantial degree to cause the injury. Crosby v. American Stores 251
9. The workmen's compensation act defines occupational disease as a disease which is due only "to causes and conditions which are characteristic of and peculiar to a particular trade, occupation, process or employment and shall exclude all ordinary diseases of life to which the general public are exposed." Neb. Rev. Stat. § 48-151(3) (Reissue 1978). Crosby v. American Stores 251
10. Generally, the time of accident is sufficiently definite if either the cause is reasonably limited in time or the result materializes at an identifiable point. Crosby v. American Stores 251

11. In testing the sufficiency of evidence necessary to sustain an award of the Nebraska Workmen's Compensation Court after rehearing, such evidence must be considered most favorably to the successful party; any controverted fact must be resolved in his or her favor; and he or she must receive the benefits of every inference reasonably deducible from it.
Alcaraz v. Wilson & Co., Inc. 256
White v. Father Flanagan's Boys' Home 528
Goers v. Bud Irons Excavating 579
12. In a workmen's compensation case, the burden is upon the claimant to establish that the accidental injury arose in the course of employment as well as out of the employment. Alcaraz v. Wilson & Co., Inc. 256
13. The findings of fact made by the Nebraska Workmen's Compensation Court after rehearing shall have the same force and effect as a jury verdict in a civil case. A judgment, order, or award of the Nebraska Workmen's Compensation Court may be modified, reversed, or set aside only upon the grounds that (1) the court acted without or in excess of its powers, (2) the judgment, order, or award was procured by fraud, (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award, or (4) the findings of fact by the court do not support the order or award. Neb. Rev. Stat. § 48-185 (Reissue 1978).
Mohr v. Soil Mover Mfg. Co. 261
Goers v. Bud Irons Excavating 579
14. There is no single test by which the determination of a workman as an employee may be made. This must be determined from all the facts in the case. Williams v. Williams Janitorial Service 344
15. Under the provisions of Neb. Rev. Stat. § 48-116 (Reissue 1978), when a contractor fails to require a subcontractor to carry workmen's compensation insurance, and an employee of the latter sustains a job-related injury, the contractor shall be included within the term employer and, with the immediate employer-subcontractor, shall be jointly and severally liable to pay compensation under the terms of the workmen's compensation act. Duffy Brothers Constr. Co. v. Pistone Builders, Inc. 360
16. The joint and several liability imposed by Neb. Rev. Stat. § 48-116 (Reissue 1978) is for the sole benefit of the injured workman; the statute in no way determines whether it is the statutory or actual employer who is primarily liable. Duffy Brothers Constr. Co. v. Pistone Builders, Inc. 360
17. Between the statutory employer and the actual employer, under the provisions of Neb. Rev. Stat. § 48-116 (Reissue

1978), the liability of the latter should be regarded as primary and that of the former as secondary. Duffy Brothers Constr. Co. v. Pistone Builders, Inc. 360

18. Under the Nebraska workmen's compensation act, a statutory employer is entitled to indemnity from the actual employer with the amount being limited to all sums which the former has paid in good faith upon a matured obligation, or has been forced to pay in satisfaction of a compensation award. Duffy Brothers Constr. Co. v. Pistone Builders, Inc. 360
19. Generally speaking, an employer paying an injured workman his wages in lieu of compensation is entitled to credit for such benefits computed by the number of weeks paid, rather than the dollar amount. Duffy Brothers Constr. Co. v. Pistone Builders, Inc. 360
20. In a workmen's compensation case, death or disability caused by (1) heart disease that was a personal risk and (2) emotional strain that was an employment risk is not compensable where the emotional strain is not greater than that of nonemployment life. The comparison is not with the employee's usual exertion in his employment but rather with the exertions present in the employee's normal nonemployment life. White v. Father Flanagan's Boys' Home 528
21. The presence of a preexisting disease or condition enhances the degree of proof required to establish that the injury arose out of the employment. White v. Father Flanagan's Boys' Home 528
22. Liability for workmen's compensation shall not be reduced or affected by any insurance of the injured employee or any contribution or other benefit whatsoever due to or received by the person entitled to such compensation. Novotny v. City of Omaha 535
23. No agreement by an employee to pay any portion of premium paid by his employer or to contribute to a benefit fund or department maintained by such employer for the purpose of providing compensation as required by the workmen's compensation act shall be valid. Novotny v. City of Omaha 535
24. The payment of disability retirement benefits to a civilian employee under Omaha, Neb., Code § 22-35 (1980) does not affect the right of the employee to claim and receive benefits under the workmen's compensation act. Novotny v. City of Omaha 535
25. Where a reasonable controversy exists between an employer and employee as to the employer's liability under the workmen's compensation act, the employer is not liable for the penalty for waiting time or for the allowance of attorney fees. Novotny v. City of Omaha 535

26. An employee suffering a schedule injury falling under subdivision (3) of Neb. Rev. Stat. § 48-121 is entitled only to the compensation provided for in that subdivision, unless some unusual or extraordinary condition as to the other members or other parts of the body has developed; and the presence or absence of industrial disability is immaterial. Goers v. Bud Irons Excavating 579
27. Whether an injury results in an unusual or extraordinary condition affecting other parts of the body ordinarily presents a question of fact. Goers v. Bud Irons Excavating 579
28. In the event the employer files an application for a rehearing before a three-judge panel of the Workmen's Compensation Court from an award of a judge of the Workmen's Compensation Court and fails to obtain any reduction in the amount of such award, the Workmen's Compensation Court may allow the employee a reasonable attorney fee to be taxed as costs against the employer for such rehearing. Neb. Rev. Stat. § 48-125 (Reissue 1978). Goers v. Bud Irons Excavating 579
29. As a general rule, the compensation act extends to and covers workmen only while engaged in, on, or about the premises where their duties are being performed, or where their service requires their presence as a part of such service at the time of injury, and during the hours of service of such workmen.
Rowan v. University of Nebraska 588
Stoll v. School Dist. (No. 1) of Lincoln 670
30. A proceeding under Neb. Rev. Stat. § 48-141 (Reissue 1978) to modify a previous award of the compensation court to recover additional compensation for an increase in incapacity can only be brought within 2 years of the time the employee knows or is chargeable with knowledge that his condition has materially changed, and there is such a substantial increase in his disability as to entitle him to additional compensation. O'Connor v. Anderson Bros. Plumbing & Heating 641
31. If an employee suffers an injury, which appears to be slight but which is progressive in its course, and which several physicians are unable to correctly diagnose, his failure to file claim or bring suit within the time limited by law will not defeat his right to recovery, if he gave notice and commenced action within the statutory period after he had knowledge that compensable disability resulted from the original accident. O'Connor v. Anderson Bros. Plumbing & Heating 641
32. 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. Stoll v. School Dist. (No. 1) of Lincoln 670