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STATE OF NEBRASKA, APPELLEE, V. DARRELL E. HATWAN, APPELLANT.

303 N.W.2d 779

Filed March 27, 1981. No. 43397.

1. **Assault: Words and Phrases.** A dangerous instrument within the meaning of Neb. Rev. Stat. § 28-309 (Reissue 1979) is any instrumentality which, because of its nature and the manner and intention of its use, is capable of inflicting bodily injury, and need not be an instrument which is inherently dangerous and capable of inflicting injury.
2. ____: ____. The infliction of *serious* bodily injury is not a necessary element of assault in the second degree as defined by Neb. Rev. Stat. § 28-309(1)(a) (Reissue 1979). Neither is it an element of third degree assault under Neb. Rev. Stat. § 28-310 (Reissue 1979).
3. **Assault: Sentences.** Where an accused is convicted of both second and third degree assault, it is not necessarily an abuse of discretion to impose a more severe sentence for the lesser assault than that imposed for the greater.

Appeal from the District Court for Lincoln County: HUGH STUART, Judge. Affirmed.

Murphy, Pederson, Piccolo & Anderson for appellant.

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

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

CLINTON, J.

The defendant, Darrell E. Hatwan, was charged in two counts with assault in the second degree. During the course of the pretrial proceedings, count I was reduced to third degree assault. Hatwan waived his right to a jury trial and consented to a trial before the court. He was found guilty by the court on both counts and sentenced to a term of 6 months in the county jail on the third degree assault charge and to 4 months in the county jail on the second degree charge, the terms to run concurrently. He has appealed to this court and makes the following assignments of error: (1) The trial court erred in finding that the second degree assault

was committed with the use of a dangerous weapon, that being an essential element of the crime. (2) The trial court erred in imposing a more severe sentence on the lesser charge than that imposed for the greater. (3) A new trial should have been granted because the defendant was represented during trial by inadequate, incompetent counsel. (4) The court erred in finding the defendant guilty of the second degree assault charge because there was no evidence that the victim suffered "serious bodily injury." The defendant's assignments are without merit and we affirm.

An understanding of the assignments requires that we examine the statutes defining the crimes charged and the evidence tending to support the State's case. Assault in the second degree is defined by Neb. Rev. Stat. § 28-309 (Reissue 1979) as follows: "(1) A person commits the offense of assault in the second degree if he:

"(a) Intentionally or knowingly causes bodily injury to another person with a dangerous instrument; or

"(b) Recklessly causes serious bodily injury to another person with a dangerous instrument."

Assault in the third degree is defined by Neb. Rev. Stat. § 28-310 (Reissue 1979): "(1) A person commits the offense of assault in the third degree if he:

"(a) Intentionally, knowingly, or recklessly causes bodily injury to another person; or

"(b) Threatens another in a menacing manner."

Second degree assault is a Class IV felony; third degree assault, as charged in this case, is a Class II misdemeanor.

The defendant, Hatwan, on the date of the alleged offenses, was a lodger in the Uptown Motel in North Platte, Nebraska, which was then operated by Mina DeVriendt and her husband, A. E. DeVriendt. Hatwan, at the time of the offenses, was 42 years old, 6 feet tall, and weighed 175 pounds. Mrs. DeVriendt, the victim of the third degree assault, was 71 years old, 5 feet 4½ inches tall, and weighed 145 pounds. Her husband was

74 years old, 5 feet 8 inches in height, and weighed about 145 pounds.

The victim's version of the crime charged was that Hatwan came into the motel lobby at about 10:15 p.m. Mrs. DeVriendt heard him enter and went into the lobby from the couple's adjacent living quarters. Hatwan made a remark to her which indicated he had been assaulted or in a fight in a bar. He then claimed that he had been overcharged for his room at the motel. When Mrs. DeVriendt attempted to explain the room rate structure, he became loud and abusive. Mr. DeVriendt then entered the lobby.

As Mr. DeVriendt attempted to explain the room rates, Hatwan declared that he had not been given a receipt. Mr. DeVriendt told him to forget about it, he would write out a receipt that would show him paid through that night. He then wrote out the receipt and offered it to Hatwan.

After the receipt was written out, Mrs. DeVriendt felt they were in trouble and reached for the telephone behind the counter. Hatwan reached over the counter, grabbing the telephone receiver with one hand and grabbing Mrs. DeVriendt by the hair of her head with the other. He then threw Mrs. DeVriendt to the floor and jerked the telephone cord and receiver away from the telephone. He stepped back and began slinging the telephone receiver around his head. Mr. DeVriendt was then struck on the side of the head with the receiver, splitting his ear open.

Hatwan grabbed Mr. DeVriendt and threw him against the front of the office and then grabbed him a second time, throwing him into the corner against the south windows of the lobby.

Mrs. DeVriendt got up and came around from behind the counter. Hatwan knocked her down. She then crawled on her hands and knees into the corner, sitting next to her husband. Hatwan left shortly thereafter and Mrs. DeVriendt then called the police.

Hatwan denied the version as related by the

DeVriendts. He claimed the DeVriendts had attacked him and that the DeVriendts' injuries were suffered when DeVriendt fell while Hatwan was defending himself. The details of his testimony are not important since the trial court resolved the evidentiary conflicts against the accused.

We now examine the assignments of error in the order in which they were made. The court apparently found that with reference to the second degree charge, the telephone receiver was, in the manner in which it was used, a dangerous instrument within the meaning of the statute. The defendant argues that a dangerous instrument is only one which, by its very nature, is able or likely to inflict injury and includes such objects as guns, knives, axes, razors, and other instruments of like nature. He, therefore, argues that without regard to the mode of use, the telephone receiver cannot be a dangerous instrument, hence, the evidence did not support the conviction. He relies upon the dictionary definition of the two terms. We quote from his brief.

"An *'instrument'* is defined in Webster's Seventh New Collegiate Dictionary (1965) as a tool, utensil or implement. The word *'dangerous'* is likewise defined as something which is able or likely to inflict injury. Thus, a dangerous instrument is a tool or implement which is able to or likely to inflict injury. Examples of a dangerous instrument would be guns, knives, axes, razors, etc.

"The word 'instrument' is extremely broad in its definition and conceivably could include any object which is capable of being held by a person. However, not all *instruments* which are used in an assault case qualify as a *dangerous* instrument. The broad definition of instrument is limited by the term *'dangerous'*, which serves to qualify and restrict the tools or implements which are within the meaning of § 28-309. By its very nature, the tool, utensil or implement must be dangerous to be within the meaning of the statute. Therefore,

a *dangerous* instrument can only be one which by its very nature is able or likely to inflict injury." He cites no legal precedents directly in point.

Our criminal code does define the term deadly weapon, but it does not define the term dangerous instrument. Neb. Rev. Stat. § 28-109(7) (Reissue 1979). Neither, apparently, has this court had occasion to define the term dangerous instrument as it is used in the statutes in question. There are, however, jurisdictions in which the term "deadly or dangerous weapon" is a term used in statutes defining various crimes. In many of the cases invoking such terms, the courts have said they include not only instruments such as guns or knives but also other instrumentalities which, because of the manner of their use and the intention with which they are used, are dangerous. Some such cases are *Cummings v. State*, 384 N.E.2d 605 (Ind. 1979) (stapler used as a bludgeon); *Bald Eagle v. State of Oklahoma*, 355 P.2d 1015 (Okla. Crim. 1960) (beer bottle used as a weapon); *Berfield v. State*, 458 P.2d 1008 (Alaska 1969) (boots on feet used to kick face and head of victim). One case almost precisely in point is that of *Thomas v. State*, 524 P.2d 664 (Alaska 1974), where it was held that a telephone used as a club was a dangerous weapon.

In the case before us, the evidence accepted by the trier of fact indicated that the telephone receiver was intentionally swung by the attached cord in such a manner as to intentionally cause bodily injury. The physical principle involved in such use is essentially the same as that which David used when he killed Goliath. We hold that a dangerous instrument within the meaning of § 28-309 is any object which, because of its nature and the manner and intention of its use, is capable of inflicting bodily injury. It might, for example, be a piece of lumber, a hammer, or many other physical objects.

The defendant next contends that the evidence is insufficient to sustain the charge under § 28-309 because

Mr. DeVriendt, who was the victim of the second degree assault, received no serious bodily injury. We simply point out that the second degree assault here charged was, by the language of the information, brought under § 28-309 (1) (a). Causing serious bodily injury is not an element of the crime under that subsection of the statute.

We now turn to the claim that the court abused its discretion in imposing a larger sentence on the third degree assault than on the second degree assault. Second degree assault is a Class IV felony and is punishable by a maximum term of 5 years' imprisonment or a $10,000 fine, or both. No minimum sentence is specified. Neb. Rev. Stat. §§ 28-309 and 28-105 (Reissue 1979). Third degree assault, as charged in this case, is a Class II misdemeanor. Neb. Rev. Stat. §§ 28-310 and 28-106 (1) (Reissue 1979). The maximum punishment is 6 months' imprisonment or $1,000 fine, or both. Again, no minimum sentence is specified. Thus the defendant received the maximum sentence on the misdemeanor charge and a relatively light sentence on the felony charge. Because the sentences are concurrent, the defendant has not been hurt even if we were convinced that the alleged "disparity" was an abuse of discretion. We do not so regard it. Many penologists and learned persons who have written on crime and punishment point out that one of the justifications for punishment and, indeed, of the penal codes themselves is to express society's disapproval of the violation of its accepted moral standards. The victim of the misdemeanor charge in this case was a small, elderly woman. The assault was by a strong, young man. Most of mankind would regard this circumstance as an aggravating factor.

The defendant's attack on the competency of counsel is premised on the trial counsel's failure to subpoena hospital records and to call as witnesses medical personnel who attended the victims. The purpose of such evidence would have been to show that the victims

did not suffer "serious bodily injury." We have already pointed out that under §§ 28-309(1)(a) and 28-310 (1)(a) the infliction of serious bodily injury is not an element of the crime. The evidence disclosed that the victims did suffer bodily injury. Whether it was serious or not was immaterial to the proof of the charges. The claim of incompetence of counsel on this score is not supported by the record.

AFFIRMED.

NORESE MEYSENBURG, APPELLANT, V. GARY MEYSENBURG, APPELLEE.

303 N.W.2d 783

Filed March 27, 1981. No. 43428.

1. **Divorce: Child Custody.** Above all other considerations in determining the question of who should have custody of a minor child upon the dissolution of a marriage, the paramount consideration is the best interests and welfare of the child.
2. **Divorce: Appeal and Error.** We review the record de novo, giving due regard to the trial court which had the opportunity to observe the witnesses.
3. **Child Support: Appeal and Error.** A decision on the amount to be awarded as child support rests in the sound discretion of the trial court and will not be disturbed on appeal unless it appears that the court abused its discretion.

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

Walter J. Matejka for appellant.

James W. Moriarty for appellee.

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

PER CURIAM.

The appellant, Norese Meysenburg, appeals from an order entered by the District Court for Douglas County,

Nebraska, awarding physical custody of the minor child of Norese Meysenburg and her former husband, Gary Meysenburg, to Gary Meysenburg, subject to further review by the court in 6 months from the date of the decree. She further appeals from the same order which also required her to pay $80 per month child support toward the support of the parties' minor child. For reasons which we will more carefully detail hereinafter, we affirm the judgment of the trial court.

The record discloses that Norese Meysenburg and Gary Meysenburg were married on April 5, 1979, in Omaha, Nebraska. During the marriage one child was born to the parties, Chad Meysenburg, born June 20, 1979. Norese was, at the time of trial, 19 years old and employed as a nurse's aide at Methodist Hospital in Omaha, Nebraska. She was a high school graduate and was earning $4.06 per hour at the hospital. She resided with her parents, her brother, and a sister in her parents' home in Omaha, Nebraska.

Gary Meysenburg was, at the time of trial, 21 years of age, a high school graduate, and employed by Werner Paint Company, earning $135 per week. He, likewise, resided with his parents at his parents' home in Omaha, Nebraska.

The record indicates without contradiction that both mother and father love their child and desire to be the principal parent to raise the child, though each of them would require assistance from their respective parents due to the fact that both are employed. The rules with regard to matters of this type are easy to pronounce but extremely difficult to apply. Above all other considerations in determining the question of who should have custody of a minor child upon the dissolution of a marriage, the paramount consideration is the best interests and welfare of the child. See, Neb. Rev. Stat. § 42-364 (Reissue 1978); *Boyles v. Boyles*, 191 Neb. 66, 213 N.W.2d 729 (1974).

Norese urges us to find that the best interests and welfare of a child are served by awarding custody to the

natural mother. Whatever may have once been the view with regard to this matter, it is now clear that where the issue of child custody is involved both the mother and father have an equal and joint right to the custody of their children. The test for determining custody, which has been reiterated by this court many times in recent years, is the best interests of the child. See *Theye v. Theye*, 200 Neb. 206, 263 N.W.2d 92 (1978).

Setting out all of the claims and counterclaims made by the parties to this action would serve little purpose. Nor would such a recitation give insight to litigants with regard to future matters or bring the parties together insofar as the future raising of their minor child is concerned. Suffice it to say that an investigative report was made in this case by the conciliation court counselor at the request of the trial court and submitted to the trial court. The report recommended that physical custody which had been granted temporarily to Gary should now be permanently granted to Gary, subject to further review by the District Court.

When one reads the entire record in this case, one must conclude that the decision by the trial court was supported by the evidence and does not in any manner indicate an abuse of discretion as urged by Norese. Norese argues that it is in the best interests of the child that he be placed with her and not with Gary. The evidence simply does not support that conclusion.

It may very well be that the best interests of Norese would support a claim that the child be placed with her. As we have already indicated, however, our principal concern is not the best interests of the mother but with the best interests of the child. We review the record de novo, giving due regard to the trial court which had the opportunity to observe the witnesses. After de novo review of the evidence, we conclude that it is in the best interests of the child that he remain in the custody of his father.

Having concluded that the trial court was not in error in awarding custody of Chad to Gary, we are, likewise,

unable to conclude that the trial court was in error in requiring Norese to participate in providing for the support of Chad. Nothing in the applicable statutes or case law indicates that a mother, not having custody of a minor child, may not be required to pay child support, and, in fact, the opposite applies. See § 42-364. The court is required to consider the earning capacity of each parent, together with other attendant circumstances. See, *Lynch v. Lynch*, 195 Neb. 804, 241 N.W.2d 123 (1976); *Hermance v. Hermance*, 194 Neb. 720, 235 N.W.2d 231 (1975). A decision on the amount to be awarded as child support rests in the sound discretion of the trial court and will not be disturbed on appeal unless it appears that the court abused its discretion. See *Sommers v. Sommers*, 191 Neb. 361, 215 N.W.2d 84 (1974).

Accordingly, we affirm the judgment of the trial court.

AFFIRMED.

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

303 N.W.2d 785

Filed March 27, 1981. No. 43611.

1. **Post Conviction: New Trial.** The ordering of a new trial by the trial court is an appropriate discretionary method of granting post conviction relief under Neb. Rev. Stat. § 29-3001 (Reissue 1979).
2. **Sentences: New Trial.** The fact that a defendant has served the full sentence imposed for a particular crime is not necessarily a bar to the granting of a new trial because of errors appearing in the earlier conviction.
3. **New Trial: Double Jeopardy.** The granting of a new trial because of errors occurring at the original trial does not necessarily constitute double jeopardy.
4. **Habitual Criminals: Sentences.** An enhanced sentence imposed under the provisions of the habitual criminal laws, Neb. Rev. Stat. §§ 29-2221

and 29-2222 (Reissue 1979), is not a new jeopardy or additional penalty for the same crime. It is simply a stiffened penalty for the latest crime which is considered to be an aggravated offense because it is a repetitive one.

5. **Habitual Criminals: Pleas.** Record examined and disclosed that pleas of guilty utilized to prove the defendant to be an habitual criminal, as well as his waiver of counsel, were entered freely, voluntarily, and knowingly.
6. **Sentences.** The crediting of prior jail time to a sentence imposed for the minimum sentence permitted by statute is discretionary with the sentencing judge.

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

Eddie Addison, pro se.

Paul L. Douglas, Attorney General, and Shanler D. Cronk for appellee.

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

HASTINGS, J.

This appeal consists of four different post conviction relief cases filed under the provisions of Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1979), which, at the request of the defendant, were consolidated for trial in the District Court. The defendant, Eddie Addison, also known as Edison Clown Horse, who appeared pro se, has appealed the July 15, 1980, order of the trial court granting him post conviction relief in the one case and denying it in the other three.

The one case in which relief was granted was a sentence imposed by the District Court for Sheridan County for a term of 1 year in the Nebraska Penal and Correctional Complex, with credit being given for 102 days' prior jail time served by the defendant. Two of the cases in which relief was denied originated out of the District Court for Sheridan County, and the other one came from Dawes County. In all three of these cases the defendant was found to be an habitual criminal under the provisions of Neb. Rev. Stat. §§ 29-2221 and 29-2222 (Reissue 1979), and was sentenced to terms

of 10 years to run concurrently with each other but consecutively to the 1-year sentence case. The direct appeals in each of these cases may be found respectively at: 196 Neb. 768, 246 N.W.2d 213 (1976); 197 Neb. 482, 249 N.W.2d 746 (1977); 198 Neb. 166, 251 N.W.2d 895 (1977); and 198 Neb. 442, 253 N.W.2d 165 (1977).

Although the defendant does not assign any errors as such in his brief, it may be gathered from the argument portion that he complains of the following: (1) He should not have been awarded a new trial in the first case because he has already served more time than that for which he was sentenced; (2) That the habitual criminal statutes previously cited are void under the fifth amendment of the United States Constitution as having subjected him to double jeopardy; (3) That the findings that he was an habitual criminal were based upon pleas of guilty which were not voluntarily and knowingly made; and (4) That he was not given full credit for time spent in jail. We affirm the action of the District Court.

Most of the evidence presented by the defendant at the consolidated hearing had to do with defendant's claim of ineffective assistance of counsel. It was on the basis of that claim that the trial judge granted relief in the one case by ordering a new trial. Section 29-3001 provides in part as follows: "If the court finds that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States, the court shall vacate and set aside the judgment and shall discharge the prisoner or resentence him or *grant a new trial* as may appear appropriate." (Emphasis supplied.) Even though it will be necessary to apply any time already served on this vacated sentence, in the event of a conviction on a retrial, he is not entitled to be insulated from prosecution on the now pending charge. If the defendant has committed the crime the State is entitled to seek his prosecution and conviction. The

proper crediting of any time served to date may be taken up in an appropriate proceeding. The trial court having determined that his conviction was void and having set the same aside, the defendant is not twice put in jeopardy for the same offense by being subjected to a retrial. *State v. Houp*, 182 Neb. 298, 154 N.W.2d 465 (1967); *Houp v. State of Nebraska*, 427 F.2d 254 (8th Cir. 1970), *cert. denied* 401 U.S. 924, 91 S. Ct. 887, 27 L. Ed. 2d 827. See, also, *Day v. State*, 76 Wis. 2d 588, 251 N.W. 2d 811 (1977); *United States v. Ball*, 163 U.S. 662, 16 S. Ct. 1192, 41 L. Ed. 300 (1896); *United States v. Dinitz*, 424 U.S. 600, 96 S. Ct. 1075, 47 L. Ed. 2d 267 (1976).

Contrary to the defendant's contention, an enhanced sentence under the provisions of the habitual criminal laws is not a new jeopardy or additional penalty for the same crime. It is simply a stiffened penalty for the latest crime which is considered to be an aggravated offense because it is a repetitive one. *Gryger v. Burke*, 334 U.S. 728, 68 S. Ct. 1256, 92 L. Ed. 1683 (1948). See, also, *Poppe v. State*, 155 Neb. 527, 52 N.W.2d 422 (1952), as holding generally that statutes which provide for enhanced penalties because of repetitive offenses are not violative of the Constitution.

One of the prior felonies used to enhance the sentence in these cases was *State v. Edison Clown Horse*, found as case No. 17321 in the District Court for Scotts Bluff County. Defendant in that case, who was identified as the same person as Eddie Addison, was sentenced on February 11, 1963, to 3 years for the felony offense of possessing a forged instrument. A certified copy of the journal entry recited that the defendant, although present without counsel, was advised of his right to counsel, his right to jury trial, and of the possible consequences of a guilty plea. The trial court further found that he waived his right to counsel and freely and voluntarily entered his plea of guilty. Another prior conviction utilized was found in the case of *State v. Edison Clown Horse*, case No. C-1181, District Court for Sheridan County, wherein the defendant was sen-

tenced on March 13, 1967, to a term of 2 years in the Nebraska Penal and Correctional Complex. Again, the record reveals that the defendant appeared without counsel, but he was advised of his right to have counsel and his right to a jury trial. The court determined that the defendant had not been induced or persuaded to enter a plea against his will and, with the consent of the court, tendered a plea of nolo contendere. The other conviction used in all three cases involving habitual criminal charges was one entitled *State of South Dakota v. Eddie Addison, also known as Edison Clown Horse*, case No. 4479, Circuit Court of Pennington County, South Dakota. In that case, the defendant was sentenced to a term of 4 years in the South Dakota State Penitentiary. The amended judgment indicates that defendant had been represented by counsel and, after having been tried by a fair and impartial jury, was found guilty of third degree forgery. Defendant's contention that his previous convictions were in any way tainted is wholly refuted by the record.

The only suggestion that any jail time was not credited to the defendant consisted of a pair of letters between the Department of Correctional Services and the Sheridan County attorney. No conclusion can be drawn from that exchange of correspondence which would refute the positive determination made by the trial court that proper credit was given for all appropriate time served. However, in any event, the decision to grant credit for jail time rests in the sound discretion of the sentencing judge. "(1) Credit against the maximum term and any minimum term *may be given* to an offender for time spent in custody as a result of the criminal charge . . . ." (Emphasis supplied.) Neb. Rev. Stat. § 83-1,106 (Reissue 1976).

We conclude that the action taken by the District Court was proper in all respects, is supported by the record, and its order is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. OTIS L. ROGERS, APPELLANT.

303 N.W.2d 788

Filed March 27, 1981. No. 43691.

1. **Right to Counsel: Waiver.** An accused may waive his right to counsel where such waiver is made intelligently and understandingly, with knowledge of the right to counsel.
2. **Right to Counsel: Waiver: Proof.** The defendant has the burden of proving nonwaiver and he must show by a preponderance of the evidence that he did not intelligently and understandingly waive that right.
3. **Right to Counsel.** One may insist upon representing himself no matter how foolhardy that decision is, if made knowingly and intelligently; and once that decision is made, the individual making that choice must accept the consequences of his election.

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

Lynn R. Carey, Jr., for appellant.

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

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

KRIVOSHA, C.J.

The appellant, Otis Rogers (Rogers), appeals from a verdict entered by a jury finding Rogers guilty of two counts of burglary. Rogers maintains that the trial court committed reversible error in allowing Rogers to waive counsel without determining said waiver to have been intelligently made. We believe that the assignment is without merit and affirm the judgment of the trial court.

The record discloses that counsel had been previously appointed for Rogers but was granted leave to withdraw on March 17, 1980, and new counsel was then appointed. The case was called to trial on April 7, 1980. At that time Rogers indicated to the trial court his desire for a privately selected attorney, his dissatisfaction with appointed counsel, and his refusal to accept court-

appointed counsel. The privately selected counsel sought by Rogers was apparently never employed by Rogers and did not appear at trial. The trial court permitted the second court-appointed counsel to withdraw at Rogers' request, but ordered him to remain in the courtroom for the purpose of assisting Rogers whenever such assistance was required. The record further discloses that, in fact, court-appointed counsel did assist Rogers in certain aspects of the trial, including aiding by securing the presence of witnesses requested by Rogers. Rogers maintains that because he was a 72-year-old cantankerous individual who refused to accept or get along with two previously appointed lawyers, the court should not have permitted him to go to trial without counsel. While the brief raises the question of whether Rogers was competent to stand trial, counsel for Rogers, at the time of oral argument before this court, conceded that Rogers was not incompetent to stand trial but only incompetent to make a voluntary waiver of counsel. Furthermore, the record does not support a claim that Rogers was incompetent to stand trial but, in fact, was competent. See *State v. Guatney*, 207 Neb. 501, 299 N.W.2d 538 (1980).

The record further does not support the claims made by Rogers even as to his inability to knowingly and intelligently waive counsel. It is true, indeed, that Rogers was 72 years of age and his behavior would disclose that he was cantankerous. The balance of the claims made by Rogers as to his mental condition rendering him unable to make an intelligent or knowing waiver of counsel are wholly unsupported in the record. An examination conducted by the State following the jury verdict and prior to sentencing indicated that, due to acute alcoholism, Rogers did suffer from some organic brain damage manifested by impaired judgment and impaired emotional stability. He did, however, know who he was and where he was and what he was generally doing. The general rule is that an accused may waive his right to counsel where such waiver is made intel-

ligently and understandingly, with knowledge of the right to counsel. *State v. Morford*, 192 Neb. 412, 222 N.W.2d 117 (1974). The defendant has the burden of proving nonwaiver and he must show by a preponderance of the evidence that he did not intelligently and understandingly waive that right. See, *North Carolina v. Butler*, 441 U.S. 369, 99 S. Ct. 1755, 60 L. Ed. 2d 286 (1979); *Moore v. Michigan*, 355 U.S. 155, 78 S. Ct. 191, 2 L. Ed. 2d 167 (1957); *Johnson v. Zerbst*, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938). One may insist upon representing himself no matter how foolhardy that decision is, if made knowingly and intelligently; and once that decision is made, the individual making that choice must accept the consequences of his election. See, *Marchand v. Gene Thorpe Finance, Inc.*, 225 So. 2d 485 (La. App. 1969); *Viles v. Scofield*, 128 Colo. 185, 261 P.2d 148 (1953). "There is no reason he should not be held responsible for the inept counsel he freely chose even though that counsel was himself." *State v. Baker*, 201 Neb. 579, 581, 270 N.W.2d 922, 924 (1978).

The record herein is totally devoid of any evidence of his not understanding what he was doing when waiving counsel. As a matter of fact, the record shows that Rogers was clearly aware of what he was doing and the consequences of his act. Rogers knew who had been appointed to represent him and what the effect of discharging counsel and representing himself meant. He subpoenaed witnesses, examined and cross-examined witnesses, and made closing argument. It was not successful simply because the evidence of guilt, including his own confession, was too great.

Finding no error, we believe the judgment should be affirmed.

AFFIRMED.

LARON L. WRIGHT, APPELLANT, V. STATE OF NEBRASKA EX REL. STATE REAL ESTATE COMMISSION OF THE STATE OF NEBRASKA, APPELLEE.

304 N.W.2d 39

Filed April 3, 1981. No. 43215.

1. **Brokers' Licenses.** Real estate licenses shall be granted only to persons who bear a good reputation of honesty, trustworthiness, integrity, and competence to transact the business of broker or salesman in such manner as to safeguard the interests of the public, and only after satisfactory proof of such qualifications has been presented to the commission. Neb. Rev. Stat. § 81-885.12 (Reissue 1976).
2. **Brokers' Licenses: Revocation.** The State Real Estate Commission may, upon its own motion, and shall, upon the sworn complaint in writing of any person, investigate the actions of any broker and shall have power to revoke or suspend any license or certificate issued under Neb. Rev. Stat. §§ 81-885.01 to 81-885.47 (Reissue 1976) whenever the license or certificate has been obtained by false or fraudulent representation or the licensee or certificate holder has been found guilty of the following unfair trade practice, i.e., demonstrating unworthiness or incompetency to act as a broker, associate broker, or salesman. Neb. Rev. Stat. § 81-885.24 (28) (Reissue 1976).
3. ____: ____. A real estate broker's license may be suspended or revoked for misconduct occurring in a real estate transaction whether the broker is acting for himself or others.
4. **Administrative Agencies: Evidence: Appeal and Error.** In proceedings to review an order of the State Real Estate Commission, the questions to be determined are whether the order of the Commission is supported by substantial evidence, whether the Commission acted within the scope of its authority, and whether its action was arbitrary, capricious, or unreasonable.

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

Dennis E. Martin and Edward F. Pohren of Dwyer, O'Leary and Martin, P.C., for appellant.

Robert H. Petersen for appellee.

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

BRODKEY, J.

Laron L. Wright, plaintiff and appellant herein, ap-

peals to this court from a decree entered by the District Court of Douglas County, Nebraska, affirming an order of the State Real Estate Commission revoking the plaintiff's real estate broker's license. We affirm.

The facts of this case, as set out in the record made before the State Real Estate Commission which was admitted in evidence as exhibit 1 by the District Court, reveal that the plaintiff is a real estate broker residing in Broken Bow, Nebraska. Since 1971 he has made his living from the sale of real estate in that community, and was a licensed real estate broker in this state. It appears that prior to July 22, 1975, Wright was the owner of a residential dwelling, described as Lot 5, Block 23, J. P. Gandy's Addition to Broken Bow, Custer County, Nebraska. On July 22, 1975, the plaintiff entered into a purchase agreement to sell the property to Joseph and Ethel Holcomb, an elderly couple who had sold their farm in Custer County. The purchase agreement, which recited a selling price of $26,000, also provided that Wright would pay off a first mortgage to First Federal Savings & Loan Association of Lincoln and deliver the property to the Holcombs free and clear of any encumbrances. At the closing of the transaction, the Holcombs paid Wright the $26,000 agreed upon and Wright delivered to the Holcombs a survivorship warranty deed. Wright, however, did not pay off the mortgage to First Federal of Lincoln, as he agreed to do, and instead used the purchase money to pay off other debts.

In approximately February of 1977 Joseph Holcomb died, and Ethel Holcomb was subsequently placed into a rest home, and at that time the Nebraska State Bank & Trust Company was appointed the guardian of Mrs. Holcomb. It appears that during the spring of 1978 the guardian began to run low on funds for Mrs. Holcomb's support and decided to sell the property which had been purchased from the plaintiff. In April of 1978 the guardian entered into a purchase agreement with a Mr. Johnson, and it was then discovered that the mortgage

owed by the plaintiff to First Federal of Lincoln had not been paid.

In July of 1978 Charles Giles of the Nebraska State Bank & Trust Company filed a complaint against the plaintiff with the State Real Estate Commission. In August of 1978, after the complaint had been filed with the Commission, the plaintiff paid off the mortgage owed to First Federal of Lincoln.

On October 24, 1978, a show cause hearing on the formal complaint was held by the State Real Estate Commission, at which time the plaintiff and Mr. Giles both testified and certain exhibits were introduced into evidence. Following the presentation of the evidence, the Commission held a 5-minute closed session, found Wright to be in violation of Neb. Rev. Stat. § 81-885.24(28) (Reissue 1976), and revoked his real estate broker's license on the grounds that Wright's actions demonstrated his unworthiness and incompetence to act as a real estate broker. Plaintiff thereafter appealed the decision of the State Real Estate Commission to the District Court of Douglas County, on the record made before the Commission, under Neb. Rev. Stat. § 81-885.30 (Reissue 1976). In its decree dated December 21, 1979, the court affirmed the order of the Commission, finding that the Commission had acted within the scope of its authority; that there was substantial evidence to support the revocation order; and that the action of the State Real Estate Commission was not arbitrary or capricious.

The plaintiff now appeals to this court, assigning as error: (1) The court erred in determining that the Commission's order was supported by substantial evidence; (2) The court erred in determining that the action of the Commission was not arbitrary, capricious, or unreasonable; and (3) The court erred in affirming the order of the State Real Estate Commission.

It is the plaintiff's contention that after entering into the purchase agreement with the Holcombs, he told them of certain financial difficulties he had en-

countered, and had received the Holcombs' permission to use the purchase money to pay off his debts so long as they would eventually receive clear title to the residential property. We note, however, that the only evidence to this effect came from Wright, the appellant. The purchasers of the property, Joseph and Ethel Holcomb, did not testify at the trial, Joseph having previously died and Ethel having been adjudged an incompetent and placed under the guardianship of the Nebraska State Bank & Trust Company. Neither the State Real Estate Commission nor the District Court, on appeal, was apparently convinced by this testimony as indicated by the decision they rendered. It is clear from the record that Wright's primary contention in this case is that his competency to act as a real estate broker is not an issue in the matter since the property he sold was his own property, and he was not acting as a broker at any time during the transaction in question.

A review of certain applicable Nebraska statutes will be helpful at this point. All references will be to Neb. Rev. Stat. §§ 81-885.01 to 81-887.03 (Reissue 1976), which deal with the authority of the State Real Estate Commission. We point out, however, that there have been extensive amendments and modifications of the foregoing sections since 1976 which, however, are not applicable.

Section 81-885.10 provides that the Commission shall have the full power to regulate the issuance of licenses and to revoke or suspend licenses issued under the provisions of §§ 81-885.01 to 81-885.47 and to censure licensees. Section 81-885.12 sets out the personal requirements for applicants for such licenses and provides that licenses shall be granted only to persons "who bear a good reputation for honesty, trustworthiness, integrity, and competence to transact the business of broker or salesman in such manner as to safeguard the interests of the public, and only after satisfactory proof of such qualifications has been presented to the commission." That section also provides that the grounds for

suspension or revocation of a license, as provided for by §§ 81-885.01 to 81-885.47, or the previous revocation of a real estate license, shall also be grounds for refusal to grant a license.

The provisions of the statute most directly applicable to the case under consideration are in § 81-885.24, which sets out specific unfair trade practices which are grounds for revoking or suspending the license or certificate of real estate brokers. That section provides in part as follows: "The commission may, upon its own motion, and shall, upon the sworn complaint in writing of any person, investigate the actions of any broker, associate broker, salesman, or subdivider and shall have power to censure the licensee or certificate holder or to revoke or suspend any license or certificate, issued under sections 81-885.01 to 81-885.47 whenever the license or certificate has been obtained by false or fraudulent representation or the licensee or certificate holder has been found guilty of any of the following unfair trade practices: . . . (28) Demonstrating unworthiness or incompetency to act as a broker, associate broker, or salesman, whether of the same or of a different character as hereinbefore specified."

Section 81-885.25 provides that before the Commission shall censure a licensee or before revoking or suspending a license, it shall give the holder of the license a hearing on the matter and shall, at least 20 days prior to the date set for hearing, notify the license holder in writing. Section 81-885.29 provides that if the Commission shall determine that the license holder has been guilty of any of the violations previously referred to, his license shall be revoked or suspended forthwith, or the Commission may enter an order censuring a license holder. Section 81-885.30 provides that within 10 days after an order of the Commission has become final, the applicant for a license or a license holder may obtain judicial review thereof by giving notice to the director of an appeal, obtaining a certified transcript of the papers and evidence, and the payment of the required

fees, and shall, within 30 days of the entry of such order, file a petition for review in the District Court for the county where the cause of action or some part thereof arose. Section 81-885.31 further provides that in any judicial proceeding under §§ 81-885.01 to 81-885.47 the court shall consider the matter de novo upon the record. The court may on its own motion order additional evidence to be taken before it; and, in addition, any party to such review may offer additional evidence before the court upon serving 10 days' written notice of the offer on the other parties.

The principal issue in this case is whether Wright is correct in his contention that a real estate broker does not come within the purview of § 81-885.24(28) unless the acts complained of were performed in his official capacity as a licensed real estate broker. Concededly, there is a split of authority on this issue, some cases holding that the revocation of a broker's license may not be based on acts which were not performed in his capacity as broker or in the furtherance of a brokerage transaction, and other jurisdictions holding to the contrary. 12 Am. Jur. 2d *Brokers* § 21 (1964); Annot., Grounds for revocation or suspension of license of real-estate broker or salesman, 56 A.L.R.2d 573 (1957). Upon a review of the authorities, we are persuaded and convinced by the language and reasoning in cases such as *Goodley v. N.J. Real Estate Com.*, 29 N.J. Super. 178, 102 A.2d 65 (1954), in which case the court found that a real estate broker had demonstrated "unworthiness" under their statute authorizing the real estate commission to suspend or revoke the license of real estate brokers deemed guilty of conduct demonstrating unworthiness. In *Goodley*, the broker who negotiated the sale and received a commission thereon was also president of the corporation which was the grantor. The court held that the word "unworthiness," as used in the New Jersey statute, signified the lack of those ethical qualities that befit the vocation. In its opinion, the court stated:

"Goodley occupies two roles in this transaction, real estate broker and president of the corporate grantor. However, he cannot, under the circumstances here, escape a charge of unworthiness because the onus of the charge falls in part upon himself in a capacity other than as real estate broker. We conclude that under the circumstances his refusal to assist in the rectification of a default brought about by his own negligence justifies a finding of unworthiness.

"The word 'unworthiness,' in the context here, signifies a lack of those ethical qualities that befit the vocation. *Marrs v. Matthews*, 270 S.W. 586 (Tex. Civ. App. 1925); *cf. Woodstown National Bank & Trust Co. v. Snelbaker*, 136 N.J. Eq. 62 (Ch. 1944); *In re Meyerson*, 190 Md. 671, 59 A.2d 489, 490 (Ct. App. 1948). By including the matter of unworthiness in N.J.S.A. 45:15-17(e), the Legislature has charged the Commission with the high responsibility of maintaining ethical standards among real estate brokers and salesmen. The maintenance of those standards serves the vocation well. See *St. Germain v. Watson*, 96 Cal. App. 2d 862, 214 P.2d 99 (Dist. Ct. App. 1950), hearing denied by Supreme Court, 214 P.2d 106 (1950), and *Holland v. Florida Real Estate Commission*, 130 Fla. 590, 178 So. 121 (Sup. Ct. 1938), pointing out that statutes there, rather different from ours in their terms, but nevertheless along the same lines, were designed for those ends. For statutes in other states which contain the word unworthiness, see the following cases (which, however, deal with matters not pertinent here): *Leakey v. Georgia Real Estae Commission*, 80 Ga. App. 272, 55 S.E.2d 818 (Ct. App. 1949); *Feight v. State Real Estate Commission*, 151 Neb. 867, 39 N.W.2d 823 (Sup. Ct. 1949)." *Id.* at 181-82, 102 A.2d at 67.

In the recent case of *S.C. Real Estate Commission v. Boineau*, 267 S.C. 574, 230 S.E.2d 440 (1976), the court held that a realtor could have his broker's license revoked for conduct not strictly related to the transaction in which he was acting as broker. In that case,

the realtor contended that he was acting not as a real estate broker but on his own behalf, and further alleged that the statute for revocation of a real estate license applied solely to activities of a broker while acting in his capacity as a broker. In reply to that contention, the court stated:

"We disagree. Even as members of the bar are subject to disciplinary procedures for conduct not strictly related to the practice of law, realtors may have their licenses revoked for conduct not strictly related to a transaction in which they are acting as broker.

"In *McKnight v. Florida Real Estate Commission*, Fla. App., 202 So. (2d) 199 (1967) the court, discussing a similar situation, noted that 'it would be ludicrous to construe the statutes to mean that a broker to be answerable to the Real Estate Commission must commit the unlawful acts when engaged in real estate negotiations but should he commit the same unlawful acts when not engaged in real estate negotiations he would still be of good character and beyond the Commission's jurisdiction.'

. . . .

"Finally, it should be noted that § 56-1545.10 requires proof of a showing of honesty, integrity, truthfulness and good reputation for any person desiring to become a broker. It does not logically follow that an initial applicant should be required to possess higher moral standards than an experienced real estate broker." *Id.* at 579-80, 230 S.E.2d at 442.

This same argument advanced by Wright was rejected by the Commonwealth Court of Pennsylvania in *Yingling, Jr. v. State Real Est. Comm.*, 8 Pa. Commw. Ct. 556, 304 A.2d 524 (1973), a case factually similar to the instant case. In *Yingling*, the appellant broker agreed to sell his own house to a buyer for $23,000. The buyer gave the broker $6,500 as a downpayment. When it came time to close, however, the broker not only failed to appear but it was discovered that there was an outstanding mortgage against the property which had not

been paid. Despite several attempts, the broker failed to pay the outstanding mortgage and the buyers made a demand for the return of their downpayment. The broker returned only $2,500 of the $6,500 downpayment and the buyers subsequently filed a complaint with the State Real Estate Commission. In affirming an order of the commission revoking the broker's license, the court stated:

"The Commission's first conclusion of law was that it had jurisdiction. Appellant in this appeal contends that the Commission was in error relative to this conclusion of law since he was selling property that he owned and therefore was not acting as a broker under the Act. This same contention was rejected by us in *Fibus v. State Real Estate Commission*, 7 Pa. Commonwealth Ct. 74, 299 A.2d 375 (1973), where we followed *State Real Estate Commission v. Tice*, 200 Pa. Superior Ct. 553, 190 A.2d 188 (1963), and held that a broker's license may be suspended or revoked for misconduct occurring in a real estate transaction when the broker is acting for himself, as well as when he acts for others. We are not persuaded that we should abandon *Fibus* and therefore we hold that the Commission did have jurisdiction here." *Id.* at 560-61, 304 A.2d at 526-27.

In *State Real Estate Comm. v. Tice*, 200 Pa. Super. Ct. 553, 559, 190 A.2d 188, 190-91 (1963), the Superior Court of Pennsylvania stated: "The court below construed our Real Estate Brokers License Act so that it would apply only to persons in connection with an agency transaction and would not apply to a person who was selling his own property. *In our judgment, there can be no justification of an interpretation of the licensing act which would allow a broker to be honest as a broker and dishonest as a property owner.* A broker who is dishonest or incompetent in the real estate activities in which he is involved as owner, is not likely to be honest or competent in his activities which are purely brokerage in nature. *The purpose of real estate licensure is to bar the dishonest or incompetent for entry into this*

occupation: [citations omitted]." (Emphasis supplied.)

We concur with the aforementioned statements of the Pennsylvania courts as they apply to the circumstances present in the instant case. We note that in *Bartlett v. State Real Estate Commission*, 188 Neb. 828, 199 N.W.2d 709 (1972), this court affirmed the Commission's decision not to grant a real estate broker's license to a party who had passed the required examination. It was found that the plaintiff in *Bartlett* had been an insurance salesman whose insurance license had been revoked because he had engaged in multiple acts of fraud, misrepresentation, and dishonest practice. It would make little sense for this court to affirm the authority of the State Real Estate Commission to deny a broker's license for misconduct engaged in outside the real estate business, but deny the Commission such authority to revoke a license for misconduct occurring after a broker's license has been issued.

To the same general effect, see *Phillips v. Mann*, 147 So. 2d 559 (Fla. App. 1962); *Hyland v. Ponzio*, 159 N.J. Super. 233, 387 A.2d 1206 (1978); *Div. of the N.J. Real Estate Comm. v. Ponsi*, 39 N.J. Super. 526, 121 A.2d 555 (1956).

It is a well-established rule that in proceedings to review an order of the State Real Estate Commission the questions to be determined are whether the order of the Commission is supported by substantial evidence, whether the Commission acted within the scope of its authority, and whether its action was arbitrary, capricious, or unreasonable. *Haller v. State ex rel. State Real Estate Commission*, 198 Neb. 437, 253 N.W.2d 280 (1977); *Herink v. State ex rel. State Real Estate Commission*, 198 Neb. 241, 252 N.W.2d 172 (1977); *Johnson & Hartman v. State ex rel. State Real Estate Commission*, 202 Neb. 182, 274 N.W.2d 536 (1979). The term "substantial evidence" is defined in Black's Law Dictionary 1281 (5th ed. 1979) as: "Evidence which a reasoning mind would accept as sufficient to support a particular conclusion and consists of more than a mere scintilla of

evidence but may be somewhat less than a preponderance." See, also, 32A C.J.S. *Evidence* § 1016 (1964). In *Olson v. Westfork Properties, Inc.*, 171 Mont. 154, 557 P.2d 821 (1976), the court stated that for purposes of determining whether the trial court's findings are supported by "substantial evidence," that evidence is such as will convince a reasonable man and on which such man may not reasonably differ as to whether it establishes plaintiff's case; that evidence may be inherently weak and still be deemed "substantial," and one witness may be sufficient to establish the preponderance of the case. Also, in *Robertson Transport. Co. v. Public Serv. Comm.*, 39 Wis. 2d 653, 159 N.W.2d 636 (1968), the court held that "substantial evidence," such as is sufficient to support an administrative decision, is not equated with preponderance of evidence since there may be cases where two conflicting views may each be sustained by substantial evidence. Likewise, in *Consolo v. Federal Maritime Comm'n.*, 383 U.S. 607, 86 S. Ct. 1018, 16 L. Ed. 2d 131 (1966), the court held that "substantial evidence," for purposes of administrative review, must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury, and this is something less than the weight of evidence; and the possibility of drawing two inconsistent conclusions from evidence does not prevent an administrative agency's finding from being supported by substantial evidence. See, also, *Celebrezze v. Bolas*, 316 F.2d 498 (8th Cir. 1963).

We find that the evidence adduced in this case was sufficient to find that plaintiff's acts demonstrated his unworthiness and incompetence to act as a broker of real estate. The action of the State Real Estate Commission in this case is supported by "substantial evidence" as above defined and justified the order of the Commission and the decree of the District Court affirming such order. We also find that the action of the State Real Estate Commission was within the scope of its

authority, and was not arbitrary, capricious, or unreasonable.

The judgment of the District Court affirming the action of the State Real Estate Commission was correct and must be affirmed.

AFFIRMED.

VALERIUS H. DAMME AND BERNICE M. DAMME, HUSBAND AND WIFE, APPELLEES, V. NEBRASKA PUBLIC POWER DISTRICT, A PUBLIC CORPORATION AND POLITICAL SUBDIVISION, APPELLANT.

304 N.W.2d 45

Filed April 3, 1981. No. 43253.

1. **Witnesses: Testimony.** A motion to strike all the testimony of a witness should be overruled unless the entire testimony of the witness is objectionable.
2. **Eminent Domain: Evidence.** In an eminent domain proceeding a wide discretion is granted the trial judge in determining the admissibility of sales, and the evidence should not be admitted where there is a marked difference in the situation of the properties or unless the judge is satisfied that the price paid was sufficiently voluntary to be a reasonable index of value.
3. **Trial: Evidence.** Improper evidence is not made admissible merely because it is designed to meet other evidence, and this is true regardless of the propriety of the other evidence.

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

Noyes W. Rogers of Albert, Leininger & Grant for appellant.

Christensen Law Offices, P.C., for appellees.

Heard before KRIVOSHA, C.J., WHITE, and HASTINGS, JJ., and HENDRIX and KNAPP, District Judges.

HENDRIX, District Judge.

This is an eminent domain action in which the defendant, Nebraska Public Power District, hereinafter

referred to as the District, appeals from a jury verdict and judgment for the plaintiffs, Valerius H. Damme and Bernice M. Damme, hereinafter referred to as the landowners, in the amount of $14,375.

The District asserts that the case should be reversed because the trial court refused to strike certain evidence and rejected certain other evidence. We affirm.

The landowners' property consists of a 152-acre farm with about 78.6 acres of cropland in two fields, about 68.4 acres of pasture, and about 5 acres used as a building site. The building site contains a garage, four granaries, a chickenhouse, a bin with auger, two small buildings, and a house occupied by the landowners. It is located in rural Wayne County just east of Highway 15, a blacktop road.

The taking is a right-of-way easement for overhang only for the construction and operation of a 345,000-volt transmission line. The line runs along the south side of landowners' property. It enters the property 768 feet east of the west line and about 430 feet from the house. The easement itself expands to a maximum of 80 feet in width and is about 1,872 feet long. A steel lattice structure, not on landowners' property, is located about 350 feet from the house. The closest phase wire, not on landowners' property, is located about 185 feet from the house.

The question presented by the refusal of the trial court to strike concerns the testimony of Henry B. Woodard, a neighboring farmer, called by the landowners. On direct examination he testified as to facts regarding his own farming operation, the landowners' farm, his knowledge of farm sales in the area, his knowledge of the taking, and the things which would affect a prospective purchaser after the placement of the line. He further testified as to his opinion of the fair market value of the landowners' property before and after the taking and placement of the line. On cross-examination Mr. Woodard testified that the line would not interfere with farming; that the main damage was to

the house; and that only feedlots of average size were located in the area but that larger feedlots could affect the value of the residence of landowners. On further cross-examination regarding the house, he was asked if it was his opinion that the line would devalue the house by $45,000, and the witness replied, "In my opinion, if I were buying the farm, it would." Whereupon, he was asked, "Well, then, you based your opinion on what you would think if you were buying the farm?" To which the witness replied, "Yes." At this point a motion was made to strike the testimony of the witness. It was overruled, and no further questions were asked of him.

We do not construe these answers to establish a failure of the witness to use market value as a basis for his originally given figures. It was not made clear, either, that the witness failed to make the original determination upon his knowledge of the farm and experiences with the market. Rather, his remarks may well have been merely a layman's method of expressing the effect the line would have upon a prospective purchaser. In any event, while the examination of the witness, both in direct and upon cross, was carried on in great measure by leading questions and brief answers, he did testify to matters other than values, and this testimony was certainly admissible. For example, testimony of the situation of landowners' farm and the number, location, and size of surrounding feedlots would not be conditioned upon his using a proper measure of damages. The motion to strike "the testimony" amounted to a motion to strike all the testimony of the witness, was too broad, and was correctly overruled. *Neldeberg v. City of Omaha*, 124 Neb. 511, 247 N.W. 45 (1933).

The evidence rejected by the trial court consisted of testimony of the sale price of development houses near, but outside, the city limits of Omaha and about 90 miles from the property of the landowners. Specifically, the testimony proposed by offer of proof would have shown the sale price of houses in close proximity to a 345,000-volt line as opposed to the sale price of similar houses

not in such close proximity. While the houses were similar to each other, they were not similar to landowners' property. The witnesses had not determined the sales to be voluntary by talking to the buyer or seller or otherwise. It is established law in this jurisdiction that in an eminent domain proceeding a wide discretion must be granted the trial judge in determining the admissibility of sales, and the evidence should not be admitted where there is a marked difference in the situation of the properties or unless the judge is satisfied that the price paid was sufficiently voluntary to be a reasonable index of value. *Anderson v. State*, 184 Neb. 467, 168 N.W.2d 522 (1969); *Swanson v. State*, 178 Neb. 671, 134 N.W.2d 810 (1965). The proffered evidence fails in both categories. The sales sought to be shown are of properties which have no real similarities, they having the differences inherent between rural and suburban properties. The District points to the case of *Y Motel, Inc. v. State*, 193 Neb. 526, 227 N.W.2d 869 (1975), which permits evidence of sales of comparable property in other states. The difference, of course, is that in *Y Motel, Inc.*, the other properties were shown to be comparable, even though far apart in distance. In the instant case, the properties are simply not comparable.

The District further argues that the sale prices offered should be admitted as rebuttal, since one of the landowners testified without objection that nobody wants to be close to a big power line and other witnesses testified without objection that the value of the house would be reduced by virtue of the power line. From its earliest days to modern times this court has held that improper evidence is not made admissible merely because it is designed to meet other evidence, and this is true regardless of the propriety of the other evidence. *McCartny v. The Territory of Nebraska*, 1 Neb. 121 (1871); *Conley v. Hays*, 153 Neb. 733, 45 N.W.2d 900 (1951). In every eminent domain action there are alleged elements of damages which might be met by

showing sales of dissimilar properties. The reasoning required to permit the proposed evidence in this case would be a departure from precedent and logic. It would open the door to evidence where the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, and undue delay. Neb. Rev. Stat. § 27-403 (Reissue 1979).

AFFIRMED.

WHITE, J., dissenting.

I disagree. The entire basis of the landowners' claim in this case is the perceived undesirability of living in close proximity to a high voltage power line, and the negative effect on fair market value. Expert witnesses testified to the existence of that perceived undesirability and were not able to demonstrate it in fact. The appellant's attorney attempted to prove the reverse of the proposition by the most telling method — substantially identical properties, one close to a high voltage line, the other not, selling for similar prices. Whether appellant could have demonstrated that both were voluntary sales cannot be known as it was prevented from introducing such evidence. I believe the refusal to receive the evidence was an abuse of the trial court's discretion and prejudiced the appellant. The important fact, overlooked by the trial court and the majority, is the purpose for which the evidence was offered. It was proper and, accordingly, I would reverse and remand.

ROBERT C. LITZ AND GENEEN K. LITZ, HUSBAND AND WIFE, APPELLANTS, V. REX W. WILSON, APPELLEE.

304 N.W.2d 48

Filed April 3, 1981. No. 43304.

1. **Contracts: Property: Sales.** The promise in a land sales contract for the seller to convey real estate is consideration for the promise of the buyer to purchase the real estate.
2. ____: ____: ____. Where a land sales contract is executory and the vendee makes default, the remedies of the vendor are to rescind, specific performance, foreclosure of the contract as a mortgage, or bring suit for damages for the breach.
3. **Contracts: Specific Performance.** As a general rule, where a valid contract exists, which is definite and certain in its terms, mutual in obligation, and free from unfairness, fraud, or overreaching, a court will grant a decree of specific performance where the remedy at law is inadequate and specific performance will not be inequitable or unjust.
4. **Specific Performance.** The burden is on the party seeking specific performance to show his right in equity and good conscience to the relief sought by clear and satisfactory evidence.
5. **Equity: Contracts.** A court of equity will refuse to enforce a contract when it is not clearly satisfied that it embodies the real understanding of the parties.

Appeal from the District Court for Holt County: HENRY F. REIMER, Judge. Affirmed.

Edward E. Hannon of Cronin, Hannon & Symonds for appellants.

Arlen D. Magnuson for appellee.

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

RONIN, District Judge.

This is an action in equity brought by the plaintiffs, Robert C. Litz and Geneen K. Litz, husband and wife, for the specific performance of a written contract for the sale of real estate to the defendant, Rex W. Wilson. Plaintiffs seek in their petition not only to foreclose their sellers' lien upon the subject real estate but also to reform the legal description of the property. The trial

court denied specific performance and held that the contract was an option to purchase real estate which was never exercised by the defendant prior to its expiration on July 1, 1976. The plaintiff sellers have appealed. The sellers having brought an equitable action of specific performance in this case, our review on appeal is de novo.

The written contract was entered into by the parties on May 25, 1976, for the sale of an unimproved acreage just outside the city limits of O'Neill, Nebraska, and "containing approximately 17 acres." The record is undisputed that the subject real estate contained only 14.472 acres and that the plaintiffs were in error in representing to the defendant the size of the subject tract. The contract provided for a sale price of $100,000 with a downpayment of $1 which was paid by the defendant to the plaintiffs at the time of the execution of the contract. Twenty-eight thousand dollars was to be paid on or before July 1, 1976, with the remainder to be paid in equal annual payments. In June of 1976 plaintiffs' attorney, Ronald Olberding, advised defendant of an error in the legal description of the property. This error placed the property approximately 11 feet to the west of its actual location. On July 2, 1976, the defendant advised Olberding that he would not perform his part of the contract because of the error in the legal description of the real estate.

We find that the contract contained no provision for an option to purchase and that the trial court was in error in its finding that the contract provided for an option which was not exercised by the defendant. We also find that the nominal payment of the $1 provision in the contract was clearly for a downpayment and there was no liquidated damages provision for its rescission as contended by the defendant. The written contractual promise of the plaintiffs to sell and the promise of the defendant to purchase the subject real estate provide sufficient consideration for the subject written contract. Restatement of Contracts § 75 (1932); *Abel v.*

Gill, 95 Neb. 279, 145 N.W. 637 (1914). We hold that the written contract of the parties was a contract for the sale of real estate without an option provision for the defendant.

A seller under a written land contract may bring an equitable action for specific performance of its provisions. In *Colson v. Estate of Johnson*, 111 Neb. 773, 776, 197 N.W. 674, 675 (1924), our court stated: "[W]here the land contract is executory and the vendee makes default, the remedies of the vendor are to rescind, specific performance, foreclose the contract as a mortgage, or bring suit for damages for the breach." It has also been stated: "As a general rule, where a valid binding contract exists, which is *definite* and *certain in its terms*, mutual in obligation, and *free from unfairness*, fraud, *or overreaching*, a court will grant a decree of specific performance as a matter of course or right where the remedy at law is inadequate and specific performance will not be *inequitable or unjust.*" (Emphasis supplied.) *Reese v. Hatfield*, 201 Neb. 540, 543, 270 N.W.2d 898, 899 (1978). However, "[s]pecific performance of a contract by a court of equity is not generally demandable or awarded as a matter of absolute legal right, but is directed to and governed by the sound legal discretion of the court, dependent upon the facts and circumstances of each particular case." *Menke v. Foote*, 199 Neb. 800, 806-07, 261 N.W.2d 635, 639 (1978).

Our court in *Panhandle Rehabilitation Center, Inc. v. Larson*, 205 Neb. 605, 607, 288 N.W.2d 743, 745 (1980), stated: "'The burden is primarily on the party seeking specific performance to show his right in equity and good conscience to the relief sought. * * * The evidence which entitles a party to specific performance must be clear, satisfactory, and unequivocal.'"

The defendant, Dr. Rex W. Wilson, in his second amended answer alleges, among other defenses, that he was mentally incompetent to enter into a valid real estate contract when he signed the real estate agree-

ment in this case on May 25, 1976. The evidence is undisputed that the defendant suffered a stroke in 1972 and was hospitalized in Omaha, Nebraska. Dr. Harold Ladwig, a neurologist, was his treating physician, and numerous psychological tests were administered by Dr. Gerald Rosenblatt. The depositions of these medical witnesses were read into evidence and relate the acute symptoms of the severity of his stroke. It was also noted that the defendant had an alcohol intake problem for which he later received inpatient treatment from November 18, 1973, until January 16, 1974, after which he left his general medical practice and became involved with alcohol treatment programs.

In March 1976 Dr. Ladwig again examined the defendant at the request of a Dr. John Sage. Dr. Ladwig's testimony is that the defendant's judgment was definitely impaired and that he exhibited a manic-like behavior at times; that this mental condition would continue in the future; and that the defendant's impairment of judgment was sufficient that it would be difficult for him to understand all the necessary information with regard to the written contract that he signed.

The record discloses that the defendant had not received the advice of a licensed realtor or the services of an attorney prior to his signing the contract. We find that the contractual price of $100,000 for the subject unimproved real estate tract was clearly exorbitant. Another defense alleged by the defendant is that the plaintiffs represented several times to the defendant, and the written contract for sale of the real estate provided, that it contained "approximately 17 acres" whereas its actual size was only 14.472 acres. The evidence is undisputed that the plaintiffs did misrepresent the size of the subject real estate in the contract in this respect.

The issues in this action in equity must be resolved on applicable equitable principles. 71 Am. Jur. 2d *Specific Performance* §§ 52, 53 (1973). We find that any one of the defenses of the defendant would probably not be

adequate by itself to deny specific performance of the sales contract. However, we find the totality of the circumstances, which includes the impairment of the judgment of the defendant at the time of the execution of the agreement, is such that the plaintiffs have clearly failed to sustain their required burden to prove their right in equity and good conscience for the specific performance of the written real estate sales agreement.

While we would not agree with the finding of the trial court that the written sales contract was only an option, we hold that specific performance of the written contract of the parties was properly denied and plaintiffs' amended petition be dismissed for the reasons stated. The judgment of the trial court is affirmed.

AFFIRMED.

WHITE, J., concurs in result.

RICHARD A. JENSEN, APPELLEE, V. UNIVERSAL UNDERWRITERS INSURANCE COMPANY, A CORPORATION, APPELLANT.

304 N.W.2d 51

Filed April 3, 1981. No. 43314.

Insurance: Motor Vehicles. Where an excess insurance clause in a driver's automobile liability policy and a no-liability clause in the automobile owner's liability policy apparently conflict, the no-liability clause is ineffective and the driver's insurance excess.

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

Harold W. Kauffman and Eugene P. Welch of Gross, Welch, Vinardi, Kauffman, Day & Langdon for appellant.

John R. Douglas and Ronald F. Krause of Cassem, Tierney, Adams, Gotch & Douglas for appellee.

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

HASTINGS, J.

This was a suit for a declaratory judgment. The District Court was asked to determine whether or not a certain policy of insurance issued by Universal Underwriters Insurance Company, a corporation (Underwriters), afforded coverage to the plaintiff, Richard A. Jensen, against any liability which he might have as the result of an automobile accident which occurred on April 1, 1977. The court found in favor of Jensen, declaring that coverage was available, and Underwriters has appealed. We affirm.

By reason of his employment, Jensen had available for his use a certain 1976 Pontiac automobile leased by his employer, Byers Brothers, from Nishna Valley Leasing, Inc. Nishna Valley Leasing together with McAlpin Motors were corporations with common ownership who were both named as insureds under a garage liability policy, No. 483496D, issued by Underwriters. A few days prior to April 1, 1977, the 1976 Pontiac was taken into McAlpin Motors for repairs, which company loaned to Jensen as a temporary replacement automobile a 1975 Pontiac owned by McAlpin. It was this automobile which Jensen was driving on April 1, 1977, when he was involved in an accident with a pedestrian who then filed suit against Jensen seeking money damages.

At the time of the accident referred to, the Hartford Accident and Indemnity Co. had in full force and effect an automobile liability insurance policy issued to Byers Brothers which included as insureds its employees and specifically covered the previously mentioned leased 1976 Pontiac.

Although the parties tried the case as if there were no real factual issues, we are faced at the outset with some confusion as to the identity and contents of the Underwriters policy. In response to an interrogatory

served on Underwriters by Jensen requesting that the terms of the garage liability policy be set forth, Underwriters furnished what has been identified as exhibit 2. This is a series of printed insurance policy forms. The problem, however, is that they appear to be part or all of three different policies. The first series consists of two pages, the first of which is entitled "Unicover Coverage Part No. 400 Garage Insurance," and which contain, respectively, the identifications "Page 2 . . ." and "Page 3 . . . ." In addition, the first page has printed at the top "Edition September 1973," and at the bottom of both pages appears "(9-73)" and "Copyright 1973 Universal Underwriters Insurance Company." The second series is similarly captioned as "Unicover . . ." but is numbered from page 2 through page 9, and is identified as "Edition December 1978," "(12-78)," and "Copyright 1973, 1975, 1977, 1978 Universal Underwriters Insurance Company." The third group of forms is also captioned "Unicover . . . ," is numbered from page 2 through page 9, and is identified as "Edition March 1977," "(3-77)," and "Copyright 1973, 1975, 1977 Universal Underwriters Insurance Company." The remaining pages of exhibit 2 consist of computer printouts obviously purporting to identify the named insureds, the policy periods, which include the critical date of April 1, 1977, the applicability of various coverages, and other information normally found in insurance policy face sheets. However, there is nothing about any of the information contained in those printouts which identifies the effective date of any particular edition of the three groups of forms.

We would observe that although the burden of proof is on the plaintiff to furnish sufficient evidence upon which a declaratory judgment can be made, Underwriters is bound by answers to interrogatories, i.e., the representation that exhibit 2 contains the proper policy provisions, even though they may be incorrect or incomplete, as long as the applicable provisions can properly be identified and interpreted.

The two pages identified as the 1973 edition conceivably could be applicable to the April 1, 1977, accident because it is reasonable to believe that the words "Edition September 1973" and "Copyright 1973 . . ." indicate that they were in existence from and after that printed date. However, in comparing them with the nine pages of the 1978 and 1977 editions, it becomes obvious that the one for 1973 is incomplete. A reading of the entire two pages reveals no definition of the term "insured," which is critical to any insurance policy.

At the other extreme is the 1978 edition. It could not seriously be contended that a group of forms which were copyrighted in 1978 could be effective during the year 1977.

That of course leaves the remaining policy, the edition of March 1977, which in all reason and logic would be applicable to an April 1977 event. It must be assumed that when Underwriters represented that exhibit 2 comprised the policy in effect at the critical date, it meant what it said. An examination of the 1977 edition reveals a policy of insurance complete in itself.

Looking to the 1977 policy, then, it quite clearly applies to this specific hazard, i.e.: "I. ADDITIONAL DEFINITIONS . . . AUTOMOBILE HAZARD 1 . . . (3) the ownership, maintenance or use of any AUTOMOBILE owned by the NAMED INSURED while furnished for the use of any person."

Taking up for the moment the Underwriters claim made in the court below that the particular use was specifically excluded, we find the following in the policy: "II. GARAGE LIABILITY . . . EXCLUSIONS This insurance does not apply . . . (e) to BODILY INJURY or PROPERTY DAMAGE arising out of the . . . operation, use . . . of any . . . (2) AUTOMOBILE . . . (ii) while rented to others by the NAMED INSURED unless to a salesman for use principally in the business of the NAMED INSURED . . . ." However, Underwriters ignores page 6 of the insurance contract, which states as follows: "ENDORSEMENT NO. 6 CUS-

TOMER RENTAL . . . It is agreed that Exclusion (e), (2), (ii) of Section II Garage Liability is deleted in its entirety and replaced by the following Exclusion: (ii) while rented to others by the NAMED INSURED . . . unless to a customer of the NAMED INSURED while such customer's AUTOMOBILE is temporarily left with the NAMED INSURED for service, repair . . . ." Even though Jensen's possession of the 1975 Pontiac was indirectly the result of a lease of the primary automobile, the 1976 Pontiac, we believe that his possession of the 1975 automobile on the date of the accident was as a result of a temporary loan while his own automobile was being repaired. Clearly, Jensen's rental, if such be the case, came within the exception to the exclusionary section.

Finally, the critical question is whether or not Jensen was an "insured" within the meaning of Underwriters' policy. The appropriate language is found in section "IV PERSONS INSURED" of the policy. Therein it is stated: "Each of the following is an INSURED under this insurance to the extent set forth below: . . . (3) with respect to the AUTOMOBILE HAZARD; . . . (b) any other person while actually using an AUTOMOBILE covered by this Coverage part with the permission of the NAMED INSURED, provided that such other person (i) *has no automobile liability insurance policy of his (her) own, either primary or excess* . . . ." (Emphasis supplied.) Both parties agree that the particular automobile being used was covered by the policy and that Jensen had the permission of the named insured to use it.

The only problem remaining concerns the italicized portion of the last-quoted language. As earlier stated, Jensen, at the time of the accident, was covered by a policy of automobile liability insurance on the automobile which he regularly drove. That policy contained the following language: "VIII. ADDITIONAL CONDITION Other Insurance — Temporary Substitute and Newly Acquired Automobiles With respect to a *temporary substitute automobile*, this insurance shall be excess insurance over any other valid and collectible

insurance available to the *insured.*" It is the contention of Underwriters that, assuming everything else was as claimed by Jensen, he was not an insured under its policy because, to be so classified, he must have had "no automobile insurance policy of his . . . own, either primary or excess."

A similar conflict between the automobile owner's policy and the driver's policy was resolved against the position of Underwriters in *Bituminous Cas. Corp. v. Andersen,* 184 Neb. 670, 673, 171 N.W.2d 175, 176 (1969): "Where an excess insurance clause in a driver's automobile liability policy and a no-liability clause in the automobile owner's liability policy apparently conflict, the no-liability clause is ineffective and the driver's insurance excess."

Although Hartford Accident and Indemnity Co. is not a party to this action, and we are not called upon to declare its rights, in keeping with the rule laid down in *Bituminous, supra,* we agree with the judgment of the District Court that the policy of insurance issued by Underwriters affords coverage to Jensen, and that judgment is affirmed.

AFFIRMED.

JOHN C. RAGLAND AND SHIRLEY ANN RAGLAND, HUSBAND AND WIFE, APPELLANTS, V. NORRIS PUBLIC POWER DISTRICT, A PUBLIC CORPORATION AND POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLEE.

304 N.W.2d 55

Filed April 3, 1981. No. 43315.

1. **Statutes.** A statute is not to be read as if open to construction as a matter of course. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning. In the absence of anything to indicate the contrary, words must be given their ordinary meaning.

2. ____. It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language. Neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute.
3. **Governmental Subdivisions: Tort Claims: Statute of Limitations.** Where the governmental subdivision does not act on a claim within 2 years after the claim accrued and the claimant does not withdraw the claim within 2 years after the claim accrued, all suits permitted by the Political Subdivisions Tort Claims Act are barred and the additional 6-month period granted under particular circumstances does not apply.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed.

Miles W. Johnston and Daniel E. Wherry of Johnston, Grossman, Johnston, Barber & Wherry for appellants.

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

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

KRIVOSHA, C.J.

The appellants, John C. Ragland and Shirley Ann Ragland (Ragland), appeal from an order entered by the District Court for Lancaster County, Nebraska, finding that the Raglands had failed to present a written claim to the appellee, Norris Public Power District, a public corporation and political subdivision of the State of Nebraska (Norris), within 1 year from the accrual of such claim and further failed to commence an action within 2 years of such accrual, all as required by Neb. Rev. Stat. § 23-2416(1) (Reissue 1977).

While Ragland has raised both the issue concerning the sufficiency of the claim and the matter of the statute of limitations, we believe that the appeal must be decided against Ragland on the issue of the statute of limitations and we need not consider the form of the claim. We therefore affirm the judgment of the trial court.

In October of 1976, Norris, desiring to eliminate vegetation interfering with certain of its power lines, applied a chemical known as Tordon 10K to a hedgerow owned by Ragland and located generally on the Ragland property next to the county right-of-way. On June 10, 1977, Ragland appeared at the Lincoln office of Norris and informed the Lincoln office manager, Wilber Hanson, that Norris had damaged trees on Ragland's property and that Ragland wanted to be compensated by Norris. There is a dispute in the evidence concerning what, if any, written document Ragland presented at that time. Ragland maintains that he presented to Hanson a small piece of spiral note paper upon which he had written "205 x 100 = $20,500," indicating that 205 trees at $100 per tree had been damaged for a total of $20,500. Norris maintains that he simply provided Hanson with a business card on which he had written on the backside: "225 trees x 100 = $22,500." While an issue may be raised as to the sufficiency of the form of the claim, we need not decide that issue in this case. Assuming, but not deciding, that the claim was sufficient, Ragland still cannot obtain any relief in this action.

Thereafter, on June 23, 1977, Glen Schmieding wrote Ragland a letter, stating in part: "[W]e feel that a claim of $22,500 is entirely out of line." Between June 23, 1977, and March of 1979, further efforts were made by the parties to discuss the possibility of settlement, though no agreement was reached. In March of 1979 all contact between the parties regarding the hedgerow ceased. Norris made no effort to formally deny the claim unless the letter of June 23, 1977, from Norris to Ragland is considered to be such a denial. Likewise, Ragland made no effort to withdraw the claim and took no other positive action in regard to the claim until he filed suit on June 13, 1979.

The narrow question necessary for our consideration is whether the petition filed on June 13, 1979, was already barred by the statute of limitations appli-

cable to cases of this nature or whether Ragland was entitled to an additional 6 months from and after the day upon which the 2 years expired in which to file his petition.

Section 23-2416 provides as follows: "(1) Every claim against a political subdivision permitted under this act shall be forever barred, unless within one year after such claim accrued, the claim is made in writing to the governing body. Except as otherwise provided in this section, all suits permitted by this act shall be forever barred unless begun within two years after such claim accrued. The time to begin a suit under this act *shall be extended for a period of six months from the date of mailing of notice to the claimant by the governing body as to the final disposition of the claim or from the date of withdrawal of the claim from the governing body* under section 23-2405, if the time to begin suit would otherwise expire before the end of such period." (Emphasis supplied.)

Ragland concedes that his suit was not filed within 2 years from the date after the claim accrued. He maintains, however, that he has an additional 6 months in which to file the claim by reason of the final sentence of § 23-2416(1), which extends the statute of limitations for an additional 6-month period upon the happening of certain events and certain conditions. We believe that Ragland is in error in that regard.

The statute is clear beyond question that suit must be filed within 2 years after the date the claim accrued or it will be forever barred. There are but two exceptions to that provision. One is where the governmental subdivision takes some action on the claim before the 2 years has expired but at a time when less than 6 months remains for filing suit. The second occurs if the claimant withdraws his claim within the 2-year period but at a time when less than 6 months to file suit remains. Under either of those circumstances the statute of limitations is extended for an additional 6-month period from and after the date that the governmental sub-

division acts on the claim or the claim is withdrawn by the claimant. In order for the extended period to apply, one of two positive acts must occur: the governmental subdivision must act on the claim or the claimant must withdraw the claim. Absent the occurrence of either one of those affirmative steps, the statute of limitations runs at the end of 2 years from and after the date the claim accrued, and the action is barred.

In this case, Ragland concedes that the governmental subdivision did not formally take any action on his claim, though Norris maintains that its letter of June 23, 1977, was a denial of the claim. Likewise, Ragland concedes that he took no positive action to withdraw the claim before the expiration of the 2-year period. He argues, however, that if the governmental subdivision does not deny the claim before the 2 years have expired and the claimant does not withdraw the claim before that time, then the failure of either party to act shall constitute the performance of the act extending the statute of limitations. That argument does not follow from the plain language of the statute.

In adopting the act in question, the Legislature recognized that a governmental subdivision might wait until a day before the statute of limitations had run to deny a claim and thereby prevent the claimant from having an opportunity to employ a lawyer, make investigation, and file suit. For that reason, it provided that if the governmental subdivision acted on the claim before the statute of limitations had run but at a time when less than 6 months remained, an additional 6 months was to be granted to the claimant to provide him an opportunity to make the necessary investigation and file suit. Likewise, the Legislature recognized that no one could compel the governmental subdivision to act on the claim if it chose not to do so, and, therefore, the claimant would be placed in the difficult position of having lost his right simply by the inaction of the governmental subdivision. For that reason, the claimant was given the right to withdraw the claim up to 1 day before the

statute of limitations had run and thereby acquire an additional 6 months in which to obtain counsel, make investigation, and file suit. In order, however, for that right to come into being, the claimant is obligated to take an affirmative act, to wit: withdraw his claim. His failure to do so and his permitting the statute of limitations to run cannot be considered the performance of the act required by the statute, nor can the filing of a petition after the statute of limitations has run be considered the withdrawing of a claim prior to the time the statute has run.

In the instant case it is an unfortunate situation that the claim was not withdrawn before the statute had run. Ragland, however, urges us to interpret and construe the statute so as to have it read by implication that the failure to withdraw the claim before the statute runs, and before the governmental subdivision acts in denying the claim, is tantamount to denial or withdrawal and thereby causes the 6-month extension to come into effect. We are not, however, at liberty to do so.

"'A statute is not to be read as if open to construction as a matter of course. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning. In the absence of anything to indicate the contrary, words must be given their ordinary meaning. It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language. Neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute.'" *O'Neill Production Credit Assn. v. Schnoor, ante* p. 105, 108, 302 N.W.2d 376, 378 (1981); *Bachus v. Swanson*, 179 Neb. 1, 136 N.W.2d 189 (1965). The language of the statute in the instant case does not require any construction and is clear. Where the governmental subdivision does not act on a claim within 2 years after the claim accrued and the claimant does not withdraw the claim within 2 years after the claim accrued, all suits permitted by the Political Subdivisions Tort Claims Act are barred and

the additional 6-month period granted under particular circumstances does not apply. For that reason, the judgment of the trial court must be affirmed.

AFFIRMED.

DENNIS BURNHAM, APPELLANT, V. CAROLYN BURNHAM, APPELLEE.

304 N.W.2d 58

Filed April 3, 1981. No. 43447.

1. **Divorce: Appeal and Error.** An appeal in a dissolution of marriage action is reviewed de novo by this court.
2. **Child Custody.** Where the issue of child custody is involved, both the mother and the father have an equal right to the custody of their children. The test for determining custody is the best interests of the child.
3. ____ In determining which parent shall be awarded custody of the children, the court shall not give preference to either parent based on the sex of the parent.
4. ____ Although the courts should preserve an attitude of impartiality between religions and will not disqualify a parent solely because of his or her religious beliefs, we do have a duty to consider whether such beliefs threaten the health and well-being of a child.
5. ____ In determining the best interests of a child in awarding custody, the court must consider myriad factors in working toward this goal, and to hold that it may not consider religious factors under any circumstances would blind courts to important elements bearing on the best interests of the child.
6. ____ In determining the question of custody of a child, it is proper for a court to examine the impact of the parent's beliefs on the child.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Reversed and remanded with instructions.

Steven Lefler for appellant.

John S. Slowiaczek of Erickson, Sederstrom, Leigh, Eisenstatt, Johnson, Kinnamon, Koukol & Fortune, P.C., for appellee.

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

HASTINGS, J.

Dennis Burnham has appealed from an order of the District Court for Douglas County dissolving the marriage of the parties and awarding custody of their only daughter, Jaime (referred to in the decree as Jamie), to the mother, Carolyn Burnham. Appellant has assigned the following as error: (1) The court erred in placing permanent custody of the child with the mother; (2) The court erred in assessing child support in the amount of $300 to be paid by the father, such amount being clearly excessive; (3) The court erred in not allowing into evidence a video tape regarding the Tridentine Church; and (4) The court erred in overruling the motion for new trial. For the reasons to follow, we reverse the order of the District Court.

The parties were married on December 19, 1975, in Omaha, Nebraska, at St. Bernard's Catholic Church. One child was born to this union on October 2, 1976, a daughter, Jaime Burnham. Dennis is employed by the Union Pacific Railroad and grosses $19,000 per year. Carolyn works as a bookkeeper for her father and grosses $9,000 per year. The parties purchased a home during the marriage, which was awarded to Carolyn and then sold by her to Dennis. The trial court made the factual finding that both parties are fit and proper persons to be awarded the care and control of the minor child.

Most of the evidence at trial focused on the religious differences between the parties, and these differences appear to be the reason for the dissolution and custody fight. Dennis was originally a Lutheran, who converted to Catholicism so that they could attend church as a family. In approximately August of 1978 Carolyn became interested in a sect calling itself the Tridentine Church, or the Fatima Crusaders. Carolyn was encouraged to get involved in the group by her parents, and her interest intensified over the next several months. Carolyn encouraged Dennis to get involved and attend meetings. However, he refused to do so. It was

this religious disagreement that Dennis blames for beginning the problems the parties were having in their relationship. In December of 1978 Dennis learned that Carolyn and her parents did not consider that the marriage of the parties was legitimate, and that they were therefore living in sin. The reason that the marriage was not considered legitimate was that they were not married in the Fatima Crusader Church. Because of her view of her marriage, Carolyn testified that she did not consider her child to be legitimate.

Carolyn also adheres to the belief that as a member of the Tridentine Church she is bound under pain of mortal sin to educate her child in the Tridentine Church, which is considered to be the true Catholic Church by its members. It is the teaching of the church that if Carolyn did not send Jaime to a Tridentine parochial school, and it was within her power to do so, then she would be excommunicated. The church's school is in Coeur d'Alene, Idaho, where Carolyn would like to send Jaime when she is of school age and it would be financially possible to do so. One of the exhibits was a copy of the general regulations of the school and its statement of principle, including a release to be signed by the parents. The release gives full permission for the use of strict discipline and corporal punishment. It then relieves the academy, all of the teachers and school personnel, various religious leaders, and the property owners, of all responsibility for the child in case of accident or injury or any unforeseen mishap.

In a letter that Carolyn wrote to her sister-in-law, she stated: "What surprised me the most, in finding out about true Catholicism, I have discovered that there exists in this world, a master plot on the part of the Jews and Communists, to gain control of the world." This points out the anti-Semitic views that Carolyn believes are being taught by the Tridentine Church and which she testified that she believed to be true.

The evidence shows that Carolyn's parents are members of the Tridentine Catholic Church, and three

of their children are attending a Tridentine school in Spokane, Washington. One of their children, Jim, age 23, who apparently does not adhere to the same religious beliefs, has been denied communication with the family. Carolyn testified on cross-examination that she agreed with her parents not being in communication with her brother. In fact, she returned a toy to Jim that he had sent as a gift to Jaime.

Carolyn testified as follows: "Q. If Jaime did the same thing, if Jaime did not believe at the age of 14 or 15 the tenets of the Tridentine Catholic Church, would you do to her what your parents are doing to Jim? A. If she disobeys the laws of the Church, I would. Q. No room for flexibility, then? A. The laws of the Church are the laws of the Church. Q. Thank you, that's answering it. Do you anticipate that in every parent-child relationship there is going to be times of conflict? A. Yes. Q. And even though that's a natural parent-child relationship, if she disobeys the rules of the Church, you are willing to cut her off from your life? A. If Jaime does what Jim did, yes. Q. If Jaime disobeyed the laws of the Church? A. Depending on which law, how it would affect me. That's too vague. Q. That's certainly possible? A. Possible what? Q. It's possible that you could cut her off from your life? A. If she married somebody that was divorced, yes."

The appellant argues that it was error for the District Court to place the custody of Jaime with Carolyn rather than with him. This case is one of equity and is reviewed de novo. "Where the issue of child custody is involved, both the mother and father have an equal and joint right to the custody of their children. The test for determining custody, which has been reiterated by this court many times, is the best interests of the child." *Theye v. Theye*, 200 Neb. 206, 207, 263 N.W.2d 92, 94 (1978).

Neb. Rev. Stat. § 42-364(2) (Reissue 1978) states: "In determining with which of the parents the children, or any of them, shall remain, the court shall not give

preference to either parent based on the sex of the parent and no presumption shall exist that either parent is more fit to have custody of the children than the other."

On a review de novo, the parents begin with an equal right to have custody; there can be no preferences based on the sex of the parent nor are there any presumptions that one parent is more fit than another. *Meysenburg v. Meysenburg, ante* p. 456, 303 N.W.2d 783 (1981). From this base, we must then consider the evidence presented at the custody hearing to determine with which parent it would be in the best interests for the child to remain. As previously noted, the trial court found, and we agree, that both parents are fit and proper persons to have custody of Jaime.

"The courts preserve an attitude of impartiality between religions and will not disqualify a parent because of his or her religious beliefs." *Goodman v. Goodman*, 180 Neb. 83, 88, 141 N.W.2d 445, 448 (1966). However, we do have a duty to consider whether such beliefs threaten the health or well-being of the child. *Goodman, supra.* See, generally, Annot., 66 A.L.R.2d 1410 (1959). Of primary consideration is the welfare of the child, and the court must consider not only the spiritual and temporal welfare but also the minor's further training, education, morals, and the ability of the proposed guardian to best take care of the child. *Kaufmann v. Kaufmann*, 140 Neb. 299, 299 N.W. 617 (1941).

"A court's task in a child custody case is to determine which parent will better serve the best interests of the child. Myriad factors may be considered in working toward this goal. To hold that a court may not consider religious factors under any circumstances would blind courts to important elements bearing on the best interests of the child." *Bonjour v. Bonjour*, 592 P.2d 1233, 1238 (Alaska 1979).

Also considering whether it is appropriate for a court to consider religion as part of the best interests equation

was the Superior Court of Pennsylvania in *Morris v. Morris*, 412 A.2d 139, 142 (Pa. Super. Ct. 1979): "[B]oth the weight of authority and established legal principles support the proposition that it is legitimate for a court to examine the impact of the parents' beliefs on the child."

We believe that the following beliefs may have an adverse impact on Jaime: (1) The belief that she is illegitimate; (2) The willingness of Carolyn to cut Jaime out of her life if she disobeys the rules of the Tridentine Church; and (3) The racist views held by Carolyn and, apparently, by her church. Although by holding these views Carolyn has not disqualified herself from being a fit and proper person to have custody of her child, we must take all factors into consideration in determining what is in Jaime's best interests. We also note that Carolyn's desire to educate Jaime in the Tridentine school in Coeur d'Alene, Idaho, would interfere with the father's rights of visitation. There is ample evidence that the father is very close to his daughter. He has the ability and desire to take care of her in the family home. He has stated that he will look after her moral and religious training and enroll her in a Sunday school or something equivalent.

We feel that Carolyn's religious beliefs, if continued in regular practice, which she indicates will be the case, will have a deleterious effect not only on the relationship between the father and his daughter but upon the well-being of the child herself. Accordingly, we find that it would be in the best interests of Jaime to place her in the permanent custody of her father, with reasonable visitation rights by the mother.

We therefore reverse the order of the District Court awarding custody to the mother, and remand the cause with instructions to award custody to the father, Dennis Burnham. Carolyn is ordered to pay child support to Dennis in the amount of $50 per month, and will be allowed reasonable visitation.

REVERSED AND REMANDED WITH INSTRUCTIONS.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM E. SODDERS, APPELLANT.

304 N.W.2d 62

Filed April 3, 1981. No. 43574.

1. **Criminal Law: Statutes: Due Process.** In order to comport with due process of law, a criminal statute must be reasonably clear and definite.
2. **Criminal Attempt: Intent.** In order to constitute an attempt to commit a crime under Neb. Rev. Stat. § 28-201 (Reissue 1979), there must be an intentional act on the part of the defendant which would constitute a substantial step toward the completion of the allegedly attempted crime, assuming that the circumstances at the time were as the defendant believed them to be.
3. **Criminal Attempt: Proof.** The determination of whether the defendant's conduct constituted a substantial step toward the completion of the crime is a question of fact.
4. **Statutes.** Difficulty in determining the meaning of the language of a statute does not automatically render it unconstitutionally vague and ambiguous.
5. **Criminal Law: Statutes.** A defendant has no standing to challenge as vague a portion of the language of a statute which does not apply to his conduct when an unambiguous section of the statute clearly applies to such conduct.
6. **Criminal Attempt: Indictments and Informations: Case Overruled.** In the absence of a motion to quash, an information which alleges an attempt to commit an act or acts which if successful would constitute a statutory crime sufficiently charges an attempted crime so as to withstand a jurisdictional attack made for the first time on appeal. To the extent that *Gandy v. The State*, 13 Neb. 445, 14 N.W. 143 (1882), is in conflict with this opinion, it is overruled.

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

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

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

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

HASTINGS, J.

The defendant, William E. Sodders, pleaded guilty

to the crime of an attempt to commit murder in the first degree and was sentenced to a term of imprisonment of from 15 to 30 years in an institution under the jurisdiction of the Department of Correctional Services. This is a Class II felony for which the maximum sentence is imprisonment for 50 years. Neb. Rev. Stat. §§ 28-201 and 28-105 (Reissue 1979). He has appealed from an order of the District Court overruling his motion to vacate its judgment and sentence. We affirm.

The information filed charged that "on or about the 5th day of March" 1980 "William E. Sodders . . . did . . . purposely and with deliberate and premeditated malice attempt to kill Judith Sodders." The intended victim was the estranged wife of the defendant. The record reveals that the defendant entered his plea of guilty while represented by counsel. His constitutional rights and the consequences of a guilty plea were fully and clearly explained to him by the trial court, and his plea was freely, voluntarily, and knowingly entered. The facts admitted by the defendant were that he had arranged over the phone with some parties to kill his wife for a payment of $5,000, and that he had made a downpayment of $500 to the man who was to accomplish this act. The balance was to be paid after the killing. The defendant was arrested immediately after making the downpayment.

Criminal attempt is defined by § 28-201 as follows:

"(1) A person shall be guilty of an attempt to commit a crime if he:

"(a) Intentionally engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or

"(b) Intentionally engages in conduct which, under the circumstances as he believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his commission of the crime.

"(2) When causing a particular result is an element of the crime, a person shall be guilty of an attempt to commit the crime if, acting with the state of mind

required to establish liability with respect to the attendant circumstances specified in the definition of the crime, he intentionally engages in conduct which is a substantial step in a course of conduct intended or known to cause such a result.

"(3) Conduct shall not be considered a substantial step under this section unless it is strongly corroborative of the defendant's criminal intent."

The necessary elements of the crime of murder in the first degree consist of purposely and with deliberate and premeditated malice killing another person. Neb. Rev. Stat. § 28-303 (Reissue 1979).

The defendant contends that the court was in error in denying his motion to vacate the judgment of conviction because: (1) The information failed to charge the essential statutory elements of the crime; and (2) The statute relating to criminal attempt is unconstitutionally vague.

The defendant's constitutional attack is based upon his assertion that the criminal attempt statute is so complex as to be beyond ordinary comprehension and, as a result, fails to provide adequate notice of what conduct it proscribes. In order to comport with due process of law, a criminal statute must be reasonably clear and definite. *State v. Valencia*, 205 Neb. 719, 290 N.W.2d 181 (1980).

Section 28-201(1)(a) prohibits intentional conduct which is done with the requisite mens rea of the attempted crime, and which conduct would constitute the crime if all of the facts and circumstances were as the defendant believed them to be. For example, if a person purposefully and with premeditated malice aims what is believed to be a properly functioning gun at another and pulls the trigger, intending to kill such person, but the gun misfires, the actor is guilty of attempted murder in the first degree.

In adopting § 28-201(1)(b), our Legislature has accepted the position of the Model Penal Code that attempt liability is primarily concerned with the dan-

gerous disposition of the actor, rather than just the dangerousness of such actor's conduct. However, it recognizes the legal principle that the law does not seek to punish evil thought alone. Therefore, the statute requires that the dangerous disposition be manifested by some intentional act which would constitute a substantial step toward the completion of the crime if the circumstances were as the actor believed them to be. Model Panel Code art. 5, Comments (Tent. Draft No. 10, 1960); Hawaii Rev. Stat. § 705-500, Commentary at 285 (Repl. 1976). Some examples of such conduct might be: Lying in wait for the intended victim; unlawful entry into a structure where it is contemplated that the crime will take place; possession or fabrication of the material necessary to complete the act which finally would constitute the crime; or soliciting an innocent agent to engage in conduct constituting an element of the crime. Ark. Stat. Ann. § 41-701, Commentary at 92-93 (Repl. 1977); Model Penal Code § 5.01 at 48-68 (Tent. Draft No. 10, 1960). The determination of whether the actor's conduct constituted a substantial step toward the completion of the crime is a question of fact. Hawaii Rev. Stat., *supra* at 285. All questions of fact have been resolved against the defendant by his plea of guilty. We believe that the meaning of § 28-201(a)(a) and (b) is abundantly clear.

Subsection (2) of § 28-201 is, at best, perhaps inartfully drafted and unduly complex. However, difficulty in determining the meaning of the language of a statute does not automatically render it unconstitutionally vague and ambiguous. *State v. Valencia, supra.* Beyond that, as applied to the defendant in this case, it adds nothing to subsections (1)(a) and (b). It simply restates that if one purposefully and with deliberate and premeditated malice intends to kill another and engages in conduct which constitutes a substantial step in a course of conduct intending to cause such death, the actor is guilty of attempted murder in the first degree. It does appear to cover an additional situation not ap-

plicable here: where the actor does not intend to cause the specific result but engages in conduct which is *known* by him in the natural progression of events to cause such result, i.e., the actor blows up an occupied building not intending to cause the death of any people yet believing in the inevitability of this result; however, in spite of the explosion, fortuitously no one is injured. Both Arkansas and Hawaii have statutes containing almost identical language to our § 28-201(2), and in their commentaries explain the language "known to cause such a result," as we have above. Ark. Stat. Ann. § 41-701(2), Commentary at 94 (Repl. 1977); Hawaii Rev. Stat. § 705-500(2), Commentary at 284 (Repl. 1976). They also have reckless or negligent homicide statutes which permit prosecution for intentionally engaging in conduct which is known to cause death, although not intending specifically to kill. Ark. Stat. Ann. § 41-1503 (b) (Repl. 1977) provides that one is guilty of murder in the second degree if "he knowingly causes the death of another person under circumstances manifesting extreme indifference to the value of human life." Hawaii Rev. Stat. § 707-702 (Repl. 1976) includes within the definition of manslaughter "if (a) He recklessly causes the death of another person." However, in patterning Nebraska's § 28-201(2) after the criminal codes of Arkansas, Hawaii, or some other state having a similar provision, our Legislature did not see fit to also include nonintentional conduct within its murder definition, as indicated by the examples set forth above. Consequently, the "known to cause such a result" provision would not constitute an element of the crime of attempted murder.

Therefore, although we do not believe that the challenged language amounts to unconstitutional ambiguity, it is superfluous to the prosecution of the defendant here, and § 28-201(1)(b) clearly applies. The defendant has no standing to challenge as vague a portion of the language of a statute which does not apply to his conduct when an unambiguous section of the

statute clearly applies to such conduct. *State v. Shiffbauer*, 197 Neb. 805, 251 N.W.2d 359 (1977).

Defendant's other assignment of error is based in part on our holding in *In re Interest of Durand*, 206 Neb. 415, 293 N.W.2d 383 (1980). In that case we held that the information was wholly invalid because it did not describe a crime. Durand, a minor, was charged under the juvenile statutes with violating the then existing Neb. Rev. Stat. § 28-533 (Reissue 1975) (repealed in 1979), which made it a felony to "willfully and maliciously" enter a dwelling house and attempt to "rob or steal." The information in that case charged only that "said child did willfully and maliciously enter a dwelling . . . with the *intent* to steal." (Emphasis supplied.) We said that "[t]he mere entry of a building with the intent to steal, absent any attempt or the commission of a crime, is without the statute; it is not proscribed by the statute." *Id.* at 417, 293 N.W.2d at 385. Stated another way, paraphrasing from syllabus 1, the mere allegation of an intent to commit a crime, unaccompanied by an allegation of overt acts toward its accomplishment, is defective. Of course, in the instant case, the information alleged more than an intent to commit a crime; it alleged an attempt to purposely and with deliberate and premeditated malice kill another person.

Nevertheless, the defendant insists that in *Gandy v. The State*, 13 Neb. 445, 14 N.W. 143 (1882), a contempt proceeding wherein the information charged that the defendant attempted to hinder the due administration of justice, we said that there is a "necessity of stating the particular acts constituting the alleged attempt." *Id.* at 449, 14 N.W. at 145. The quotation is accurate. However, the distinguishing features of that case are that there was no statutory provision containing a definition of an attempted crime and, furthermore, Gandy had called the court's attention to the alleged defect by moving to quash the information.

As a practical matter, we believe that the information here, coupled with the statutory provisions, ade-

quately informed Sodders of the crime with which he was charged, and was sufficiently definitive so as to permit him to plead the judgment as a bar to a later prosecution. We agree with the reasoning of the Court of Criminal Appeals of Texas in the case of *Green v. State*, 533 S.W.2d 769 (Tex. Crim. 1976), in which the defendant had been charged with attempting to enter a building with intent to commit theft. "While the better practice would be to allege the act constituting the attempt, we do not conclude that the omission is fundamental error to require reversal in absence of a motion to quash. To the extent *Fonville v. State*, Tex. Cr. App., 62 S.W. 573 is in conflict, the same is overruled. Nor do we find that the failure to allege the act deprived the appellant of the opportunity to prepare a defense." *Id.* at 770. See, also, *People v. Miller*, 2 Cal. 2d 527, 42 P.2d 308 (1935); *State v. Wray*, 142 Wash. 530, 253 P. 801 (1927). It cannot seriously be contended, nor is it claimed by the defendant, that he did not understand the conduct with which he was charged or that the same was unlawful.

We hold that, in the absence of a motion to quash, an information which alleges an attempt to commit an act or acts which if successful would constitute a statutory crime sufficiently charges an attempted crime so as to withstand a jurisdictional attack made for the first time on appeal. *Nelson v. State*, 167 Neb. 575, 94 N.W.2d 1 (1959). To the extent that *Gandy v. The State, supra*, is in conflict with this opinion, it is overruled.

Considering the seriousness of the crime attempted, and the defendant's actions to accomplish its completion, we do not believe that the trial court abused its discretion in imposing the sentence which it did in this case.

The judgment and sentence of the District Court are affirmed.

AFFIRMED.

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES LOCAL 2088, APPELLEE, V. COUNTY OF DOUGLAS ET AL., APPELLANTS.

304 N.W.2d 368

Filed April 10, 1981. No. 43141.

1. **Commission of Industrial Relations: Appeal and Error.** The standard of review by the Supreme Court of orders and decisions of the Commission of Industrial Relations is generally restricted to considering whether the Commission of Industrial Relations order is supported by substantial evidence, whether the Commission of Industrial Relations acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable.
2. **Commission of Industrial Relations: Evidence.** Determinations made by the Commission of Industrial Relations in accepting or rejecting claimed comparables are within the field of expertise of the Commission of Industrial Relations and should be given due deference.
3. ____:____. Factors most often used to determine comparability are geographic proximity, population, job descriptions, job skills, and job conditions.
4. **Commission of Industrial Relations: Evidence: Appeal and Error.** Attempting to arrive at comparables requires granting some discretion to the Commission of Industrial Relations; and unless there is no substantial evidence upon which the Commission of Industrial Relations could have concluded that the counties used by the Commission of Industrial Relations did, indeed, provide comparables, we may not as a matter of law disallow the action taken by the Commission of Industrial Relations.
5. **Commission of Industrial Relations: Evidence.** Where there are local comparisons which can or should be made, they may not be disregarded if in fact it appears from the evidence that the local employers are comparable in that they meet the requirements of Neb. Rev. Stat. § 48-818 (Reissue 1978).
6. ____:____. Whenever there is another employer in the same market hiring employees to perform same or similar skills, the salaries paid to those employees must be considered by the Commission of Industrial Relations unless evidence establishes that there are substantial differences which cause the work or conditions of employment to be dissimilar.
7. **Commission of Industrial Relations: Public Officers and Employees.** No public employer shall withhold pay raises otherwise determined to be granted to public employees in a given year solely on the basis that they are then engaged in a labor dispute over a previous year's wages.

Appeal from the Nebraska Commission of Industrial Relations. Reversed and remanded with directions.

Nelson & Harding, Donald L. Knowles, Douglas County Attorney, H. L. Wendt, and John J. Reefe, Jr., for appellants.

John B. Ashford of Bradford & Coenen for appellee.

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

KRIVOSHA, C.J.

The appellants, the County of Douglas, Douglas County Social Service Administration, the State of Nebraska, and State of Nebraska Department of Public Welfare, as coemployers (Douglas County), appeal from an order entered by the Commission of Industrial Relations (CIR) fixing compensation to be paid to certain employees of Douglas County employed by the Douglas County Social Service and represented by American Federation of State, County and Municipal Employees Local 2088 (county employees). For reasons more specifically set out hereinafter, we find that we must reverse the order of the CIR and remand the matter to the CIR for further proceedings, if necessary.

American Federation of State, County and Municipal Employees Local 2088 (AFSCME), has been the collective bargaining agent of certain of the employees of Douglas County Social Service Administration since 1973 when it was voluntarily recognized by Douglas County. A collective bargaining agreement was entered into between Douglas County and AFSCME, which remained in effect until July 1, 1976.

On May 5, 1976, prior to the termination of the collective bargaining agreement, this court determined that county-level welfare employees were jointly employed by the State Department of Welfare as well as the respective counties. See *American Fed. of S., C. & M. Emp., AFL-CIO v. County of Lancaster*,

196 Neb. 89, 241 N.W.2d 523 (1976).

Apparently, by reason of our decision, Douglas County refused to negotiate a new contract with AFSCME without the State, and the State refused to recognize AFSCME. A petition for recognition was filed by AFSCME with the CIR. The CIR then joined all the counties of the state as party defendants.

After a hearing, the CIR determined that the appropriate bargaining unit for the county divisions of welfare was a county-by-county unit. An election was ordered in Douglas County. The State had favored a statewide unit. Before an election could be held, the State appealed. This court affirmed the decision of the CIR on July 5, 1978. See *American Fed. of S., C. & M. Emp. v. Counties of Douglas & Lancaster*, 201 Neb. 295, 267 N.W.2d 736 (1978). The AFSCME unit was subsequently elected as collective bargaining representative for Douglas County Social Service employees and proceeded to negotiate wages for 1979-80. Negotiations proceeded until April of 1979 when an impasse developed. After that, Douglas County took the position that no bargaining could take place concerning wages and fringe benefits because these issues were precluded from bargaining due to the state pay plan and Joint Merit System rules and regulations. As a result of the impasse, a petition was filed by AFSCME with the CIR.

Thereafter, Douglas County reconsidered its position and returned to the bargaining table. No agreement could be reached, however, and the action then pending before the CIR was reopened. Both parties presented evidence to the CIR, including various surveys taken of other communities.

Due to the apparent fact that the employees of Douglas County fall into two separate categories, i.e., (1) professional and (2) hourly and clerical workers, different surveys were offered for the two classifications. Both parties used a local survey for hourly and clerical employees and a national survey for

professional-level employees. In addition, Douglas County offered a statewide survey for each category, which the CIR rejected. Douglas County offered its data from what was defined in the record as Standard Metropolitan Statistical Areas (SMSA). Douglas County employees, on the other hand, submitted surveys developed in counties having principal cities similar to the Douglas County/Omaha configuration. Douglas County also tendered one or more Omaha-based employers, other than Douglas County, as comparable on the professional level, and included in its tender for the hourly and clerical employees Omaha-based employers engaged in the insurance and banking industries.

After analysis, the CIR arrived at one array for the professional employees and one array for the hourly and clerical employees. The array developed by the CIR for the professional employees consisted of the counties of: Pulaski, Arkansas; Peoria, Illinois; Polk, Iowa; Tulsa, Oklahoma; Dane, Wisconsin; El Paso, Colorado; Allen, Indiana; Mahoning, Ohio; Jackson, Missouri; and Sedgwick, Kansas. The array for the hourly and clerical workers determined by the CIR consisted solely of employers in the Omaha/Council Bluffs area who were all public employers, nonprofit social service agencies, and nonproprietary hospital corporations. With regard to the professional employees, the CIR rejected as comparables wages paid by Omaha-based employers other than Douglas County to professional employees "for the reason that the consistent low level of salary indicates some non-verbalized difference in the situation of these employers which would make the work, skills and working conditions not comparable." With regard to the hourly and clerical employees, the CIR rejected the banking and insurance employers because, by doing so, "we have a manageable array, having the logical consistency of being public employers, non-profit social service agencies, and non-proprietary

hospital corporations as its base. The inclusion of banks, insurance companies and a miscellaneous service company does not fit with the other categories."

Following its development of the arrays, the CIR entered an order on November 14, 1979, setting the wages for both professional and hourly and clerical employees, all as was more particularly set out in its order. The CIR then compared the fringe benefits and concluded that no adjustment was required for holidays, vacation, health, dental or life insurance, pension amounts, or pension contributions. The CIR did find that Douglas County's accumulation of sick leave was out of step with that obtained in the sample comparables and adjusted the sick leave by increasing the accumulation from 156 days to 185 days.

Douglas County has appealed from that order, assigning some 32 errors allegedly committed by the CIR in entering its order. We now find ourselves, in April of 1981, seeking to determine the appropriate wages to be paid certain employees of Douglas County for the period August 1, 1979, to and including July 30, 1980.

While Douglas County has listed numerous errors, in fact, the critical one concerning the appropriate array for each group may be considered under a broader grouping and a number may be disregarded in view of the action taken by the court in this matter.

Before proceeding, however, to examine the principal assignment necessary for consideration, we believe it is helpful if we once again articulate the rules by which this court reviews the action of the CIR. As recognized by Douglas County in its brief, the standard of review by this court of orders and decisions of the CIR is generally restricted to considering whether the CIR order is supported by substantial evidence, whether the CIR acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable. *State Coll. Ed. Assoc. & Chadron State Coll. v. Bd. of Trustees*, 205 Neb. 107,

286 N.W.2d 433 (1979); *Nebraska Assn. of Public Employees v. State*, 204 Neb. 165, 281 N.W.2d 544 (1979); *American Assn. of University Professors v. Board of Regents*, 198 Neb. 243, 253 N.W.2d 1 (1977). Moreover, we have held that determinations made by the CIR in accepting or rejecting claimed comparables are within the field of expertise of the CIR and should be given due deference. See *Fraternal Order of Police v. County of Adams*, 205 Neb. 682, 289 N.W.2d 535 (1980).

Turning then to the first group of errors assigned by Douglas County, and the one which we believe to be the most critical to our decision, we find a contention by Douglas County that the CIR erred in establishing the array upon which it determined comparables for both professional and nonprofessional employees.

There is no dispute that the CIR was acting within its statutory authority when taking such action. Under the provisions of Neb. Rev. Stat. § 48-811 (Reissue 1978), whenever any public employer and public employee or labor organization find themselves in an industrial dispute with regard to matters such as wages and fringe benefits, either party may invoke the jurisdiction of the CIR.

Neb. Rev. Stat. § 48-818 (Reissue 1978) provides that the CIR may establish or alter the scale of wages, hours of labor, or conditions of employment, or any one or more of the same. In making such finding, the act requires that the CIR establish rates of pay and conditions of employment "which are comparable to the prevalent wage rates paid and conditions of employment maintained for the same or similar work of workers exhibiting like or similar skills under the same or similar working conditions." While the language of the act is extremely clear and concise, the manner in which the CIR is to determine what is comparable to the prevailing wage rate is, under the act, left to a large extent to the discretion of the

CIR. See *Lincoln Fire Fighters Assn. v. City of Lincoln*, 198 Neb. 174, 252 N.W.2d 607 (1977).

The act does not define "comparable" nor specifically direct the CIR in the manner in which it is to make its determination. Our decisions, however, have to some extent given guidance to the CIR. In *Omaha Assn. of Firefighters v. City of Omaha*, 194 Neb. 436, 440-41, 231 N.W.2d 710, 713-14 (1975), after first quoting the provisions of § 48-818, we said: "That portion of the statute remains after an amendment by the Legislature in 1969 deleted language which restricted comparisons to 'the same labor market area and, if known, in adjoining market areas within the state and which in addition bear a generally comparable relationship to wage rates paid and conditions of employment maintained by all other employers in the same labor market area.' . . . A prevalant [sic] wage rate to be determined by the Court of Industrial Relations must almost invariably be determined after consideration of a combination of factors. . . . Under section 48-818, R.R.S. 1943, in selecting cities in reasonably similar labor markets for the purpose of comparison in arriving at comparable and prevalent wage rates the question is whether, as a matter of fact, the cities selected for comparison are sufficiently similar and have enough like characteristics or qualities to make comparison appropriate. Those determinations here were within the field of expertise of the Court of Industrial Relations, were made after a consideration and comparison of all the evidence, and the methods of selection and comparison were in accord with the requirements of section 48-818, R.R.S. 1943."

Likewise, in the case of *Crete Education Assn. v. School Dist. of Crete*, 193 Neb. 245, 252-53, 226 N.W.2d 752, 757 (1975), we attempted to define the word "comparable," saying: "Webster's Third New International Dictionary (Unabr.), p. 461, defines the word 'comparable' as having enough like character-

istics or qualities to make comparison appropriate. However section 48-818, R.R.S. 1943, further refines the definition of 'comparable' and specifies certain items to be considered in determining comparability under that section. The definition as set forth in the above section is, of course, controlling."

We then stated at 255, 226 N.W.2d at 758-59: "The Court of Industrial Relations should not be compelled to compare the same school districts in every case that comes before it involving the same school districts. The ultimate question is whether, as a matter of fact, the school districts selected for comparison are sufficiently similar to the subject district to fulfill the requirements of section 48-818, R.R.S. 1943. If they are, then there is no room for complaint. We are not prepared to say that merely because one set of school districts was deemed adequate in one case, a different set of school districts would necessarily be inadequate in a different case, particularly where different evidence is adduced."

It appears to us that what we have said with regard to school districts is equally applicable with regard to other governmental subdivisions. As a general rule it may be said that factors most often used to determine comparability are geographic proximity, population, job descriptions, job skills, and job conditions. See *Lincoln Fire Fighters Assn. v. City of Lincoln, supra.* Of necessity, attempting to arrive at comparables requires granting some discretion to the CIR; and unless there is no substantial evidence upon which the CIR could have concluded that the counties used by the CIR did, indeed, provide comparables, we may not as a matter of law disallow the action taken by the CIR.

The difficulty in attempting to second-guess the CIR is made apparent when one examines the arguments presented by both of the parties to this action. Each maintains that its particular array was the more appropriate one for reasons urged by that party.

There is, however, no scientific basis upon which one can conclude that one argument is more compelling than the other or that one array is better than the other. We therefore conclude that the CIR did not act arbitrarily or capriciously in using the communities it did in fact use in attempting to arrive at comparable wages.

The rejection by the CIR, however, of other Omaha-based employers of professionals and its further rejection of data concerning hourly and clerical workers employed by Omaha-based employers engaged in the insurance and banking industry pose a different problem and the one upon which we must find the CIR erred.

In *Omaha Assn. of Firefighters v. City of Omaha*, 194 Neb. 436, 440, 231 N.W.2d 710, 713 (1975), we noted: "Prevalent wage rates must of necessity be established by nonlocal comparisons whenever the public employer is the only employer for a specified type of work in a local labor market." It appears to us that it must therefore logically follow that where there are local comparisons which can or should be made, they may not be disregarded if in fact it appears from the evidence that the local employers are comparable in that they meet the requirements of § 48-818. In the instant case, the CIR rejected other Omaha-based employers of professionals performing duties which on their face appeared to be similar to those performed by employees of Douglas County because, as previously noted, "the consistent low level of salary indicates some non-verbalized difference in the situation of these employers which would make the work, skills and working conditions not comparable." The difficulty with that conclusion, however, is that the CIR has apparently determined that the work cannot be similar because the salaries are lower than what the CIR perceives the salary should be. In essence, then, the CIR has made a finding based upon a conclusion which, as the CIR acknowledges, is not supported by

the evidence and is nonverbalized. It may very well be that the CIR is correct in its ultimate conclusion and evidence would disclose that there are sufficient dissimilarities so as to explain the differences in the salaries paid to the employees of the other Omaha-based employers. We do not find, however, any basis in the record upon which the CIR could have reached that conclusion. If, in fact, the county employees believe that the CIR should not consider salaries paid to other social service professionals hired by other Omaha-based employers, then the county employees must bear the burden of producing evidence upon which the CIR may conclude that services performed by other such professionals hired by other Omaha-based employers are not sufficiently similar so as to fall within the meaning of comparable as defined in § 48-818. Until that evidence is produced, however, the CIR may not, in the first instance, rely upon "nonverbalized differences," nor can we conclude that reliance upon "nonverbalized differences" constitutes substantial evidence which would support the action taken by the CIR.

We are uncertain at this point what the effect of including these other Omaha-based employers in the array would be. Regardless of that fact, if relevant, they must be considered. Whenever there is another employer in the same market hiring employees to perform same or similar skills, the salaries paid to those employees must be considered by the CIR unless evidence establishes that there are substantial differences which cause the work or conditions of employment to be dissimilar. Having failed to consider the salaries paid by the other Omaha-based facilities, the order of the CIR in this matter must be reversed.

What we have said with regard to the professionals employed by other Omaha-based employers likewise applies to the hourly and clerical employees. Douglas County tendered to the CIR a number of Omaha-based employers to establish comparable wages for the

hourly and clerical employees. The CIR eliminated from that array private banks, insurance companies, and one miscellaneous company. The CIR concluded that a more manageable array would be arrived at if it used only public employers, nonprofit social service agencies, and nonproprietary hospital corporations as its base. There is, however, no evidence to support the CIR's conclusion that hourly or clerical nonprofessional employees performing work for Douglas County do not perform work which is the same or similar to that performed by hourly or clerical employees employed by insurance companies and banks, both of whom constitute a significant portion of the employee market in Douglas County, or that the conditions of employment are not the same or similar. We are unable to conclude how the CIR determined that other Omaha-based nonprofit employers should be disregarded for the professionals, while at the same time limiting their array to the nonprofit employers for the nonprofessionals. It appears to us that a receptionist, typist, or clerk/typist does, indeed, perform same or similar functions, whether employed by Douglas County or by an insurance company or banking institution. Again, absent evidence to show dissimilarities of work performed, or conditions, the CIR cannot create an array which is not reflective of the local labor market. Excluding private banks, insurance companies, or other private employers solely for the purpose of obtaining a manageable array, having the logical consistency of all being public employees, nonprofit social service agencies, and nonproprietary hospital corporations as its base, is not supported by substantial evidence in the record and likewise must be considered to have been arbitrary and capricious. We believe, therefore, that the CIR erred in not including insurance companies, banks, and other private employers in its array of clerical and hourly employees, absent other clear evidence establishing the contrary.

Douglas County also objects to the CIR using a "key job" classification comparison system in determining the appropriate wages for the various classes of employees. This method has been devised and adopted by the CIR and litigants practicing in this area as a simplified approach to cases which involve large numbers of job classifications. Thus, instead of compiling statistical data for each of 100 job classifications, for example, this approach allows the parties to identify "key classifications" and extrapolate wages for all of the others based on the historical mathematical relationship of the surveyed key classification to the other classifications within each line of progression.

The CIR has developed certain guidelines to be generally followed in using the "key job" classification. Those guidelines, in summary form, are: (1) Job descriptions exist or can be generated; (2) Job descriptions must match within 20 percent from one employer to another; (3) Wage rates surveyed must cover no less than 40 percent of the employees of the respondent employer; (4) Wage rates surveyed must cover not less than 20 percent of the total job descriptions of the respondent employer; (5) "Key classifications" together with related lines of progression must permit direct or computed establishment of at least 85 percent of the classes involved; (6) The "key classifications" or wage rates tendered should have at least one in each regular line of progression, or lines of progression should be established as comparable, or their relative market value established or apparent to the court from its previous experience; (7) The "key classifications" must be subject to checking for accuracy of assessment of job content; (8) The CIR will not average rates of adjustment where more than one classification is surveyed in any one line of progression; and (9) The CIR will not average percentages of all classifications surveyed in order to arrive at one overall percentage of adjustment.

Douglas County asserts that AFSCME failed to satisfy the requirements of guidelines (5) and (6) above. Appellants seem to be arguing that in order for a key classification approach to be valid at least 85 percent of the classes surveyed must be in line of progression. That is simply a misreading of guideline (5). The clear language of the guideline speaks about establishing wage rates of 85 percent of the classes involved in the employer's work force. Thus, what is required is a survey of key classifications designed so that, either by direct comparison or by extrapolated computation, wage rates may be established for 85 percent of the classes.

The positions surveyed by AFSCME, together with an additional position surveyed by Douglas County, fall just short of strict compliance with the 85 percent requirement. However, based upon traditional relationships between the clerical positions surveyed and others which were not, it appears that the CIR concluded that several nonsurveyed positions really fit within one of the clerical lines of progression. Taking that approach, the data offered allowed computation of wages for the required percentage of the job classifications.

We must not lose sight that the "guidelines" used by the CIR are not statutory requirements, and the failure of the evidence to strictly comply with the guidelines does not require us to find that the action of the CIR in developing the "key job" classification was arbitrary and capricious. Guidelines are nothing more than that — a framework whereby the CIR can reasonably develop comparable salaries for multiple positions without having to survey each position. Our examination of all the evidence in this record satisfies us that sufficient compliance with the guidelines were met so as to permit the CIR to reach the conclusions it did in using the "key job" classification.

With regard to guideline (6), it is clear that AFSCME did not have a key classification in every identified

line of progression. Those lines not represented by a key classification are listed in footnote 1 on page 2 of the CIR's opinion. The CIR, in its opinion and order, concluded: "It is apparent here that petitioner does not meet the requirement of one key class in each line of progression, since four or five lines of progression or family job groupings are ignored. [Footnote omitted.] Were it not for respondent's evidence, we would be obligated to evaluate petitioner's data to determine whether it met any of the secondary tests of requirement 6, supra. Here, however, respondent has provided data with which we can work, and we need pursue the technical requirements of a key classification no further." Thus, the requirements of guideline (6) were satisfied by all the evidence taken as a whole. And, secondly, the requirement concerning the lines of progression is only one option of that guideline. There are two other ways to satisfy the guideline. One is when lines of progression within the work force are comparable to one another so that the wages set for one can be used to determine the wages for the other. The other alternative way to satisfy guideline (6) is if the market value for the lines not represented by a key classification is established or readily apparent to the CIR from its own previous experience. Even without Douglas County's evidence, one or the other of these alternatives might have been satisfied. Certainly, a relationship between some of the clerical lines could have been found.

We affirm the use of the "key job" classification by the CIR in arriving at comparable salaries for public employees having a large number of classifications, and further affirm the use of those guidelines developed by the CIR for determining whether the evidence available permits the use of the "key job" classification.

Having so disposed of this issue, it is not necessary for us to give any further consideration to the other numerous errors assigned by Douglas County.

We do believe, however, that one further matter requires comment. Though it was not raised by either party, the record discloses that Douglas County may have granted to county employees not members of AFSCME a raise but withheld the same to members of AFSCME because of the existence of a labor dispute. We believe such practice is both improper and illegal. In a separate opinion in *Lincoln Fire Fighters Assn. v. City of Lincoln*, 198 Neb. 174, 187, 252 N.W.2d 607, 615 (1977), it was correctly observed: "'In an unregulated labor market, labor and management test their relative market power through bargaining. This testing may include resort to the strike or the lockout. However, the Legislature decided that the services provided by employees subject to [the CIR's] jurisdiction were too vital to allow interruption while employer and employees tested the merits of their claims by trial by battle. When discussion is barren, employers and employees in the public sector are routed [to the CIR]. Judicial mandate replaces economic power as the determinate of wages.'" We recognize, therefore, that the public employer and the public employee do not stand on the same footing as employers and employees in the private sector.

The policy of the public sector law in Nebraska is clear. It is to ensure "[t]he continuous, uninterrupted and proper functioning and operation of the governmental service . . . ." See Neb. Rev. Stat. § 48-802 (Reissue 1978). If, on the one hand, employees may not refuse to work without risk of discharge, employers may not refuse to pay employees the wage established by the governmental employer for such work.

Furthermore, Neb. Const. art. XV, §§ 13 and 15, would indicate that public employees may not be discriminated against or punished because they have sought collective bargaining and have reached an impasse with the public employer. In the case of *Local Union No. 647 v. City of Grand Island*, 196 Neb. 693, 244 N.W.2d 515 (1976), it was determined that

any attempt by management to dissuade employees from joining a union is an unfair and unlawful act. To withhold from employees the salary which the governmental employer has determined is at least the minimal appropriate wage for no other obvious purpose but to punish the public employee is not permitted.

Logic indicates to us that the wage to be paid for similar work during a given year to employees not involved in the dispute would be the minimum wage the employer could pay to those involved in the dispute. Any other conclusion would result in the employer favoring nondisputing employees over disputing employees, in violation of Neb. Const. art. XV, §§ 13 and 15.

As an example, if the public employee in this case were to dismiss its suit in the CIR, it would be paid at least that amount which the public employer has determined to be appropriate for all employees in a given year. We therefore fail to see how the existence of a labor dispute in the public sector can authorize the public employer to withhold from the public employee wages which the public employer has publicly declared to be, at a minimum, the appropriate wage for the job performed and to require the public employee to continue performing services at a wage which has been determined for a previous year and which, by the employer's own determination, is below the comparable wage.

It is therefore the order of this court that no public employer shall withhold pay raises otherwise determined to be granted to public employees in a given year solely on the basis that they are then engaged in a labor dispute over a previous year's wages. Such a declaration may, in fact, cause some disputes to become moot. It would occur to us that that would be in keeping with the policy of the entire act and consistent with the Legislature's desire that the public policy of this state be such that there be no interruption of public service. The action of the CIR in the

instant case is reversed and remanded for further proceedings in accordance with this opinion, if necessary.

REVERSED AND REMANDED WITH DIRECTIONS.

BOSLAUGH, J., concurs in result.

MARIO FEOLA, APPELLANT, V.
VALMONT INDUSTRIES, INC.,
A NEBRASKA CORPORATION, APPELLEE.

304 N.W.2d 377

Filed April 10, 1981. No. 43157.

1. **Employment Contracts: Termination of Employment.** Where an employer lawfully terminates the employment of an employee, such term of employment is not extended by the receipt of severance pay benefits provided by the employer. The payment of severance pay by the employer and the acceptance of the same by the employee generally manifests a termination of the employment relationship.
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 hiring. 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.
3. **Employment Contracts.** A provision in a contract of employment providing that the employee should have the privilege of terminating his employment at any time, with or without cause, upon written notice, and that the employer should have the same privilege, constitutes a hiring at will.
4. **Evidence: Questions of Law.** Where the essential facts presented in a case are undisputed, the decision becomes a question of law to be decided by the court, and the findings of the trial court are essentially conclusions of law.

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

Russell S. Daub of Daub, Stehlik & Smith for appellant.

John E. North and Lee H. Hamann of McGrath, North, O'Malley & Kratz, P.C., for appellee.

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

BRODKEY, J.

Mario Feola, plaintiff and appellant herein, filed suit in the District Court of Douglas County to recover the sum of $6,500 allegedly due him under the terms of a certain employee bonus plan maintained by his former employer, Valmont Industries, Inc. (Valmont), for the benefit of certain employees of that company, subject to the fulfillment of specified conditions. Plaintiff was employed by defendant company on or about May 5, 1975, as a marketing manager of the Electrical Products Division, his duties consisting primarily of being a salesman for that division. Feola was informed by his superiors in November of 1976 that his employment would be terminated due to a general work force reduction because of economic conditions. Subsequent to that notification, he remained with the company under the terms of its severance pay policy, the stated purpose of which was "to provide fairly for the separation of exempt and non-exempt salaried employees, being terminated at Company convenience, by providing an equitable severance pay as set forth in this policy"; and pursuant to that plan he was paid 10 weeks of severance pay, and was afforded the opportunity of endeavoring to obtain new employment. This pay continued until February 4, 1977, at which time Feola notified Valmont that he had obtained other employment.

Valmont filed an answer to plaintiff's petition, alleging that Feola was not an eligible participant on its payroll on December 25, 1976, as required by the terms of the bonus plan under consideration. During the pendency of the proceedings prior to trial, both the plaintiff and the defendant filed motions for summary judgment, which were denied by Judge

Richling for the reason that there remained genuine issues of material facts to be determined. At the close of the plaintiff's case-in-chief at the subsequent trial, the defendant renewed its motion for summary judgment and also moved for a directed verdict of dismissal, which motions were sustained by the trial judge, who thereafter dismissed the case and discharged the jury. Plaintiff's motion for a new trial was overruled, and he now appeals to this court.

In view of the fact that a partial trial was had after defendant's motion for summary judgment was overruled, we consider the validity of the actions taken by the trial judge, in this case Judge Gitnick, on the basis of the principles of law applicable to motions for directed verdict. In *Foremost Ins. Co. v. Allied Financial Services, Inc.*, 205 Neb. 153, 286 N.W.2d 740 (1980), we set forth the rule as follows: "It is well settled law in this state that the party against whom a verdict is directed is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence. It is only when the facts are conceded, undisputed, or are such that *reasonable* minds can draw but one conclusion therefrom that the trial court must decide the question as a matter of law and not submit it to a jury." See, also, *Novotny v. McClintick*, 206 Neb. 99, 291 N.W.2d 252 (1980); *Woodsmall v. Marijo, Inc.*, 206 Neb. 405, 293 N.W.2d 378 (1980).

In this case a great number of the determinative facts were stipulated between the parties prior to trial, among which were the following:

1. That Mario Feola was employed by Valmont on or about May 5, 1975, under the terms and conditions of a letter from Al Hunt, a personnel representative of Valmont, to Feola dated March 25, 1975. The letter referred to, which was incorporated into the stipulation by reference, after confirming the plaintiff's decision to become employed by Valmont and

setting out the terms of his salary, also provides: "It is our understanding that during your employment with Valmont you will, of course, devote your full time to the interest of Valmont and not be engaged in other commercial pursuits. You shall have the full privilege of terminating your employment with Valmont Industries, Inc. at any time, with or without cause, upon written notice and Valmont shall have the same privilege."

2. During the term of his employment Feola worked as an administrative employee at Valmont.

3. At all pertinent times Valmont had in effect a severance pay policy, No. 274, dated January 1, 1975. A copy of that plan was also incorporated into the stipulation by reference.

4. On December 10, 1976, Tom Whalen (the personnel director for Valmont) sent to Feola a letter enclosing a document entitled "Severance Pay Eligibility Form" to be completed and returned by December 13, 1976. The aforementioned document was returned by Feola, executed by Feola and dated December 10, 1976, and read as follows: "I certify that during the weeks of Nov. 20 - Dec. 3, 1976, and Dec. 6 - Dec. 10, 1976, I have been unable to secure similar employment. I understand that I am receiving severance payments under terms of Policy #274, the contents of which was explained to me on termination. /s/ Mario Feola Returned to Tom Whalen." Identical forms were executed by Feola between December 10, 1976, and January 31, 1977. The December 10, 1976, letter and Severance Pay Eligibility Form were incorporated into the stipulation by reference.

5. Between November 13, 1976, and February 4, 1977, Feola actively sought alternative employment with other firms. On or about January 31, 1977, Feola was employed by Power Enterprises, Inc., of New Orleans, Louisiana.

6. Plaintiff's base rate of pay at Valmont at the time of his termination was $26,000 per year. For the fiscal

year 1976, the earnings per share were $3.60. If plaintiff was eligible under the terms of the plan and if the court finds that the payment was not a gratuity and defendant was thus legally obligated to pay plaintiff a bonus under the plan, plaintiff is entitled to receive a $6,500 bonus. This statement does not constitute a stipulation as to the merit of the defenses raised by defendant that payment under the plan was a gratuity and that plaintiff was not an eligible administrative employee under the plan.

At this point it will be helpful to examine the two plans in effect at Valmont at all times material to this litigation. The bonus plan involved in this litigation was received in evidence as exhibit 3, and entitled "ADMINISTRATIVE BONUS PLAN — 1976." In general, the plan provides that it is applicable to administrative employees of Valmont, and is effective for the year 1976. It states that the purpose of the plan is to build into the compensation plan for administrative employees a direct financial reason for striving continually for more effective operation of the business. It is further provided that the plan shall be administered by the president of the company, and in applying and interpreting the provisions of the plan, his decision shall be final.

Paragraph V of the plan is as follows, and we quote it in full: "V. ELIGIBILITY FOR PARTICIPATION "All Administrative Employees who are not included under another type incentive plan. Payment will be based upon a time period as a percentage of the total twelve months, with the exception that no one employed after October 1, 1976, will be eligible to receive any bonus under the 1976 Bonus Plan."

Paragraph VII is entitled "AMOUNT OF PAYMENTS," and subsection B thereof provides as follows: "B. Allocation to individual employees is subject to individual appraisal; however, total bonus payout under this Plan will remain the same."

Another very pertinent provision contained in the

plan is paragraph X entitled "SEPARATIONS." That paragraph reads as follows: "Payment will be made only to eligible participants who are on the payroll on December 25, 1976, the end of the fiscal year. However, pro-rata payment will be made to participants retiring during the Plan year and to the estates of participants who die during the Plan year."

Finally, paragraph XI, entitled "REVISION OR DISCONTINUANCE OF THE PLAN," provides as follows:

"This Bonus Plan shall not create any rights of future participation therein of any employee nor limit in any way the right of the Board of Directors to modify or to rescind the Plan in whole or in part. No person eligible to receive any payments shall have any right to pledge, assign, or otherwise dispose of any unpaid portion of such payments.

"In the event that the minimum profit level of $2.85 per share for the Fiscal Year 1976 is not met, no bonus will be paid."

We now set out certain pertinent provisions of Valmont's "Severance Pay Policy" as set forth in exhibit 4 received in evidence at the trial. After reciting that the policy and procedure covers severance pay for exempt and nonexempt salaried employees of Valmont and that its purpose is to add to the employees' feelings of economic security, to provide an alternative to retaining employees in the company in excess positions, and also to minimize public relations damage by separated employees, that document, bearing an effective date of January 1, 1975, specifically states that it is the policy of Valmont to provide fairly for the separation of exempt and nonexempt salaried employees, being terminated at company convenience, by providing an equitable severance pay as set forth in the policy.

Section III E thereof specifically provides: "Severance will be made at what would have been the separated employees regular pay intervals until the

allowance is exhausted; except, however, when the separated employee secures other employment at a similar pay rate, severance payments will cease. The separated employee must certify at receipt of each severance that employment has not been secured." Also, section III I provides: "Determination of severance pay and interpretation of this policy shall be the joint responsibility of the department head and the Director of Personnel."

The evidence is undisputed that Feola was originally employed by Valmont under an oral contract of employment, later confirmed by letter, but that the employment contract was not for any specific period of time, nor was there a termination date specified. That being so, it is clear that his employment, under Nebraska law, was terminable at will, even without reference to the specific provision contained in the letter of confirmation of Feola's employment stating that Feola "shall have the full privilege of terminating your employment with Valmont Industries, Inc. at any time, with or without cause, upon written notice and Valmont shall have the same privilege." In the recent case of *Mau v. Omaha Nat. Bank*, 207 Neb. 308, 299 N.W.2d 147 (1980), we stated the rule to be that 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 hiring. We also held in *Mau* that 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. It is clear from the specific provisions of the contract of employment of Feola, as well as from the established case law in Nebraska, that Valmont had a perfect right to terminate Feola's employment

and acted within its legal rights in so doing, which the record in this case reveals was done as a result of economic necessity in the reduction of the work force of the company; and plaintiff's contentions to the contrary, as contained in his third amended petition, that he was discharged without "good cause," is clearly without merit.

It is clear that Feola's employment was terminated by the company as of November 26, 1976. It is also clear from the specific provisions of the bonus plan that in order to be eligible for the bonus, Feola had the burden of proving that he was an administrative employee of Valmont on December 25, 1976. By virtue of the stipulation entered into between the parties, there is no dispute that he was an administrative employee of Valmont prior to November 26, 1976. We must, therefore, next consider his status as an employee between November 26, 1976, and February 4, 1977, at which time his benefits under the severance policy ceased and he entered upon the duties of his new employment. The essential question to be determined is whether his participation in the company's severence pay policy after his notice of termination had the effect of extending his employment to and past December 25, 1976.

Plaintiff relies heavily upon the case of *Kruzer v. Giant Tiger Stores*, 39 Ohio Misc. 129, 317 N.E.2d 70 (1974), in support of his contention that he was "on the payroll" as of December 25, 1976. In *Kruzer*, the plaintiff was a former employee of the defendant seeking profit-sharing benefits for 1968. The profit-sharing plan in that case expressly required that to qualify for participation a person must be "in the employ" of the employer on the particular employer's anniversary date, which was specified to be the last day of the particular "plan year." The plaintiff in that case was told on December 6, 1968, that his services were being terminated; but he was, however, paid "final checks and severance pay," representing

the amount of compensation the plaintiff would have been entitled to receive for services through January 4, 1969. The court in *Kruzer* held that the mere continued payment of the equivalent of plaintiff's regular salary constituted the keeping of the plaintiff "in the employ" until the critical anniversary date of the bonus plan, the court stating: "There is no question that the employer here intended, as a voluntary act, to maintain the plaintiff on the payroll until after the first of January, and, therefore, he was in the employ of the defendant on the anniversary plan date of the defendant, although he performed no services." *Id.* at 135, 317 N.E.2d at 74. In his brief on appeal, the plaintiff states that the court in *Kruzer* noted that extensive research failed to disclose any cases directly on point. However, in Shepardizing the *Kruzer* case, we have been able to locate a very recent case taking the opposite view from *Kruzer*, and whose language, reasoning, and statements of law are persuasive. That case is *Compton v. Shopko Stores, Inc.*, 93 Wis. 2d 613, 287 N.W.2d 720 (1980), which case involved an action by an employee to recover an executive bonus where the executive had been discharged for a good cause. The facts involved in *Compton* are similar to those in the instant case, except that in *Compton*, as was also true in *Kruzer*, the employee performed no services for his employer after the date of his discharge. However, the law discussed by the court in *Compton* is pertinent and helpful to a decision in this case. In *Compton*, the Supreme Court of Wisconsin held that his employment ended on the date of discharge for purposes of the employer's rule requiring the executive to be employed at the end of the fiscal year in order to be eligible for the bonus, and the fact that the executive received severance pay for the period ending on the last day of the fiscal year did not extend his employment for purposes of the bonus plan. In its opinion, the court stated at 621-23, 287 N.W.2d at 724-25: "The issue is whether

he was employed by Shopko during this period so as to make him eligible for an executive bonus payment under company rules and policies. Counsel seems to argue that because Compton is not eligible for unemployment compensation benefits, he must be an employee of Shopko. In any event, the Unemployment Compensation Act, in contrast to its definition of 'unemployment,' also defines 'employment' as 'service . . . performed by an individual for pay.' Sec. 108.02(5)(a), Stats. The purpose of the Unemployment Compensation Act is to 'cushion the cruel blow of unemployment,' *Salerno v. John Oster Mfg. Co.*, 37 Wis. 2d 433, 441, 155 N.W.2d 66 (1967); to minimize the loss of income from unemployment, *Kessler v. Industrial Comm.*, 27 Wis. 2d 398, 401, 134 N.W.2d 412 (1965); and to mitigate economic loss to a worker, *Milwaukee Transformer Co. v. Industrial Comm.*, 22 Wis. 2d 502, 511, 126 N.W.2d 6 (1964). If a person is receiving income in the form of severance pay, he has no need for unemployment compensation; the purposes for which unemployment compensation was established are being accomplished by severance pay.

"Severance pay, by definition, means compensation given to an employee upon the severance of his employment relationship with his employer. Contrary to the trial court's conclusion, severance pay does not extend the employment period, but terminates it.

"The general effect of severance pay is discussed in *Annotation, Construction and effect of severance or dismissal pay provisions of employment contract or collective labor agreement*, 40 A.L.R.2d 1044, 1045 (1955):

"'"Dismissal compensation may be defined as the payment of a specific sum, in addition to any back wages or salary, made by an employer to an employee for permanently terminating the employment relationship primarily for reasons beyond the control

of the employee." Such compensation, more recently often referred to as "severance pay," is usually associated with a termination of the employment relationship for reasons primarily beyond the control of the employee; its purpose is to assure a worker whose employment is terminated funds to depend upon while he seeks another job. . . .' (Footnotes omitted.)

"The term 'severance pay' is defined in *Republic Steel Corp. v. Maddox*, 275 Ala. 685, 689, 158 So. 2d 492, 494 (1963), reversed on other grounds, 379 U.S. 650 (1965), as follows:

"'Severance pay, by its very definition, means compensation due an employee, upon the severance of his employment status with the employer. He must accept his discharge as final before any claim for severance pay can be made. A payment of severance pay by the employer and the acceptance of the same by the employee would, in our opinion, be the complete manifestation of the termination of the employment relationship. A claim for severance pay could never arise during the employment relationship of the parties. . .'

"It has also been stated that severance pay is a form of compensation for the termination of the employment relation primarily to alleviate the consequent need for economic readjustment. *Mace v. Conde Nast Publications, Inc.*, 155 Conn. 680, 683, 237 A.2d 360, 361 (1967); *Adams v. Jersey Central Power & Light Co.*, 21 N.J. 8, 13, 14, 120 A.2d 737, 740 (1956). Severance pay is accumulated compensation for past services. *Botany Mills, Inc. v. Textile Workers Union*, 50 N.J. Super. 18, 30, 141 A.2d 107, 113 (1958); *Mace v. Conde Nast Publications, Inc., supra*, at 683, 237 A.2d at 361; *Owens v. Press Publishing Co.*, 20 N.J. 537, 546, 120 A.2d 442, 446 (1956)."

The court also had this to say with reference to the *Kruzer* case relied upon by plaintiff in this action: "Compton places considerable reliance on *Kruzer v. Giant Tiger Stores, Inc.*, 39 Ohio Misc. 129, 317

N.E.2d 70 (1974). This is a county court case and concerns an employee's rights under pension and profit sharing plans. We do not consider it persuasive authority for the proposition that severance pay paid to a discharged employee on the date of discharge extends employment beyond the date of discharge." *Id.* at 623-24, 287 N.W.2d at 725.

In its opinion the court also stated:

"The trial court in the instant case found that the discharge of Compton was for good cause attributable to the employer. This finding is not challenged on appeal, and thus, the cases cited are not applicable. It has been held that where an employee was discharged for good cause prior to distribution of the proceeds of a general bonus plan, the discharged employee was not entitled to participate in the bonus plan. *Molburg v. Hunter Hosiery, Inc.*, 102 N.H. 422, 158 A.2d 288 (1960); *Croskey v. Kroger Co.*, 259 S.W.2d 408 (Mo. App. 1953); *Watwood v. Potomac Chemical Co.*, 57 N.J.E. 631, 42 A.2d 728 (1945). See: *Annotation, Rights and Liabilities as between employer and employee with respect to general bonus or profit-sharing plan*, 81 A.L.R.2d 1066 (1962).

"The contract in this case required Compton to be employed at the end of the fiscal year, February 22, 1975. Since he was not employed by Shopko at that time, he was not entitled to receive a bonus for the 1974-75 fiscal year." *Id.* at 627, 287 N.W.2d at 727.

We also note that in Black's Law Dictionary 1232 (5th ed. 1979) the term "severance pay" is defined as: "Payment by an employer to employee beyond his wages on termination of his employment. Generally, it is paid when the termination is not due to employee's fault and many union contracts provide for it."

In his appeal to this court, plaintiff has contended that, contrary to the finding of the trial court, the bonus plan was not a gratuity but rather was a unilateral contract enforceable by the plaintiff. Since, as we have demonstrated, Valmont was perfectly

within its rights in terminating Feola's employment in response to economic problems in the division, the fact of Feola's termination makes moot any question as to whether the bonus plan was a gratuity or a unilateral contract, since Feola did not satisfy the conditions precedent necessary to be entitled to the bonus. As previously stated in *Compton v. Shopko Stores, Inc.*, 93 Wis. 2d 613, 623, 287 N.W.2d 720, 725 (1980): "A payment of severance pay by the employer and the acceptance of the same by the employee would, in our opinion, be the complete manifestation of the termination of the employment relationship. A claim for severance pay could never arise during the employment relationship of the parties. . ." While plaintiff contends that at least he was "on the payroll" on December 25, 1976, since he was receiving checks for severance pay, we note that the bonus plan specifically provides that payment will be made only to *eligible participants* who are on the payroll on December 25, 1976. The plan, in defining "eligibility for participation," specifically covers *"[a]ll administrative employees* who are not included under another type incentive plan." (Emphasis supplied.) This clearly indicates that to be entitled to a bonus, the applicant must be an employee. As a matter of fact, the plan requires that he be an "administrative employee" on December 25, 1976. As stipulated, it is clear that Feola was an administrative employee up to November 26, 1976; but we conclude that on that date his status as an administrative employee terminated and he obtained a new status as a "separated employee" under the terms of the severance pay policy, the stated purpose of which was principally to afford terminated employees an opportunity to search for new employment and to receive a certain amount of income during that period to support them in their endeavors.

In connection with the effect of an employer's discretionary determination of whether to pay a bonus, see, *Parrish v. General Motors Corporation*, 137

So. 2d 255 (Fla. App. 1962); *Mosow v. National Lock Co.*, 119 Ill. App. 2d 232, 255 N.E.2d 500 (1970); and Annot., 43 A.L.R.3d 503 at 531-32 (1972). We conclude from a review of the terms of defendant's bonus plan and severance pay policy, as well as the evidence presented in the record of this case, that the decision as to whether or not a bonus would be paid was one within the discretion of the president and board of directors of Valmont who, in their discretion, lawfully terminated Feola's employment on November 26, 1976; and we determine that he was not an administrative employee of Valmont on December 25, 1976. In announcing his decision following the trial of this matter, the trial judge stated: "I don't think the contract is ambiguous. I find as a matter of law that the plaintiff was not an administrative employee on December 25, 1976; that as a result, he was not an eligible participant under the term of the Administrative Bonus Plan of 1976 by reason of his termination and severance from employment effective on November 26, 1976." The material facts of this case are essentially undisputed. The law is well settled that in such a situation the case only presents questions of law for the court, and the findings of the trial court are essentially conclusions of law. See *Compton v. Shopko Stores, Inc.*, *supra*. We agree with the conclusions of the trial court and conclude that the trial judge did not err in directing a verdict for the defendant on its motion for directed verdict and his dismissal of plaintiff's petition.

One further matter should be mentioned. Plaintiff also assigns as error the refusal of the trial court to admit the evidence of his witness, Nancy K. Meier, whose testimony was proffered for the purpose of impeaching certain statements made by another witness of the plaintiff, Tom Whalen, the personnel manager of Valmont. The trial court apparently ruled that such impeachment testimony was not permissible during plaintiff's case-in-chief, but could

only be used, if at all, as a rebuttal testimony. The court also based its ruling on the fact that the witness Nancy Meier was not endorsed on the list of witnesses to be called as determined during the pretrial conference. It is, of course, well settled that a witness may be called for impeachment purposes, even though the name was not listed among the witnesses to be called by a party in establishing its case-in-chief. However, we believe the court erred in its conclusion that the impeachment must be done during rebuttal evidence, and was not permissible during the case-in-chief. Be that as it may, however, the plaintiff made an offer of proof as to the nature of the testimony which would have been given by the witness Nancy Meier. The offer of proof failed to show that witness Meier would have testified that she was receiving severance pay on or before December 25, 1976, as was the plaintiff, when she received a bonus from the company nor that she was employed in the division for which Mr. Whalen had responsibility. The offer failed to include a statement that she was a "separated employee" on that date, which would indicate she was not in a separated status, but was still regularly employed in an administrative capacity. We conclude that the error, if any, was without prejudice to plaintiff's case, and that the assignment of error is without merit.

In view of what we have stated above, the judgment of the trial court must be, and hereby is, affirmed.

AFFIRMED.

ROBERT NIELSEN ET AL., APPELLANTS AND CROSS-APPELLEES, V. SANITARY AND IMPROVEMENT DISTRICT NO. 229 OF DOUGLAS COUNTY, NEBRASKA, ET AL., APPELLEES, HAWKINS CONSTRUCTION COMPANY, APPELLEE AND CROSS-APPELLANT, FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF LINCOLN, INTERVENOR-APPELLANT.

304 N.W.2d 385

Filed April 10, 1981. No. 43301.

1. **Sanitary and Improvement Districts: Derivative Actions.** In a derivative action by a taxpayer on behalf of a sanitary and improvement district the taxpayer has no rights greater than the rights the district itself possesses.
2. **Sanitary and Improvement Districts: Special Assessments.** In order to render an assessment for improvements valid, the improvements may be constructed only on land in which the public has title or at least a valid easement.
3. **Res Judicata.** For purposes of res judicata, a judgment decides all issues essential to support it and those assumed or decided in leading to and supporting the final conclusion as well as the ultimate decision.
4. ——. Any right, fact, or matter in issue, and directly adjudicated upon, or necessarily involved in, the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies whether the claim or demand, purpose, or subject matter of the two suits is the same or not.
5. **Judgments: Collateral Attack.** As a general rule, domestic judgments cannot be collaterally attacked or impeached by the parties for fraud or collusion not going to the jurisdiction, and consent judgments are as conclusive on collateral attack as judgments rendered after trial.
6. **Judgments.** In cases involving public interests where the public was a party merely by representation, the persons represented may show fraud or collusion in obtaining the judgment.
7. **Appeal and Error.** Questions not presented to or passed upon by the trial court will not be considered on appeal.

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

Daniel G. Dolan of Daniel G. Dolan, P.C., and August Ross of Ross & Mason for appellants Nielsen.

John W. Delehant and James D. Sherrets for intervenor-appellant First Federal.

Walsh, Walentine, Miles, Fullenkamp & O'Toole for appellee SID.

Dennis E. Martin and Edward F. Pohren of Dwyer, O'Leary & Martin, P.C., for appellee Hawkins.

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

MCCOWN, J.

This is an action by plaintiffs on behalf of themselves and all taxpayers in Sanitary and Improvement District No. 229, to declare void and enjoin the payment of warrants issued by the district to defendant Hawkins Construction Company for the construction of certain improvements, including paving, sewers, and related work. The District Court found that plaintiffs had no greater right than the sanitary and improvement district to assert the invalidity of the warrants, and that plaintiffs' claims were barred by certain consent decrees previously entered into between Sanitary and Improvement District No. 229 and the mortgagees and owners of the property on which the improvements were constructed. The District Court dismissed the plaintiffs' petition and this appeal followed.

Plaintiffs are the owners of a residence located within the boundaries of Sanitary and Improvement District No. 229 of Douglas County, Nebraska, which was duly formed on December 1, 1971. Among the petitioners for the creation of the district were the developers of The Knolls apartment complex, a joint venture formed by Edward E. Wilczewski and Hawkins Investment Co. Limited Partnership No. 1. The developers were the owners of property in The Knolls Addition which is the subject of this action.

Following the creation of the district the developers requested the board of trustees of the district to

construct certain pavement, sewer, and other public improvements on dedicated rights-of-way or on permanent easements. No written easements were given. The then constituted board of trustees of the district approved a resolution of advisability and necessity to construct the improvements in dedicated rights-of-way on the properties owned by the developers. On August 25, 1972, following public bidding in which Hawkins was the low bidder, the board of trustees of the district accepted the bid of Hawkins Construction Company in the sum of $984,573.26.

The warrants the plaintiffs seek to void were issued by the district to Hawkins as the work progressed upon receipt of pay order estimates from the engineering firm supervising the construction. Hawkins did not retain the warrants but sold them to Chiles, Heider & Co., which in turn sold the warrants to the general public. Current warrant holders have not been paid nor have they been joined as parties in this litigation.

Subsequent to the construction of the improvements in question, as well as the construction of three apartment complexes, the developers met with financial difficulties and the separate tracts of land on which the apartment complexes are located were foreclosed and purchased at the foreclosure sale by the respective mortgagees, Occidental Life Insurance Company, First Federal Savings and Loan Association of Lincoln, and Banco Mortgage Company.

On November 17, 1977, the then board of trustees of the district levied special assessments against the three properties then owned by the three lending institutions for the total project cost, including engineering and legal costs, plus interest, in the total amount of $1,569,311.22. The respective benefits sought to be apportioned against the owners were: Occidental Life Insurance Company, $433,185.83; First Federal Savings and Loan Association, $759,641.23; and Banco Mortgage Company, $376,484.16.

Each of the three owners thereafter appealed the assessment to the District Court for Douglas County and each alleged, among other things, that the improvements which formed the basis for the special assessments were constructed on private rather than public property, and that the levy and assessments were therefore void. The district's answers affirmatively alleged that predecessors in title had given both oral and written dedications to the district across the property upon which the improvements were made.

The parties entered into settlement negotiations in each of the three cases and on December 8, 1977, the District Court entered a consent decree in each case finding that the properties were not specially benefited to the extent levied and that each assessment should be reduced to a specific amount which was to be paid on or before December 12, 1977. The amounts in each case were: Occidental Life Insurance Company, $165,757.40; First Federal Savings and Loan Association, $411,124.37; and Banco Mortgage Company, $151,157.67. The total settlement amount was $728,039.44. Collateral to the decrees the three lending institution owners released the district from its future responsibility to maintain the improvements, and the district assigned whatever claim the district may have had because of defects in the improvements to the owners.

There was evidence that the settlement was beneficial to the district. There was a genuine question as to the validity of the assessments. There was evidence that had the assessment been made in accordance with standard subdivision practice, approximately $345,000 of the total amount would have been a general obligation of the district rather than being assessed against the three particular property owners involved. There was also evidence that the yearly maintenance cost assumed by the three property owners would be $10,000 to $12,000 per year and that

because the settlement amount was paid immediately in cash rather than spread over 10 years, the district achieved a benefit of $234,000 in connection with the sale of its bonds.

At the conclusion of the trial in the case at bar the District Court found that a substantial amount of the improvements involved here were constructed on private property, did not constitute public improvements within the authority of the district, and were, in fact, for the use and benefit of the developers. The court also found that the three owners and mortgagees did not give the district valid easements for the construction of the improvements and that no easements existed by operation of law.

The District Court also found that the plaintiffs had no right to assert the claim of invalidity of the warrants and the construction work since they had no greater right than Sanitary and Improvement District No. 229, and that the plaintiffs' claims in the case at bar were barred by the consent decrees entered into by the district and the mortgagees and owners of the private property in the assessment cases.

Finally, the court found that the consent decrees entered by the District Court in the Occidental, First Federal, and Banco cases were binding and conclusive on the issues raised by the plaintiffs in the case at bar, and that it is implicit in the findings in those three respective lawsuits that the question of improvements constructed on private property as asserted by the plaintiffs in the case at bar was decided by the District Court and therefore precluded from determination in the case at bar. The District Court therefore dismissed plaintiffs' petition and this appeal followed.

The petition of First Federal Savings and Loan Association, which had intervened, seeking a conditional refund of special assessments paid under the consent decree, was also dismissed.

The action here is essentially a derivative action by the plaintiffs as resident taxpayers of the district. In such a derivative action by a resident taxpayer on behalf of the sanitary and improvement district, the plaintiffs have no rights greater than the rights the district itself possesses. *Pedersen v. Westroads, Inc.*, 189 Neb. 236, 202 N.W.2d 198 (1972). See, also, 64 C.J.S. *Municipal Corporations* § 2138(a) (1950); 74 Am. Jur. 2d *Taxpayers' Actions* § 2 (1974).

In the case at bar the plaintiffs assert on behalf of the district that certain construction work was done on private property rather than public property, and request that warrants issued in payment therefor be declared void. It is well established that in order to render an assessment for improvements valid, the improvements may be constructed only on land in which the public has title or at least a valid easement. *Metropolitan Life Ins. Co. v. SID No. 222*, 204 Neb. 350, 281 N.W.2d 922 (1979); 14 McQuillin, Municipal Corporations § 38.179 (3d ed. 1970).

The evidence in the case at bar included the complete court record of the three cases involving the consent decrees which the district contends resolved the issue of public or private property. Those three cases involved the same construction work and improvements involved in this case, and in each case the specific issue of whether the improvements were located on public or private property was raised and in issue. The consent decrees reduced the special assessments made on the basis that the lands had only been specially benefited to the extent of the amounts set out in the decrees. There can be no doubt that the decrees, in determining that the respective special assessments were valid in the reduced amounts, necessarily and implicitly determined that the improvements involved were constructed on public rather than private land. Such a finding was necessary to support each judgment and the trial court in the present case so found. The district, as a party

to those three cases, is bound by the decrees, and it is also clear that a taxpayer plaintiff in a derivative claim on behalf of a governmental body is bound by all findings and orders to the same extent that the governmental body is bound. See *Pedersen v. Westroads, Inc., supra.*

For purposes of res judicata, a judgment decides all issues essential to support it and those assumed or decided in leading to and supporting the final conclusion as well as the ultimate decision. *Norlanco, Inc. v. County of Madison*, 186 Neb. 100, 181 N.W.2d 119 (1970).

Any right, fact, or matter in issue, and directly adjudicated upon, or necessarily involved in, the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies whether the claim or demand, purpose, or subject matter of the two suits is the same or not. *Vantage Enterprises, Inc. v. Caldwell*, 196 Neb. 671, 244 N.W.2d 678 (1976).

The plaintiffs acknowledge that the general rule with respect to domestic judgments is that they cannot be collaterally attacked or impeached by the parties for fraud or collusion not going to the jurisdiction, and that consent judgments are as conclusive on collateral attack as judgments rendered after trial. Plaintiffs contend, however, that in cases involving public interests where the public was a party merely by representation, the persons represented may show fraud or collusion in obtaining the judgment, and they rely upon the case of *Warren v. County of Stanton*, 145 Neb. 220, 15 N.W.2d 757 (1944).

The *Warren* case adopted the general rule and recognized the public interest exception where there was fraud or collusion in obtaining the judgment. The *Warren* holding as to fraud or collusion has no application here. In the case at bar plaintiffs did not plead

any fraud or collusion by the parties to the consent decrees. There was no evidence of fraud or collusion at trial, nor was the issue raised or argued in the District Court. Questions not presented to or passed upon by the trial court will not be considered on appeal. *Powers v. Chizek*, 204 Neb. 759, 285 N.W.2d 501 (1979).

In view of our holdings it is unnecessary to consider the issues raised in the cross-appeal of defendant Hawkins Construction Company.

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

AFFIRMED.

KRIVOSHA, C.J., concurs in result.

CLINTON, J., participating on briefs.

IN RE INTEREST OF COOK, A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. YVONNE COOK, APPELLANT.

304 N.W.2d 390

Filed April 10, 1981. No. 43388.

Parental Rights. Parental rights may be terminated when the parents have substantially and continuously or repeatedly neglected the child; have refused to give the child necessary parental care and protection; and such action is in the best interests of the child. Neb. Rev. Stat. § 43-209 (Reissue 1978).

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

Steven Lefler for appellant.

Donald L. Knowles, Douglas County Attorney, and W. Mark Ashford for appellee.

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

BOSLAUGH, J.

Yvonne Cook appeals from an order of the separate juvenile court of Douglas County, Nebraska, terminating her parental rights over her child.

Yvonne Cook and Joseph Cook are the natural parents of a child who was born February 20, 1973. A petition was filed in the juvenile court on August 24, 1979, which, as amended, alleged that the child was lacking proper parental care because of sexual molestation and manipulation by her father. The petition set out specific incidents which had occurred on March 22, 1977, and August 8, 1979, and alleged that numerous incidents had occurred between those dates and that Yvonne had failed to remove the child from the environment created by the father. At the adjudication hearing on November 27, 1979, Yvonne admitted these allegations were true.

The child was placed in foster care by the juvenile court on the date the petition was filed. After an evidentiary hearing on September 10, 1979, the detention was continued over the opposition of both Yvonne and Joseph. An adjudication hearing was held on November 27, 1979, and the parental rights of Yvonne and Joseph were terminated on January 29, 1980. Yvonne and Joseph appeared in person at the hearings and were represented by separate counsel. The child was represented by a guardian ad litem. Only Yvonne appeals from the order of January 29, 1980, terminating parental rights.

Parental rights may be terminated when the parents have substantially and continuously or repeatedly neglected the child; have refused to give the child necessary parental care and protection; and such action is in the best interests of the child. Neb. Rev. Stat. § 43-209 (Reissue 1978).

There is little or no dispute concerning the facts in this case. The evidence shows that the sexual molestation or abuse of the child by her father commenced at about the time she began to walk, at approxi-

mately 18 months of age, and continued until the time that she was placed in foster care. The molestation included fondling, kissing, oral sex, attempted intercourse, and masturbating in the presence of the child.

When Yvonne complained to Child Protective Services on August 9, 1979, she knew that the molestation had been going on for more than 2 years. She testified that the child complained to her in March 1977. Yvonne testified concerning a third incident which had occurred in January 1979 and admitted that the child had complained to her before March 1977. After the complaint by the child in March 1977 Yvonne confronted Joseph and contacted Child Protective Services, which suggested counseling. Approximately 1 month later Joseph admitted that he had been molesting the child since she was 18 or 19 months old and sought counseling. The counseling, however, consisted of only one or two conferences. Joseph did not again seek counseling until after the incident in January 1979. It is apparent that counseling was ineffective to stop the molestation and abuse.

After the August 8, 1979, incident Yvonne refused to cooperate with the police officers who contacted her and refused permission for the officers to speak with the child or for the child to be examined by a physician. The child at that time was complaining of irritation and discomfort while urinating. Yvonne suggested the condition was due to insufficient bathing and soiled underwear.

The record shows that Yvonne was more interested in preserving her relationship with Joseph than in protecting the child. The fact that Yvonne claimed ignorance of but a few of the incidents that had occurred demonstrated her inability to deal with the realities of the situation. She was unwilling to do anything to remedy the situation other than urge Joseph to seek counseling and attempt to be more "watchful" of the child. Although Yvonne and the

other children moved to her mother's home after the August 1979 incident, she has not told her mother the reason why the child was placed in foster care.

The evidence shows that the child has progressed very well in foster care. Although the nightmares which she suffered while living at home continued for a while, she now appears to have made a satisfactory adjustment.

There is some indication in the record that Yvonne and Joseph separated in September 1979. At the hearing on the motion for new trial on March 19, 1980, counsel stated that Yvonne had commenced a dissolution proceeding. Without regard to what may have happened or may happen in that proceeding, there is no assurance that Joseph will not return to the home at some future time. The other children in the family were not affected by this proceeding. The record indicates Yvonne would hope to reunite the family.

As we view the record, it was in the best interests of the child that the parental rights of both parents be terminated. The judgment is therefore affirmed.

AFFIRMED.

KRIVOSHA, C.J., dissenting.

I regret that I must once again dissent with the majority of the court in this case concerning the matter of terminating parental rights. While I do not for a moment minimize the seriousness of the matter, either generally or in this case, I believe that the court has resorted to means more drastic than are necessary under the facts in this case.

Before an order of the juvenile court terminating parental rights under Neb. Rev. Stat. § 43-209 (Reissue 1978) may be upheld by this court, the action taken by the lower court must be supported by clear and convincing evidence. See, *State v. Wedige*, 205 Neb. 687, 289 N.W.2d 538 (1980); *In re Interest of Morford*, 207 Neb. 627, 300 N.W.2d 795 (1981). I do not believe

that the record in this case will establish by clear and convincing evidence that the parental rights of the mother should be terminated.

No one who testified in this case suggested such action should be taken. As a matter of fact, all of the evidence offered in the case indicates that the visitation rights of the mother should be continued.

A report dated January 16, 1980, signed by Ann Campion, service officer; John Tiedeman, guardian ad litem; and Gladys Haines, Child Protective Services worker, and offered into evidence, recommended that, while the minor child be placed in the custody of the State Department of Public Welfare for continued foster care placement, the mother, nevertheless, continue to have regular visitation with the child. A report filed by the Douglas County Welfare Administration dated January 23, 1980, and offered into evidence, likewise recommended that the mother continue to have rights of visitation with the child. Neither report recommended that her parental rights be terminated.

A report dated January 21, 1980, prepared by Dr. K. J. Kenney, center director for Immanuel Community Mental Health Center, and offered into evidence at the hearing held on January 29, 1980, indicated that the father and mother have been obtaining outpatient counseling since September 1979 and "they have made excellent progress." The report goes on further to provide: "Both Mr. and Mrs. Cook have made great strides in resolving the problem. They each recognize, at the present time, that the reason for Mr. Cook's deviant behavior was his anger towards his wife Yvonne. This anger has been worked through satisfactorily and the two of them are, at the present time, getting along very well." Dr. Kenney's report concludes as follows: "Therefore, my recommendation would be the resumption of their living as a married couple, in their own house, with their daughter, and a continued family therapy program

established either with Dr. Dahlke, or with us here at Immanuel Community Mental Health Center, for at least six months. If this program should be carried out here, we would be happy then to supply you with further information as to the progress the family has made."

The guardian ad litem likewise urged the court not to terminate the rights of the mother.

The majority relies, to some extent, on the fact that the mother, though aware of what was taking place, did not remove herself and the child from the home immediately.

While we might have hoped that such action would have occurred, we must not, nevertheless, fail to recognize the realities of life. A moderately educated woman with small children, no means of support, and no place to go does not quickly remove herself from the family home for whatever reason.

Moreover, the evidence discloses that, when the episode apparently first occurred, the mother contacted Child Protective Services and advised them of what was taking place. At that point Child Protective Services did not recommend that she remove herself or the child from the home, but, rather, suggested that the entire family seek counseling. If the failure to remove the child was so negligent as to justify our terminating her parental rights, why did not Child Protective Services see the problem and suggest to the woman she take such action, rather than apparently assure her that she could remain in the family home if she sought counseling?

We must not lose sight of the fact that this entire matter came to light because the mother did, in fact, remove the child from the home. While it is true she should have done it sooner, we should not overlook the fact that she did, in fact, take such action and report the matter to the police. We now reward her for having finally acquired the necessary strength to act by terminating her parental rights.

I do not believe that the evidence in this case is clear and convincing that the mother has acted in such a manner that she has, indeed, lost her parental rights or that the best interests of the child, under the facts, demand that she be separated from her mother and two brothers. As I noted in my dissent in *In re Interest of Goodon, ante* p. 256, 262, 303 N.W.2d 278, 281 (1981): "The options available to the juvenile court, short of terminating parental rights for the best interests of the child, are many. See Neb. Rev. Stat. § 43-210 (Reissue 1978)." Where, as here, the evidence indicates that the mother has sought and obtained counseling and is making progress, and the child has had counseling and is making progress, I would have been inclined to follow the recommendations of the professionals and the urging of the guardian ad litem and delayed terminating the parental rights of the mother in this case for at least an additional 6 months to see whether the mother and her child could not have been successfully reunited.

STATE OF NEBRASKA, APPELLEE, V.
MELL T. WOSTOUPAL, APPELLANT.

304 N.W.2d 393

Filed April 10, 1981. No. 43529.

1. **Contempt: Affidavits.** Contempts may be prosecuted by affidavit, and such an affidavit serves the purpose of a pleading.
2. ____: ____. Where the reading of an affidavit for contempt clearly indicates that the alleged violation of a court order was willful, the failure to use that express word does not render the affidavit defective.
3. **Contempt: Pleas: Waiver.** The voluntary entry of a plea of guilty to a charge of contempt waives formal defects in the information, affidavit, or accusation.

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

Vince Kirby for appellant.

Paul L. Douglas, Attorney General, and Robert F. Bartle for appellee.

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

CLINTON, J.

Defendant, Dr. Mell T. Wostoupal, a veterinarian and owner of Oink, Inc., appeals from an order by the District Court for Stanton County holding him in contempt for violating a court order which enjoined the movement of swine off the Oink, Inc., premises except under specified conditions. Defendant assigns as error on appeal that the contempt proceedings against him were defective because the accusation filed by the State was not notarized. We affirm.

A short factual summary is necessary to understand defendant's assignment of error. On March 27, 1978, the Nebraska Department of Agriculture, acting on information from the Missouri Department of Agriculture, Animal Health Division, concerning pseudorabies found among swine transported to Missouri, issued a quarantine restricting any movement of swine from the Oink, Inc., premises "other than direct to slaughter . . . until the entire swine herd" was "tested negative under either State or Federal supervision." The Department of Agriculture amended the quarantine 3 days later to cover all swine owned by Oink, Inc., and defendant in Stanton County. Defendant received the quarantine notice on March 31, 1978.

In August 1978 the State, acting on behalf of the Department of Agriculture, petitioned for an injunction against the movement of swine from Oink, Inc. The State's petition alleged various violations of the abovementioned quarantine. Following a hearing, the District Court issued a temporary injunction on August 21, 1978. Four months later, on December 5, 1978, a permanent injunction was issued pursuant to a stipulation

made by both parties. The permanent injunction set forth specific conditions under which swine could be moved from Oink, Inc.

During January 1980 the State filed an affidavit and motion for contempt against defendant. The affidavit, which was properly notarized and set forth the terms of the court's order of injunction, alleged that defendant had *intentionally* violated the conditions set forth by the permanent injunction in 23 separate instances. For each alleged violation the affidavit named the number of swine moved, to whom they were sold, and the location where they were sent and that they were sold as feeder pigs. The District Court issued a show cause order. Following a hearing the court ordered the State to file a written accusation against defendant. The State filed an unnotarized accusation 6 days later which summarized the permanent injunction, stated the alleged violations, specified damages caused by the alleged violations, and prayed that defendant be found guilty of contempt. The accusation differed from the affidavit in that instead of using the words "intentionally disregarded," it used the terms "knowingly, willfully, contumaciously, and contemptuously refused to obey." Defendant demurred on six grounds and also filed a motion to dismiss. None of the grounds alleged in either defendant's demurrer or motion are the same as the error which he assigns in this appeal. The demurrer and motion to dismiss were overruled after a hearing on March 7, 1980. One week later, defendant pleaded that he had violated the permanent injunction and consented to a finding that he was guilty of contempt. The court found defendant guilty of contempt, laid down conditions under which he could purge himself, and deferred sentencing. Three months later, after several proceedings which are not the subject of this appeal, defendant was sentenced to 3 months in jail upon the court's finding that he had failed to purge himself of contempt.

Defendant argues that contempt proceedings, for

contempt committed outside the presence of the court, must be initiated by an information or accusation and affidavit alleging the specific facts constituting contempt; both pleadings, he claims, must be properly verified, hence, the finding that he is in contempt is void because the accusation filed by the State was not notarized.

The record clearly shows that the State filed a properly notarized affidavit and motion for contempt before filing its accusation. There is no question raised as to the affidavit's verification, hence, no jurisdictional issue of the type mentioned in *Belangee v. State*, 97 Neb. 184, 149 N.W. 415 (1914), and *Herdman v. State*, 54 Neb. 626, 74 N.W. 1097 (1898), is presented. Likewise, no issue concerning the sufficiency of the affidavit and motion for contempt in providing defendant with notice as required under Neb. Rev. Stat. § 25-2122 (Reissue 1978) is raised. Furthermore, this court has recognized the propriety of notifying a party to criminal contempt through an affidavit for contempt and a motion to hold in contempt as was done here. *Sempek v. Sempek*, 198 Neb. 300, 252 N.W.2d 284 (1977). There we held: "Contempts may be prosecuted by affidavit, and such an affidavit serves the purpose of a pleading. . . . Where the reading of an affidavit for contempt clearly indicates that the alleged violation of a court order was willful, the failure to use that express word does not render the affidavit defective." (Syllabi of the court.)

Only the issue of the State's failure to have the court-ordered accusation notarized is presented in this appeal. This court has held that formal defects in an information are waived by a defendant in a criminal contempt action if he fails to object to such defects before proceeding to trial. *Zimmerman v. State*, 46 Neb. 13, 64 N.W. 375 (1895) (overruled on other grounds). See, also, 17 C.J.S. *Contempt* § 74, pp. 191-92; *The People v. Severinghaus*, 313 Ill. 456, 145 N.E. 220 (1924). Defendant did not object to the State's failure to have the

accusation against him notarized before he pleaded guilty to it and proceeded to judgment. He thereby waived his right to raise the defect on appeal.

AFFIRMED.

LOWELL A. JONES, APPELLANT, V.
VALLEY COUNTY BOARD OF EQUALIZATION
ET AL., APPELLEES.

304 N.W.2d 396

Filed April 10, 1981. No. 43561.

1. **Taxation: Appeal and Error.** Relief from the overassessment of property for tax purposes is by appeal to the District Court from the order of the county board of equalization fixing the assessed value of the property, and the remedy thus given is full, adequate, and exclusive.
2. **Taxation: Collateral Attack.** A collateral attack may be made upon an assessment of property for tax purposes only if the assessment or some part thereof is wholly void.
3. **Declaratory Judgments: Taxation.** A declaratory judgment action is not an appropriate remedy to attack an assessment of real property made by the county board of equalization.

Appeal from the District Court for Valley County: JAMES R. KELLY, Judge. Affirmed.

Donald H. Weaver of Anderson, Vipperman, Weaver, Hinman & Hall for appellant.

Paul L. Douglas, Attorney General, Ralph H. Gillan, and Gregory G. Jensen, Valley County Attorney, for appellee.

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

MCCOWN, J.

This is an action for a declaratory judgment seeking to have the 1979 increase in real property tax assessments in Valley County, Nebraska, declared void. The

District Court entered judgment in favor of the defendants and dismissed plaintiff's petition.

The plaintiff, in various capacities, is the owner of numerous tracts of real property located in Valley County, Nebraska. In 1977 Valley County contracted with an appraisal company for a reappraisal of real estate in Valley County. The values of real property reflected by the appraisals were put into effect by the county assessor and the board of equalization in 1979 and notice of increases in assessment valuation of real property was given as required by statute. Plaintiff appeared before the Valley County Board of Equalization and protested the increased assessments. The county board rejected plaintiff's complaints and he perfected his appeals to the District Court.

The State Board of Equalization and Assessment, after receiving abstracts of assessment from the various counties, determined that increases in valuations of real property of some of the counties, including Valley County, were required. Notice of proposed increases to be made by the state board were given and equalization hearings were thereafter held at which Valley County appeared and objected to the proposed increases. On August 6, 1979, the state board entered its order raising the valuations on certain classes of real property in Valley County and the order was certified to Valley County as required by law. The plaintiff did not appear before the state board, nor did he attempt to appeal from the order of that board.

On August 28, 1979, the plaintiff filed this action in the District Court for Valley County, seeking a declaratory judgment that the increased assessments of real property in Valley County in 1979 were void because the county and state boards of equalization and assessment and the county and state taxing officials failed to comply with various statutorily authorized rules and regulations in the valuation and assessment of Valley County property in 1979. Following requests for admissions the defendants filed a motion for summary judgment which was overruled.

At trial plaintiff introduced evidence tending to show that various rules and regulations of the Department of Revenue dealing with procedures for the appraisal classification and valuation of real property had not been complied with by Valley County. The plaintiff also asserted that the order of the State Board of Equalization and Assessment with respect to Valley County real property was void because of vagueness. The defendants introduced no evidence but stood on the motion for summary judgment.

The District Court found that the rules and regulations allegedly violated by the county board of equalization were not applicable in this case and that the collateral attack on the action of the State Board of Equalization did not lie and entered judgment in favor of the defendants and dismissed plaintiff's petition.

In our view the case of *Scudder v. County of Buffalo*, 170 Neb. 293, 102 N.W.2d 447 (1960), is dispositive of this case. That case was also a declaratory judgment action challenging an erroneous assessment of plaintiff's property. This court held that relief from the overassessment of property for tax purposes is by appeal to the District Court from the order of the county board of equalization fixing the assessed value of the property, and the remedy thus given is full, adequate, and exclusive. A collateral attack may be made upon an assessment of property for tax purposes only if the assessment or some part thereof is wholly void. A declaratory judgment action is not an appropriate remedy to attack an assessment of real property made by the county board of equalization. Those principles were reaffirmed in *Ryan v. Douglas County Board of Equalization*, 199 Neb. 291, 258 N.W.2d 626 (1977).

In the case now before us the record establishes that the assessment of plaintiff's property met all jurisdictional requirements of the statutes. The assessments of plaintiff's property were not wholly void and were not subject to collateral attack. Direct appeals are pending in the District Court.

The defendants' motion for summary judgment should have been granted and it was unnecessary to proceed further under the facts in this case. The judgment of the District Court in dismissing plaintiff's petition was correct and is affirmed.

AFFIRMED.

CYNTHIA SUE COLE, APPELLEE, V. LARRY D. COLE, APPELLANT.

304 N.W.2d 398

Filed April 10, 1981. No. 43571.

1. **Divorce: Alimony: Property Division.** There is no mathematical formula by which awards for alimony or division of property in an action for dissolution of marriage can be precisely determined. They are to be determined by the facts of each case and the court will consider all pertinent facts in reaching an award that is just and equitable.
2. **Divorce: Alimony.** This court, on appeal, is not precluded from modifying an alimony award made by the District Court where such award is patently unfair on the record. An award of alimony may be altered on appeal where the record reflects good cause.
3. **Divorce: Alimony: Property Division.** When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties.
4. **Divorce: Alimony.** It is the general rule in this state that allowances of alimony in the form of an annuity or requiring the husband to pay a fixed sum for an indefinite period of time are not favored.

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

Van Steenberg, Brower, Chaloupka, Mullin & Holyoke for appellant.

Laurice M. Margheim of Bayer & Margheim for appellee.

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

BRODKEY, J.

Larry D. Cole (Larry), respondent and appellant herein, has appealed to this court from a decree entered by the District Court of Box Butte County, Nebraska, dissolving the marriage of the appellant and Cynthia Sue Cole (Cynthia), petitioner and appellee. The appellant assigns as error that the trial court's allowance of $1,000 per month in alimony to the petitioner is excessive, and that the court erred in awarding alimony for an indefinite period of time. We affirm as modified.

The record in this matter indicates that Larry and Cynthia were married on May 29, 1965, in Alliance, Nebraska. One child, Suzanne, was born July 7, 1966. The care and custody of Suzanne was placed in Cynthia, and is not an issue in this appeal. We are principally concerned with the question of whether the alimony award of the trial court was equitable.

The evidence adduced at the trial reveals that the parties separated in December of 1975, when the petitioner first filed for divorce. In December of 1976 Cynthia moved with her daughter from Alliance to Gering, Nebraska, where Cynthia became employed as a licensed practical nurse. In March of 1977, while a passenger on a motorcycle, Cynthia was seriously injured in a one-vehicle collision. Her injuries resulted in her paralysis from the chest down, with only partial use of her arms and hands remaining. After the accident, Larry and Cynthia attempted a reconciliation; and with the proceeds recovered from a personal injury settlement received by the petitioner arising out of the motorcycle accident built a house which was "wheelchair accessible" and was otherwise designed to accommodate Cynthia's disabilities. After a period of 2 months, the reconciliation proved unsuccessful, and Larry moved out of the house. On August 22, 1979, Cynthia again filed a petition seeking the dissolution of her marriage to the appellant. This matter came to trial on April 22, 1980. In its decree

dated May 30, 1980, and filed on June 27, 1980, the court ordered in pertinent part:

"(a) That the marriage of Cynthia Sue Cole and Larry C. [sic] Cole is hereby dissolved.

"(b) That Cynthia shall have the custody of Suzanne, subject to reasonable rights of visitation by Larry.

"(c) On June 2 and June 16, 1980, and on the 2nd and 16th days of each month thereafter until Suzanne dies, marries, obtains the age of 19, becomes self-supporting or until further order of the Court, Larry shall make child support payments of $75.00 for a total of $150.00 each month. Larry may claim Suzanne as a dependent for income tax purposes.

"(d) On June 2 and June 16, 1980, and on the 2nd and 16th day of each month thereafter until further order of the Court, Larry shall make alimony payments of $500.00 for a total of $1,000.00 each month, subject to modification upon a showing of changed circumstances." The court divided the property of the parties, awarding Cynthia approximately 48 percent of the marital property and the appellant approximately 52 percent. Appellant makes no complaint with reference to the property division, but contends the alimony award is excessive.

The scope of review of a dissolution action in this court is well established, as follows: "'While in a divorce action the case is to be tried de novo, this court will give weight to the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the opposite.'" *Witcig v. Witcig*, 206 Neb. 307, 311, 292 N.W.2d 788, 791 (1980); *Boroff v. Boroff*, 204 Neb. 217, 281 N.W.2d 760 (1979); *Grummert v. Grummert*, 195 Neb. 148, 237 N.W.2d 126 (1975). The rules for determining alimony or division of property in an action for dissolution of marriage provide no mathematical formula by which such awards can be precisely determined. They are to be determined by the facts of each case and the court will consider all pertinent facts in reaching an award that is

just and equitable. *Grady v. Grady*, 204 Neb. 595, 284 N.W.2d 402 (1979); *Ragains v. Ragains*, 204 Neb. 50, 281 N.W.2d 516 (1979); *Blome v. Blome*, 201 Neb. 687, 271 N.W.2d 466 (1978). It is the general rule that a judgment of the District Court is supported by a presumption of correctness, and this court is not inclined to disturb the alimony award made by the trial court unless it is patently unfair on the record. See, *Buker v. Buker*, 205 Neb. 571, 288 N.W.2d 732 (1980); *Rinderknecht v. Rinderknecht*, 204 Neb. 648, 284 N.W.2d 569 (1979). However, we have also held that an award of alimony may be altered on appeal where the record reflects good cause. *Hermance v. Hermance*, 194 Neb. 720, 235 N.W.2d 231 (1975).

Guidelines for determining the reasonableness of alimony following a decree of dissolution of marriage are set out in Neb. Rev. Stat. § 42-365 (Reissue 1978), which provides as follows: "When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party. . . ."

A review of the record convinces us that the alimony award ordered by the trial court was, under the circumstances of this case, unreasonably harsh and burdensome, and beyond his ability to pay, notwithstanding the unfortunate circumstances in which the appellee finds herself as a result of her accident. The record reveals that the appellant is a locomotive engineer for Burlington Northern railroad and has 10 years of experience and seniority. At the time of trial he was 39 years of age, in good health, and had an annual

income of approximately $37,000. The house and property awarded him by the court in its decree are unencumbered and debt free. Although the age of the appellant is set forth in the record, a careful search reveals that there is no evidence whatsoever as to the age of the appellee, or her life expectancy, although appellant states in his brief that she was 33 years of age at the time of the trial. Her present educational background is limited to a high school education, although, at trial, she indicated a desire to further her education and estimated that in view of her physical condition it would probably take her at least 6 years to complete college, rather than the normal 4-year period. The appellee has had surgery to improve the functioning of her right hand, and the record indicates she can now write with it. She desires to undergo further surgery to improve the functioning of her left hand. The court awarded her the home which she built with the proceeds of her insurance settlement in the amount of $15,000, which was used as a downpayment. There is a mortgage on the home in the amount of $37,858, on which she is obligated to make the payments. She shares this home with her daughter. Because of her condition, she is unable to dress and bathe herself, and depends upon home nursing care to aid her with her bladder and bowel problems.

Cynthia stipulated that she currently receives $235 per month for herself and $122 per month for her child, Suzanne, from Social Security. She further testified that her monthly expenses total approximately $900 per month. However, it appears from the record that this figure probably was inaccurate and did not include all of her monthly expenses; and the trial court expressed an opinion that she had underestimated her living expenses. Under the decree entered by the court, she was awarded an additional $1,000 per month as alimony and $150 per month as child support for Suzanne.

It further appears from the record that Larry's take-

home pay averages $2,137.63 per month; that his minimum monthly expenses are $923.15; and that when his monthly support obligation is added to his monthly expenses, his total monthly outlay is $2,073.15, which leaves him $64.48. Appellant argues that in view of his age and life expectancy as set forth in the Commissioners 1958 Standard Ordinary Mortality Table, if there is no change in the alimony award in this case, he will be required to pay a total of $462,000 to the appellee in alimony. It seems clear, however, that this conclusion is based on the assumption that Cynthia will live as long as he does. However, as previously stated, there is no evidence in the record with regard to Cynthia's age, or her life expectancy, and in view of her poor physical condition as the result of her accident, there may be serious doubts as to whether she could anticipate the life expectancy of a normal woman of her age. It would seem almost impossible at this time to accurately predict what the financial needs of Cynthia in the future will be, although the rule is clear that the amount of an alimony award should be based upon the evidence of conditions and circumstances existing at the time of the trial. The trial court in this case specifically provided that in the event of a future change of circumstances, its alimony award could be modified.

This brings us to appellant's second assignment, that the District Court erred in allowing alimony payable over an indefinite period of time. We have frequently reiterated the general rule in this state that allowance of alimony in the form of an annuity or requiring the husband to pay a fixed sum for an indefinite period of time is not favored, although we have on occasion upheld such awards where we deem them necessary or desirable. *Witcig v. Witcig*, 206 Neb. 307, 292 N.W.2d 788 (1980); *Magruder v. Magruder*, 190 Neb. 573, 209 N.W.2d 585 (1973); *Dunlap v. Dunlap*, 145 Neb. 735, 18 N.W.2d 51 (1945). We believe that in this case we should abide by the rule as announced

in the foregoing cases, particularly in view of the fact that in the event conditions change the award can always be modified by the court upon proper application and showing of such change of circumstances. Our conclusion is that the appellant in this case should be given relief from the rather high award of monthly alimony specified by the trial judge so that he may, to a limited degree at least, improve his financial condition. We therefore determine that the award by the trial court in its decree of $1,000 per month alimony for Cynthia should be modified so as to require the payment by Larry to Cynthia of alimony in the amount of $800 per month, in addition to the amount he is required to pay for child support, such monthly alimony to continue for a period of 25 years from the date of the original decree, with the proviso, however, that such alimony shall terminate in the event of her death or remarriage before that time.

Appellee has requested that we award her an attorney fee for the services of her attorney in this court. In view of the circumstances in this case, we award her an attorney fee of $500 for that purpose.

No other errors having been assigned or discussed in this case, we affirm the decree entered by the trial court, as modified.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. STEVEN ROY HARPER, APPELLANT.

304 N.W.2d 663

Filed April 17, 1981. No. 43070.

1. **Death Penalty: Constitutional Law.** The Nebraska death penalty statutes, Neb. Rev. Stat. §§ 29-2519 to 29-2546 (Reissue 1979), do not violate the provisions of the U.S. or Nebraska Constitutions.
2. **Death Penalty: Words and Phrases.** In the context of Neb. Rev. Stat. Ch. 29, art. 25 (Reissue 1979), the word "sentence" in § 29-2521.03 is

construed to mean a sentence of death, and the provisions of that section directing the determination by the Supreme Court of the propriety of a "sentence" by comparison with previous cases are applicable only in a case where a sentence of death has been imposed.

3. **Death Penalty.** Where a death sentence has been imposed and the Supreme Court is required to determine the propriety of that sentence in such case, the determination of which previous first degree murder cases involve the same or similar circumstances and are therefore comparable will be made by this court on a case-by-case basis.
4. **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.

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 J. Kirk Brown for appellee.

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

MCCOWN, J.

The defendant was found guilty on two counts of first degree murder and three counts of poisoning with intent to kill, wound, or maim. After hearings on the constitutionality of the death penalty and the existence of aggravating and mitigating circumstances, a sentence of death was imposed on each of the first degree murder counts and consecutive sentences of 10 years each were imposed on the poisoning counts.

In 1973-74 the defendant, Steven R. Harper, was involved in an emotional relationship with Sandra Johnson, a woman whom he had known since high school. In late 1974 the relationship deteriorated and Sandra told the defendant she intended to marry Duane Johnson. Sandra and Duane Johnson were

married January 17, 1975. A few days later defendant attempted to persuade Sandra to annul her marriage, and when she refused defendant threatened to kill both Sandra and Duane.

On June 21, 1975, Sandra and Duane Johnson and several other members of their family were outdoors at the residence of Sandra's mother, Jean Betten. The defendant drove up to the residence and, after some argument, fired a shotgun at the group and Sandra's mother and brother were struck by shotgun pellets. As a result of the shooting incident the defendant was arrested, charged, and convicted of shooting with intent to kill, wound, or maim. He was sentenced to imprisonment in the penal complex. On November 16, 1977, defendant was paroled, and returned to Omaha.

On March 3, 1978, defendant commenced work at the Eppley Research Institute in Omaha, Nebraska. His job was to take care of the animals which the institute was using in connection with cancer research. While he was employed there the defendant had access to various carcinogenic drugs.

While working at Eppley the defendant lived in his parents' home in Omaha. On August 7, 1978, the Harper family took a dog to the veterinarian clinic and a cat on the next day. Both animals were suffering from symptoms of some type of poisoning which the veterinarian stated he had never seen before. Both animals were treated without success and both died within a few days. Shortly thereafter, on August 18, 1978, the defendant resigned his position at the Eppley Research Institute.

On Saturday, September 9, 1978, Sandra and Duane Johnson were living in a residence on Fontenelle Boulevard in Omaha, Nebraska, with their two children, a son, Michael, who was 3 months old, and a daughter, Sherry, 2 years old. Sandra's sister, Susan Conley, also lived with the family. The Johnson family and Susan left the home around 8 p.m. on

Saturday, September 9, and the family returned home at about 1 a.m. on the morning of September 10. At about 6 a.m. Susan Conley went to the refrigerator and tasted the lemonade from a pitcher but it tasted strange so she spit it out. She then had a piece of pecan pie and poured herself a glass of milk. The milk also tasted odd so she spit it out, too, and dumped the rest of the milk in the sink. Later that morning Sandra and Duane and their daughter, Sherry, got up. Sandra prepared some cereal with milk for Sherry. Duane had a glass of milk and Sandra had nothing to eat or drink.

Immediately after eating her cereal Sherry complained of a stomach ache. Sandra thought nothing of it and she and Sherry went to a shopping center. Sherry suddenly began to vomit and Sandra and Sherry returned home. Meanwhile, Harold Betten, Sandra's father, and Elaine Betten, Sandra's stepmother, had stopped at the Johnson home for a visit. The Bettens had coffee and Harold Betten saw Duane Johnson drink two glasses of some sort of liquid from the refrigerator. Neither of the Bettens had any milk or lemonade. The Bettens were leaving as Sandra and Sherry returned home. Shortly thereafter, Duane became sick and began vomiting, and by noon both Duane and Sherry were quite ill and both were in bed.

About 2 p.m. Sandra's sister, Sallie Shelton, her husband, Bruce Shelton, and their 11-month-old son, Chad, stopped at the Johnson home for a visit. They stayed approximately an hour and they split a glass of lemonade between them. Neither Sandra nor her 3-month-old son, Michael, drank milk or lemonade that day. By evening Duane Johnson, Sherry Johnson, Bruce Shelton, Sallie Shelton, and Chad Shelton were all very ill. Chad Shelton was taken to the hospital on Tuesday, September 12, and died on Thursday, September 14, 1978. His doctors thought the problem might be Reye's syndrome. Duane Johnson was taken to one doctor on September 13 and to

another doctor the next day, at which time he could not walk and was incoherent. He was taken to the hospital and died September 15, 1978.

At that point, with two persons dead and three others extremely ill, the Johnson household was investigated by medical authorities for toxic substances, without any success. Autopsies were performed on the bodies and on Monday, September 18, 1978, a meeting of some 20 doctors and public health officials was held to discuss the situation. They determined that on September 10, 1978, 10 people had been in the Johnson household and 5 of them, within 8 days, were either dead or ill while the other 5 were apparently healthy. Of the 5 people who were affected, all of them drank either milk or lemonade while at the Johnson household. Of the 5 who were not affected, none of them had consumed any milk or lemonade at the Johnsons on that day. At this point the matter was brought to the attention of the Omaha police.

The police began a homicide investigation. They discovered, among other things, the 1975 shooting incident and they received a report from the Center for Disease Control in Atlanta, Georgia, which indicated that whatever the substance was which had killed Chad Shelton and Duane Johnson, it was of a toxic nature and might well have been some type of carcinogenic drug. The report suggested checking with the Eppley Research Institute. The director, after having the situation explained to him, suggested the substance dimethylnitrosamine as the possible toxic agent. Dimethylnitrosamine is a carcinogen used to induce cancer in the liver.

With the evidence which the police had by that time, they obtained a warrant to search the defendant's home on October 3, 1978. The search revealed several empty animal cages of the type used at Eppley and two empty vials of the kind used at Eppley. Tests revealed that one vial had contained a mixture of a salt of arsenic and dimethylbenzanthracene, and the

other vial contained dimethylaminobenzaldehyde. One was a carcinogen which was stored, along with dimethylnitrosamine, in a locked refrigerator on the sixth floor of the Eppley Research Institute in an area where the defendant had worked. The key was in a receptacle next to the refrigerator.

In a long series of tests and detailed studies and by the testimony of medical forensic experts, the toxic substance which killed Chad Shelton and Duane Johnson and poisoned the other three individuals was identified as dimethylnitrosamine, a carcinogen. Dimethylnitrosamine is an extremely toxic liquid, comparatively tasteless and lethal in small quantities, which attacks the liver and disrupts the blood clotting mechanism.

Following the search of the defendant's home a warrant for his arrest was issued. On October 13, 1978, the defendant was arrested in Beaumont, Texas, and later returned to Nebraska for trial.

At the trial William Trout, a former inmate at the penal complex who became acquainted with the defendant during the defendant's imprisonment for the 1975 shooting incident, testified as a witness for the State. Trout testified that while he and the defendant were together at the penal complex the defendant told Trout that he had tried to kill his girl friend and that if he could not have her no one could.

Trout was sent to Omaha, Nebraska, on work release detail about May 1, 1978, and at that time renewed his friendship with the defendant, who had been previously paroled in November 1977. Trout saw and visited with the defendant five or six times during the summer of 1978 and also talked to the defendant on the telephone from time to time.

Trout testified that in early June 1978 in one of their conversations the defendant told Trout that in his job he had access to some very lethal drugs which would be extremely effective for use in murder. The

defendant indicated to Trout that he wanted to use the drugs to kill his former girl friend. In another conversation the defendant also told Trout that he had subjected his family cat and dog to the drugs and both had died. Trout also testified that in the last conversation that he had with the defendant while in Omaha, which occurred on Labor Day weekend 1978, the defendant said he was going to enter his girl friend's house and poison the food. The defendant told Trout that he would put the substance in something in the refrigerator which would disguise the taste of the drug.

Trout was placed on final parole September 13, 1978, and went to California on the same day. Trout testified that on October 3, 1978, he received a telephone call from the defendant from Beaumont, Texas, in which the defendant told Trout that he was about to be arrested. When Trout asked why, the defendant told him that he had gone to his former girl friend's house and put the substance in the food and that there were deaths in the family and defendant had left Omaha because he was under suspicion.

Trout did not offer any information to the police, although he knew of the crime by reading the Omaha newspaper. Trout testified under a promise that no charges would be filed against him. The defendant did not testify at the trial. One witness testified for the defense that she was with the defendant in a bar from approximately 7 p.m. September 9, 1978, until 2 a.m. September 10, 1978.

The jury found the defendant guilty on all counts. A sentence of death was imposed on each of the first degree murder counts and consecutive sentences of 10 years' imprisonment on each of the poisoning counts, and this appeal followed.

The major portions of the defendant's arguments on appeal are directed at the constitutionality of the death penalty and the constitutionality of the statutes of Nebraska dealing with its imposition. Virtually

all of the defendant's challenges have been dealt with previously by this court, including the issues of aggravating and mitigating circumstances set out in Neb. Rev. Stat. § 29-2523 (Reissue 1979). We see no point in reviewing these principles again. See, *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881 (1977); *State v. Rust*, 197 Neb. 528, 250 N.W.2d 867 (1977); *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977); *State v. Otey*, 205 Neb. 90, 287 N.W.2d 36 (1979); *State v. Anderson and Hochstein*, 207 Neb. 51, 296 N.W.2d 440 (1980).

The defendant contends that the case of *Godfrey v. Georgia*, 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980), raises additional issues as to whether the defendant's conduct in the present case was especially heinous, atrocious, and cruel, or manifested exceptional depravity. In *Godfrey* the victims died instantly when shot and no other assault or infliction of physical pain preceded the death of either victim. The single aggravating circumstance found by the Georgia court to be present was that the killing was "outrageously or wantonly vile, horrible, and inhuman." In applying the facts of the case to the aggravating circumstances finding under rules previously set down by the Georgia court, the Supreme Court of the United States found no way to distinguish the *Godfrey* case in which the death penalty was imposed from the many cases in which it was not. We believe there is little or no relationship between *Godfrey* and the case at bar.

In the case now before us the sentencing court found four specific statutory aggravating circumstances present and no mitigating circumstances. The District Court found: (1) The defendant had previously been convicted of another crime involving the use of violence to the person; (2) The murders were especially heinous, atrocious, and cruel, and manifested exceptional depravity by ordinary standards of morality and intelligence. In that respect the court found that

the murders of Duane Johnson and Chad Shelton were both "conscienceless" and "pitiless" and were "unnecessarily torturous to the victim." After detailing the physical facts, the court found that each of the victims had died a slow and agonizing death, and that the imposition of extreme suffering on each of them resulted from the defendant's acts. The trial court also found that the murders were so coldly calculated as to indicate a state of mind totally and senselessly bereft of regard for human life; (3) At the time the murder was committed the defendant also committed another murder; and (4) The defendant knowingly created a great risk of death to at least several persons. The sentencing court found no mitigating circumstances present, and we can find no error in the sentencing court's assessment of either the aggravating or the mitigating circumstances. *Godfrey* has no application to the case at bar.

The defendant also urges us to reconsider our interpretation of 1978 Neb. Laws, L.B. 711, codified as part of Neb. Rev. Stat. Ch. 29, art. 25 (Reissue 1979), as to which homicide cases will be reviewed, analyzed, and compared in a case where a sentence of death has been imposed. We decline to do so and we reaffirm our holdings in *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979).

The obligation of this court to determine the propriety of a death sentence in each case and to determine which prior first degree murder cases involve the same or similar circumstances embodies the exercise of the constitutionally imposed duty of the judiciary to determine in each case whether the conviction was lawful and whether a death sentence was legally and constitutionally imposed. Under the Constitution, so long as the death penalty is authorized by law and its imposition is left, under law, to the discretion of the judiciary, the ultimate determination of whether the death penalty was legally and constitutionally imposed in any case must remain a matter for judicial

rather than legislative determination.

The defendant next contends that the trial court erred in ruling that certain statements of the defendant, taken in violation of *Miranda* requirements and inadmissible in the State's case-in-chief, could be used for impeachment of the defendant on rebuttal if a proper foundation were laid. The defendant asserts that except for the erroneous ruling of the trial court, the defendant would have testified at trial.

The statements involved were inculpatory, one of them having been made in Beaumont, Texas, on October 13, 1978, and one made in Omaha, Nebraska, on January 8, 1979. On both occasions the police knew that the defendant was represented by counsel and that counsel had directed that there was to be no interrogation. The statements were obtained after the defendant had repeatedly refused to make a statement without the presence of his attorney. In connection with at least one statement the police promised the defendant that any statement made would never be used against him. At the hearing on the motion to suppress the District Court quite properly suppressed both statements and they were not admitted at the trial.

The U.S. Supreme Court has held that a statement of a defendant taken in violation of *Miranda* and, therefore, inadmissible in the case-in-chief may be used for impeachment purposes to attack the credibility of defendant's trial testimony if its trustworthiness meets legal standards. *Harris v. New York*, 401 U.S. 222, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971); *Oregon v. Hass*, 420 U.S. 714, 95 S. Ct. 1215, 43 L. Ed. 2d 570 (1975). We see no reason to extend the rule in Nebraska beyond the constitutional requirements laid down by the Supreme Court of the United States in *Harris* and *Hass*. In the case at bar, however, the issue is not properly before us. The trial court's ruling as to the admissibility of the statements in rebuttal was prospective only and the statements

were never offered or admitted at trial for any purpose.

The defendant also contends that the court erred in failing to grant a mistrial because of improper comments by the prosecutor in closing argument. During the final summation to the jury the prosecutor said: "Another aspect of the thing is that whoever did this — It's — It's not a secret that these people are sick, and it's not a secret that people have died. All along, you know, the person that did it can do one thing. He can say 'Yeah, substance used was this, so I'm going to help . . . .'" At this point the defense objected and moved for a mistrial. The trial court denied the motion for mistrial and immediately instructed the jury to disregard the statement. At the conclusion of the trial, as a part of the comprehensive instructions, the jury was specifically instructed that they were to draw no conclusions or inferences from the fact that the defendant had not testified in the case and that they were entitled to draw no conclusions or inferences as to his reasons in that regard.

The defendant relies upon the holding in *Griffin v. California*, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965), which forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt. We do not condone comment by the prosecution on the silence of the accused, whether the comment is direct or indirect, but under the circumstances here, where the evidence of guilt was overwhelming and the trial court specifically struck the comment and instructed the jury to disregard the statement and later gave a correct and proper instruction on the failure to testify, we are constrained to find that the error, if any, was not prejudicial within the meaning of *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

The defendant also contends that the trial court erred in admitting evidence of the 1975 shotgun

assault. Under Neb. Rev. Stat. § 27-404 (Reissue 1979), evidence of other crimes, wrongs, or acts may be admissible for purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. In the case at bar the evidence of the 1975 crime was clearly admissible under the statute. See *State v. Hitt*, 207 Neb. 746, 301 N.W.2d 96 (1981).

The final issue in the case at bar is whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. See Neb. Rev. Stat. § 29-2522 (Reissue 1979).

We have previously noted that the sentencing court found four statutory aggravating circumstances present and no mitigating circumstances. The defendant was a 25-year-old college graduate at the time these crimes were committed. His only prior criminal conviction was for the 1975 incident shown in the record here. The sentencing court meticulously considered each of the statutory aggravating and mitigating circumstances and made written findings of fact based upon the records of the trial as required by statute. Some of those findings have been previously set out. The sentencing court's finding that the murders of Duane Johnson and Chad Shelton were so coldly calculated as to indicate a state of mind totally and senselessly bereft of regard for human life appropriately summarizes the facts of this case.

Our review of first degree murder convictions finds no case which is factually comparable to the case at bar. Any objective weighing and balancing of aggravating and mitigating circumstances and comparison to the other death penalty cases now pending in this state establishes that the death sentence in the case now before us is not excessive or disproportionate to death penalties imposed in other death penalty cases under any measure of comparison.

The defendant's remaining assignments of error are without merit and the convictions and sentences are affirmed.

AFFIRMED.

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

I find that once again, I must in part concur with and in part dissent from the majority in its decision concerning the proper disposition of a case involving the commission of a first degree murder. See, *State v. Holtan*, 205 Neb. 314, 287 N.W.2d 671 (1980); *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979); *State v. Otey*, 205 Neb. 90, 287 N.W.2d 36 (1979); *State v. Peery*, 205 Neb. 271, 287 N.W.2d 71 (1980); *State v. Rust*, *ante* p. 320, 303 N.W.2d 490 (1981).

I concur with the majority's finding that the judgment of conviction should be affirmed, and likewise concur with the majority's conclusion that the trial court did not err regarding the admitting into evidence of certain statements made by the appellant. I likewise concur in the majority's conclusion that the trial court did not err in refusing to declare a mistrial because of allegedly improper comments by the prosecutor in closing argument.

With regard to the matter of the admissibility of the evidence of the 1975 gunshot assault, I likewise concur with the majority that in the instant case the evidence of the 1975 gunshot assault was relevant to prove motive and, therefore, admissible under the provisions of Neb. Rev. Stat. § 27-404 (Reissue 1979). I do not, however, believe that we should leave the impression that merely because evidence may in some manner be relevant to any one of the various noted exceptions, though the prosecution does not know which one, such evidence of prior or subsequent crimes is always admissible. See dissent of Krivosha, C.J., in *State v. Ellis*, *ante* p. 379, 399, 303 N.W.2d 741, 753 (1981).

It is with regard to the imposition of the death penalty in this case that I must dissent. My disagreement with the majority is not because I do not believe the crime committed to be atrocious and deplorable. Quite to the contrary, I believe the crime to be flagrant and shocking. But emotions may never cancel the Constitution.

I remain firm in my view that the imposition of the death penalty is not, per se, cruel and unusual punishment in violation of the eighth amendment. *Proffitt v. Florida*, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976). I likewise remain firm in my belief that the imposition of the death penalty is not immoral or unethical. See dissent in *State v. Williams*, *supra*.

Moreover, I am now convinced that there are indeed some instances, though extremely limited, when the imposition of the death penalty is constitutionally permissible. I believe that "killers for hire" may be executed as a consequence of their conviction. See *State v. Anderson and Hochstein*, 207 Neb. 51, 296 N.W.2d 440 (1980). There may be other limited categories which have not as yet been presented to the court for consideration. As to those, I shall reserve comment at this time.

However, I have now concluded that under the limitations imposed upon courts by both the federal and state Constitutions, the imposition of the death penalty as now applied in most other instances is arbitrary and capricious and not permitted.

As I noted in my dissent in *State v. Rust*, *supra*, even disregarding the provisions of 1978 Neb. Laws, L.B. 711, now Neb. Rev. Stat. §§ 29-2521.01 et seq. (Reissue 1979), the death penalty is generally in violation of one's constitutional rights prohibiting the imposition of the death penalty in an arbitrary and capricious manner.

In *State v. Rust*, *supra* at 327, 303 N.W.2d at 495, I observed: "A reading of the various opinions rendered in the case of *Furman v. Georgia*, 408 U.S. 238, 92

S. Ct. 2726, 33 L. Ed. 2d 346 (1972), makes it manifestly clear that the adoption of statutes such as Neb. Rev. Stat. § 29-2522 (Reissue 1979), and the provisions of L.B. 711, are simply a response to the United States Supreme Court's recognition that it is a violation of an individual's constitutional rights when the decision to execute is arrived at in an arbitrary and discriminatory manner. The fact that we may create criteria to aid us in imposing the death penalty does not overcome the constitutional prohibition if, after applying the formula, *we nevertheless continue to impose the penalty in an arbitrary and capricious manner.*" (Emphasis supplied.)

I believe that the language of the majority opinion in *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976), though not reaching my present conclusion, does in fact support that conclusion. It reads in part as follows: "While *Furman* did not hold that the infliction of the death penalty *per se* violates the Constitution's ban on cruel and unusual punishments, it did recognize that the penalty of death is different in kind from any other punishment imposed under our system of criminal justice. Because of the uniqueness of the death penalty, *Furman* held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner. . . . '[T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.' [Citation omitted.]

"Furman mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Id.* at 188-89.

As I have noted, examining a host of cases decided

within this jurisdiction makes it clear to me that the imposition of the death penalty in most cases in this state is indeed arbitrary and capricious. See analysis of cases in dissent, *State v. Williams*, *supra*, and *State v. Rust*, *supra*.

Not only does an analysis of those cases referred to in *Williams* and *Rust* lead one to the inescapable conclusion that the imposition of the death penalty is arbitrary and capricious, but a further examination of those cases in which a charge of second degree murder is filed, rather than first degree murder, likewise makes it clear that by the time a case comes to this court for examination there have been a sufficient number of arbitrary decisions made so as to make impossible the imposition of the death penalty in anything other than an arbitrary and capricious manner. While I do not for a moment question the right of the prosecutor to elect the charge to be filed, nor do I for a moment urge any change in that process, I likewise cannot ignore its existence in attempting to rationally analyze whether the death penalty can be imposed in anything other than an arbitrary manner except in very rare instances. I am not unmindful of the fact that this argument has already been rejected by the majority in the *Gregg* case. Nevertheless, I believe that in this respect the majority in *Gregg* is totally in error.

One need only examine two of the cases released by this court this day to note how the matter of prosecutorial discretion of necessity results in the death penalty being arbitrarily imposed. In addition to this case where the penalty of death was imposed, we have this day also announced our decision in the case of *State v. Stranghoener*, *post* p. 598, 304 N.W.2d 679 (1981). In that case we have affirmed a sentence of 20 years given to Stranghoener for second degree murder. The facts of the case, however, indicate to me that the appellant was, indeed, guilty of first degree murder. The facts in the *Stranghoener* case

disclose that Stranghoener, together with several other individuals, carefully, cruelly, and viciously planned the execution of one Jim Goslee, a member of their "family," for no other reason except to test the loyalty of another member of the "family." Stranghoener, though originally charged with first degree murder, was permitted as a part of a plea bargain to plead to the lesser charge of second degree murder and was sentenced to prison for 20 years. While one does not question or quarrel with the right of either the prosecution or the trial court in *Stranghoener*, it is impossible to set this case alongside those cases in which the death penalty has been imposed and discern a rational distinction.

Moreover, the *Stranghoener* case is not an isolated instance. An examination of only a few cases decided since 1973 establishes clear examples of how the imposition of the death penalty in a particular case is mere happenstance. In the case of *State v. Wredt*, *ante* p. 184, 302 N.W.2d 701 (1981), the defendant was permitted to plead guilty to second degree murder of his father. The evidence discloses that the defendant was 16 years old at the time of the commission of the crime. On the evening of the murder the defendant took a .45-caliber revolver outside and waited for his father to come home, which he did shortly after 6 p.m. After the father got out of his truck and started walking toward the house, the defendant stepped out from the corner of the house, aimed and cocked the revolver, and fired one shot into his father's chest which killed him instantly.

In *State v. Rouse*, 206 Neb. 371, 293 N.W.2d 83 (1980), the defendant was permitted to plead guilty to second degree murder as a result of a plea bargain arrangement and was sentenced to a term of 16 to 20 years in the penal complex. Defendant had originally been charged with six felony counts, including one count of first degree murder, one count of felony murder, three counts of burglary, and one count of

escape. The killing was of a police officer apparently seeking to apprehend defendant in connection with the burglary.

In *State v. Thompson*, 199 Neb. 67, 255 N.W.2d 880 (1977), the defendant was permitted to plead guilty to a charge of second degree murder after the State amended the complaint originally charging the defendant with first degree murder. He was sentenced to life imprisonment. The defendant had attended a party at the home of his sister. During the evening an argument developed, a fight broke out, and several guests subdued the defendant by getting him down on the floor. The defendant worked until noon the following day, purchased a .22-caliber semiautomatic rifle and some ammunition, and then returned to his apartment. At about 8 p.m. his niece and sister came to see him. The defendant told them he was going to kill someone, whom he described. Later that evening the defendant walked into his sister's house, carrying the loaded rifle. There were a number of people in the house, including the victim. The defendant pointed the gun at a Mrs. Hicks and said he wanted to talk to her about what had happened the night before. He also pointed the rifle at several other persons in the room. A brief fight ensued, and after it was broken up the victim started to leave the room when the defendant shot him, striking him in the chest near his right shoulder, severing his trachea and several arteries. The victim died almost instantaneously.

In *State v. Laravie*, 192 Neb. 625, 223 N.W.2d 435 (1974), the defendant was charged with first degree murder and pled guilty to a reduced charge of second degree murder. He was sentenced to life imprisonment. The evidence discloses that the defendant broke into a residence in the early morning, picked up a knife from the kitchen table, then entered the bedroom of a 2-year-old child. When the 2-year-old cried out, the defendant stabbed him twice in the chest, causing his death.

In the case of *State v. Reyes*, 192 Neb. 153, 219 N.W.2d 238 (1974), the defendant was permitted to plead guilty to second degree murder pursuant to a plea bargain. He was sentenced to 20 years' imprisonment for the killing. The evidence discloses that the defendant approached the victim on a street corner where he had been standing with a 6-pack in each hand. The defendant shot the victim five times, killing him instantly.

The cases cited above are simply those which were appealed to this court and therefore found in the Nebraska Reports. We have no quick way of determining how many more cases of this nature can be found by examining the various District Court records. To be sure, the appealed and reported cases are not the only instances where this disparity occurs.

While I have already acknowledged that such variances and discretion are not within the control of the courts, and should not be within the control of the courts, I, nevertheless, cannot ignore the reality of those matters in attempting to determine whether the death penalty is imposed in a nonarbitrary and noncapricious manner in this state.

The words of Mr. Justice Stewart in *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), seem most applicable to this analysis. At 309-10, he said: "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. . . . I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and freakishly imposed." I likewise must conclude that the Constitution of the United States and the Constitution of the State of

Nebraska cannot tolerate the infliction of a sentence of death to be so wantonly and so freakishly imposed. Recognizing the system to be what it is, and further recognizing that the system must at least for the present remain as it is, I find no other alternative but to conclude that the Constitution of the United States and the Constitution of the State of Nebraska preclude the imposition of the death penalty except in but a few extremely isolated cases.

However, I wish not to be misunderstood by what I have said here. I do not believe that persons convicted of murder should be quickly forgiven and returned to society. Quite to the contrary, I believe that having acted like an animal in the commission of the crime, they should now be restrained as an animal during the balance of their lives. If it is indeed punishment we seek to impose, and I find no fault with that, then requiring them to live out the balance of their lives in a 9- x 6-foot cell, isolated from civilization and any of the benefits of freedom, would indeed be an appropriate punishment.

For me, the question is not whether the convicted should be punished but, rather, whether the form of punishment is permitted under the Constitution. Having now attempted for more than 2 years to glean any reasonable pattern in which one is either selected to be charged with first degree murder or selected to be executed, and being unable to do so, I must conclude our selection process is arbitrary and capricious and therefore invalid. The fact that we act arbitrarily in accordance with standards which we have established to aid us in making our decision, but which in fact repeatedly fail, does not cure the constitutional defects in the scheme.

Concluding, as we have, that all persons who have been ordered executed are treated alike does not address the issue. Discrimination is determined by examining the entire class and not just those who are discriminated against. The class is persons who

have unlawfully killed and not persons sentenced to death. That is what §§ 29-2521.01 et seq. seek to address.

I would sentence the appellant herein to be incarcerated in the penal complex for the balance of his natural life, and I would hope that the Board of Pardons would not commute the sentence so as to make him eligible to be released.

KARIN CONRAD, APPELLANT, V.
PHILLIP C. CONRAD, APPELLEE.

304 N.W.2d 674

Filed April 17, 1981. No. 43288.

1. **Child Support.** Accrued child support payments are not subject to modification.
2. ____. Remarriage of mother before decree of dissolution became final and her removal of child from the jurisdiction without consent of the court held not to estop mother from collecting accrued child support payments.

Appeal from the District Court for Douglas County: KEITH HOWARD, Judge. Reversed and remanded with directions.

Lawrence H. Yost of Yost, Schafersman, Yost, Lamme & Hillis for appellant.

Richard J. Spethman for appellee.

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

PER CURIAM.

This is an appeal in a contempt proceeding against the respondent, Phillip Conrad, for failure to pay child support. In response to an order to show cause the respondent filed an application for an order suspending all child support payments due after January

1963. The trial court found that the petitioner, Karin Conrad, was equitably estopped from collecting accrued child support and permanently enjoined the petitioner from attempting to collect all unpaid child support obligations. The petitioner has appealed.

The petitioner and respondent were married on April 13, 1960. A daughter, Debby Anne Conrad, was born November 17, 1960. The petition for dissolution was filed on September 27, 1961, and a decree of dissolution entered on August 3, 1962. The decree awarded custody of the minor child to petitioner and provided that respondent should pay child support in the amount of $10 per week until such time as the minor child reached 21 years of age, became married, or self-supporting. The respondent was granted reasonable visitation rights.

The record indicates that while the dissolution proceeding was pending, the respondent failed to make some of the payments for temporary child support. The respondent testified that he did not make the payments because he was experiencing difficulty in exercising his visitation rights. After the dissolution, the respondent regularly exercised his rights of visitation through December 1, 1962.

On or about September 15, 1962, after the dissolution, the respondent learned that the petitioner planned to remarry and take Debby Anne to Germany. Based on this information the respondent filed an application on September 19, 1962, for a temporary restraining order to prevent the removal of Debby Anne from the court's jurisdiction. On October 18, 1962, a restraining order was granted. The petitioner denied knowledge of this order or of any subsequent pleadings filed by respondent pertaining to support and visitation rights.

On December 9, 1962, the petitioner married Kent R. Warren, a serviceman stationed at Fort Leonard Wood, Missouri. This marriage took place during the 6-month period before the decree of dissolution had become final.

On January 8, 1963, the respondent filed an application for an order requiring the petitioner to show cause why he had been denied visitation rights since December 1, 1962. On January 8, 1963, the court ordered the petitioner to appear and show cause why the respondent had been denied visitation privileges. The record does not show whether this order was complied with. A second application for an order to show cause was made on February 6, 1963, in which the respondent prayed for an order requiring the petitioner to permit visitation or, in the alternative, to discontinue child support payments. The record does not show any disposition of this final application.

The respondent made support payments until January 15, 1963. The last time he saw his daughter was December 1, 1962.

The petitioner, her new husband, and Debby Anne lived in Germany from February 1963 until the first part of 1966. During this time Phillip was not aware of their exact location and did not correspond with his daughter.

In 1965 the petitioner and Debby Anne returned to Omaha for a wedding. The petitioner did not attempt to contact the respondent at that time. In 1966 Warren took a job with the Omaha Public Power District and the family moved to North Bend, Nebraska, where they were living at the time this action was commenced.

The petitioner made no attempt to contact the respondent during the 14 years she and Debby Anne resided in North Bend. Since 1962 the only contact Debby Anne has had in relation to the respondent was in 1974 when her mother showed her a picture of her natural father.

The respondent throughout this period has resided in Omaha, Nebraska, and has been employed by the Omaha Police Department. The respondent has also remarried and now has 3 children from his second marriage. He testified at trial that he would not recognize his daughter if she walked into the courtroom.

We have held in many cases that accrued child support payments are not subject to modification. In *Ferry v. Ferry*, 201 Neb. 595, 600, 271 N.W.2d 450, 453-54 (1978), we said: "Where a divorce decree provides for the payment of stipulated sums monthly for the support of a minor child or children, contingent only upon a subsequent order of the court, such payments become vested in the payee as they accrue. The courts are without authority to reduce the amounts of such accrued payments."

The proper remedy for the respondent in this action would have been to seek a modification of the decree on the basis of changed circumstances before the payments accrued. Apparently, no disposition was made of the application filed by the respondent on February 6, 1963.

In *Eliker v. Eliker*, 206 Neb. 764, 772-73, 295 N.W.2d 268, 273 (1980), the father had suspended payment of child support because of a denial of visitation rights. We held: "This jurisdiction is committed to the view that courts of this state are without authority to forgive accrued child support and that such payments continue to accrue in accordance with the court's previous order until paid in full or otherwise modified by the court. See, *Smith v. Smith*, 201 Neb. 21, 265 N.W.2d 855 (1978); *Ruehle v. Ruehle*, 169 Neb. 23, 97 N.W.2d 868 (1959). The fact that a mother in whose custody a minor child has been placed by the court refuses to permit a father ordered to pay child support to exercise his rights of visitation does not justify the father's withholding the payment of child support. The father is not without remedy and may make application to the court for further orders requiring the mother to permit the father to exercise his right of visitation. The right of visitation, however, is not a quid pro quo for the payment of child support and the mother's action does not justify the father's failure to pay. . . .

"The fact that Mrs. Eliker may have improperly

and without justification prevented Mr. Eliker from exercising visitation rights with his daughter, did not either entitle or justify Mr. Eliker's failing to continue making child support payments as required. Neither of the parties is authorized to interfere with the court's orders and only the court can determine what, if any, adjustments should be made."

The respondent seeks to invoke the doctrine of equitable estoppel as applied in *Smith v. Smith*, 201 Neb. 21, 265 N.W.2d 855 (1978), to avoid the payment of accrued child support. In the *Smith* case, however, there was a reliance in good faith upon statements or conduct of the party estopped and a change of position to the injury or detriment of the party claiming estoppel. Unlike the *Smith* case, there is in this case no evidence of detrimental reliance and a change of position on the part of respondent. Equitable estoppel is inapplicable to the present case.

The respondent's remedy was to obtain a modification of the decree at the time of the alleged change in circumstances. Having failed to obtain a modification, this court is now without jurisdiction to reduce the accrued support payments vested in the petitioner.

The judgment of the District Court is reversed and the cause remanded with directions to dismiss the application of the respondent.

REVERSED AND REMANDED WITH DIRECTIONS.

BOSLAUGH, J., dissenting in part.

I concur in that part of the opinion which holds that accrued payments of child support are not subject to modification. I dissent from the holding that the petitioner is not equitably estopped to enforce payment of the accrued amounts.

The majority opinion focuses upon the failure of the respondent to obtain a modification of the decree in accordance with his application filed on February 6, 1963. It ignores the inequitable conduct of the petitioner.

There can be little doubt but that the respondent was entitled to relief upon his application filed in 1963. The grounds for relief are admitted by the petitioner or shown in the record. In *Prell v. Prell*, 181 Neb. 504, 505, 149 N.W.2d 104, 105 (1967), we said: "We hold that where the decree of divorce gives visitation rights, the law contemplates that the children shall remain within the state so that the rights may be exercised. The mother's removal of the children from the state without the consent of the father or of the court may be sufficient change of circumstances to justify the court in suspending or reducing the amount of child support payments until the children have returned to the state."

This is not a case in which the father was indifferent to his visitation rights or the removal of his child from the jurisdiction. Upon his application, a restraining order to prevent the removal of the child from the jurisdiction was issued on October 18, 1962. This order was approved as to form by the petitioner's attorney of record.

The petitioner, in disregard of the limitations of the decree, remarried on December 9, 1962. Then, without the permission of the trial court, took the child to Germany, effectively depriving the respondent of his visitation rights for a period of 3 years.

At no time after January 1963 did the petitioner request or demand the support payments which were provided for in the decree. The reason is obvious. The petitioner knew that she would have to afford the defendant his right of visitation if she expected to receive support payments. Instead, she chose to raise the child completely separate and apart from the respondent so that the child would have no opportunity to know her natural father. Now, after the child has reached her majority, the petitioner demands payment of the accrued child support.

In *Smith v. Smith*, 201 Neb. 21, 265 N.W.2d 855 (1978), we held that a mother who had obtained a

relinquishment from the father was estopped to collect accrued child support after the date that the adoption could have been completed even though no adoption ever took place. We said: "This court does not have authority to reduce past-due installments of child support. This is not to say, however, that it may not find in a proper case that a party has equitably estopped herself from collecting installments accruing after some affirmative action which would ordinarily terminate future installments. The securing of the consent of the father to an adoption by another of his child is such action which by its nature should terminate further liability for child support." *Id.* at 28, 265 N.W.2d at 860. In *Williams v. Williams*, 206 Neb. 630, 294 N.W.2d 357 (1980), we again recognized that equitable estoppel may prevent the enforcement of accrued child support.

The doctrine of clean hands which bars redress to those guilty of improper conduct in the matter as to which they seek relief is also applicable in proceedings of this nature. In cases involving factual situations similar to this case, other courts have held that payment of accrued child support will not be enforced.

In *Smith v. Smith*, 282 Minn. 190, 193-95, 163 N.W.2d 852, 856-57 (1968), the court refused to enforce payment of accrued child support. The court said: "Here, the father violated the divorce decree by failing to make the monthly support payments expressly required by the decree. The mother, however, also impliedly violated the decree by surreptitiously removing the minor daughters to the United Arab Republic, thereby defeating the right to reasonable visitation reserved to the father and provoking his refusal to pay support.

"Applying the equitable doctrine of 'unclean hands,' it is clear that a party who has initially violated a divorce decree should not under ordinary circumstances be permitted to enforce the decree against

the other party even though the latter subsequently violates the decree. This rationale seems to be the underlying theoretical basis for the well-established and oft-cited Minnesota rule first promulgated in Eberhart v. Eberhart, 153 Minn. 66, 189 N.W. 592, that, absent unusual circumstances, where a mother by wrongful or malicious conduct deprives the father of visitation rights or where she removes the child to another state and does not inform the father of the removal or the whereabouts of the child, the father is relieved of the obligation to continue making support payments accruing thereafter.

"In Michalson v. Michalson, 263 Minn. 356, 357, 116 N.W.2d 545, 547, we clarified this rule by cautioning that it is 'not a hard-and-fast rule which must have strict application in each case' to which it may appear to apply. Rather, a revision of child support payments depends upon the particular facts of each case. We emphasize, as we did in Michalson, that the welfare of the child or children of the marriage is the paramount consideration, and that providing support is primarily the father's parental duty. Thus, unlike the situation in which a husband might rely upon the commonly accepted view of automatic abatement of payment of alimony upon remarriage of the wife, a father should not regard his obligation to pay support terminated where the mother wrongfully or maliciously deprives him of his visitation rights or otherwise defeats such rights by surreptitious removal of the children from the jurisdiction of the court. When such occurs, a proper concern by the father for the welfare of the children and regard for his duty to provide support makes it incumbent upon him, no less than upon the mother, to seek a modification of the decree to meet changed circumstances. While it may be argued that the mother, whose conduct created the problem, ought to be required to take the initiative and commence proceedings to justify her actions and her right to continued child support,

her failure to do so cannot excuse the father from continuing to pay support where a refusal to make payments detrimentally affects the welfare of the child. An unreasonable delay in seeking a revision of the decree, coupled with a failure to pay resulting in detriment to the child, can very easily be viewed as selfish and embittered conduct designed to punish the mother in disregard of the physical needs of the child. It should be noted that in at least two cases involving unusual circumstances we have upheld postdecree orders compelling payment of accrued support installments despite removal of the children from the state without consent of the father or leave of court.

"Unusual circumstances which alone or in combination with other facts may justify such an unconsented-to removal are: (1) The father's failure to make support payments prior to the removal; (2) the necessity of quick action by the mother to accept an attractive job opportunity in another state; and (3) the father's indifference to his visitation rights or to the removal of his children upon the transfer of the mother's new husband to a military post outside the United States.

"The record in this case reveals no such circumstances."

In *Stratton v. Stratton*, 67 S.D. 354, 358, 293 N.W. 183, 184-85 (1940), the court held the inequitable conduct of the wife in depriving the husband of his rights of visitation prevented her from enforcing payment of accrued alimony. The court said: "It is the contention of the appellant that the provision in the decree of divorce requiring respondent to pay alimony being unconditional in its terms, appellant is entitled to such payments notwithstanding the fact that she has never performed any of the obligations imposed upon her by said decree. In other words, having openly defied the court for more than ten years, and until the passage of time has rendered the performance of the obligations imposed upon her, to-wit:

to permit the respondent to enjoy the society of his little girl for occasional brief intervals—impossible, she now insists that respondent be compelled to perform the obligations imposed upon him, and that he be imprisoned until such obligations are performed. Appellant's conception of the duty and function of a court of equity is entirely wrong. A court of equity delights in doing equity, but nothing could be more inequitable than what appellant is asking the court to do in this case. The agreement of the parties was that respondent was to pay appellant certain sums of money as alimony and in consideration therefor appellant was to permit respondent to occasionally enjoy the society of his little child. This she steadfastly refused to do and for no reason in the world except pure malice.

"Appellant is not in court with clean hands and the court will leave her where it finds her. The Supreme Court of Minnesota recently reached the same result in a similar case. Anderson v. Anderson, Minn., 291 N.W. 508." See, also, *Pronesti v. Pronesti*, 368 Mich. 453, 118 N.W.2d 254 (1962); *Heidemann v. Heidemann*, 96 Idaho 602, 533 P.2d 96 (1974); *Pence v. Pence*, 223 Ark. 782, 268 S.W.2d 609 (1954); *Noble v. Noble*, 86 Nev. 459, 470 P.2d 430 (1970); *Levell v. Levell*, 183 Or. 39, 190 P.2d 527 (1948).

A number of courts have held that the controlling question in such cases is the best interests or welfare of the child. Where there is no prejudice to the child and public funds are not involved, payment of accrued child support will not be enforced where it would be inequitable between the parties to do so.

This principle was recognized in *McGee v. McGee*, 190 Neb. 415, 417, 209 N.W.2d 339, 340 (1973), where we said: "It must be emphasized that this rather extraordinary relief should not, and will not, be granted in every case seeking termination of child support. It is only in those rare cases like the instant one where the mother has removed the children from

the state and the jurisdiction of the court and has deprived the father of all visitation rights that suspension of child support payments should be granted. We do not in any way intimate that a dispute between parents as to visitation rights may be used by a father as a threat collaterally to relieve himself from his duty and obligation to support his children. But the removal of the children from the jurisdiction of the court without consent, together with the deprivation of all visitation rights and no suggestion or showing, after notice, that the children are in need or not properly taken care of warrants a court to invoke a suspension of the payments to preserve its jurisdiction in the matter. The remedy of suspension is the only one that can be used to meet an intentional violation of the law and destroy the jurisdiction of the court."

There is another basis upon which the respondent can obtain relief in this case. In *Goodman v. Goodman*, 173 Neb. 330, 113 N.W.2d 202 (1962), we held that child support payments which accrue after a petition to modify the judgment has been filed may be canceled. In *McGee v. McGee, supra*, a case involving a somewhat similar factual situation, we suspended child support payments retroactively to the date the children had been removed from the state by the mother.

McCOWN, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V.
DAVID STRANGHOENER, APPELLANT.

304 N.W.2d 679

Filed April 17, 1981. No. 43556.

1. **Presentence Reports.** Any presentence report or psychiatric examination shall be privileged and shall not be disclosed directly or indirectly to anyone other than a judge, probation officers to whom an offender's file is duly transferred, or others entitled by law to receive such informa-

tion. The court may permit inspection of the report or examination of parts thereof by the offender or his attorney, or other persons having a proper interest therein, whenever the court finds it is in the best interest of a particular offender. The court may allow fair opportunity for an offender to provide additional information for the court's consideration. Neb. Rev. Stat. § 29-2261(5) (Reissue 1979).

2. **Criminal Law: Sentences.** A sentencing judge has broad discretion as to the source and type of evidence or information which may be used as assistance in determining the kind and extent of the punishment to be imposed, and the judge may consider probation officer reports, police reports, affidavits, and other information, including his own personal observations.
3. ____:____ A sentencing judge is not bound by the recommendations of the probation officer in determining the sentence to be imposed.
4. ____:____ Among the factors meriting consideration when sentence is imposed are the family ties, age, mentality, education, experience, and social and cultural background of the convicted criminal; his willingness to work at honest labor; his past criminal record or law-abiding conduct; the motivation for the offense, the nature of the offense, and the amount of violence, if any, involved in the commission of the offense.
5. **Homicide: Sentences.** Upon conviction for second degree murder, the court is not authorized to pronounce an indeterminate sentence, but may impose a sentence of a definite term of years, not less than the minimum authorized by law; or, in the alternative, may impose a sentence of life imprisonment.

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

Michael N. Schirber for appellant.

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

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

BRODKEY, J.

David Stranghoener, the defendant and appellant herein, appeals to this court from his sentence by the District Court of Sarpy County, Nebraska, to a term of 20 years' imprisonment, stemming from his conviction in that court of second degree murder. We affirm.

By way of factual background, as reflected in the

preliminary hearing and the deposition of Charles McGee, received in evidence in this case, Stranghoener resided with his wife, Polly Stranghoener, in a house located in LaVista, Nebraska. Also residing at the Stranghoener house were Charles McGee, Dennis Paulson, and Laureen Leander, codefendants in the cause below. It appears that these individuals comprised a social "family," with Dennis Paulson as head of the family. One additional member of this family was the victim, Jim Goslee. However, it appears that by June 4, 1979, Paulson, McGee, and the defendant had met and determined that Goslee was to be "eliminated" from the family.

On June 5, 1979, the parties met at the Stranghoener house for a party, which was attended by two additional codefendants in this matter, Darrell Thomas and Michael Meegan. At this party, the codefendants were made aware of the fact that Goslee would be killed that evening. The record indicates that alcohol and various drugs were being consumed by the family members, and that on at least one occasion the victim was given whiskey which had been drugged. At some time during the evening, several of the codefendants proceeded to a basement recreation room with the victim, while Michael Meegan, Charles McGee, and the defendant loaded a rifle in an upstairs bedroom. Before they returned to the basement, Meegan and McGee went outside the house and decided that McGee would shoot Goslee. It was determined Meegan would hand the rifle owned and provided by Stranghoener to McGee upon hearing the code word "execute." McGee returned to the basement, turned up a stereo, and gave the code word. Meegan stepped down into the basement and handed the rifle to McGee, who in turn shot Goslee. McGee later testified at the preliminary hearing that the rifle was an automatic weapon, and he fired the weapon until the gun was empty.

After the shooting had taken place, the victim's

body and clothes were searched, and his social security card, comb, and a note pad were destroyed. At 10 p.m., the body was wrapped up in a sheet and a quilt blanket which was taken from one of the defendant's couches. McGee, Meegan, Thomas, and Paulson wrapped the body and placed it into the trunk of a car; and then, in company with the defendant, McGee, Meegan, and Thomas drove over to Iowa, where the body was thrown into a creek bed. The body was subsequently discovered on June 18, 1979.

The defendant was originally charged with first degree murder in an information filed on June 25, 1979. This charge was subsequently amended to second degree murder pursuant to a plea bargain entered between the defendant and the State. The defendant pled guilty to the amended charge before the trial court on January 14, 1980.

On June 3, 1980, a sentencing proceeding was held before the trial court, at which time the court made both the defendant's presentence report and the presentence reports of each of his codefendants a part of the record. When the defendant was asked if he knew of any reason why the court should not then impose sentence, he responded: "No." However, counsel for the defendant asked to be "made aware" of any recommendations which the court had received from the probation officer. To this request, the court responded: "I have no information other than what is contained in the presentence investigation. Any recommendation as to whether there was incarceration or probation by Mr. Hartzell [the probation officer] was done solely as my agent, and you will not interview or cross-examine Mr. Hartzell, nor will I make it available to you any more than I would take the witness stand and let you know my particular deliberations that have gone into or made up a sentence that I impose. . . . If there are other factual matters that he put in the presentence investigation that you feel should be contradicted in some manner, or that he was

in error in placing them in, certainly you have the opportunity to rebut anything that's contained in the presentence investigation. . . . You're simply not going to question him or elicit information from him concerning private conversations or communications he's had as my particular agent any more than you would a law clerk." The defendant was subsequently sentenced to a term of 20 years' imprisonment at the Nebraska Penal and Correctional Complex, with credit granted for 1 year spent in the county jail while awaiting the disposition of this case.

Stranghoener has appealed to this court, alleging five errors on the part of the trial court. However, in his brief on appeal, only two of the assigned errors are discussed. It is elementary that consideration of a cause on appeal to this court is limited to errors assigned and discussed. *McClellan v. Dobberstein*, 189 Neb. 669, 204 N.W.2d 559 (1973); Neb. Ct. R. 8.a.2.(3). The defendant contends that the trial court erred: (1) By denying defendant's counsel an opportunity to inspect the presentence report and refusing to divulge any recommendation made by the probation officer; and (2) By imposing an excessive sentence.

At the outset we note that Neb. Rev. Stat. § 29-2261 (Reissue 1979) sets out the right of a criminal defendant or his attorney to investigate the contents of a presentence report. The pertinent subsections of the statute state:

"(1) Unless it is impractical to do so, when an offender had been convicted of a felony, the court shall not impose sentence without first ordering a presentence investigation of the offender and according due consideration to a written report of such investigation.

. . . .

"(5) Any presentence report or psychiatric examination shall be privileged and shall not be disclosed directly or indirectly to anyone other than a judge, probation officers to whom an offender's file is duly

transferred, or others entitled by law to receive such information. The court *may* permit inspection of the report or examination of parts thereof by the offender or his attorney, or other person having a proper interest therein, whenever the court finds it is in the best interest of a particular offender. The court may allow fair opportunity for an offender to provide additional information for the court's consideration." (Emphasis supplied.)

The law is well established in this state that in considering a proper sentence, the trial court is not limited in its discretion to any mathematically applied set of factors. It is necessarily a subjective judgment and includes the observations of the sentencing judge as to the demeanor, attitude, and all facts and circumstances surrounding the life of the defendant. "A sentencing judge has broad discretion as to the source and type of evidence or information which may be used as assistance in determining the kind and extent of the punishment to be imposed and the judge may consider *probation officer reports*, police reports, affidavits, and other information, including his own personal observations." (Emphasis supplied.) *State v. Kramer*, 203 Neb. 658, 660-61, 279 N.W.2d 634, 636 (1979); *State v. Miller*, 199 Neb. 19, 255 N.W.2d 860 (1977); *State v. Hylton*, 175 Neb. 828, 124 N.W.2d 230 (1963). Other than in recidivist cases, the presentence investigation is not involved with the issue of guilt of the defendant. The latitude allowed a sentencing judge in determining the nature and length of punishment is almost without limitation as long as it is relevant to the issue. *State v. Rose*, 183 Neb. 809, 164 N.W.2d 646 (1969). Moreover, this court has specifically held that the sentencing judge is not bound by the recommendations of the probation officer in determining the sentence to be imposed. *State v. Steed*, 201 Neb. 120, 266 N.W.2d 240 (1978).

In his brief on appeal, the defendant cites *State v. Richter*, 191 Neb. 34, 214 N.W.2d 16 (1973), for the

proposition that his attorney must be allowed to review a recommendation communicated between the probation officer and the sentencing judge. We do not agree. In *Richter*, we held only that it was harmless error for a sentencing judge to deny the defendant or his attorney access to that part of a presentence report which notes any prior record of arrests and convictions. See, also, *State v. Carey*, 199 Neb. 288, 258 N.W.2d 141 (1977). In the present case, however, the court did permit the defendant and his counsel to inspect the written presentence report. However, the defendant claims that he was denied an adequate opportunity to inspect the report because he was not allowed to respond to the recommendations made by the probation officer to the sentencing judge. Judge Reagan, at the time of the arraignment proceedings, indicated to the defendant that he would ask the probation office to compile information to be included in the presentence report and which, among many other things, would be utilized in determining the sentence to be imposed. The recommendation of the probation officer is just one of numerous considerations taken into account by the sentencing judge, and the recommendation in no way binds the judge in determining the sentence to be imposed. *State v. Steed, supra.* As indicated in § 29-2261(5), it is within the discretion of the sentencing judge to allow inspection of a probation officer's presentence report, which discretion is, of course, reviewable by this court. In this case we conclude that the sentencing judge did not abuse his discretion. See *State v. Keller*, 195 Neb. 209, 237 N.W.2d 410 (1976).

The defendant also contends that the sentence he received was excessive in comparison to the sentence imposed upon his codefendant, Dennis Paulson. The court, after reviewing the presentence reports of both Stranghoener and Paulson, concluded that Stranghoener's involvement in the murder of Goslee was greater than that of his codefendant, Paulson;

and therefore, after sentencing Paulson to 15 years' imprisonment, sentenced Stranghoener to 20 years' imprisonment. We cannot conclude from the record that the trial judge abused his discretion in so doing. In *State v. Etchison*, 188 Neb. 134, 137-38, 195 N.W.2d 498, 501 (1972), we stated: "The primary function of the criminal law is to protect individuals and society from the depredations of the criminally bent. In furtherance of this purpose, it is deemed necessary to mete out punishment as a deterrent to others and to lock up incorrigible criminals. On the other hand, the rehabilitation of criminals is one of society's major safeguards. Among factors meriting consideration are the family ties, age, mentality, education, experience, and social and cultural background of the convicted individual; his willingness to work at honest labor; his past criminal record or law abiding conduct; the motivation for the offense, the nature of the offense, and the amount of violence, if any, involved; the frankness and willingness of the defendant to cooperate; narcotic addiction, if any; circumstances aggravating or mitigating the offense; community attitudes toward the offense; and the individual's potentialities for reform or recidivism." Concededly, it is difficult, if not impossible, to accurately "color match" records of codefendants to determine the varying degrees of punishment each should receive. In this regard, the court is granted considerable discretion and latitude in making that decision.

In the instant case it appears from the presentence report that Stranghoener is married, has two children, was 27 years of age at the time of the crime, had serious mental problems, had a 10th grade education, and an antisocial personality. He has changed jobs frequently and has a prior record of suspected larceny from an automobile, injury-warrant, speeding, and trespassing. He is also an alcoholic who takes drugs whenever he can get them. According to the presentence report, his chances for reform are small. On the other

hand, according to Paulson's presentence report, he was 27 years of age at the time of the crime and attended school to the 10th grade, completing his G.E.D. during the 2 years he was in the Marines. Upon receiving a general discharge, he completed an automobile mechanics course while he was serving a 1- to 3-year sentence in the Nebraska Penal Complex for forgery. He was paroled in less than a year and discharged in a little over 2 years. The only other criminal charges against him for which he was sentenced were in 1978, they being possessing liquor on public property and having an open container. His work record includes about 1 year with a meat processor in Omaha while he was on parole, 6 months with another meat processor in Omaha, and about 8 months with Omaha Temporaries. While Paulson appears to have been the leader of the "family," the murder occurred in Stranghoener's home; and it also appears that Stranghoener provided the rifle used by McGee to shoot Goslee, and also the shotgun used by Paulson to cover McGee. Stranghoener helped to dispose of the body and of the murder weapon, while Paulson did not participate in the disposal of the body or the weapon. Both Stranghoener and Paulson were charged with first degree murder, which charges were reduced to second degree murder in exchange for pleas of guilty.

Under the provisions of Neb. Rev. Stat. § 28-304 (Reissue 1979) murder in the second degree is classified as a Class IB felony. Neb. Rev. Stat. § 28-105 (Reissue 1979) provides that the penalty for a Class IB felony is a maximum of life imprisonment and a minimum of 10 years' imprisonment. However, under our present statutes, we have held that upon conviction for second degree murder, the court is not authorized to pronounce an indeterminate sentence, but may impose a sentence of a definite term of years not less than the minimum authorized by law; or, in the alternative, may impose a sentence of life imprisonment. *State v. Randall*, 208 Neb. 248, 302 N.W.2d 733

(1981); *State v. Laravie*, 192 Neb. 625, 223 N.W.2d 435 (1974). The sentences imposed by the trial judge upon both Stranghoener and Paulson clearly comply with the requirements for sentences in second degree murder cases, and hence cannot be considered as excessive, particularly in consideration of the fact that as a result of their respective plea bargains they each had their charges reduced from first degree murder to second degree murder.

Our conclusion is, therefore, that the sentence of the trial court given Stranghoener of 20 years' imprisonment was not excessive, either in the abstract, or in comparison to the sentence meted out to Paulson; that the court did not abuse its discretion; and that said sentence should be and hereby is affirmed.

AFFIRMED.

JED CONSTRUCTION COMPANY, INC., A CORPORATION, APPELLANT, V. GENE LILLY, DOING BUSINESS AS GENE LILLY SURETY BONDS AND INSURANCE, APPELLEE.

305 N.W.2d 1

Filed April 24, 1981. No. 43218.

1. **Issue Preclusion.** For the theory of issue preclusion to bar further litigation on a specific issue, the issue concluded must be identical, must have been raised and litigated in the prior action, must have been material and relevant to the disposition of the prior action, and the determination made of the issue in the prior action must have been necessary and essential to the resulting judgment.
2. ____. Identity of parties is not necessary to give validity to a claim of issue preclusion.
3. ____. A stranger to a primary suit can assert the theory of issue preclusion as a defense in a subsequent suit provided other elements of the theory of issue preclusion coincide.

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

Kenneth Cobb of Law Offices of Kenneth Cobb, P.C., for appellant.

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

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

CLINTON, J.

This is an action brought in the District Court for Lancaster County, by JED Construction Company, Inc., against Gene Lilly, its alleged agent, doing business as Gene Lilly Surety Bonds and Insurance, an insurance broker, to recover damages alleged to have been suffered because Lilly violated his instructions and exceeded his authority while acting as such agent in not causing an application for an indemnity agreement and a contractor's bond and indemnity agreement executed by JED in blank to be completed in accordance with the terms of the actual agreement. The beneficiary of the indemnity agreement was Universal Surety Company which, in reliance on the indemnity, issued a performance bond to Erik Hansen Construction Co. in connection with the construction of an addition to Norris Junior-Senior High School. In the case of *Universal Surety Co. v. Jed Constr. Co., Inc.*, 200 Neb. 712, 265 N.W.2d 219 (1978), this court affirmed a judgment which Universal Surety obtained against JED on the indemnity agreement in the amount of $61,872.68 and denied an offset of $18,516.12 claimed by JED on its counterclaim. A more detailed statement of the facts surrounding the transaction is set forth in the above case and we will not repeat those facts except as necessary for an understanding of the issue here presented.

JED, in this action, seeks to recover from Lilly the amount it was required to pay in the case of *Universal Surety Co. v. Jed Constr. Co., Inc., supra*, as well as other expenses in connection with that litigation.

The issues in this case were submitted to the jury, which rendered a judgment for Lilly. JED then appealed to this court, assigning various errors pertaining to instructions given to the jury or refused by the court and an error in connection with the reception of evidence.

In his answer Lilly pleaded, among other defenses: "[T]hat if the Amended Petition states any cause of action, such action is barred and estopped by principles of collateral estoppel and res judicata for the reason that all issues raised by the Amended Petition have been concluded by the judgment of the District Court of Lancaster County, Nebraska in *Universal Surety Co. v. JED Construction Co.*, Docket 296, Page 244, which judgment was duly given."

At trial Lilly introduced and there was received in evidence the transcript and bill of exceptions in *Universal Surety Co. v. Jed Constr. Co., Inc., supra.* Lilly, after both parties had rested, asked the trial court for a directed verdict for the defendant on the ground of collateral estoppel or, as it is more usually referred to, issue preclusion. The trial court reserved ruling on that motion and, after the jury verdict, held that the issue was moot and did not rule thereon.

Lilly, on this appeal, responds to the claims of error but also urges that even if there was error it was immaterial because, in any event, its motion for a directed verdict, based upon issue preclusion, should have been granted. We sustain this contention, hence it becomes unnecessary for us to examine JED's assignments of error.

In the prior case, among the issues decided were: (1) What was the actual agreement, and (2) The nature and extent of Lilly's authority and instruction. The first issue depended upon the facts in the second. In the previous action JED maintained that Lilly was the agent of Universal Surety. In this action it claims that Lilly was its agent. However, be that as it may, the issue of Lilly's authority and whether he acted in accordance with instructions from JED was an

issue in both cases and was decided against JED in the previous action. JED had an opportunity to and did fully litigate those issues in the prior action. We quote from JED's brief in the previous case. "Applying the principle that the form contract must be completed in accordance with the authority granted, it is clear that the Form 2 is subject to reformation on the basis that Universal *failed to conform it to the oral agreement reached between JED and Eugene Lilly*, Universal's agent. The Form 2 could easily have been so conformed via deletions and insertion of superseding language in blank spaces, including that reserved for Paragraph 17. JED does not dispute that an agreement existed whereby it was to indemnify Universal, but the Form 2 does not constitute that agreement and should be reformed." (Emphasis supplied.)

Lilly testified as a witness in the previous action, as did the officers of JED. Both Lilly and the officers testified in the case before us. Their testimony relates Lilly's authority and instructions given him by JED. The issue now before us was before us on the earlier appeal. In our opinion in *Universal Surety Co. v. Jed Constr. Co., Inc.*, *supra*, we said at 714-15, 265 N.W.2d at 221: "Jed advances two theories, mutual mistake of fact and failure to complete the agreement according to its terms. Mistake as a ground for reformation of a contract must be a mutual mistake. [Citations omitted.]

"It is conceded that the officers of Jed did not read the contract and that they did not even talk with an agent or officers of Universal. The evidence does not show that the claimed mistakes were ever discussed with Lilly prior to the signing in blank by Jed's officers. The officers of Jed testified that the agreement they signed contained provisions different from the actual agreement. There is no evidence that Universal thought the terms of the contract were other than those contained in the actual agreement. Even if the officers of Jed were mistaken, it was a unilateral

mistake rather than a mutual one. Furthermore, one who does not read a contract before signing it cannot relieve himself of its burdens. [Citations omitted.]

"The second theory fails for the reasons discussed above. No evidence was offered tending to prove that the agreement was to be completed to include the provisions relating to exhaustion of the assets of the Hansens, retainage, or consent to extras. Again, the evidence could only establish that the Jed officers may have intended or thought that the agreement contained those provisions."

In *Peterson v. The Nebraska Nat. Gas Co.*, 204 Neb. 136, 281 N.W.2d 525 (1979), we held: "Collateral estoppel may be applied if the identical issue was decided in a prior action, there was a judgment on the merits which was final, the party against whom the rule is to be applied was a party or in privity with a party to the prior action, and there was an opportunity to fully and fairly litigate the issue in the prior action.

"Mutuality of estoppel is no longer considered to be a requirement for the application of collateral estoppel." (Syllabi of the court.) In that case The Nebraska Natural Gas Company was a defendant in a prior action where the issues of its negligence and legal responsibility for a gas explosion were litigated and a verdict was rendered against it. In *Peterson v. The Nebraska Nat. Gas Co., supra*, the negligence issue was the same as that in the prior case but a different injured party was plaintiff.

The Supreme Court of Iowa has given a clear exposition of the principles of issue preclusion in the case of *Schneberger v. United States Fidelity & Guar. Co.*, 213 N.W.2d 913 (Iowa 1973). The court there held at 917: "To bar further litigation on a specific issue four requirements must be established:

"(1) The issue concluded must be identical.

"(2) The issue must have been raised and litigated in the prior action.

"(3) The issue must have been material and relevant to the disposition of the prior action, and

"(4) The determination made of the issue in the prior action must have been necessary and essential to the resulting judgment. [Citations omitted.]

"Identity of parties is not necessary to give validity to a claim of issue preclusion. A stranger to a primary suit can assert the theory of issue preclusion as a defense in a subsequent suit provided other elements of the theory of issue preclusion coincide."

Professor Allan D. Vestal, in his text Res Judicata/Preclusion (1969), analyzes the various situations in which issue preclusion might arise. At V-317 he says: "In these situations where the losing defendants take the offensive and initiate subsequent lawsuits, it is very helpful to apply the test of reasonable expectations. Here it would again appear obvious that the person who once loses after having had his day in court would not be reasonable in expecting to be able to recover later when he sues someone not a party to the first suit. It is completely reasonable to hold that the nonparticipating nonparty to the first suit is able to assert preclusion against a plaintiff in the second suit if the plaintiff in Suit II was a losing party in the first suit, regardless of the position he occupied in Suit I.

"In these situations in which a defendant in Suit I has had an opportunity to present his side of a controversy fully and completely and has lost, it seems completely unreasonable to say that he can then start an action as a plaintiff and relitigate the matters which have been decided against him. Such a party should be bound by the decision which has been handed down."

For the reasons set forth we affirm the judgment for the defendant.

AFFIRMED.

ELSIE HAGERBAUMER, APPELLANT, V. HAGERBAUMER BROTHERS, INC., APPELLEE.

305 N.W.2d 4

Filed April 24, 1981. No. 43245.

1. **Contracts.** A subsequent contract which does not completely cover the same subject matter of a prior agreement and does not contain terms inconsistent with the former contract so that the two cannot stand together does not supersede or substitute for the earlier contract and become the only agreement of the parties.
2. ——. A contract complete in itself will be conclusively presumed to supersede and discharge another one made prior thereto between the same parties concerning the same subject matter, where the terms of the latter are inconsistent with those of the former so that they cannot subsist together.

Appeal from the District Court for Washington County: WALTER G. HUBER, Judge. Reversed and remanded with directions.

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

Neil W. Schilke of Sidner, Svoboda, Schilke, Wiseman & Thomsen for appellee.

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

WHITE, J.

This is an action by a stockholder in a closely held family corporation to compel the defendant-appellee corporation to purchase 666 shares of stock in the appellee corporation in accordance with a Buy and Sell Agreement executed October 22, 1976, between the corporation and all stockholders. The trial court determined that the agreement of October 22, 1976, had been rescinded by an agreement of July 1977 and that there was no duty on the part of the corporation to purchase the shares from the appellant, and therefore denied relief. We reverse and remand.

The original stockholders of the appellee, Hagerbaumer Brothers, Inc., were Obert and Elsie Hager-

baumer (Elsie being appellant herein) and their three children, Ardean, Gorlyn, and Leewane. The corporation operated farms and carried on extensive cattle feeding operations in Washington County, Nebraska. Although generally successful in the farming operation, in the early 1970's the company had experienced severe financial reverses because of a downturn in the cattle market. The history of the relationship between the stockholder-parents and the stockholder-sons, and among one another, has been stormy and, at times, violent. There are issues raised by the appellant in her petition suggesting that the agreement of 1977 was compelled by duress and fraud practiced on her, but as these issues are not necessary for a determination of the case, they will not here be considered.

The 1976 agreement entitled "Buy And Sell Agreement" has as its declaration of purpose: "[T]o make provision for the future disposition of the shares of capital stock of the Corporation, and to provide that such shares shall be transferable only upon compliance with the terms hereof . . . ."Appellant attempted to have the corporation redeem her stock under the following paragraph: "3. Sale During Life. A Stockholder desiring, during his lifetime, to sell or otherwise encumber his stock shall first give the other stockholders at least ninety days written notice by registered or certified mail of his intention to sell or dispose of any part or all of his stock. The remaining stockholders shall have the exclusive right and option during said ninety day period to purchase said stock. In the event that the Stockholders do not exercise this right, the Corporation must purchase all such shares of stock upon these terms and conditions: . . . ." The record is clear that appellant complied with all notice provisions and that both the remaining stockholders and the corporation refused to purchase the shares. Upon the corporation's refusal to purchase the shares, appellant brought this action.

The occasion for the execution of the 1977 agreement was the difficulties, both financial and personal, which arose between the brothers in the operation of the farm corporation. Their father, Obert, had died in April 1977 and the three brothers were unable to agree with respect to assignment of duties and certain benefits to Leewane by way of housing and automobiles; and, as a result, negotiations were commenced, at the request of a financial institution which had lent considerable money to the corporation to finance the cattle operation, to settle the status as to who should operate the corporation. The agreement principally provided for the deposit in escrow and the retirement of Leewane's stock and the agreement by the corporation to buy the stock over a period of years at specified yearly payments with interest. However, the agreement contained the following provision: "9. This agreement for the purchase of the stock of Leewane must of necessity comply with the request and requirements of the Arlington State Bank from which the necessary financing must be obtained. The bank understandably recognizes that it must work with the operators of the company for some years and as a community bank is interested in assuring that the operaion [sic] is successful and for the benefit of all parties concerned. It is contemplated that Gorlyn and Ardean will do the work for the corporation both as to physical labor and management and that any increase in value of the corporation will result substantially from their efforts and similarly a failure of the company will result in Ardean and Gorlyn taking the bulk of the loss by reason of their investment of time, labor and effort in the company. Therefore, it is important that the disposition of the remaining outstanding 666 shares of stock held by Elsie be determined. In order to obtain the necessary financing and secure fairness for all parties concerned, Elsie agrees that she will not at any time dispose of her shares of stock by gift, or bequest in

such manner that Ardean and Gorlyn would each receive less than one-third of such shares. It is contemplated that the remaining one-third of her shares would pass to Leewane but inasmuch as he will not be an active member of the company there is no binding agreement as to this one-third. It is further agreed that any such transfers will be made simultaneously so that at any given time Gorlyn and Ardean will each receive one-third of any shares transferred by Elsie. *This agreement does not preclude the sale of shares of stock by Elsie but in the event of sale other than as redemption by the Company Gorlyn and Ardean shall each have the right to purchase one-third of any shares of stock offered for sale by Elsie on the terms and conditions of any such bona-fide offer of sale and Elsie shall give Ardean and Gorlyn at least 30 days written notice of the terms and conditions of any proposal for the purchase of such stock and Gorlyn and Ardean will have 30 days after receipt of such notice to advise Elsie in writing as to whether or not the wish to exercise their option to purchase.*" (Emphasis supplied.)

Paragraph 11, that part referred to by the appellee corporation and the trial court in the determination that the 1977 agreement rescinded the 1976 agreement, provides as follows: "Each party hereto by entering into this agreement releases each other party and the Company from any and all claims for liability compensation, reimbursement or other claim of whatever nature, whether now known or unknown and whether now liquidated or unliquidated." The 1977 contract was not executed on behalf of the corporation.

It was the obvious purpose of both the first and second agreements that outsiders not be permitted to own stock in the appellee corporation. In their testimony, Gorlyn and Ardean testified that they opposed the purchase of the stock by the corporation for the reason that it would deplete seriously the working capital of the corporation and that the future of the corporation

would therefore be in doubt; and further, if the proceeds from the sale of the shares of Elsie were paid over to her, she would then be free to leave the money to Leewane or to do with it as she chose instead of distributing the value of her stock one-third each to Leewane, Ardean, and Gorlyn. It is obvious from a comparison of the plain language of paragraph 3 of the original Buy and Sell Agreement and paragraph 9 of the 1977 stock-purchase agreement that the two do not conflict. Indeed, the right of Elsie to sell the stock is reaffirmed; the right of the other three then existing stockholders to purchase is affirmed; and any purported cancellation of the right of Elsie to compel the corporation to purchase the stock in the event of refusal by the remaining shareholders is simply not mentioned.

In fact, paragraph 9 of the 1977 agreement even contemplates redemption by the company by providing that the right of Ardean and Gorlyn to purchase one-third each of Elsie's shares only applies to sales other than as redemption by the company.

A subsequent contract which does not completely cover the same subject matter of a prior agreement and does not contain terms inconsistent with the former contract so that the two cannot stand together does not supersede or substitute for the earlier contract and become the only agreement of the parties. *Walsh v. Lunney*, 75 Neb. 337, 106 N.W. 447 (1905). *Accord, Cooperative Refinery Ass'n v. Consumers Public Power D.*, 190 F.2d 852 (8th Cir. 1951).

The rule has also been stated that: "'A contract complete in itself will be conclusively presumed to supersede and discharge another one made prior thereto between the same parties concerning the same subject matter, *where the terms of the later are inconsistent with those of the former, so that they cannot subsist together.*'" (Emphasis supplied.) *In re Estate of Wise*, 144 Neb. 273, 282, 13 N.W.2d 146, 152 (1944); *Goings v. Gerken*, 200 Neb. 247, 263 N.W.2d

655 (1978); *Price v. Platte Valley Public Power and Irrigation District*, 139 Neb. 787, 298 N.W. 746 (1941).

An examination of the two contracts does not disclose inconsistencies sufficient for the presumption to obtain. The subject of the possible sale of the stock to the corporation in the event of a refusal of the remaining stockholders to purchase is referred to, as above noted, in the 1977 agreement. It cannot be said that this provision is inconsistent with the provision of the earlier contract which compelled the corporation to buy in the event of such refusal. The judgment of the trial court was therefore incorrect, and we reverse and remand.

There are other issues raised in the proceedings below that were not decided by the trial court or discussed by this court, i.e., whether or not under the terms of the agreement there was a binding agreement on Elsie to distribute the shares held by her in the corporation to each of her three sons, one-third each, and that a resulting trust should therefore be imposed on the proceeds. These matters will necessarily be decided by the trial court on remand.

REVERSED AND REMANDED WITH DIRECTIONS.

EUGENE H. ALLEMAND ET AL., APPELLEES, V. ROBERT WEAVER EL AL., APPELLEES, JULIE EDWARDS ET AL., APPELLANTS.

305 N.W.2d 7

Filed April 24, 1981. No. 43317.

1. **Wills.** It is a natural presumption that a testator making his will intended to dispose of his whole estate and not to die intestate as to any part of it, and in construing doubtful expressions this presumption has weight, but it cannot supply the actual intent of the testator to be derived from the language of the will.

2. ____ It is not the province of the courts by construction to supply omissions or to write residuary clauses for testators who neglect to do so.
3. ____ The object and purpose of the court is to carry out and enforce the true intention of the testator as shown by the will itself, in the light of attendant circumstances under which it was made.
4. ____ Ordinarily, a class gift is a gift to two or more persons who are not named and who have one or more characteristics in common by which they are indicated or who answer to a general description.
5. ____ If the gift is made to beneficiaries by name, the gift is, prima facie, not one to a class, even if the individuals who are named possess some quality or characteristic in common. This is particularly true if the beneficiaries are not described as having some quality or attribute in common.
6. ____ Where the language of a will is not conclusive but rather ambiguous, the court must determine the intent of the testator to the extent possible from the terms of the will itself.

Appeal from the District Court for Richardson County: WILLIAM F. COLWELL, Judge. Affirmed.

Charles D. Hahn of McKnight, Hahn, Hahn, Fuller & Chatelain for appellants.

Weaver, Beekman & Merz for appellees.

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

WHITE, J.

This is an appeal from the District Court for Richardson County, Nebraska, from a decree in a quiet title action assigning shares and ordering partition of certain real estate.

At issue in the District Court was the construction of paragraph III in the will of Albert W. Weaver which read as follows: "I give, bequeath and devise to my beloved wife, Edna May Weaver, all real estate which I may own at the time of my death, for and during her natural life; at her death the remainder in said real estate shall vest in my surviving brothers and sisters as follows:

"In Frank Weaver, an undivided one-fifth (1/5) part.

"In George Weaver, an undivided one-fifth (1/5) part.

"In Lulu Wixon, an undivided one-fifth (1/5) part.

"In Effie Weddel, an undivided one-fifth (1/5) part. and in the children of my deceased sister, Pearl Allemond, an undivided one-fifth (1/5) part. If any of my above named brothers or sisters shall die before my death, their children shall take the same share in my estate as such deceased brother or sister would have taken if they had survived me."

The testator, Albert W. Weaver, was predeceased by George Weaver, a brother. George Weaver died on March 11, 1954. Albert W. Weaver, the testator, died on July 18, 1954. George Weaver died leaving no children or other issue surviving him.

Since there is no residuary clause in the will, the bequest to George Weaver would have lapsed at the testator's death and passed under the laws of intestacy as they read in 1954 if the devise in paragraph III was a distributive devise. Under Neb. Rev. Stat. § 30-101 (Cum. Supp. 1953), one-half of George's share would have gone in fee simple to Edna May Weaver, the testator's wife, and upon her death in 1979, to appellants who are distributees and legatees under her will. However, if paragraph III created a class gift, George's share would have been divided equally among the testator's surviving brothers and sisters and the issue of deceased brothers and sisters by representation. The trial court found that paragraph III created a class gift and the remainder interest in the testator's real estate belonged in equal shares to appellees who are the heirs of Albert's now deceased brothers and sisters. This appeal followed, the question for decision being whether paragraph III created a class devise or a distributive devise.

The effect of holding the devise in paragraph III to be to individuals, rather than a gift to a class, would render the testator intestate as to a one-fifth share of the real estate disposed of in the paragraph since the will had no residuary clause. There are certain principles to be followed in the construction of this paragraph: First, "'It is a natural presumption that a testator making his will

intended to dispose of his whole estate and not to die intestate as to any part of it, and in construing doubtful expressions this presumption has weight, *but it cannot supply the actual intent of the testator to be derived from the language of the will.'" Katt v. Claussen*, 174 Neb. 603, 611, 118 N.W.2d 1002, 1007 (1963); *Jacobsen v. Farnham*, 155 Neb. 776, 53 N.W.2d 917 (1952).

"It is not the province of the courts by construction to supply omissions or to write residuary clauses for testators who neglect to do so." *Katt* at 610, 118 N.W.2d at 1006.

"The object and purpose of the court is to carry out and enforce the true intention of the testator as shown by the will itself, in the light of attendant circumstances under which it was made." (Syllabus of the court.) *In re Estate of Dimmitt*, 141 Neb. 413, 3 N.W.2d 752 (1942).

"Ordinarily, a class gift is a gift to two or more persons who are not named and who have one or more characteristics in common by which they are indicated or who answer to a general description." *Katt* at 608, 118 N.W.2d at 1005.

"'If the gift is made to beneficiaries by name, the gift is, prima facie, not one to a class, even if the individuals who are named possess some quality or characteristic in common. This is particularly true if the beneficiaries are not described as having some quality or attribute in common.'" *Katt* at 609, 118 N.W.2d at 1006.

It can be seen that paragraph III of the will possesses both characteristics of a class gift and characteristics of an individual gift. The characteristics of a class are the description of a group having common characteristics, i.e., brothers, sisters, or heirs of deceased brothers and sisters. The paragraph possesses some indication of a gift not to a class by the recitation of the individual names of the beneficiaries, including the brothers and sisters and the children of a deceased sister and by the specification of their shares. Since the language itself is not conclusive but rather ambiguous, we must determine the intent of the testator to the

extent possible from the terms of the will itself.

The will of Albert W. Weaver consists of four paragraphs. In the first paragraph he directs that his just debts be first paid out of his personal estate. Paragraph II is as follows: "All the residue of my *personal* estate, of every kind and nature, I give and bequeath to my beloved wife, Edna May Weaver." (Emphasis supplied.) Paragraph III, set forth above, refers to real estate. Paragraph IV names Edna May Weaver executrix, and provides that in the event Edna May Weaver does not survive the testator, the court appoint a suitable person to act as a personal representative. The obvious intent of the will, gathered from the instrument, was to dispose of all the property which the testator possessed. Total personal property was assigned for the payment of debts and cost of administration, and any balance thereof to the testator's widow. The widow was granted only a life estate in the real estate and the remainder in the real estate was assigned to his own brothers and sisters. It is obvious from the will that the testator intended that the real estate remain in his own family after making suitable provisions for his widow. The absence of a residuary clause, although not conclusive, suggests that it was the impression of the testator that there was nothing to dispose of by a residuary clause; that everything had been disposed of by the will. From a reading of the four corners of the instrument, it is therefore our conclusion, as it was the conclusion of the trial court, that the testator intended the gifts described in paragraph III to be a gift to a class and not to individuals; that he intended to dispose of all his real estate and to have the same remain in his own family; and not to die intestate as to any part of the property.

The judgment of the trial court is in accordance with these findings and is therefore affirmed.

AFFIRMED.

IN RE INTEREST OF SWANNIE ELIZABETH MCKEE, A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. RICHARD MCKEE AND MARY MCKEE, NATURAL PARENTS, APPELLANTS.

304 N.W.2d 918

Filed April 24, 1981. No. 43399.

1. **Juvenile Courts: Appeal and Error.** An appeal of a juvenile case to this court is heard de novo upon the record; and the findings of fact by the trial court which heard and observed the witnesses and parties are accorded great weight and will not be set aside on appeal unless they are against the weight of the evidence or there is a clear abuse of discretion.
2. **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.
3. ——. When natural parents cannot rehabilitate themselves within a reasonable time after the adjudication hearing, the best interests of the child require that a final disposition be made without delay.

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

H. Jerome Kinney for appellant.

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

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

BRODKEY, J.

Richard and Mary McKee, appellants and natural parents herein, appeal to this court from an order entered by the separate juvenile court of Douglas County, Nebraska, terminating the parental rights to their child, Swannie Elizabeth McKee, born February 27, 1979. We affirm.

The facts which comprise the background of this matter indicate that on March 30, 1979, the Douglas County Attorney filed a petition in the juvenile court alleging that Swannie McKee was a child within the meaning of Neb. Rev. Stat. § 43-202(1) (Reissue 1978),

in that the child was under the age of 18 and without proper support through no fault of her parents. The petition also alleged that Richard and Mary McKee were unable to discharge their parental responsibilities because they were mentally retarded. In an order entered on that same date, the juvenile court ordered that temporary custody of the child be placed with Douglas County Social Services. The cause was continued for a detention hearing on April 10, 1979, at which time it was established that the Child Protective Services of Douglas County had received a referral from the University of Nebraska Medical Center concerning the infant McKee in March of 1979. At that time Swannie was 2 weeks old, but had gained only one-tenth of a pound in body weight and was experiencing internal bleeding, as evidenced by bloody stools. Testimony at the detention hearing established that the proximate cause of the infant's internal bleeding was the fact that the natural mother had been feeding the baby table foods, such as canned fruit, vegetables, and meat. It was also established that Mary McKee experienced difficulties in understanding instructions on how to care for her child, and that both parents demonstrated poor "parenting" skills. The juvenile court determined that it was in the best interests of Swannie McKee that she remain in the temporary custody of Douglas County Social Services until an assessment could be made as to whether or not Richard and Mary were capable of taking care of the child.

Following a court-ordered psychological evaluation of both parents, an adjudication hearing was held on June 26, 1979. At that time the natural parents admitted that their child was a child within the meaning of § 43-202(1). The court admitted the psychological evaluations into evidence. On July 18, 1979, the court ordered that custody of Swannie McKee be placed in the State Department of Public Welfare for temporary foster care under the supervision of Douglas County Social Services, and also ordered that Richard and

Mary participate in rehabilitative programs, such as mental health counseling, nutrition, positive "parenting," and financial planning.

It next appears that on January 25, 1980, the Douglas County Attorney filed a motion seeking the termination of the parental rights between Richard and Mary McKee as to Swannie McKee. The motion alleged in pertinent part:

"IV. That Swannie Elizabeth McKee comes within the meaning of Nebraska Revised Statutes, Section 43-209 (6) R.S. Supp. 1978, because reasonable efforts, under the direction of the Court, have failed to correct the conditions leading to the aforementioned determination, to wit: A. That the natural parents were ordered by the Court to become involved in mental health counseling and a nutrition program on a regular basis. Both parents have failed, neglected, or refused to involve themselves in both mental health counseling and any nutrition program. B. That the natural parents have failed to become involved in a financial planning program as ordered by the Court. C. That the natural parents have failed to cooperate with the Child Protective Service worker, the Visiting Nurse's Association, Foster Care worker, the Juvenile Court service officer, and the ENCOR worker as ordered by the Court.

"V. That Swannie Elizabeth McKee comes within the meaning of Nebraska Revised Statutes, Section 43-209 (5) R.S. Supp. 1978 because her natural parents are unable to discharge their parental responsibilities because of mental deficiency and there are reasonable grounds to believe such condition will continue for a prolonged indeterminate period, to wit: A. On or about September 28, 1979, Mary McKee, natural mother of said child, was psychiatrically evaluated and diagnosed as being mentally retarded; suffering from epilepsy; evidencing immature behavior; and functioning at the third grade level. B. On or about April 18, 1979, Mary McKee and Richard McKee, natural parents of said

child, were psychologically evaluated. The recommendation of the clinical psychologist was that the child, Swannie Elizabeth McKee, should not be returned to the possession and custody of her natural parents."

On February 27, 1980, a hearing on the motion for termination of parental rights was held, at which time the testimony of Barbara Schuett, the clinical psychologist who had previously examined Richard and Mary McKee, and Dr. Shashi Bhatia, a child psychologist who had also examined Mary McKee, was presented by the State. Both experts testified that their opinion was that Swannie McKee should not be returned to her natural parents because they had not learned the minimum requirements necessary for child care. Barbara Schuett also concluded, to the best of her professional knowledge, that the mental condition of both Richard and Mary McKee would continue for a prolonged indeterminate period. This likewise was the conclusion of Dr. Bhatia as to Mary. Based upon this testimony, the juvenile court found that Swannie McKee was a child within both subsections (5) and (6) of Neb. Rev. Stat. § 43-209 (Reissue 1978) and ordered that the McKees' parental rights be terminated. A subsequent motion for new trial was overruled, and the appellants have appealed to this court, contending that the evidence presented was not sufficient to terminate their parental rights under § 43-209.

At the outset, we note that an appeal of a juvenile case to this court is heard by trial de novo upon the record; and also that the findings of fact by the trial court which heard and observed the witnesses and parties will be accorded great weight, 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 Morford*, 207 Neb. 627, 300 N.W.2d 795 (1981); *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 held 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*, 207 Neb. 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).

Section 43-209, the juvenile court act dealing with the termination of parental rights, reads in pertinent part 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: . . . (5) The parents are unable to discharge parental responsibilities because of mental illness or mental deficiency, and there are reasonable grounds to believe that such condition will continue for a prolonged indeterminate period; or (6) Following upon a determination that the child is one as described in subdivision (1) or (2) of section 43-202, reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the determination." (Emphasis supplied.)

In this regard, we have also 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); *In re Interest of Morford*, *supra*.

With the foregoing statutes and rules in mind, we conclude that the evidence contained in the record clearly supported the decision of the juvenile court to terminate the parental rights of Richard and Mary McKee. We note that the psychological evaluation of Mary McKee, admitted by the court as exhibit 2, concludes that: "Mary is a small, 29-year-old woman who appears approximately ten years younger than her age. Grooming was marginal. She was spontaneous in interview. At times she would become angry and hostile and

want to terminate the testing, but was easily persuaded back into the evaluation. Mary would not discuss her marriage and was quite defensive about this. The examiner wonders if there are problems in this marriage between her and her husband, and if so, what they are. Not wanting to talk about her marriage would tend to lead one to believe that there were problems of some nature. The questions asked about her marriage were certainly not of an intimate nature.

"Mary functions in the retarded range, achieving at a second or third grade level. She is an epileptic and does not take her medication regularly. Personality and behavior are quite typical of the epileptic.

"*Recommendation:* In the examiner's opinion, this child should not be returned to Mary and her husband for the following reasons: 1. Mary has inadequate knowledge of the appropriate child care and expectations for her child. 2. She does not have the mental capacity to learn the minimum requirements in child care. 3. She uses very poor judgment and reasoning ability. 4. Mary over-reacts to environmental stress, usually in an angry, aggressive manner. 5. Mary takes inadequate care of herself. 6. Even if given support by various agencies, would be inadequate in this examiner's opinion, as she would have all the remaining hours in each day to be responsible for this child.

"In the examiner's opinion, returning the child would deny this child the opportunity to develop to its fullest capacity and the child would be 'set up' to be neglected and also probably physically abused."

Richard McKee's psychological evaluation, which was admitted by the juvenile court as exhibit 4, concluded: Richard comes across as a very inadequate individual in most areas, especially socially. He presented himself for this evaluation in a very filthy condition, however the examiner realizes that his water has been turned off for several weeks. He was not wearing his hearing aid, even though much work had been done by another individual to be sure that it was ready for him prior to this

evaluation. Richard did not take the responsibility of going to get the hearing aid. He does not work, nor does he want to. He has no hobbies or interests and shows little, if any, motivation. Richard functions in the mild range of retardation and is achieving at a first and second grade level. He has a rather significant speech problem and is difficult to understand. Personality pattern is consistent with mental retardation, with features of the inadequate personality. Richard gives himself inadequate care and seems to be a very dependent person.

"The examiner would recommend that this child not be returned to its natural parents. Mary has many inadequacies which are indicated in her report. Richard cannot be depended upon to be a help in this marriage and parenting. All the care would be left up to Mary. Neither individual is prepared for the responsibilities of child care and Richard does not have the capacity nor the motivation to learn. The examiner feels if this child is returned to the home, it would not be able to develop to its best capacity and would be badly neglected and perhaps even physically abused."

We also note the testimony of Dr. Bhatia, who had the opportunity to examine Mary McKee. When asked: "Doctor, it's unfortunate that Mrs. McKee has this problem, but it is a fair statement to say that her condition will continue for a prolonged indeterminate period, if not forever?" Dr. Bhatia responded: "Sure, most probably it will be forever." Dr. Bhatia did not express an opinion with regard to Richard McKee because Richard failed to show up for any of the scheduled evaluations.

The rule is well established that when natural parents cannot rehabilitate themselves within a reasonable time after the adjudication hearing, the best interests of the child require that a final disposition be made without delay. *State v. Chant*, 202 Neb. 750, 277 N.W.2d 97 (1979). That, unfortunately, is the situation in this case.

We conclude, therefore, on a de novo review of the record, that the action taken by the separate juvenile court was correct and supported by the evidence, and that its judgment must be affirmed.

AFFIRMED.

CITY OF LINCOLN, NEBRASKA, A MUNICIPAL CORPORATION, APPELLANT, V. NEBRASKA LIQUOR CONTROL COMMISSION ET AL., APPELLEES, JAX, INC., INTERVENOR-APPELLANT.

304 N.W.2d 922

Filed April 24, 1981. No. 43425.

1. **Liquor Licenses.** A liquor license is a purely personal privilege, does not constitute property, and vests no property rights in a licensee which can be transferred.
2. ——. Under the statutes of Nebraska, liquor licenses are issued to a single entity and, when so issued, may not be used by anyone else or transferred to anyone else.
3. **Statutes.** A statute is not to be read as if open to construction as a matter of course. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning. In the absence of anything to indicate the contrary, words must be given their ordinary meaning. It is not within the province of a court to read a meaning into a statute that is not warranted by legislative language. Neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute.
4. **Administrative Agencies: Liquor Licenses.** The Nebraska Liquor Control Commission has broad discretion in determining whether applications for licenses should be granted or denied and courts are without authority to interfere with that discretion unless it has been abused.
5. **Administrative Agencies: Appeal and Error.** The courts, in reviewing decisions of the Nebraska Liquor Control Commission, do not exercise independent judgment on fact and policy, but must give due deference to the decisions made by the commission if the same are based upon evidence in the record.
6. **Liquor Licenses.** Absence of need alone is not a sufficient reason to deny an otherwise proper application for a liquor license.

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

Dana W. Roper, Assistant City Attorney, for appellant City.

James E. Ryan for intervenor-appellant Jax.

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

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

KRIVOSHA, C.J.

The appellant, City of Lincoln (City), and the intervenor, Jax, Inc. (Jax), appeal from a judgment entered by the District Court for Lancaster County, Nebraska, finding that the Nebraska Liquor Control Commission did not abuse its authority when, on March 29, 1979, it issued a retail off-sale beer license to one Leonard J. Stransky and Maynard R. Brummer, doing business as "The Pop Shoppe and Beer Stop," pursuant to Neb. Rev. Stat. § 53-131 (Reissue 1978). Jax obtained leave to intervene on the basis that it operated a similar retail establishment some 200 feet from where the new license was to be located. We believe the trial court was correct, and affirm the judgment entered by it.

The record discloses that the Nebraska Liquor Control Commission (the commission), on October 20, 1978, received an application for a beer, off-sale only, license filed on behalf of Leonard J. Stransky and Maynard R. Brummer, a partnership, doing business under the name of "The Pop Shoppe and Beer Stop." The establishment was to be located at 48th and Van Dorn in the city of Lincoln, Nebraska. The application was submitted on a commission form which is used by applicants for all types of liquor licenses, including manufacturers' and wholesalers' liquor licenses, in addition to retail licenses such as the one involved

in this case. City maintains that this was not an application for a new license pursuant to § 53-131, but rather for the transfer of a license previously held by Darrell L. Stanard, and therefore is governed by the provisions of Neb. Rev. Stat. § 53-129 (Reissue 1978) which provides, in effect, that once a license has been granted it may not be relocated without the approval of the local governing body. In the instant case the city council of the city of Lincoln, "the local governing body," denied approval for such transfer. We disagree with the City's position that the application was for a transfer and not for a new license.

In the first instance, the position of both the City and Jax is contrary to our previous holdings. In the case of *City of Lincoln v. Nebraska Liquor Control Commission*, 181 Neb. 277, 147 N.W.2d 803 (1967), we had occasion to review the purpose of § 53-129 and declared that the purpose of this section is to provide a short procedure for a change of location in the business of a liquor licensee when neither the commission nor the municipality involved objects thereto.

The meaning and purpose of § 53-129 becomes clear when we recognize that under the laws of the State of Nebraska a liquor license is issued to a named licensee for a named location. It may not be used by any entity other than that to whom it has been issued, nor may the license be used in any other premises except that which is specifically noted in the license. If, then, a named licensee desires to relocate the license, it may do so under the provisions of § 53-129 by making application to either the commission or the local governing body and, when approved by the local governing body, may move to the new location. In this respect, the relocation of a license from its issued premises to new premises is dependent upon approval by the local governing body. If the local governing body disapproves, then the license may not be relocated. However, this does not mean that another license may not be sought under § 53-131. That was the very issue

in *City of Lincoln v. Nebraska Liquor Control Commission, supra.* There we held that if the licensee to whom the license had previously been issued could not obtain the approval of the local governing body to transfer, it could, nevertheless, make application to the commission for a new license under the provisions of § 53-131. In that instance, the recommendation of the local governing body is only advisory and the commission may issue a license even if the local governing body objects.

But the major difficulty with the argument made by City and Jax, and a difficulty which perhaps arises too often in matters involving liquor licenses, is that the City and Jax characterize this matter as a "transfer." The simple fact of the matter is that there is no statutory authority under Nebraska law to "transfer" a liquor license. We have previously held that a liquor license is a purely personal privilege, does not constitute property, and vests no property rights in a licensee which can be transferred. See *Bali Hai, Inc. v. Nebraska Liquor Control Commission*, 195 Neb. 1, 236 N.W.2d 614 (1975).

Under the statutes of Nebraska, liquor licenses are issued to a single entity and, when so issued, may not be used by anyone else or transferred to anyone else. As we have already indicated, the only "transfer" ever involved with a liquor license is really the "relocation" of the license by the existing licensee.

While the City and Jax argue that the application was originally made for the "transfer" of a license, the record does not legally support that position. It is true that the parties did, on occasion, use the word "transfer." Nevertheless, an examination of the application filed with the commission discloses that the application was filed by Maynard R. Brummer and Leonard J. Stransky, a partnership, doing business as "The Pop Shoppe and Beer Stop." At the time that the application was filed on October 20, 1978, Stransky and Brummer did not have any legal interest or right

in a license previously issued to Stanard and therefore could not have been making application to relocate a license under the provisions of § 53-129.

The provisions of § 53-129 are absolutely clear, and provide in part: "*After such license has been granted for particular premises*, the commission, with the approval of the local governing body, and upon proper showing, may endorse upon the license permission to abandon the premises therein described and remove therefrom to other premises approved by him or it, but in order to obtain such approval *the retail licensee* shall file with the local governing body a request in writing, and a statement under oath which shall show that the premises to which removal is to be made comply in all respects with the requirements of this act. No such removal shall be made by any *such licensee* until his said license has been endorsed to that effect in writing both by the local governing body and by the commission." (Emphasis supplied.) The statute is clear that it applies only to an existing licensee seeking to relocate his license. Neither Stransky nor Brummer, nor "The Pop Shoppe and Beer Stop," are within the meaning of licensee described in § 53-129.

The City and Jax urge us, in effect, to read the statute as though a new licensee may be created under the provisions of § 53-129 by a transfer. The statute, however, is clear and unambiguous and not open to interpretation.

A statute is not to be read as if open to construction as a matter of course. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning. In the absence of anything to indicate the contrary, words must be given their ordinary meaning. It is not within the province of a court to read a meaning into a statute that is not warranted by legislative language. Neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute. See,

Ragland v. Norris P. P. Dist., *ante* p. 492, 304 N.W.2d 55 (1981); *O'Neill Production Credit Assn. v. Schnoor*, *ante* p. 105, 302 N.W.2d 376 (1981); *Bachus v. Swanson*, 179 Neb. 1, 136 N.W.2d 189 (1965). It matters not at all what the parties may have believed to be the case nor what the counsel assumed to be the case. A statute cannot be amended by the consent of the parties or by their misunderstanding of the statute.

Having therefore determined that the action involved herein was an application for a new license and not the relocation of an existing license, the applicable statute must be § 53-131 and the approval of the city council was not mandatory to the action of the commission, but only advisory. The only remaining question that we need determine then is whether the granting of the license by the commission was an abuse of discretion.

We have held that the Nebraska Liquor Control Commission has broad discretion in determining whether applications for licenses should be granted or denied and courts are without authority to interfere with that discretion unless it has been abused. See *Harrigfeld v. Nebraska Liquor Control Commission*, 203 Neb. 741, 280 N.W.2d 61 (1979). Moreover, the courts, in reviewing decisions of the Nebraska Liquor Control Commission, do not exercise independent judgment on fact and policy, but must give due deference to the decisions made by the commission if the same are based upon evidence in the record. See *72nd Street Pizza, Inc. v. Nebraska Liquor Control Commission*, 199 Neb. 729, 261 N.W.2d 614 (1978).

City and Jax maintain that the commission abused its discretion in that there is no showing of need and there is evidence that the issuance of the license will create a traffic problem.

Insofar as the matter of need is concerned, we believe we have already addressed that issue in *Joe & Al's IGA, Inc. v. Nebraska Liquor Control Commission*, 203 Neb. 176, 182-83, 277 N.W.2d 693, 697

(1979), wherein we said: "Absence of need alone is not a sufficient reason to deny an otherwise proper application for a liquor license." The reason for such a position is obvious. There are those who would maintain there is never any need for any liquor establishment while others would maintain there are never enough.

With regard to the matter of traffic, the evidence simply does not support the position urged by City and Jax. A member of the Lincoln Police Department testified that the proposed licensed location was already a heavily traveled area. He therefore concluded that the issuance of the license would create even more traffic problems. There was, however, no evidence to support that conclusion. The area involved abuts a main thoroughfare in the city of Lincoln, Nebraska, and is bordered on both sides by minishopping areas. On cross examination he was asked to tell how many cars he thought would be added if the commission saw fit to grant the license. He testified in response to that question, "There would be no way that I could project the increase in traffic." He then attempted to surmise that the existence of the license would cause "crisscrossing" patterns. Yet, there is no evidence to support the conclusion that the crisscrossing patterns would not exist absent the liquor license in view of the fact that both sides of the street are occupied by these minishopping areas. As a matter of fact, the officer conceded that the crisscrossing was already occurring. It is apparent from the record that the area may indeed have a traffic problem, but the record does not reveal that it is one which would in any way be affected significantly by the addition of another liquor license.

Therefore, we cannot say that the commission was in any manner arbitrary in granting the license, and accordingly we are without authority to overrule its action. The trial court properly recognized its limitations by affirming the action of the commission and

we, in turn, must affirm the action of the District Court. The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHN MEREDITH, APPELLANT.

304 N.W.2d 926

Filed April 24, 1981. No. 43472.

1. **Criminal Attempt: Indictments and Informations.** In the absence of a motion to quash, an information which alleges an attempt to commit an act or acts which if successful would constitute a statutory crime sufficiently charges an attempted crime so as to withstand a jurisdictional attack made for the first time on appeal.
2. **Criminal Law: Statutes.** The defendant has no standing to challenge as vague a portion of the language of a statute which does not apply to his conduct when an unambiguous section of the statute clearly applies to such conduct.

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

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

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

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

WHITE, J.

In this appeal from the District Court for Douglas County, Nebraska, on a conviction of attempted robbery, the defendant was found guilty by a jury and further found to be an habitual criminal. He was sentenced to a term of from 15 to 25 years in the Nebraska Penal and Correctional Complex. The defendant assigns two errors: (1) That the information

against the defendant was fatally defective; and (2) That the statute defining criminal attempt under which the defendant was charged is unconstitutional.

The information charged as follows: The defendant ". . . JOHN MEREDITH late of the County of Douglas aforesaid, in the County of Douglas and State of Nebraska aforesaid, then and there being, did then and there forcibly and by violence, or by putting in fear, attempt to take money from the personal protection of Cynthia M. Karaus, the property of 7-11 Store, with the intent to steal . . . ."

Prior to the adoption of the criminal code revision, there was no general attempt statute in the Nebraska criminal code. Criminal attempt is defined in Neb. Rev. Stat. § 28-201 (Reissue 1979). The case of *State v. Sodders*, *ante* p. 504, 304 N.W.2d 62 (1981), is controlling. We there held: "[I]n the absence of a motion to quash, an information which alleges an attempt to commit an act or acts which if successful would constitute a statutory crime sufficiently charges an attempted crime so as to withstand a jurisdictional attack made for the first time on appeal." *Id.* at 510, 304 N.W.2d at 66.

Defendant's vagueness challenge centers around § 28-201(2), which, as we noted in *Sodders*, may be "inartfully drafted and unduly complex." *Id.* at 507, 304 N.W.2d at 65. However, the conduct of the defendant is clearly proscribed by subsection (1)(a) of § 28-201: "(1) A person shall be guilty of an attempt to commit a crime if he:

"(a) Intentionally engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or

"(b) Intentionally engages in conduct which, under the circumstances as he believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his commission of the crime."

The defendant has no standing to challenge as vague a portion of the language of a statute which

does not apply to his conduct when an unambiguous section of the statute clearly applies to such conduct. *State v. Shiffbauer*, 197 Neb. 805, 251 N.W.2d 359 (1977).

The defendant's contentions are both without merit and the judgment and sentence of the trial court are hereby affirmed.

AFFIRMED.

CLINTON, J., concurs in result.

STATE OF NEBRASKA, APPELLEE, V. WESLEY H. PEERY, APPELLANT.

305 N.W.2d 354

Filed April 24, 1981. No. 43643.

Post Conviction: Motion to Vacate. A motion to vacate a judgment and sentence under the Post Conviction Act cannot be used as a substitute for an appeal or to secure a further review of issues already litigated.

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

Stanley D. Cohen for appellant.

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

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

MCCOWN, J.

The defendant filed a motion for post conviction relief seeking to vacate and set aside a sentence of death on the ground that the judgment was void or voidable under the Constitution of this state or of the United States. The District Court denied defendant's request for an evidentiary hearing, and found that the motion and the files and records of the case show

that the defendant is entitled to no relief, and overruled the motion.

The defendant was found guilty by a jury on two counts, murder in the first degree and robbery. A three-judge sentencing panel sentenced the defendant to death on the murder count and the trial judge sentenced the defendant to a term of not less than 16 nor more than 50 years' imprisonment on the robbery count, the sentences to run consecutively. The convictions and sentences were affirmed on direct appeal to this court in *State v. Peery*, 199 Neb. 656, 261 N.W.2d 95 (1977). Following an unsuccessful attempt to appeal to the Supreme Court of the United States the defendant filed the motion for post conviction relief in this case.

In this post conviction action the defendant essentially contends that the death sentence has been arbitrarily and unconstitutionally imposed in this case and requests that we alter or overrule our holdings in previous death sentence cases. The defendant also contends that *Godfrey v. Georgia*, 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980), raises new and additional constitutional issues which are applicable in this case.

We have recently held that the death penalty, when properly imposed, does not violate either the U.S. or Nebraska Constitution. *State v. Anderson and Hochstein*, 207 Neb. 51, 296 N.W.2d 440 (1980). The holding in *Godfrey* is not applicable in this case for the reasons set out in the very recent case of *State v. Harper*, *ante* p. 568, 304 N.W.2d 663 (1981).

The remaining issues and contentions of the defendant have been presented, considered, and determined in the direct appeal of the convictions involved here.

A motion to vacate a judgment and sentence under the Post Conviction Act cannot be used as a substitute for an appeal or to secure a further review of issues already litigated. *State v. Svoboda*, 199 Neb. 452,

259 N.W.2d 609 (1977); *State v. Holtan*, 205 Neb. 314, 287 N.W.2d 671 (1980).

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MARVEL JONES, APPELLANT.

305 N.W.2d 355

Filed April 24, 1981. No. 43664.

1. **Statutes: Words and Phrases.** Unless the context shows otherwise, whenever the word "month" is used in a statute it means a calendar month.
2. **Words and Phrases.** A calendar month is a period terminating with the day of the succeeding month, numerically corresponding to the day of its beginning, less one.
3. **Speedy Trial: Time.** The requirement of Neb. Rev. Stat. § 29-1207 (Reissue 1979) that a defendant be brought to trial within 6 months of the filing of the information refers to 6 calendar months, not 180 days.
4. **Time.** Generally, the period of time within which an act is to be done in any action or proceeding shall be computed by excluding the day of the act, event, or default after which the designated period of time begins to run.
5. **Arrests: Probable Cause.** The test of probable cause for a warrantless arrest is whether at the moment the facts and circumstances within the officers' knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense.
6. **Search and Seizure: Arrests: Probable Cause.** Knowledge on the part of law enforcement officers of previous law violations of a suspect is a factor to be considered in establishing probable cause for search or arrest for a similar crime.
7. **Confessions.** To be admissible in evidence a confession must be free and voluntary and must not have been extracted by any sort of threat or violence, nor may it have been obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.

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

Stephen K. Yungblut of Rosenberg & Yungblut for appellant.

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

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

HASTINGS, J.

The defendant, Marvel Jones, appeals from a conviction of first degree sexual assault upon a child. Jones was found guilty by a jury and was sentenced to serve a term of 8 to 12 years in an institution under the jurisdiction of the Department of Correctional Services. The defendant assigns as error that he was not brought to trial within 6 months and therefore was denied his right to a speedy trial. He further assigns as error that his oral and written statements to police officers should have been ruled as inadmissible in that they were not freely and voluntarily given; and that there was no probable cause for the arrest of the defendant at the time of his seizure and therefore the taking of his statement constituted a violation of his fourth amendment rights. We affirm the judgment of the District Court.

The defendant was initially charged in an information filed on July 3, 1979, with the offense of first degree forcible sexual assault. The assault had taken place in the early morning hours of June 15, 1979. The victim, a 14-year-old boy, was walking home that night after visiting a friend and was subjected to forcible oral and anal sexual penetration. The victim described his assailant as a black male, 17 to 19 years of age, 5 feet 9 to 5 feet 10 inches tall, and weighing 140 to 150 pounds. The assailant was clean shaven, had a red bandanna over his head, and his hair was braided in corn rows. After the victim was given a physical examination, he was shown four pictures, including one of the defendant. The victim could not

identify his assailant from one of the pictures. Later on that day the victim was again shown four pictures, including the same picture of the defendant. Again he could not make a positive identification. When asked if any of the men in the pictures had the same build as the assailant, the victim pointed to the picture of the defendant as having a similar build.

On June 16, 1979, shortly before 7 p.m., the defendant was arrested without a warrant and taken to police headquarters for what the police term as investigative purposes. The defendant was advised of his *Miranda* rights and was questioned. He denied any involvement in and knowledge of the sexual assault.

At approximately 8:30 p.m. the same evening the defendant participated in a lineup in which he was positively identified as the assailant by the victim. Later that night the defendant agreed to speak with officers without the aid of or presence of an attorney. He then gave a full written statement of his involvement in the assault and confessed to being the assailant.

The first assignment of error concerns the defendant's right to a speedy trial. The information was filed on July 3, 1979. Neb. Rev. Stat. § 29-1207 (Reissue 1979) requires that a person shall be brought to trial within 6 months of the filing of the information. Subsection (4)(a) and (b) provides, however, that periods of delay resulting from proceedings concerning the defendant, including the filing and pendency of motions to suppress evidence filed by the defendant and continuances requested by or properly chargeable to the defendant, shall be excluded in computing the time for trial. The defendant concedes, and the record supports a conclusion, that the period from July 10, 1979, the date defendant filed two motions to suppress evidence, and July 25, 1979, the date originally set for hearing those motions, a total of 15 days, should be excluded from the computation of the required trial date. Similarly, there is no question

but that November 27, 1979, the date that the defendant filed a motion to suppress a blood test, and the period from November 30, 1979, to December 4, 1979, representing a continuance requested by the defendant, a total in all of 5 days, likewise must be excluded in computing the time for trial. This appears to be a total of 20 days. The State therefore has met its burden of proving by a substantial preponderance of the evidence that at least a 20-day period may be excluded in computing the 6-month trial commencement date. *State v. Johnson*, 201 Neb. 322, 268 N.W.2d 85 (1978).

The defendant was brought to trial commencing on January 21, 1980. Although citing no authority to support his position, the defendant asserts that the statutory 6-month period is in fact 180 days, extended by the 20 days' excluded time to 200 days. Therefore, as January 21, the date the trial commenced, was 202 days from the date of filing the information, the State was 2 days over the statutory limitation.

However, the defendant overlooks the plain words of the statute. The requirement is to bring the defendant to trial within 6 months. In *The People v. Gilbert*, 24 Ill. 2d 201, 181 N.E.2d 167 (1962), an argument similar to that of the defendant's was rejected when the court said that a requirement that a defendant be brought to trial within 4 months is satisfied by trial within 4 calendar months and it need not be had within 120 days. Additionally, unless the context shows otherwise, the word "month" has been legislatively defined to mean calendar month. *Ruan Transport Corp. v. Peake, Inc.*, 163 Neb. 319, 79 N.W.2d 575 (1956); Neb. Rev. Stat. § 49-801(13) (Reissue 1978). Finally, we have construed "calendar month" as being a period terminating with the day of the succeeding month, numerically corresponding to the day of its beginning, less one. *Brown v. City of Omaha*, 179 Neb. 224, 137 N.W.2d 814 (1965). However, we must also consider Neb. Rev. Stat. § 25-2221 (Reissue

1979), which provides in part as follows: "Except as may be otherwise more specifically provided, the period of time within which an act is to be done in any action or proceeding, shall be computed by excluding the day of the act, event, or default after which the designated period of time begins to run." Therefore, excluding the day of the filing of the information, July 3, 1979, the last day which would still fall within 6 months following would be January 3, 1980. Adding the 20 days of exclusions, the final date for commencement of the trial would have been January 23, 1979. There is no question but that the defendant was brought to trial within the period mandated by the statute. We find no merit to the defendant's first assignment of error.

The second assignment of error is that there was not probable cause to arrest the defendant. Neb. Rev. Stat. § 29-404.02 (Reissue 1979) states that a peace officer may arrest a person without a warrant if the officer has reasonable cause to believe that such person has committed a felony. "In Nebraska, the test of probable cause for a warrantless arrest is whether at the moment the facts and circumstances within their (the officers') knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense." *State v. Tipton*, 206 Neb. 731, 734-35, 294 N.W.2d 869, 872 (1980).

We have also held that knowledge on the part of law enforcement officers of previous law violations of the suspect is a factor to be considered in establishing probable cause for search or arrest for a similar crime. *State v. Booth*, 202 Neb. 692, 276 N.W.2d 673 (1979).

In this case the arresting officers knew that the defendant had been involved in sexual assaults in the past, that the assaults had occurred in the general area of this incident, and that the prior assaults also

involved young men. The victim had indicated that the defendant had a similar build to his assailant, the defendant was known to have worn a bandanna on his head in the past, and that the victim thought someone had called out to his assailant prior to the assault as "Ma" or "Marv." (Defendant's first name is Marvel.) We believe that the combination of these factors gave the officers probable cause to arrest the defendant. Such probable cause was not negated, as the defendant contends, by the inability of the victim to positively identify the defendant from the pictures shown to him. The arrest was lawful.

The defendant next contends that the confession was not given voluntarily and freely. A review of the record shows to the contrary. The defendant was explained his *Miranda* rights three times during the course of the evening, and all three times waived them. After giving the statements he had the opportunity to read and correct any misstatements. To be admissible, a confession must be free and voluntary and must not be extracted by any sort of threat or violence, nor may it be obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. *State v. Irwin*, 191 Neb. 169, 214 N.W.2d 595 (1974). There is no indication in the record of any threat, violence, promise, or improper influence. The officers took great care to safeguard all of the defendant's constitutional guarantees. Again, we find no error committed by the trial court.

The judgment and sentence of the District Court for Lancaster County are correct and are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. VIRGIL E. SLIVA, APPELLANT.

305 N.W.2d 10

Filed April 24, 1981. No. 43665.

Sentences. A sentence validly imposed takes effect from the time it is pronounced and a subsequent sentence, fixing a different term, is a nullity.

Appeal from the District Court for Polk County: BRYCE BARTU, Judge. Appeal dismissed.

R. Steven Geshell of Robak & Geshell for appellant.

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

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

KRIVOSHA, C.J.

The appellant, Virgil E. Sliva (Sliva), appeals from an order originally entered by the county court of Polk County, Nebraska, and subsequently affirmed by the District Court for Polk County, Nebraska. For reasons more particularly set out hereinafter, the appeal is dismissed as being untimely.

The record discloses that Sliva was originally charged in the county court of Polk County, Nebraska, under a two-count complaint. Count I charged that on or about the 24th day of November 1979, in the County of Polk, Nebraska, Sliva operated or had in his physical control a motor vehicle while under the influence of alcoholic liquor, in violation of Neb. Rev. Stat. § 39-669.07 (Reissue 1978). Count II of the complaint charged that Sliva had previously been convicted of driving while under the influence of alcoholic liquor on February 13, 1970, and that this, therefore, was his second offense.

At the hearing held on December 20, 1979, Sliva appeared with his attorney, Cleo F. Robak, and

entered a plea of guilty to the charge. He thereafter reappeared before the county court of Polk County, Nebraska, on February 22, 1980, at which time the court, having previously accepted his plea of guilty, sentenced Sliva to serve a sentence of 10 days in the county jail, pay a fine of $500, and have his driver's license revoked for 1 year, during which time he was ordered not to drive. After the sentence was imposed, the court announced that the matter was adjourned.

The record then reflects that sometime later the same day the parties again appeared before the county judge and asked that the sentence be vacated because apparently Sliva, through inadvertence or mistake, did not understand an option that was offered to him by the trial court and which was rejected by him. The offer had to do with his drinking and required him to submit himself to evaluation by the Eppley Center in Omaha, Nebraska. The court acceded to the request of Sliva and set the sentence aside, although the plea of guilty remained.

The record then reflects that on April 25, 1980, Sliva and his attorney, R. Steven Geshell, a partner of Mr. Robak, appeared before the county court of Polk County, Nebraska. At this time the court again sentenced Sliva to pay a fine, serve a jail sentence, and have his license and driving privileges revoked for 1 year. Notice of appeal was filed on April 30, 1980, an appeal bond having already been filed on April 25, 1980. The difficulty with all of this, however, is that the sentence which was originally imposed on February 22, 1980, was a final judgment and one which the trial court was not at liberty to vacate. We recently held in the case of *State v. Cousins*, *ante* p. 245, 247, 302 N.W.2d 731, 732 (1981): "'The rule is that a sentence validly imposed takes effect from the time it is pronounced and that a subsequent sentence fixing a different term is a nullity.'" The rule is not new, having previously been declared by this court in *State v. Snider*, 197 Neb. 317, 248 N.W.2d 342 (1977).

Furthermore, in *State v. Williams*, 194 Neb. 483, 484, 233 N.W.2d 772, 773 (1975), we held: "An order by a District Court purporting to suspend a sentence legally pronounced in a criminal action for the purpose of placing a defendant on probation is a nullity." We perceive of no rule or reason which would distinguish a sentence imposed by a District Court from one imposed by a county court. It must be kept in mind that the court did not grant a new trial for errors occurring at trial, but merely vacated a valid sentence. Sliva was required to perfect his appeal from the county court to the District Court within 10 days from the rendition of the judgment on February 22, 1980. Neb. Rev. Stat. § 24-542 (Reissue 1979). Having failed to do so, his appeal to the District Court was untimely and the District Court was without jurisdiction to review the matter. See *Edward Frank Rozman Co. v. Keillor*, 195 Neb. 587, 239 N.W.2d 779 (1976). The judgment imposed by the county court on February 22, 1980, must, therefore, be reinstated in all respects, including the payment of the fine of $500.

APPEAL DISMISSED.

STATE OF NEBRASKA, APPELLEE, V.
MAGELLAN HUDSON, APPELLANT.
STATE OF NEBRASKA, APPELLEE, V.
FLOYD MAEBERRY, APPELLANT.

305 N.W.2d 359

Filed May 1, 1981. Nos. 43277, 43278.

1. **Criminal Trials: Defense Counsel: Conflict of Interest.** Unless the trial court knows or reasonably should know that a particular conflict of interest between defendants represented by the same counsel in a criminal trial exists, the court need not initiate an inquiry.
2. ____:____:____. Without special circumstances which would create a duty of inquiry, a defendant who raised no objection at trial must

demonstrate that an actual conflict of interest adversely affected his lawyer's performance in order to gain reversal of a conviction.

3. ____: ____: ____. Where the trial court recognizes a divergence between the respective roles played by defendants in an alleged crime, special circumstances then exist which require a voluntary inquiry by the court into a possible conflict of defendants' interests.

4. ____: ____: ____. Where a potential conflict in interest arises, the proper course of action for the trial judge is to conduct a hearing to determine whether a conflict exists to the degree that a defendant may be prevented from receiving advice and assistance sufficient to afford him the quality of representation guaranteed by the sixth amendment.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Reversed and remanded for new trial.

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

Paul L. Douglas, Attorney General, and Mark D. Starr for appellee.

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

WHITE, J.

Defendants Hudson and Maeberry appeal from a judgment of conviction in the District Court for Douglas County, Nebraska, for the crime of first degree sexual assault. Defendant Hudson was sentenced to a term of 1½ to 3 years' imprisonment, and defendant Maeberry to a term of 1 to 2 years' imprisonment with credit for time served prior to trial. Defendants appeal their convictions. We reverse and remand for a new trial.

The evidence established that on September 26, 1979, at about 2 p.m., the prosecutrix was walking from her job to her home on South 27th Street in Omaha, Nebraska. Near 24th and Farnam Streets she was approached by defendant Hudson and asked if she "wanted to party" and "smoke some angel dust." Defendant Maeberry was in a nearby drugstore and joined Hudson and the prosecutrix while they were

talking. It was agreed that all three would go to the prosecutrix's apartment. They did so, with the prosecutrix unlocking the apartment door so they could enter. She did not lock the door from the inside once they were all in the apartment but did notice later that it had been locked. In a pretrial deposition she stated that defendant Hudson locked the door from the inside, but at trial she testified that "the last person in" locked it and that she could not remember which defendant that was.

The apartment contained a living room, dining room, kitchen, bathroom, dressing room-closet combination, and a Murphy bed which pulled down out of the wall into the living room. The prosecutrix supplied the defendants with drinking glasses for wine which defendant Maeberry had brought in, and all three sat down on a couch in the living room. Defendant Hudson then lit a rolled cigarette and passed it to the other parties. He then attempted to kiss the prosecutrix.

The prosecutrix's version of the next-recited incidents are to a large degree contradicted by the testimony of the defendant Maeberry, who was the only defendant to testify at trial.

According to the prosecutrix, Hudson asked her to accompany him into the bathroom to snort some cocaine. As she entered the bathroom, Hudson shut the door and ordered, "Take off your clothes, bitch." The prosecutrix rolled over into the corner of the bathroom and began crying, and Hudson threatened that he would hurt her if she did not keep quiet. He then began to choke her and she lost consciousness. When she regained consciousness, Hudson was removing her slacks. He then took her into the dressing room from the bathroom and forced her to perform fellatio. Next he ordered her to pull down the Murphy bed in the living room and lie on it and Hudson then had vaginal intercourse with her. Defendant Maeberry was on the couch during all these events. After Hudson engaged in intercourse with the prosecutrix on the bed, Mae-

berry disrobed and also engaged in vaginal intercourse with her. Thereafter the defendants forced her to bathe, and each had vaginal intercourse with her after the bath. While Maeberry was engaging in intercourse with her this second time, Hudson again forced her to perform fellatio. Hudson then ransacked the apartment and she later found that a flute, some jewelry, and $100 cash was missing. At no time during the intercourse on the bed did she resist the defendants because she was afraid they would hurt or kill her.

Following the above-described events, defendants then insisted that the prosecutrix accompany them to California to work as a prostitute. As the three were walking down the steps to leave her apartment building, she jumped behind a young man in the hallway and began to cry that she had been raped. Hudson immediately left the building. Maeberry stayed behind to deny to the young man that he had raped the prosecutrix, but left when the young man suggested he do so. The young man then assisted the prosecutrix in telephoning a friend who took her to Lutheran Hospital. Police were summoned. The examination of the prosecutrix at the hospital established that she had engaged in sexual relations and had marks on her throat. Police made an investigation and defendants were subsequently arrested and charged.

Defendant Maeberry's testimony was that, while the prosecutrix and Hudson were in the bathroom, the door was open and that he neither saw nor heard evidence of violence or threats upon the prosecutrix by Hudson. He maintained his belief that all the sexual acts which occurred were consensual, that the prosecutrix had asked defendants if she could go to California with them, and that the personal property was taken in order to get money for her bus ticket. On the way down the steps, according to Maeberry, Hudson then told the prosecutrix she could not accompany them to California and just after that she jumped behind

the young man and began crying that she had been raped.

Defendants assign a number of errors, but we shall discuss only one: Whether the District Court committed reversible error in overruling both defendants' objections to consolidation of their cases for trial.

Defendants were represented by two staff attorneys from the Douglas County Public Defender's office. Each attorney participated actively in the trial and it is apparent that each was representing both defendants. Before trial, counsel for the defendants objected to the State's motion to consolidate the cases for trial, but there is no indication from the record that arguments were heard on the motion or the objection. At no time before, during, or after the trial did counsel ask the trial court that separate counsel working independently of one another be appointed for the defendants, although, under the above-mentioned assignment of error, they argue strenuously in their brief that a conflict of interest existed between the two defendants. We treat the above assignment as one dealing with appointment of separate counsel, and agree with the defendants.

The prosecutrix's testimony showed that the threats and violence which accompanied the sexual penetration, thereby making it a forcible assault, were all made or perpetrated by defendant Hudson out of Maeberry's presence. It is defense counsel's argument on appeal that the jury could have found Maeberry innocent of any knowledge of threats or violence accompanying the incidents, and thus innocent of forcible penetration. However, defense counsel now argue that, in order to maintain a full defense of consent for both defendants, it was necessary for them to ignore elements of the prosecutrix's testimony which could have helped Maeberry to the detriment of Hudson. They argue that they could have impeached her more vigorously on the disparity of her deposition and trial statements as to who locked the apartment

door from the inside in order to exonerate Maeberry had it not been so perilous to Hudson's consent defense. Also, the prosecutrix testified that, while the threats and violence were occurring in the bathroom, the door from that room to the living room was closed. Maeberry testified that it was open and that he heard no threats or violence. It would have been to Maeberry's advantage, but not Hudson's, if counsel could have stressed that the bathroom door was closed and that Maeberry had no knowledge of the threats and violence undertaken by Hudson. Counsel argue that they were forced to forego this opportunity to rehabilitate Maeberry at the expense of Hudson in order to protect Hudson's interests.

We agree that there was a conflict between the interests of the defendants at trial which called for separate representation. However, defense counsel never brought the issue to the trial court's attention. The question for decision then becomes: If defense counsel do not raise the conflict issue at trial, is the trial court under a duty in a multiple representation case to initiate any inquiry along those lines on its own motion?

The most recent statement of the U.S. Supreme Court on this question appears in *Cuyler v. Sullivan*, 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980). In *Cuyler*, three defendants, all charged with the murder of two people, were represented by two attorneys at separate trials. Sullivan was convicted after resting his defense at the end of the state's case. The other two defendants were subsequently acquitted at their trials. During none of the trials did any defendant suggest to the court that a possible conflict of interest existed which would prohibit multiple representation. The Supreme Court held that "[u]nless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry." The court went on to hold that, without special circumstances which would create a

duty of inquiry, "a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance" in order to gain reversal of a conviction. *Cuyler* at 347-48.

The record in the present case does not demonstrate that defense counsel ever raised the conflict issue with the trial court. Thus, we must decide whether "special circumstances" existed which should have alerted the trial court to a possibility of a conflict arising between the interests of the defendants.

In finding that no special circumstances existed in *Cuyler* which would have put the trial court on notice of a possible conflict, Mr. Justice Powell noted that there were separate trials; no objections were made to the multiple representation; that defense counsel's "opening argument . . . outlined a defense compatible with the view that none of the defendants was connected with the murders"; and that defense counsel's decision to rest at the end of the state's case was a legitimate trial tactic based on the weakness of the state's case against Sullivan and not a red flag to the trial court of a possibility of conflict. *Cuyler* at 347.

In the present case, the record shows only an objection to the State's motion to consolidate, without more. Nothing in the record indicates that the possibility of conflicting interests was brought to the trial court's attention by defense counsel. At a pretrial hearing on another matter, the following colloquy between the court and defense counsel took place: "THE COURT: I would assume that — and I'm only assuming because no one's made it a matter of record yet — that consent is a defense in this?

"MR. FRANK [defense counsel]: Yes, Your Honor.

"THE COURT: All right.

"MR. SIGLER [State's attorney]: And that's as to both?

"MR. FRANK: Yes. . . ."

Counsel made no mention of conflict either in this hearing or in any of the in camera hearings during the course of the trial. Defense counsel's treatment of trial testimony referred to above, both as to the prosecutrix's testimony and to Maeberry's, would not of itself rise to the level of "special circumstances" sufficient to impose a duty of inquiry on the trial court as to conflict, since both represent legitimate trial tactics based on a mutual defense of consent.

However, after the jury was instructed, retired, and began deliberating, the trial court requested it to stop its deliberation and return to the courtroom for further instruction. At that time the court gave an aider and abettor instruction, even though it had earlier informed all counsel that it would not honor the State's request to give that instruction. The instruction emphasized the difference between the respective roles played by Hudson and by Maeberry in the alleged assault, and the resulting peril of their being represented by the same counsel.

The *Cuyler* opinion places significant emphasis on the fact that there were separate trials for the codefendants in finding that no special circumstances existed. "The provision of separate trials for Sullivan and his codefendants significantly reduced the potential for a divergence in their interests." *Cuyler* at 347. In the present case, however, the trial was consolidated and, in fact, the court specifically denied a defense request for separate trials. While an objection to consolidation, without more, does not of itself bring about the requirement of an inquiry into conflict, we think that it should place the trial court slightly more on its guard to inquire when divergence between the defendants' interests becomes apparent as it did here when the trial court recalled the jury to give the aider and abettor instruction. Although the primary responsibility of watching for conflict remains on the bar, the trial court must still be "watchful for indicia of conflict during the trial." *United States v. Mandell*, 525 F.2d

671, 677 (7th Cir. 1975).

As noted in *United States v. Carrigan*, 543 F.2d 1053, 1055 (2nd Cir. 1976): "When a potential conflict of interest arises . . . the proper course of action for the trial judge is to conduct a hearing to determine whether a conflict exists to the degree that a defendant may be prevented from receiving advice and assistance sufficient to afford him the quality of representation guaranteed by the Sixth Amendment." In light of *Cuyler*, this hearing must take place when the requisite "special circumstances" arise. At the time, then, when the trial court in the present case gave the aider and abettor instruction, it should have held this type of hearing since it apparently had recognized a divergence in the respective levels of participation in the alleged assault of each defendant, indicating a possible conflict in their interests. See *Wood v. Georgia*, 49 U.S.L.W. 4218, decided March 4, 1981. Since this hearing was not held, we reverse and remand for a new trial.

REVERSED AND REMANDED FOR NEW TRIAL.

CLINTON, J., dissents.

BOSLAUGH, J., dissenting in part.

I am unable to discern how the defendant Hudson was prejudiced by the joint trial. I would affirm the judgment as to Hudson.

HASTINGS, J., joins in this dissent.

GLEN R. MILLER, APPELLANT, V. HARRY PETERSON, DIRECTOR OF THE DEPARTMENT OF MOTOR VEHICLES, APPELLEE.

305 N.W.2d 364

Filed May 1, 1981. No. 43320.

1. **Motor Vehicles: Licenses: Pleas.** Whenever a guilty plea is utilized to support a judgment of conviction used to support an order revoking a motor vehicle operator's license under Neb. Rev. Stat. § 39-669.27 (Reissue 1978), and it is challenged in District Court, it must appear from the record that there was a judicial acceptance of that plea.
2. **Statutes.** It is a fundamental rule of construction that in construing statutes this court will, if possible, try to avoid a construction which leads to absurd, unjust, or unconscionable results.
3. ——. A sensible construction will be placed upon a statute to effectuate the object of the legislation rather than a literal meaning that would have the effect of defeating the legislative intent. In order to determine this intent the reasons for the enactment of the statute and the purposes and objects of an act, as obtained from an examination of the legislative history, may be used as guides in an attempt to give effect to the main intent of lawmakers.
4. **Motor Vehicles: Judges: Jurisdiction.** By creating a classification of "traffic infractions" by Neb. Rev. Stat. § 39-602(107) (Cum. Supp. 1980), it was not the intention of the Legislature to deprive the nonlawyer associate judges of jurisdiction over this particular classification of offenses.
5. **Motor Vehicles: Words and Phrases: Judges.** "Traffic infractions" are misdemeanors for the purpose of determining the authority of nonlawyer associate judges under the provisions of Neb. Rev. Stat. § 24-519 (Reissue 1979).

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

Steven C. Smith of Van Steenberg, Brower, Chaloupka, Mullin & Holyoke for appellant.

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

Heard before KRIVOSHA, C.J., WHITE, and HASTINGS, JJ., and VAN PELT and CAPORALE, District Judges.

HASTINGS, J.

Plaintiff, Glen R. Miller, appealed to the District

Court from an order of Harry Peterson, director of the Department of Motor Vehicles for the State of Nebraska, defendant, who had revoked Miller's motor vehicle operator's license pursuant to the so-called point system, Neb. Rev. Stat. § 39-669.27 (Reissue 1978). The District Court affirmed the action of the director, and Miller has appealed to this court. We reverse.

One of the convictions utilized to assess the requisite 12 points was one dated November 17, 1978, out of the county court of Hamilton County. The transcript from the Department of Motor Vehicles contains an abstract of judgment obviously describing that case and certified to by the clerk of the county court. The record made in District Court contains a certified copy of the actual docket sheet. That sheet is filled out completely except that there is no signature by a judge. The record also contains a "waiver and plea of guilty" signed by Miller. We were presented with the same situation in *Hyland v. State*, 194 Neb. 737, 235 N.W.2d 236 (1975), and were forced to reject the director's reasoning. "We find no authority to support that position [that a waiver of appearance and plea of guilty signed by the person charged should be treated as a 'judgment of conviction'] where there is no acceptance of the guilty plea and no record of a conviction or judgment of conviction by the court." *Id.* at 740, 235 N.W.2d at 238. If in fact the plea was accepted and Miller judicially found guilty, but the judge simply neglected to affix his signature, that omission can readily be cured. If the "waiver and plea" actually has not been acted upon by a judge, it can properly be presented at this time.

Miller objects to two other speeding convictions as being void because they were entered by nonlawyer associate judges. His reasoning is that the trial authority of such judges is limited by Neb. Rev. Stat. § 24-519 (Reissue 1979) to "[a]ny civil proceeding when the amount . . . claimed does not exceed one

thousand dollars; . . . [a]ny proceeding based on violation of a city or village ordinance; [or] . . . [a]ny criminal proceeding which is a misdemeanor under the laws of this state." After the effective date of that statute, the Legislature enacted what has now been codified as Neb. Rev. Stat. § 39-602(107) (Cum. Supp. 1980). This legislation, Miller argues, creates an additional offense category called a "traffic infraction," which includes the violation of any of the Nebraska Rules of the Road "or of any law, ordinance, order, rule, or regulation regulating traffic which is not otherwise declared to be a misdemeanor or a felony and which shall be a civil offense."

Miller insists that the powers of nonlawyer associate judges, like judges themselves, extend and are limited to those fixed by law, beyond which they cannot act. He concludes, then, that there being no statutory authority for the nonlawyer judges to hear traffic cases, his two convictions were void and cannot form the basis for a point assessment.

Section 24-519 is a part of L.B. 1032 enacted in 1972, and § 39-602(107) finds its origin in L.B. 45, effective in 1973. Section 24-519 authorizes, and continues to authorize, a nonlawyer associate judge to enter judgments in civil cases involving damages of up to $1,000 and to impose criminal sentences of imprisonment for 1 year and fines of $1,000. Neb. Rev. Stat. § 28-106 (Reissue 1979). It makes absolutely no sense for the Legislature to 1 year later forbid these same judges to hear infractions of a civil nature in which the maximum fine ranges from $100 to $300. Neb. Rev. Stat. § 39-6,112 (Reissue 1978).

"It is a fundamental rule of construction that in construing statutes this court will if possible try to avoid a construction which leads to absurd, unjust, or unconscionable results." *State v. Goham*, 191 Neb. 639, 641, 216 N.W.2d 869, 871 (1974). A sensible construction will be placed upon a statute to effectuate the object of the legislation rather than a literal

meaning that would have the effect of defeating the legislative intent. In order to determine this intent the reasons for the enactment of the statute and the purposes and objects of an act as obtained from an examination of the legislative history may be used as guides in an attempt to give effect to the main intent of lawmakers. *PPG Industries Canada Ltd. v. Kreuscher*, 204 Neb. 220, 281 N.W.2d 762 (1979).

The Nebraska Rules of the Road, Neb. Rev. Stat. §§ 39-601 et seq. (Reissue 1978), was the result of a comprehensive revision of motor vehicle traffic laws as expressed by Neb. Laws 1973, L.B. 45, and for the most part was based upon the Uniform Vehicle Code prepared by the National Committee on Uniform Traffic Laws and Ordinances (Rev. 1968). Committee on Public Works, Eighty-third Legislature, Minutes of January 18, 1973, Hearing at 17-20. The notable deviation has to do with the penalty provisions. The uniform code for the most part classifies traffic offenses as misdemeanors and provides for penalties of not more than 10 days in jail or a fine of $100, with a corresponding increase for the second and third convictions within the same year. Uniform Vehicle Code § 17-101. The Nebraska Rules of the Road, as previously mentioned, classify these offenses as "traffic infractions" and, although failing to grant authority for jail sentences, follow the system of progressive fines found in the uniform code. The creation of the offense of "traffic infraction" is explained in the minutes of the Public Works Committee previously cited, beginning at 21: "SENATOR WARNER: Would some penalties for infractions be less now as a general rule? MR. NELSON: In terms of a maximum, this is true. There have been some changes because of the United States Supreme Court decision requiring counsel where there is a possible jail. [sic] Now the experience over the country, and this is verified in Lincoln or Omaha, Nebraska, is that for that type of offense jail has not been used, but

there would be a requirement for counsel to be appointed and this type of thing. As a consequence, there has been a definition in here of the term 'infraction' which does not include any jail sentence, but it does include some heavier penalties in terms of fines, as opposed, for example, to the term 'misdemeanor' which will include a jail sentence or possible jail sentence." It would therefore seem that it was never the intention of the Legislature to deprive the nonlawyer associate judges of jurisdiction over this particular classification of offenses. Rather, it was intended simply as a limitation on the penalties to be imposed in a category of cases which formerly had been called misdemeanors.

Another answer to Miller's claim may be found in *State v. Karel*, 204 Neb. 573, 284 N.W.2d 12 (1979); *State v. Huffman*, 202 Neb. 434, 275 N.W.2d 838 (1979); and *State v. Knoles*, 199 Neb. 211, 256 N.W.2d 873 (1977). In all of these cases we held, under different circumstances, that a "traffic infraction" was a criminal offense and that the prosecution of such action is a criminal proceeding.

We therefore hold that a nonlawyer associate judge of the county court is authorized to preside in any proceeding involving a "traffic infraction" as defined by § 39-602(107), and Miller's assignment of error in that regard has no merit.

However, because of the deficiency in the November 17, 1978, conviction in the county court of Hamilton County, relied upon by the director, the District Court should have vacated and set aside his order revoking Miller's license. Therefore, the judgment of the District Court is reversed and the order complained of is vacated and set aside.

REVERSED.

SCHOOL DISTRICT NO. 20, COUNTY OF DAWSON, APPELLANT, V. COMMISSIONER OF LABOR, APPELLANT, AND HOWELL G. OLDHAM, APPELLEE.

305 N.W.2d 367

Filed May 1, 1981. No. 43354.

1. **Employment Security Law: Words and Phrases.** An employee who desires to retain his employment but resigns or quits because the employer has clearly indicated that if he does not his employment will be terminated has not left his employment "voluntarily," as that term is used in Neb. Rev. Stat. § 48-628(a) (Reissue 1978).
2. **Employment Security Law: Attorney Fees.** Neb. Rev. Stat. § 48-646 (Reissue 1978) requires that the amount of attorney fees charged by a lawyer to his client be approved by the Commissioner of Labor. It does not authorize the District Court to award attorney fees for which approval by the commissioner has not been sought.

Appeal from the District Court for Dawson County: KEITH WINDRUM, Judge. Affirmed in part, and in part reversed.

James B. Gessford of Perry, Perry, Witthoff & Guthery for appellant school.

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

Richard G. Kopf of Cook & Kopf, P.C., for appellee.

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

CLINTON, J.

Defendant Dr. Howell G. Oldham (Oldham) applied for and was awarded unemployment compensation benefits under the Employment Security Law. Upon redetermination, a Department of Labor claims deputy found that Oldham was disqualified from receiving benefits for 7 weeks, under Neb. Rev. Stat. § 48-628(a) (Reissue 1978), because he resigned his employment "voluntarily . . . without good cause." Oldham appealed to the appeal tribunal. Following a

hearing, the appeal tribunal found that Oldham did not leave his employment voluntarily, but was discharged. The plaintiff, School District No. 20, County of Dawson (the Gothenburg Public School District), and the defendant Commissioner of Labor (Commissioner) appealed to the District Court for Dawson County, which affirmed and awarded Oldham attorney fees for the appeal. The Gothenburg Public School District appeals to this court, assigning as error the finding that Oldham resigned involuntarily or with good cause, and arguing that upon de novo review this court should find to the contrary. The Commissioner appeals solely on the issue that the District Court wrongly awarded Oldham attorney fees without statutory authority to do so. We affirm in part and reverse in part.

An appeal under the Employment Security Law, Neb. Rev. Stat. §§ 48-601 to 48-669 (Reissue 1978), must be heard by the District Court de novo on the record, although either party may offer additional evidence after proper notice. On appeal this court must also consider the cause de novo on the record. *Powers v. Chizek*, 204 Neb. 759, 285 N.W.2d 501 (1979); *Glionna v. Chizek*, 204 Neb. 37, 281 N.W.2d 220 (1979).

For 10 years Oldham served as superintendent of the Gothenburg Public School District. Each year in March or April the school board voted on whether to reelect the district administrators, including the superintendent, for the coming year. Reelection required an "aye" vote by at least three school board members, assuming all six were present and voting.

On February 12, 1979, Oldham and all six members of the school board attended a regularly scheduled school board meeting. After the public portion of the meeting, the school board went into executive session. During this session, France, the school board president, dismissed everyone from the room except Oldham and the school board members and initiated a conversation.

Although the testimony as to the precise language used in the conversation is slightly conflicting, there is no doubt of its substance and import. Oldham testified that France told him: "'Dr. Oldham, I feel I should inform you it is extremely doubtful that you would get a majority vote for reelection for Superintendent of Schools for the coming year.'" France and Buddenberg, a school board member present at the meeting, testified that it was to the effect that Oldham possibly or probably would not receive a majority vote for reelection as superintendent. Oldham told the school board he would like to remain superintendent for another year so that, upon reaching age 55, he could sell his home in Gothenburg with more favorable tax consequences and his son could graduate from the Gothenburg High School. The other witnesses agreed that Oldham told the school board he would like to remain for another year so that his son could graduate from Gothenburg High School. At this point, according to France, Oldham, and Buddenberg, Buddenberg asked something to the effect that: "You have all heard Dr. Oldham. Because of [his son] would you change your [mind] and let him stay another year?" No one responded. Oldham testified that he then said: "'Leonard [France], if that is the feeling of the Board, I suppose we can handle it in my office tomorrow.'" According to France and Buddenberg, Oldham offered to resign provided France would give a letter saying that it was possible he would not be reelected.

Oldham testified that he believed he had been discharged by the school board during the February 12, 1979, meeting. This belief was based in part on his experience with the school board which led him to think that they discussed his reelection before the meeting. He testified that when he had asked the school board on a couple of prior occasions whether they had discussed a particular issue he was told: "'Yes, down at the post office.'" France denied any attempt to force Oldham's resignation, saying that he intended

solely to give Oldham the opportunity to resign rather than be publicly voted out later. According to France, he took this step without consulting other board members because two school board members approached him before February 12th and told him that they would not vote for Oldham's reelection.

After the meeting, according to France's own testimony, he called Kelley Baker, attorney for the state school board, and asked whether any legal problems would result if he furnished Oldham with the above-mentioned letter. Baker responded in the negative, saying that school boards could fire superintendents at any time under state law.

The next afternoon France and Oldham met in the latter's office. Oldham presented France with a letter stating, in part: "It appears doubtful that you will secure a majority vote to be re-elected to your position as Superintendent of the Gothenburg Schools for another term.

"Sincerely,
/s/ Leonard France
Leonard France, President
Gothenburg Board of Education"

France signed the letter and, according to Oldham, remarked: "'I guess that represents the feeling of the Board of Education.'" France testified that he signed the letter only on behalf of himself and not upon authorization by the school board. Oldham then gave France a letter of resignation which said, in part: "[A]s per our verbal conversation last night at the Board meeting, I feel it to be in my best interest to inform you of my resignation."

The school board accepted Oldham's resignation on April 9, 1979.

Section 48-628(a) provides, in part, that: "An individual shall be disqualified for benefits:

"(a) For the week in which he has left work voluntarily without good cause, if so found by the Commissioner of Labor, and for not less than seven

weeks nor more than ten weeks which immediately follow such week, as determined by the commissioner according to the circumstances in each case."

In construing this language we have said: "[T]o 'leave work voluntarily,' . . . means to intentionally sever the employment relationship with the intent not to return to, or to intentionally terminate, the employment." *Powers v. Chizek*, 204 Neb. 759, 764, 285 N.W.2d 501, 504 (1979). *MacFarland, Aplnt., v. Unemploy. Comp. Bd.*, 158 Pa. Super. 418, 45 A.2d 423 (1946), which was cited in *Powers*, defined "voluntary" as meaning an employee who left of his own volition and was not discharged. A similar definition, also quoted in *Powers*, was that "voluntary" means that the claimant, by his or her own choice, intentionally, of his or her own free will, terminates the employment. *Allen v. Core Target City Y. Prog.*, 275 Md. 69, 338 A.2d 237 (1975). See, also, 76 Am. Jur. 2d *Unemployment Compensation* § 59 at 956 (1975).

Powers dealt with the question of whether an employee discharged for failing to appear for work, in the belief that she had already been fired, terminated her employment voluntarily. In *Powers* the question arose because it was unclear whether the employee intended and acted to terminate her employment; in this case the question of voluntariness arises because it is unclear whether the employer intended and acted to terminate the employment relationship or, in other words, to discharge the employee.

Upon de novo review we hold that the District Court correctly found that Oldham did not terminate his employment voluntarily. The record shows that France, not Oldham, first raised the issue of Oldham's reelection. Likewise, it is undisputed that Oldham desired to remain in his position as superintendent for at least another year, and told the school board of his desire. When Buddenberg asked the school board members whether they would change their minds and let Oldham stay for one more year, no one encouraged

him to remain. It was only after this exchange that resignation was mentioned. The record is devoid of any evidence showing that Oldham had expressed a desire to resign prior to this discussion or that there was any question of misconduct, on his part, involved. It is clear that he resigned only because the school board members who had the power to reelect him intended not to do so.

Since we find that Oldham did not terminate his employment voluntarily, we need not reach the issue of whether he had "good cause" under § 48-628(a) for his actions.

Next, we turn to the issue of attorney fees. The first mention of attorney fees in this record was at the District Court level where both Oldham and the Gothenburg Public School District sought an award of attorney fees for the appeal. The court ordered the Commissioner to pay Oldham reasonable attorney fees. The Commissioner argues that the court lacked statutory authority to do so.

This court has said many times that an award of attorney fees is erroneous unless permitted by statute or uniform practice. *Suhr v. City of Seward*, 201 Neb. 51, 266 N.W.2d 190 (1978); *Warren v. Warren*, 181 Neb. 436, 149 N.W.2d 44 (1967). Neither statute nor uniform practice permits the District Court upon appeal to order an adverse party to pay attorney fees incurred by an unemployment compensation claimant.

Oldham suggests that § 48-646 authorizes such an award. That section provides, in part, that: "Any individual claiming benefits in any proceeding before the commissioner or an appeal tribunal or his or its representative or a court may be represented by counsel or other duly authorized agent, and such counsel may either charge or receive for such services a reasonable fee to be approved by the commissioner. The commissioner may, in special cases, pay such fee from the Employment Security Administration

Fund. Any person who violates any provision of this section shall be guilty of a Class II misdemeanor."

In construing a statute, we have consistently held that the language used by the Legislature should be considered to determine its intent and the words used should be given their plain meaning. *Weiss v. Union Ins. Co.*, 202 Neb. 469, 276 N.W.2d 88 (1979); *PPG Industries Canada Ltd. v. Kreuscher*, 204 Neb. 220, 281 N.W.2d 762 (1979). In plain language, § 48-646 deals with the fees charged to a claimant by his own attorney, approval of such fees by the Commissioner, and payment of fees in special cases by the Commissioner. It plainly provides that the amount of any fee charged to the client by his attorney requires approval by the Commissioner, including any fee for services in any court. The record does not show that any request was ever made to the Commissioner for approval of fees charged. Consequently, there is no showing of any special circumstances which would require payment by the Commissioner from the Employment Security Administration Fund. This statute in no way provides for an award of attorney fees by the District Court where such award was first sought on appeal by the parties and there was no issue on the appeal concerning any determination by the Commissioner as to the reasonableness of fees assessed a claimant by his own attorney or the eligibility of a claimant to have his attorney fees paid by the Commissioner under § 48-646.

We affirm the finding of the District Court that Oldham did not terminate his employment voluntarily, and reverse on the issue of attorney fees.

AFFIRMED IN PART, AND IN PART REVERSED.

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

I concur with that part of the majority opinion which holds that the claimant did not terminate his employment voluntarily. I dissent from that portion of

the opinion disallowing the payment of a reasonable attorney fee to the defendant-claimant for the services of his attorney in the District Court.

It is clear that Neb. Rev. Stat. § 48-646 (Reissue 1978) authorizes the Commissioner of Labor to pay a reasonable attorney fee from the Employment Security Administration Fund "in special cases." That provision is disjunctive from that portion of the statute requiring that any attorney fee charged to a claimant must be approved by the Commissioner.

Where the Commissioner of Labor appeals to the courts from an award of the appeal tribunal in favor of an unemployed claimant, unless there is some provision for the payment of reasonable attorney fees for claimants, the claimants will, in all probability, have extreme difficulty in obtaining the services of counsel to protect their awards. To require a claimant to request the Commissioner of Labor to allow a reasonable attorney fee in an appeal to the courts and have the request approved or denied before entering an appearance rather than to request it in an answer filed in the District Court exalts form over substance.

In this case it is clear that the attorney fees involved are only the fees for services in the District Court, and it is clear that the claimant prayed for such fees in his answer. It is also undisputed that the Commissioner of Labor has resisted, and still resists, the allowance of any fee for the claimant's attorney, either in the District Court or in this court. There can be no reasonable doubt that the Commissioner has denied the payment of any attorney fee out of the Employment Security Administration Fund.

Unless a decision by the Commissioner of Labor denying a request for the payment of attorney fees from the Employment Security Administration Fund is unreviewable by the courts, it should be reviewed in this case because the Commissioner of Labor has denied the payment of attorney fees from the fund and even appealed to this court on the ground that such

fees are not allowable. It cannot be expected that he will reverse that decision, and his exercise of discretion ought to be reviewed now rather than later or not at all.

Where the Commissioner of Labor appeals to the courts from an award of the appeal tribunal to an unemployed claimant and loses the appeal, if there is any case which could be said to be a "special case" this one would be it.

If the majority opinion holds that under the statute a court cannot set or determine a reasonable attorney fee for services of an attorney in its own court without the prior approval of the Commissioner of Labor, I cannot believe the authority of the courts is so limited.

It is unconscionable to require a successful unemployment compensation claimant to defend his award in the District Court against an appeal by the Commissioner of Labor without an allowance of attorney fees, particularly when the appeal is unsuccessful and the Commissioner of Labor has the power to allow a reasonable attorney fee in "special cases." If the statute must be so interpreted, at least the Legislature's attention should be called to the obvious injustice.

The District Court obviously found that this case was a "special case" and quite properly awarded a reasonable attorney fee of $700. That judgment was eminently correct and should be affirmed. I would also order the payment of an additional $700 fee for services of the claimant's attorney in this court.

DIANE L. SOUKUP, APPELLEE, V. GLEN SOUKUP, APPELLANT.

305 N.W.2d 372

Filed May 1, 1981. No. 43361.

1. **Child Custody: Appeal and Error.** The determination of the trial court with respect to changing the custody of minor children will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence.
2. **Child Support.** A decree fixing child support payments is not subject to modification in the absence of a material change in circumstances occurring subsequent to the entry of the decree requiring modifications in the best interests of the children.
3. ____. In determining whether a modification of child support is warranted, the circumstances of the parents as well as those of the children must be considered.

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

Duane L. Nelson for appellant.

Badami & Radke for appellee.

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

MCCOWN, J.

This is a proceeding for modification of a decree of dissolution of marriage as to custody and child support. The District Court denied the husband's application for change of custody of the minor child and granted the wife's request for removal of certain conditions imposed in the decree and also an increase in child support. The husband has appealed.

On December 2, 1976, the marriage of the parties was dissolved. The decree placed the care, custody, and control of Nicholle, the minor child, born January 15, 1971, in the wife, subject to reasonable visitation by the husband, and subject to the following conditions: (a) The juvenile probation department was to strictly supervise the custody and have the right to visit the home at all reasonable times; (b) When the wife was not present the

minor child was to be under adult supervision; and (c) There were not to be any adult male visitors in the home after 11 p.m. if the minor child was on the premises. The decree also awarded the wife $175 per month for support of the minor child.

Following the entry of the decree the juvenile probation department supervised the custody of the minor child and visited the home as provided in the decree. In July 1977 the wife remarried, and thereafter the wife and her present husband and the minor child lived together and the juvenile probation department continued to supervise the custody of the minor child and continued to visit the home.

On December 13, 1978, the wife filed an application to modify the decree by removing the three specific conditions. The application alleged the remarriage of the wife and that that remarriage had made the third condition inapplicable and had also removed any necessity for the other conditions. The former husband filed a response resisting the wife's motion and also sought modification of the decree by changing custody of the minor child from the wife to the husband and eliminating the provision for child support. The wife filed her response to the husband's motion to change custody, denying the husband's allegations and seeking to increase the amount of child support.

In late January and early February 1980 hearings were held on the respective motions, applications, and responses. The evidence of the juvenile probation officers who had supervised the custody of the minor child was that the wife was a fit and proper person to have custody, that the child was being properly cared for, and the home was suitable and proper. In October 1978 the juvenile probation department recommended that supervision be terminated and the wife's application to terminate the conditions followed.

The former husband and his brother-in-law testified that through continued surveillance by them of the wife and her current husband they had observed him

leaving the home on several occasions after 11 p.m., although there was no evidence that the minor child was in the home at the time. There was an attempt to introduce evidence as to the wife's conduct prior to the entry of the original decree, which the court quite properly excluded.

The husband also attempted to establish that the wife's conduct at home created an unsatisfactory atmosphere for the child. Much of the evidence tendered was inadmissible, objected to, and properly excluded.

On February 5, 1980, the trial court entered its order modifying paragraph 2 of the decree of dissolution by deleting subparagraphs a, b, and c; found that the wife was a fit and proper parent and that care, custody, and control of the minor child should remain with her, subject to reasonable rights of visitation by the husband; and ordered that child support payments be increased from $175 to $225 per month. The District Court taxed the costs of the action to the husband and directed that the parties should pay their own attorney fees. The husband has appealed.

The husband contends that the District Court erred in refusing to change the custody of the minor child from the wife to the husband. A decree fixing custody of minor children will not be modified unless there has been a change in circumstances indicating that the person having custody is unfit for that purpose or that the best interests of the children require such action. The determination of the trial court with respect to changing the custody of minor children will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. *Murdoch v. Murdoch*, 206 Neb. 327, 292 N.W.2d 795 (1980); *Kringel v. Kringel*, 207 Neb. 241, 298 N.W.2d 150 (1980).

In the determination of custody and visitation matters the principal concern is the best interests of the children. On the evidence in this record there can be little

doubt that the evidence fully supports the action of the trial court in deleting the former conditions as to custody and in refusing to change the custody of the minor child. There was no abuse of discretion in that regard.

The husband also contends that the evidence was wholly insufficient to establish a substantial change in financial circumstances of the parties since the date of the original decree of dissolution sufficient to warrant an increase in child support. This court has consistently held that a decree fixing child support payments is not subject to modification in the absence of a material change in circumstances occurring subsequent to the entry of the decree requiring modifications in the best interests of the children. *White v. White*, 202 Neb. 199, 274 N.W.2d 546 (1979). In determining whether a modification of child support is warranted, the circumstances of the parents as well as those of the children must be considered. *Bruckner v. Bruckner*, 201 Neb. 774, 272 N.W.2d 270 (1978).

The only evidence offered in the present case tends to establish that neither the husband nor the wife has experienced a substantial change in financial circumstances since the date of entry of the original decree. To the extent there has been a change in circumstances, the husband's financial position and income is somewhat less than it was at the time of the decree and the wife's income and financial resources are greater than they were at the time of the original decree. The only fact which could arguably support an increase in child support was the acknowledged fact of inflation. Inflation operates equally upon the husband, the wife, and the child. The evidence in this case is insufficient to establish materially changed circumstances requiring an increase in child support.

That portion of the decree of the District Court which deleted subparagraphs a, b, and c of paragraph 2 and left the care, custody, and control of the minor child in the wife subject to reasonable rights of visitation by

the husband is affirmed. That portion of the decree which increased the child support payments to $225 per month is vacated and the original sum of $175 per month is reinstated. The parties shall pay their own costs and attorney fees.

AFFIRMED AS MODIFIED.

LYNN M. SAVAGE, APPELLANT, V. HENSEL PHELPS CONSTRUCTION COMPANY, A CORPORATION, AND AETNA CASUALTY AND SURETY COMPANY, A CORPORATION, APPELLEES.

305 N.W.2d 375

Filed May 1, 1981. No. 43542.

1. **Workmen's Compensation.** The Workmen's Compensation Court may, as a condition of awarding compensation to an injured employee, require the employee, if appropriate, to submit himself for evaluation to determine if the employee may be retrained and thereby gainfully employed in the future.
2. **Workmen's Compensation: Time.** Where a reasonable controversy exists between the parties as to the payment of compensation, an injured employee is not entitled to the statutory penalties for waiting time.
3. **Workmen's Compensation: Attorney Fees.** The right to tax attorney fees is purely statutory in a workmen's compensation case.

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

Harry R. Meister of Winner, Nichols, Meister & Douglas for appellant.

Holtorf, Kovarik, Nuttleman & Ellison, P.C., and James M. Mathis for appellees.

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

KRIVOSHA, C.J.

The appellant, Lynn M. Savage (Savage), appeals from a judgment entered by a three-judge panel of the

Workmen's Compensation Court finding that Savage, while in the employ of appellee Hensel Phelps Construction Company (Hensel Phelps), suffered injuries to his back and that, as a result of such injuries, Savage was totally disabled from March 29, 1978, to the date of the rehearing on March 25, 1980, and will continue to be so disabled for an indefinite period of time. The compensation court further found that, as a result of the accident and injury, Savage is unable to perform work for which he has previous training or experience and is entitled therefore to seek vocational rehabilitation services, including retraining and job placement, if possible, to the extent as may be reasonably necessary to restore him to suitable employment. The compensation court further found that there was a reasonable controversy between the parties in regard to the suspension of disability payments which occurred during the course of the dispute and that, therefore, Savage's request for penalties and attorney fees should be denied. Also denied was Savage's request for the cost of travel from Nebraska to Massachusetts where Savage's treating physician resided and where the surgery was performed. We believe that the compensation court was correct in all respects and the judgment should be affirmed.

Savage assigns three specific errors as the basis for this appeal. Savage maintains as his first assignment of error that the compensation court erred "[i]n failing to find that the plaintiff is totally permanently disabled." The second assignment of error is that the compensation court erred in forcing Savage to take vocational rehabilitation services when he is not able to be retrained and restored to suitable employment. And, third, the compensation court erred in not awarding all medical travel expenses, penalty, and attorney fees. We shall address the errors in the order assigned by Savage.

Turning to the first error, that the court failed to find that Savage was totally permanently disabled, we

believe that Savage misinterprets the compensation court's order. The order of the compensation court, entered May 27, 1980, specifically provides, in part, as follows: "[A]s a result of said accident and injury the plaintiff incurred hospital and medical expenses and was totally disabled from March 29, 1978, to the date of this rehearing on March 25, 1980, and will continue to be so disabled for an indefinite future period of time." Moreover, the court's award provides, in part, as follows: "That the plaintiff have and recover of the defendants the sum of $140.00 per week for 104 weeks to and including the date of this rehearing on March 25, 1980, and a like sum per week thereafter for as long as plaintiff shall remain totally disabled as a result of said accident and injury."

Apparently, Savage believes that the compensation court's award should not have been in any manner qualified by inserting the words "for as long as plaintiff shall remain totally disabled as a result of said accident and injury." We know of no such prohibition imposed upon the compensation court. The appellees concede and accept, for the purposes of this accident, that Savage is presently permanently disabled, and we are unable to discern what more we can order under the law. The first assignment of error must be overruled.

We believe that Savage's real complaint goes to his second assignment of error. He believes that he should not be forced to take vocational rehabilitation services when he is not able to be retrained and restored to suitable employment. The order, however, does not require him to take the training. It merely provides that: "The plaintiff should contact the Rehabilitation Specialist of the Nebraska Workmen's Compensation Court within 30 days after the date of this Award in order to be referred to a qualified physician or facility *for evaluation and report of the practicability of, need for and kind of service, treatment or training necessary and appropriate to render him fit for a remunerative occupation.*" (Emphasis supplied.) Savage argues that, at age 62

and with limited education and training, it would be difficult, if not impossible, for him to be retrained for any kind of gainful employment. That may be absolutely true. The order of the compensation court, however, does not require him to obtain employment or even submit to retraining if such training is not appropriate. It merely requires him to contact the rehabilitation specialist of the Nebraska Workmen's Compensation Court so that he may be evaluated. If the evaluation discloses that Savage is indeed correct in his conclusion and he cannot be retrained, that is the end of the matter. Such an evaluation is totally consistent with the purpose of the Workmen's Compensation Act. See Neb. Rev. Stat. § 48-162.01 (Reissue 1978).

In *Camp v. Blount Bros. Corp.*, 195 Neb. 459, 466, 238 N.W.2d 634, 639 (1976), we noted: "Since there is a possibility that rehabilitation services might reduce the liability of the Second Injury Fund we believe the State of Nebraska should be given an opportunity to request that the plaintiff be required to submit to an evaluation at its expense." Likewise, we believe that Hensel Phelps is entitled to such an opportunity. Obviously, if Savage is not retrainable and cannot obtain employment, he will not be penalized in any manner. On the other hand, if, indeed, he can be retrained and can obtain gainful employment, it is both to his advantage and to the advantage of Hensel Phelps and Aetna that such action be taken. The Workmen's Compensation Court may, as a condition of awarding compensation to an injured employee, require the employee, if appropriate, to submit himself for evaluation to determine if the employee may be retrained and thereby gainfully employed in the future. We believe that there was nothing improper in the compensation court requiring, as a condition of payment, that Savage at least submit himself for evaluation. We accordingly overrule the second assignment of error.

Turning then to the last assignment of error, the

question of whether the temporary disability payments were unreasonably withheld so as to entitle Savage to penalty and attorney fees, and whether he was entitled to be reimbursed for the cost of travel from Lincoln to Massachusetts, we believe, likewise, the assignment must be overruled. We have previously held that where a reasonable controversy exists between the parties as to the payment of compensation, an injured employee is not entitled to the statutory penalties for waiting time. See *Spiker v. John Day Co.*, 201 Neb. 503, 270 N.W.2d 300 (1978). Whether or not there was a reasonable controversy between the parties is always a question of fact. In *White v. Western Commodities, Inc.*, 207 Neb. 75, 295 N.W.2d 704 (1980), we again reiterated the oft-noted rule that in reviewing a judgment of the Workmen's Compensation Court, this court is bound by findings of fact made by such compensation court after rehearing to the extent that such findings have support in the evidence. We cannot say that the compensation court's finding that there was a reasonable controversy is without support in the record. That being the case, we are not at liberty to reverse that finding and therefore we affirm the action of the compensation court in denying penalties.

As to the matter of attorney fees, what we have said with regard to the compensation court's refusal to order the payment of a penalty applies to its refusing to order the payment of an attorney fee. The right to tax attorney fees is purely statutory in a workmen's compensation case. See, Neb. Rev. Stat. § 48-125 (Reissue 1978); *Rexroat v. State*, 143 Neb. 333, 9 N.W.2d 305 (1943). We find no statutory authorization to impose attorney fees in this case.

As to the matter of travel expenses from Nebraska to Massachusetts, the compensation court refused to allow Savage's request for payment, limiting the payment of travel expense reimbursement to driving while in Massachusetts. This was apparently due to the provisions of Neb. Rev. Stat. § 48-120 (Reissue 1978), which provides,

in part, as follows: "If the employee shall select a physician located in a community not the home or place of work of the employee, and a physician is available in the local community or in a closer community, no travel expenses shall be required to be paid by the employer or his insurer."

The compensation court apparently found from the evidence that a physician was available in the local community or in a closer community than Massachusetts where Savage's daughter lived. Our review of the record supports that view, and we cannot say the compensation court was in error.

Furthermore, the record fails to disclose any evidence to support Savage's claim as to either the miles traveled or expenses incurred. We must, therefore, overrule Savage's last assignment of error. The judgment of the compensation court is correct in all respects and the judgment is affirmed.

AFFIRMED.

BRODKEY, J., concurs in result.

STATE OF NEBRASKA, APPELLEE, V. FARUQ AL-HAFEEZ, ALSO KNOWN AS RAYMOND L. MOSS, APPELLANT.

305 N.W.2d 379

Filed May 1, 1981. No. 43757.

1. **Courts: Judgments.** The purpose of an order nunc pro tunc is to correct the record so that it will truly reflect action actually taken, but which through inadvertence or mistake has not been truly recorded.
2. ____: ____. The limited remedy available in an application for an order nunc pro tunc will not be extended to question the constitutionality of the actions taken or declined to be taken by the trial court, but is limited to the specific purpose of the proceeding, that is, to correct the record to accurately reflect what actually happened in the proceedings.

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

Faruq Al-Hafeez, pro se.

Paul L. Douglas, Attorney General, and Shanler D. Cronk for appellee.

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

WHITE, J.

Defendant Moss was convicted in the District Court for Douglas County, Nebraska, in 1970 for the crimes of sodomy, robbery, and the use of a firearm in the commission of a felony. He was sentenced to a term of from 25 to 30 years on the robbery charge, 10 to 15 years on the sodomy charge, and 5 years for use of a firearm in the commission of a felony. This latter sentence is to run consecutively to the other sentences which are to run concurrently with one another. In August 1980 the defendant filed an action in the District Court for Douglas County seeking an order nunc pro tunc to credit the defendant with 88 days of jail time served awaiting trial in the District Court. The District Court denied request for the order nunc pro tunc and the defendant appeals. We affirm.

The defendant makes four assignments of error, but they may be condensed into two: That the District Court erred (1) in finding that it did not have authority to amend the judgment of 1970 nunc pro tunc to give credit for the 88 days previously served, and (2) in failing to find that the crediting of 88 days served prior to trial was required by the equal protection clause of the United States Constitution.

Neb. Rev. Stat. § 83-1,106 (Reissue 1976) provides that the District Court in passing sentence may give credit to the defendant for time served pending trial of the cause. Such was not the case on November 6, 1970, when the defendant was sentenced. Neb. Rev. Stat. § 83-1,106 (Cum. Supp. 1969) then provided: "Credit against the maximum term and any minimum term may be given by the Director of Corrections to an

offender for time spent in custody as a result of the criminal charge for which a prison sentence is imposed or as a result of the conduct on which such a charge is based." The trial judge at the time of sentencing had no power to give credit for time served prior to sentencing. The power to grant credit for time served awaiting trial was vested in the Director of Corrections. The record of the sentencing does not indicate that the trial judge took into account the time spent in jail awaiting trial, nor that he did not. In any event, the trial judge had no such power to give such credit at the time of the sentence and the District Court had no such power at a later time.

The purpose of an order nunc pro tunc is to correct the record so that it will truly reflect action actually taken, but which through inadvertence or mistake has not been truly recorded. *State v. Coffen*, 184 Neb. 254, 166 N.W.2d 593 (1969); *State v. Kortum*, 176 Neb. 108, 125 N.W.2d 196 (1963).

There is no contention or proof that there was any mistake in the sentence that was imposed and not granting credit for time served while awaiting trial, nor was there any power in the trial court to do that which is now requested even if it had been requested or considered by the trial court at the time of sentence. The first assignment of error is without merit.

The second assignment of error will not be considered at this time. While it is true that the defendant is free to raise a constitutional infirmity in the judgment and conviction in proceedings had with respect to his trial and sentencing for the specific crimes, the vehicle chosen is not the proper one to do so. Any constitutional infirmity may be appropriately raised in the provisions of the Nebraska Post Conviction Act. Neb. Rev. Stat. §§ 29-3001 through 29-3004 (Reissue 1979). The limited remedy available in an application for an order nunc pro tunc will not be extended to question the constitutionality of the actions taken or declined to be taken by the trial court, but is limited to

the specific purpose of that proceeding, i.e., to correct the record to accurately reflect what actually happened in the proceedings.

The appeal is without merit and the action of the District Court is therefore affirmed.

AFFIRMED.

SUSAN FOURNELL, APPELLANT, V.
USHER PEST CONTROL CO., A CORPORATION, APPELLEE.
DAVID FOURNELL ET AL., APPELLANTS, V.
USHER PEST CONTROL CO., A CORPORATION, APPELLEE.

305 N.W.2d 605

Filed May 8, 1981. No. 43200.

1. **Damages: Negligence.** If an actor's conduct is negligent as creating an unreasonable risk of causing either bodily harm or emotional disturbance to another and it results in such emotional disturbance alone without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance.
2. ____: ____. Under the circumstances here, conduct involving the failure of the defendant to discover termite damage to plaintiffs' house did not create an unreasonable risk of causing bodily harm as a matter of law.

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

Richard D. Sievers of Marti, Dalton, Bruckner, O'Gara & Keating, P.C., for appellants.

Donald R. Witt of Baylor, Evnen, Curtiss, Grimit & Witt for appellee.

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

MCCOWN, J.

This is an action for damages for mental or emotional disturbance resulting from alleged negligence of the defendant in connection with a termite inspection of

plaintiffs' home. The District Court sustained defendant's motion for summary judgment and plaintiffs have appealed.

In February 1978 the plaintiffs, a young couple with two small children, were in the process of purchasing a new home. As a part of an offer to purchase the house plaintiffs requested a termite inspection and requested that it be done by the defendant. The defendant made the termite inspection and a written report was prepared and delivered. The report stated that there was termite tubing in two described areas and gave an estimated cost of treatment. The plaintiffs interpreted the report to mean that there was evidence of termite activity at one time but that there was no damage present and that defendant recommended treatment. Plaintiffs then employed Mid-State Pest Control, which treated the house for termites. The sale was then closed and plaintiffs moved into the house on March 28, 1978.

In May or June 1978 plaintiff Susan Fournell, in tearing up carpet in the living room, discovered extensive termite damage in the flooring. Plaintiffs called Mid-State and later the defendant, and defendant found active termites in the house and recommended that the house be treated. Plaintiffs then removed the siding and discovered termite activity running all the way to the roof, involving mud sills, plates, windows, doors, casings, and siding. A structural engineer examined the house and estimated the extent and cost of the necessary repairs. Work began in the latter part of June and plaintiffs did much of it themselves.

On July 3, 1978, Susan Fournell consulted a physician because she was constantly crying, could not sleep, and was deeply depressed. On July 19, 1978, she was hospitalized under the care of a psychiatrist who treated her for reactive depression. She was discharged from the hospital on August 6, 1978. She was again hospitalized on September 13, 1978, and discharged

on September 21, 1978. She was again hospitalized on October 10, 1978, and discharged on October 18, 1978, as still depressed but no longer actively suicidal. She has continued to be treated by psychiatrists since October of 1978, and the evidence is that her mental and emotional disturbance was caused by the discovery of the termite infestation and damage to her home.

Plaintiffs brought separate actions against the defendant involving Susan's claim for damages for emotional disturbance and David's claim for medical expenses incident to that claim, and a cause of action for property damage. Mid-State Pest Control was joined as a third-party defendant. After the taking and filing of various depositions and answers to interrogatories, the defendant filed motions for summary judgment as to all the causes of action. The District Court overruled defendant's motion for summary judgment with respect to plaintiffs' claim for property damage, and that cause of action remains pending in the District Court.

The District Court found from the evidence adduced that two elements essential to a recovery under Nebraska law for the negligent infliction of emotional trauma were not present: (1) That physical injury resulted from the emotional trauma; and (2) That defendant's negligence placed the injured party, Susan Fournell, in fear of peril for her own safety. The court therefore found that there was no genuine issue as to any material fact and that defendant was entitled to judgment as a matter of law, and dismissed plaintiffs' remaining petitions. This appeal followed.

In the present case there are many genuine issues of fact, including the facts necessary to determine whether either the defendant or the third-party defendant was negligent and whether the plaintiff Susan Fournell suffered severe emotional disturbance with resulting physical disability. However, unless

we were to recognize the right of a plaintiff to recover under the circumstances here, none of the facts are material because even if the factfinder resolved every factual dispute in favor of the plaintiff, as we are required to assume would be done, she still would have failed to state a cause of action for negligent infliction of emotional trauma.

Traditionally, recovery for the negligent infliction of emotional trauma was viewed with disfavor by the courts, and the older cases generally rested on broad statements that there was no duty to refrain from the negligent infliction of mental distress. See *Spade v. Lynn & Boston Railroad*, 172 Mass. 488, 52 N.E. 747 (1899). Modern cases have developed various rules circumscribing defendant's liability in such cases. Basically, such rules rest on policy considerations and there have been few modern cases in Nebraska upon which to base a formulation of current policy.

In the case of *Owens v. Childrens Memorial Hospital, Omaha, Nebraska*, 347 F. Supp. 663 (D. Neb. 1972), the federal district court interpreted the position of this court at that time and determined that even though Nebraska had abrogated the "impact" rule there was still a requirement that some type of physical injury result from the negligently inflicted suffering and that recovery for emotional disturbance must be limited by at least requiring the plaintiff to have been within the "zone of danger or actually put in fear for his own safety." That interpretation was correct.

Restatement (Second) of Torts § 436 A (1965) provides: "If the actor's conduct is negligent as creating an unreasonable risk of causing either bodily harm or emotional disturbance to another, and it results in such emotional disturbance alone, without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance."

In the case at bar, when the termite damage was discovered by the plaintiffs no physical injury resulted

to anyone, nor was Susan Fournell placed in fear of bodily harm to herself or anyone else. The plaintiffs' claim for damages here rests on mental and emotional disturbance and distress alone.

It should be noted also that under the Restatement rules relative to liability for the negligent infliction of emotional distress or disturbance, §§ 313, 436, and 436 A, liability is predicated on conduct deemed negligent because it involves an unreasonable risk of causing bodily harm to a person, not damage to property. On the evidence in this case it is evident that conduct involving the failure of the defendant to discover termite damage to plaintiffs' house did not create an unreasonable risk of causing bodily harm to Susan Fournell as a matter of law.

Plaintiffs assert that the case of *Rasmussen v. Benson*, 135 Neb. 232, 280 N.W. 890 (1938), fully supports plaintiffs' position in the case at bar. We disagree. *Rasmussen* is distinguishable on the basis pointed out in the *Owens* case. It is also apparent that the court in *Rasmussen* regarded the defendant's conduct in disposing of a poison label and selling bran with a tremendous amount of arsenic in it at a public sale without warning or labeling of any sort as creating such an unreasonable risk of harm to persons as to be reckless and wanton to such a degree that it approached intentional injury. In any event, the case at bar is no current version of *Rasmussen*.

Policy considerations primarily determine whether a particular plaintiff is entitled to redress for a particular wrong or that a defendant is entitled to restrictions limiting liability. Be that as it may, the law must also recognize that not every human loss arising out of another's conduct constitutes a legal injury for which compensation will be available. See Prosser, Law of Torts 1 (4th ed. 1971).

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

AFFIRMED.

KRIVOSHA, C.J., dissenting.

I find that I must respectfully dissent from the majority in this case.

At the outset, I think it important to keep in mind that only a limited question is before us. Simply stated, it is whether the defendant is entitled to a summary judgment because, as a matter of law, Mrs. Fournell has failed to state a cause of action and failed to raise a genuine issue of fact. In contrast, we have in essence decided this case as if a demurrer had been filed by the defendant. It could very well be that, upon trial, Mrs. Fournell would be unable to prove the essential elements of her claim or the jury would be unwilling to find in her favor. That is not the issue before us. The sole and only issue before us is whether Mrs. Fournell is entitled to have her day in court.

The matter of granting summary judgment is not to be lightly taken and is never to be a substitute for trial. In *Ingersoll v. Montgomery Ward & Co., Inc.*, 171 Neb. 297, 300, 106 N.W.2d 197, 199 (1960), we said: "In considering a motion for summary judgment the court should view the evidence in the light most favorable to the party against whom it is directed, giving to that party the benefit of all favorable inferences that may be reasonably drawn therefrom." And in *Hiram Scott College v. Insurance Co. of North America*, 187 Neb. 290, 295, 188 N.W.2d 688, 691 (1971), we said: "Summary judgment is an extreme remedy and should be awarded only when the issue is clear beyond all doubt. Any reasonable doubt touching the existence of a genuine issue of material fact must be resolved against the moving party." In *McDowell v. Rural Water Dist. No. 2*, 204 Neb. 401, 282 N.W.2d 594 (1979), we further said: "Before a summary judgment may be granted, the moving party must establish that there exists no genuine issue as to any material fact in the case, and that under the facts he is entitled to a judgment as a matter of law. Even where there are no conflicting evidentiary

facts, a summary judgment is not appropriate if the ultimate inferences to be drawn from those facts are not clear. In considering such a motion, the trial judge must take that view of the evidence most favorable to the party against whom summary judgment is directed, giving to that party the benefit of all favorable inferences that may reasonably be drawn from the evidence." (Syllabus of the court.) And in *Blue v. Champion International Corp.*, 204 Neb. 781, 285 N.W.2d 511 (1979), we said: "Where reasonable minds may differ as to whether an inference supporting the ultimate conclusion sought can be drawn, summary judgment should not be granted." (Syllabus of the court.) And, finally, in *State ex rel. Schuler v. Bd. of County Commissioners*, 205 Neb. 647, 649, 289 N.W.2d 514, 515 (1980), we said: "The burden is upon the party moving for summary judgment to show that no issue of fact exists, and unless he can conclusively do so, the motion must be overruled."

The majority in this case has concluded that Mrs. Fournell cannot, as a matter of law, recover because of two reasons. The first reason given by the majority is that one may not recover for emotional disturbances without there being a concurrent bodily injury; and, secondly, because "as a matter of law" a woman cannot reasonably become emotionally distressed because her home is destroyed by termites. I shall attempt to address both matters in this dissent.

The majority's conclusion that one may not recover for emotional disturbance without bodily harm is based, in part, upon the Restatement (Second) of Torts § 436 A (1965), set out in full in the majority opinion. I believe that the rule is outmoded and should be rejected. While the Restatement rule quoted may reduce the number of claims made, it is totally out of step with modern medical knowledge. To suggest that a psychological injury is not as grievous as a physical injury is to ignore reality. And to further suggest that if one can be sufficiently mentally dis-

turbed so as to suffer a coronary occlusion, he or she may recover in tort, but if he or she simply becomes an emotionally distressed person, reduced to sniveling and crying and attempting suicide, he or she may not recover, does not seem to me to be founded upon any rational basis.

It is interesting to note that while the American common law rule, exemplified by the Restatement, is based at least in part upon early English law, England has long since abandoned that requirement.

The case which was frequently relied upon by American courts as authority for denying recovery for negligently inflicting mental anguish, absent physical injury, was *Victorian Railways Comm. v. Coultas*, 13 App. Cas. 222, 57 L.J.P.C. 69 (1888). In *Coultas*, the plaintiff was severely frightened when the gatekeeper at a railway crossing negligently allowed her to cross the track in front of an approaching train. There was no impact or immediate physical injury. However, she suffered severe nervous shock, fainted, and experienced impairment of her eyesight and memory. The trial court sustained a verdict for the plaintiff. However, on appeal, the Privy Council held that damages arising from mere terror, without any physical injury, could not be considered as a foreseeable consequence of the negligence of the defendant, and the verdict was set aside. For a further discussion, see Smith, *Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli*, 30 Va. L. Rev. 193 at 196-97 (1944); Campbell, *Injury Without Impact*, 1951 Ins. L.J. 654.

Within 2 years, however, another English court had taken a conflicting view of the issue and thus was born the controversy which remains with us today. A case arising in Ireland, *Bell v. Great Northern Railway Co.*, 26 L.R. Ir. 428 (1890), totally repudiated the reasoning of *Coultas*. The opinion of Baron Palles is often quoted: "In conclusion, then, I am of the opinion that, as the relation between fright and injury to the

nerve and brain structures of the body is a matter which depends entirely upon scientific and medical testimony, it is impossible for any Court to lay down, as a matter of law, that if negligence cause fright, and such fright, in its turn, so affects such structures as to cause injury to health, such injury cannot be 'a consequence which, in the ordinary course of things would flow from the' negligence, unless such injury 'accompany such negligence in point of time.'" *Id.* at 442. It is of passing interest to note that, in 1890, a court with limited medical knowledge concluded that one could not, as a matter of law, resolve such an issue. Yet in 1981 we conclude, as a matter of law, that absent bodily harm, one may not recover for emotional disturbance.

In 1901 the King's Bench abandoned the rule laid down in *Coultas.* In the case of *Dulieu v. White & Sons*, [1901] 2 K.B. 669, a woman who was frightened into giving premature birth, when the defendants drove a pair-horse van into the main room of her husband's pub while she was standing behind the bar, sued for damages. The nervous shock which she suffered from the incident made her ill and gave rise to premature birth of her child. Relying largely upon the *Bell* case, Justice Kennedy overruled the demurrer, commenting upon the remoteness objection which had led courts to deny recovery in such action. He said that remoteness refers not to relations in time but to the continuity of causation. He further commented that nonliability for negligent invasion of another's mental tranquility is generally explained by the practical difficulties of proving the injury and not by the lack of any legal wrong. Justice Kennedy concluded in *Dulieu* by holding that where a physical disability is caused by fright or mental disturbance, the subject of the requested compensation may be objectively evaluated and no logical reason remains for denying recovery. After *Dulieu*, English law became settled that actual injury or

disability negligently caused by psychic stimuli was actionable, whether or not the plaintiff suffered an impact or contemporaneous injury.

The present English rule has been recognized by some of the American courts, though the specific theories upon which such recovery has been permitted have varied from jurisdiction to jurisdiction. Louisiana, which has adopted the French civil code, has historically recognized the right to recover such damages without any physical harm. See, *Romero v. Town of Welsh*, 370 So. 2d 1286 (La. App. 1979); *J. B. Lahaye Farms v. La. Dept. of Highways*, 377 So. 2d 1286 (La. App. 1979); *Elston v. Valley Electric Membership Corp.*, 381 So. 2d 554 (La. App. 1980). Further, see Cooks, *Mental Anguish Arising from Property Damage*, 3 So. U.L. Rev. 17 (1976).

A similar approach has been taken by the Texas courts. In *Cactus Drilling Co. v. McGinty*, 580 S.W.2d 609 (Tex. Civ. App. 1979), a drilling company improperly used the plaintiff's land. The court held that recovery for mental anguish arising from that act was recoverable, saying: "Given an injury to property which is actionable independently and separately from mental anguish, compensation for mental anguish which proximately results from the wrongful injury is one element of actual damages." *Id.* at 610. For other cases to the same effect, see *Hendry v. United States*, 280 F. Supp. 27 (S.D.N.Y. 1968), *aff'd* 418 F.2d 774 (2d Cir. 1969); *Petition of United States*, 418 F.2d 264 (1st Cir. 1969). At least five jurisdictions have held that an independent cause of action for negligently inflicted mental distress exists.

In 1970 two states at opposite ends of the nation's geographic boundaries (Maine and Hawaii) adopted new rules allowing recovery for negligently inflicted mental distress, absent any physical injury. In the Maine decision, *Wallace v. Coca-Cola Bottling Plants, Inc.*, 269 A.2d 117 (Me. 1970), the Supreme Judicial Court had for consideration an action arising against a

soft-drink bottler for injuries allegedly resulting to plaintiff who drank from a bottle containing an unpackaged prophylactic. The plaintiff became ill after he returned home and began to think about his experience. In sustaining a jury verdict, the Maine court said: "In the light of advances which have been made by medical science and the improvement in investigatory techniques since this Court decided *Herrick* in 1921 [*Herrick v. Publishing Co.*, 120 Me. 138, 113 A. 16 (1921)], we decline to follow it any longer. Instead, we adopt the rule that in those cases where it is established by a fair preponderance of the evidence there is a proximate causal relationship between an act of negligence and reasonably forseeable [sic] mental and emotional suffering by a reasonably forseeable [sic] plaintiff, such proven damages are compensable even though there is no discernable [sic] trauma from external causes. The mental and emotional suffering, to be compensable, must be substantial and manifested by objective symptomatology." *Id.* at 121. In its decision, the Supreme Judicial Court of Maine noted that the reasoning in *Spade v. Lynn & Boston Railroad*, 172 Mass. 488, 52 N.E. 747 (1899), noted by the majority in this case, has been the object of much critical comment in legal periodicals and cases and has been rejected by the New Hampshire court.

During the same year, the Supreme Court of Hawaii was presented the case of *Rodrigues v. State*, 52 Hawaii 156, 472 P.2d 509 (1970). In the *Rodrigues* case the plaintiffs' home was flooded during a rainstorm because the state highway workers negligently blocked a drain culvert. The plaintiffs were not present at the time of the flooding so they suffered no impact or physical injury. The court noted: "The traditional rule, based upon considerations of policy we discuss herein, is that there is no recovery for the negligent infliction of mental distress alone." *Id.* at 169.

The Supreme Court of Hawaii then rejected that notion and upheld the award for the mental anguish, absent physical injury. The primary consideration, said the Hawaii court, should be to assure the genuineness of such claims. The court then adopted standards to guarantee genuineness as well as require that the mental anguish is indeed serious. With those requirements present, the court then declared that normal tort principles are to be applied to determine the right of recovery.

The State of Washington, likewise, appears to have aligned itself with those courts which now recognize what I believe to be the more realistic approach to mental distress. In *Hunsley v. Giard*, 87 Wash. 2d 424, 435, 553 P.2d 1096, 1102-03 (1976), the Washington court held: "Balancing those interests and subject to the limitations hereinafter set forth, we conclude that the plaintiff who suffers mental distress has a cause of action; that is to say, the defendant has a duty to avoid the negligent infliction of mental distress. It is not necessary that there be any physical impact or the threat of an immediate physical invasion of the plaintiff's personal security." See, also, *Corrigal v. Ball & Dodd Funeral Home*, 89 Wash. 2d 959, 577 P.2d 580 (1978).

In 1980 the California Supreme Court adopted the more modern view in the case of *Molien v. Kaiser Foundation Hospitals*, 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980). The *Molien* case involved the question of whether the plaintiff husband could recover for the mental distress he suffered as a result of the defendants' negligent and incorrect diagnosis that his wife had syphilis. The California court reversed the trial court's sustaining of the defendants' demurrers and ordered the case to trial. In so doing it created an independent cause of action in California, saying: "In our view of the attempted distinction between physical and psychological injury [it] merely clouds the issue. The essential question is one of

proof; whether the plaintiff has suffered a serious and compensable injury should not turn on this artificial and often arbitrary classification scheme. We thus agree with the view of the *Rodrigues* court: 'In cases other than where proof of mental distress is of a medically significant nature, [citations] the general standard of proof required to support a claim of mental distress is some guarantee of genuineness in the circumstances of the case. [Citation.]' (472 P.2d at p. 520.) This standard is not as difficult to apply as it may seem in the abstract. . . . [T]he jurors are best situated to determine whether and to what extent the defendant's conduct caused emotional distress, by referring to their own experience." *Id.* at ___, 616 P.2d at 821, 167 Cal. Rptr. at 839.

And finally we find, on March 25, 1981, the Supreme Court of South Carolina deciding the case of *Ford v. Hutson*, 49 U.S.L.W. 2663. In permitting recovery for mental and emotional injury, absent physical injury, the South Carolina court noted that numerous jurisdictions today have recognized that infliction of mental suffering is in fact a cause of action in itself. This new tort is commonly denominated, appropriately, "infliction of emotional distress" or "outrage." In upholding the cause of action, the South Carolina court noted that it had earlier permitted a plaintiff to sue upon a claim in which she alleged she suffered a nervous breakdown after defendant had used vile, profane, and abusive language.

One need not think very long on the matter before one recognizes and concludes that an emotional injury is as serious as, and often more serious than, a physical injury. The damages caused by emotional injuries oftentimes take much longer to heal than a physical injury would.

Cases are legion supporting a cause of action for situations where one becomes ill by reason of finding a foreign object in food, even though the foreign

object is not consumed and does not cause illness. See, *Opelika Coca-Cola Bottling Company v. Johnson*, 46 Ala. App. 298, 241 So. 2d 327 (1970); *Jasper Coca-Cola Bottling Company v. Roberts*, 47 Ala. App. 219, 252 So. 2d 428 (1971); *Way v. Tampa Coca Cola Bottling Company*, 260 So. 2d 288 (Fla. App. 1972); *Paul v. Hardware Mut. Ins. Co.*, 254 So. 2d 690 (La. App. 1971); *Coca-Cola Bottling Co. of Plainview v. White*, 545 S.W.2d 279 (Tex. Civ. App. 1976); *Miller v. Atlantic Bottling Corp.*, 259 S.C. 278, 191 S.E.2d 518 (1972); *Shoshone Coca-Cola v. Dolinski*, 82 Nev. 439, 420 P.2d 855 (1966).

In all of the above-cited cases, and they are but an example of the many that can be found, recovery was permitted because an individual became ill at the thought of the contamination being in the food or drink. One who is so affected by the thought process is mentally injured. It is that clear. To therefore require that, before one who is mentally injured may recover, he must at least regurgitate once seems to me to be imposing upon the law a requirement that makes little or no sense. As I indicated at the outset, I would join with those jurisdictions which have adopted what I perceive to be the more modern view and would permit a cause of action to exist for mental anguish, absent bodily harm or other compensable damage.

Setting aside for the moment my view that one should be permitted to recover for mental anguish, absent bodily harm or other compensable damages, I do not believe that we need reach that issue in this case. An examination of the cases decided by this court on previous occasions should lead one to the conclusion that summary judgment was not appropriate in this case, and the granting of that summary judgment by the trial court should be reversed.

To properly understand what has in fact taken place, one must note all of the evidence presented in opposition to the motion for summary judgment, in-

cluding the deposition of Mrs. Fournell and her treating psychiatrist.

The record presented to us on the motion for summary judgment discloses that in January of 1978 marital difficulties existing between Mr. and Mrs. Fournell resulted in their obtaining a decree of divorce. This was then set aside in February of 1978 when they reconciled. Part of the reconciliation process was the purchase of a new home located at 3772 Everett Street in the city of Lincoln, Nebraska, the previous home having been sold in connection with the divorce. The Fournells borrowed $35,000 for the purchase of the house, though between them they had a total monthly income of only $1,200.

As noted by the majority, in May or June of 1978 Mrs. Fournell discovered extensive termite damage in the flooring even though a termite inspection had been performed by the defendant. The cost of repair was in excess of $15,000. The Fournells did not have that money and had to borrow the $15,000 in addition to the $35,000 they had already borrowed for the house in the first instance. Only one contractor was even willing to bid on the repair project, and it was necessary to discharge him when it appeared he was unable to do the job adequately for the bid price. Mr. Fournell wound up making the repairs himself by working weekends and after his job. The $15,000, however, proved to be inadequate for the materials necessary to repair the damage and the Fournells were unable to complete the repairs. Left uncompleted at their home were the repairs to the garage, additional insulation, and certain drywall work.

The record further discloses that beginning in July of 1978, as the repair was underway, the contractor was not doing what he was hired to do and the family was having unusual strain put upon it by reason of all these difficulties. Mrs. Fournell found it necessary to consult Dr. Glen Lau. At the time she was constantly

crying, could not sleep, was shaking, and, in general, was depressed. Things got worse, and on July 19, 1978, Mrs. Fournell was hospitalized by Dr. Whitla, a psychiatrist. The hospitalization covered the period from July 19, 1978, to August 6, 1978. Mrs. Fournell was next hospitalized on September 13, 1978, and remained in the hospital until September 21, 1978. On October 10, 1978, she was again hospitalized when she took an overdose of Thorazine in an attempt to commit suicide. She was discharged on October 18, 1978, when, according to Dr. Whitla, she was still depressed but no longer actively suicidal. She remains, according to the record, under medical care.

By reason of her mental and physical condition, she was unable to maintain active employment. As a result, the Fournells and their two children were trying to live on $300 per month after their $500-per-month house and construction loans were paid.

The deposition of Dr. Whitla establishes that Mrs. Fournell had suffered a "psychic injury" as a result of discovering the termites. He defined a "psychic injury" as basically reactive depression demonstrated by physiological consequences. By definition, physiological consequences must relate to some injury to the body. The evidence as presented to us at this point on the motion for summary judgment, then, is to the effect that, as a result of the negligence of the defendant, Mrs. Fournell suffered a mental breakdown, evidenced by shaking, crying, depression, inability to sleep, and an attempt to commit suicide. That does not significantly differ from those cases in which we have heretofore permitted recovery.

In the case of *Hanford v. Omaha & C.B. Street R. Co.*, 113 Neb. 423, 203 N.W. 643 (1925), we held that where a woman standing at a street intersection within a few feet of the track upon which two streetcars collided was greatly frightened thereby, and

jumped back and immediately felt sick and 3 days later suffered a miscarriage, the reasonableness of her fright and subsequent conduct were questions for the jury. We further held in *Hanford* that where a pregnant woman is placed in a position of reasonably apprehended peril by the negligence of one owing her a legal duty, and suffers a miscarriage as a proximate result of shock and fright produced by such negligence, she may recover damages from the wrongdoer. *Hanford* did not require any immediate physical injury but only that any ultimate physical injury be proximately caused by the mental injury occasioned by the negligence of the defendant.

In *LaSalle Extension University v. Fogarty*, 126 Neb. 457, 253 N.W. 424 (1934), we specifically held that threats to sue and to appeal to one's employer, made willfully and intentionally, for the purpose of producing mental pain and anguish in attempting to collect a debt, authorizes recovery for mental pain and suffering though no physical injury results. Admittedly, the *LaSalle Extension University* case involved an intentional tort, but the concern about the reliability of proof of the injury is no less or different whether committed by an intentional act or by a negligent act.

In *Rasmussen v. Benson*, 133 Neb. 449, 275 N.W. 674 (1937), *on rehearing* 135 Neb. 232, 280 N.W. 890 (1938), noted by the majority, we permitted recovery to a dairy farmer who bought a sack of bran at a farm sale and later discovered that the bran contained lethal levels of arsenic which destroyed his dairy herd and ruined his business. Plaintiff suffered great mental anguish as a result of the loss and his concern about whether others might have consumed the poisonous milk. Within a year he suffered a heart attack and died. Again, there was no immediate physical injury. The majority suggests that *Rasmussen* was an intentional tort case or at least reckless and wanton behavior. The case, however,

was tried on a traditional theory of negligence.

I find it difficult to rationally distinguish why a mental injury which ultimately results in a breakdown of one's arterial system is compensable but a mental injury resulting in an ultimate breakdown of one's nervous system is not. This court at least implied that such distinction should not exist when, in the earlier *Rasmussen* case, it said at 458, 275 N.W. at 679: "A mental shock or disturbance sometimes causes injury or illness to the body, especially to the nervous system. Now, if the shock or fright was a natural consequence of what was brought about by the circumstances of the loss of Rasmussen's business, — the death of his live stock, — then such nervous shock was the proximate cause of Rasmussen's physical and mental condition that led to his death." And on rehearing in *Rasmussen*, we said: "Damages for actual injury resulting from fright and shock are recoverable, although not accompanied by a contemporaneous injury." (Syllabus of the court.) Yet we are now saying as a matter of law that crying, shaking, withdrawing, experiencing depression, and attempting to commit suicide are not sufficiently physical in nature to constitute subsequent physical injury entitling one to recover if believed by a jury.

I am unable to determine how we can find, as a matter of law, that Mrs. Fournell has not suffered bodily harm sufficient to bring her within the Restatement rule announced by the majority and thereby entitle her to a trial on the merits.

For that reason, I believe that the majority is in error and I must dissent.

I make but brief comment on the majority's second point to the effect that "under the circumstances here, conduct involving the failure of the defendant to discover termite damage to plaintiffs' house did not create an unreasonable risk of causing bodily harm *as a matter of law.*" I gather that it is the position of the majority of the court that an owner of

real estate may not be so distressed by serious damage to his or her property which cannot be easily repaired that the owner may suffer serious mental distress. And it appears that the majority also believes, as a matter of law, that one in the termite business should not recognize that an owner of property may be seriously affected emotionally by the failure to find termites in the property before a purchase. The basis for the business itself appears, as advanced by the exterminators, to be to permit one to be at rest, knowing that termites are not at work while owners are at sleep. The majority may declare that such cannot happen, but both the facts of this case and the realities of life dispute that conclusion. It is no accident that one's home is considered one's castle. I am at a loss to understand how we may conclude, as we have here, that "under the circumstances" (as a matter of fact) there was not an unreasonable risk "as a matter of law," but at the same time acknowledge that there is or may be an unreasonable risk of causing bodily harm if two trolley cars come together in the presence of a pregnant woman or a dairy farmer feeds his cattle contaminated bran.

Whether we choose to adopt the more modern view concerning the right to recover for mental injury or simply acknowledge that Mrs. Fournell has indeed suffered a bodily injury from an emotional disturbance, the granting of a summary judgment in this case is in error. I would have reversed and remanded for further proceedings.

WHITE, J., joins in this dissent.

STATE OF NEBRASKA EX REL. PAUL L. DOUGLAS, ATTORNEY GENERAL, APPELLEE, V. JOY SPORHASE ET AL., APPELLANTS.

305 N.W.2d 614

Filed May 8, 1981. No. 43206.

1. **Constitutional Law.** In order for the commerce clause of the U.S. Constitution to apply to state regulation of a commodity, that commodity must be an article of commerce.
2. **Waters.** Nebraska's common law of ground water permits the overlying landowner to appropriate subterranean waters found under his land, but he cannot extract and appropriate them in excess of a reasonable and beneficial use upon the land which he owns, especially if such use is injurious to others who have substantial rights to the waters; and if the natural underground supply is insufficient for all owners, each is entitled to a reasonable proportion of the whole.
3. **Constitutional Law: Waters.** The Nebraska Constitution declares water for irrigation purposes in the State of Nebraska to be a natural want.
4. **Legislature: Waters.** Since the Nebraska common law of ground water permits use of the water only on the overlying land, legislative action is necessary to allow for transfers off the overlying land.
5. **Legislative Power: Waters.** The Legislature has the power to determine public policy with regard to ground water.
6. **Legislature: Waters.** Ground water may be transferred from the overlying land only with the consent of and to the extent prescribed by the public through its elected representatives.
7. **Waters.** Free transfer and exchange of ground water in a market setting have never been permitted in this state.
8. _____. The public may limit or deny the right of private parties to freely use the water when it determines that the welfare of the state and its citizens is at stake.
9. _____. Nebraska ground water is not an article of commerce.
10. _____. Since water is the only natural resource absolutely essential to human survival, the application of rules designed to facilitate commerce in less essential resources to the transfer of water must be done, if at all, with extreme caution.
11. **Constitutional Law: Statutes: Waters.** Since ground water in Nebraska is not an article of commerce, the commerce clause of the U.S. Constitution does not apply to Neb. Rev. Stat. § 46-613.01 (Reissue 1978).
12. **Waters: Constitutional Law.** Neb. Rev. Stat. § 46-613.01 (Reissue 1978) does not deprive affected persons of liberty or property without due process of law.
13. **Legislative Delegation.** The Legislature cannot delegate its powers

to make a law, but it can make a law to become operative on the happening of a certain contingency or on an ascertainment of fact upon which the law intends to make its own action depend.

14. **Waters.** The reciprocity provision of Neb. Rev. Stat. § 46-613.01 (Reissue 1978) merely states one of several conditions which must be satisfied before a permit to transfer ground water out of state may issue.
15. _____ Neb. Rev. Stat. § 46-613.01 (Reissue 1978) sets up a reasonable classification of persons which is reasonably related to a legitimate state interest in preserving, for the beneficial use of its citizens, Nebraska's underground water supply, and it operates equally on all members of the affected class.

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

Peter E. Schoon, Jr., and George M. Zeilinger of Padley & Dudden, P.C., for appellants.

Steven C. Smith, Special Assistant Attorney General, of Van Steenberg, Brower, Chaloupka, Mullin & Holyoke for appellee.

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

WHITE, J.

Appellants own adjacent tracts of land in Chase County, Nebraska, and in Phillips County, Colorado. A well physically located on the Nebraska tract pumps ground water for the purpose of irrigating crops on both the Nebraska tract and the Colorado tract. Defendants' predecessor in title registered the well with the State of Nebraska on January 18, 1971, as required by Neb. Rev. Stat. § 46-602 (Reissue 1978). However, neither the defendants nor their predecessor in title applied to the Nebraska Department of Water Resources for a permit to transport ground water from the Nebraska well across the border into Colorado as required by Neb. Rev. Stat. § 46-613.01 (Reissue 1978).

The State of Nebraska brought this action in the District Court of Chase County to enjoin defendants from transporting Nebraska ground water into Colorado without a permit. After trial on the merits, the

District Court issued the injunction, holding that § 46-613.01 does not violate the commerce clause of U.S. Const. art. I, § 8, since under Nebraska law water is not an article of commerce. The District Court also held that even if ground water is an article of commerce, the statute does not impose an unreasonable burden on interstate commerce. We affirm.

We start our analysis with the assumption that if the commerce clause is to apply to a state statute regulating the interstate transfer of a commodity, that commodity must be an "article of commerce." The term "commerce" implies that the commodity must be capable of being reduced to private possession and then exchanged for goods or services of the same or similar economic value. An analysis of Nebraska case law and statutes demonstrates that Nebraska law has never considered ground water to be a market item freely transferable for value among private parties, and therefore not an article of commerce.

The first Nebraska case to consider the overlying landowner's proprietary interest in water under his land is *Olson v. City of Wahoo*, 124 Neb. 802, 248 N.W. 304 (1933). The *Olson* court specifically rejected the "English rule" of rights in ground water, which recognizes absolute ownership of ground water in the overlying landowner. Instead, the court adopted a slightly modified version of the more restrictive American rule of "reasonable use": "The American rule is that the owner of land is entitled to appropriate subterranean waters found under his land, but he cannot extract and appropriate them in excess of a reasonable and beneficial use upon the land which he owns, especially if such use is injurious to others who have substantial rights to the waters, and if the natural underground supply is insufficient for all owners, each is entitled to a reasonable proportion of the whole, and while a lesser number of states have adopted this rule, it is, in our opinion, supported by the better reasoning." *Id.* at 811, 248 N.W. at 308. The "pure" American rule,

as stated by other authorities at the time, did not include the concept of sharing in times of shortage, and the *Olson* court's inclusion of that concept demonstrates its view that water is a unique commodity subject to state regulation to assure that it is available to everyone in the state in relation to their need, rather than their ability to pay for it.

The Nebraska Constitution declares water for irrigation purposes in the State of Nebraska to be a natural want. Neb. Const. art. XV, § 4. The decades of the 1930s and 1940s saw a quantum expansion in Nebraska of the use of ground water for irrigation. See Aiken, *Nebraska Ground Water Law and Administration*, 59 Neb. L. Rev. 917 (1980). Legislative recognition of the state's power and the corresponding need to manage the state's ground water resources began in 1957 when the Legislature declared "that the conservation of ground water and the beneficial use thereof are essential to the future well-being of this state." Neb. Rev. Stat. § 46-601 (Reissue 1978), and enacted statutes requiring well registration, well-spacing, and filling of abandoned wells. Neb. Rev. Stat. §§ 46-602 and 46-609 (Reissue 1978).

Transfer of ground water was considered by the Legislature in 1963. Neb. Rev. Stat. §§ 46-638 through 46-650 (Reissue 1978), enacted that year, and § 46-654, enacted in 1965, granted only to cities, villages, and municipal corporations the right to transport ground water out of its basin of origin for the purpose of supplying urban water needs. Since the Nebraska common law of ground water permitted use of the water only on the overlying land, legislative action was necessary to allow for transfers off the overlying land, even for as pressing a need as supplying urban water users.

Metropolitan Utilities Dist. v. Merritt Beach Co., 179 Neb. 783, 799-800, 140 N.W.2d 626, 636 (1966), confirmed that "[u]nderground waters, whether they be percolating waters or underground streams, are

a part of the waters referred to in the Constitution as a natural want. . . [I]t is becoming more important and extremely necessary that regulation and control of all sources of water supply be attained." That court held that it is "the right of the Legislature, unimpaired, to determine the policy of the state as to underground waters and the rights of persons in their use." *Id.* at 801, 140 N.W.2d at 637. The opinion clearly held that the Legislature has the power to determine public policy with regard to ground water and that it may be transferred from the overlying land only with the consent of and to the extent prescribed by the public through its elected representatives.

Only a year after the decision in the *Metropolitan* case, the Legislature enacted the statute at issue in this case, § 46-613.01, dealing with transfer of Nebraska ground water across state lines. The statute allows such transfers conditioned on the receipt of a permit from the director of the Department of Water Resources, who may grant the permit if the transfer "is reasonable, is not contrary to the conservation and use of ground water, and is not otherwise detrimental to the public welfare," and if the receiving state "grants reciprocal rights" providing for transfer of ground water from that state into Nebraska.

The parties concede that Colorado forbids the transfer of ground water outside its borders and has no reciprocity provision in its statute. Neither the courts nor the Legislature of Nebraska have considered Nebraska ground water as an article of commerce. Free transfer and exchange of ground water in a market setting have never been permitted in this state, since the water itself is publicly owned. The public, through legislative action, may grant to private persons the right to the use of publicly owned waters for private purposes; but as the *Olson* opinion demonstrates, with its emphasis on sharing in times of shortage, the public may limit or deny the right of private parties to freely use the water when it de-

termines that the welfare of the state and its citizens is at stake. Even where it appears that water itself is being marketed, as in municipal water supply arrangements, it is the value of the cost of distributing the water that is the basis of the rate structure and not the value of the water itself. See *K. S. B. Tech. Sales v. North Jersey Dist. Water Supply*, 75 N.J. 272, 381 A.2d 774 (1977).

Appellants in their brief place great reliance on the case of *City of Altus, Oklahoma v. Carr*, 255 F. Supp. 828 (W.D. Tex. 1966), *aff'd per curiam* 385 U.S. 35, 87 S. Ct. 240, 17 L. Ed. 2d 34 (1966), which held that a Texas statute forbidding interstate transfers of water without legislative permission placed an unconstitutional burden on interstate commerce. However, at the time of *Altus*, Texas law treated ground water much differently than Nebraska. Texas recognized the absolute ownership of subterranean water in the overlying landowner. This is in sharp contrast to the narrowly circumscribed right of reasonable use only on the overlying land recognized in Nebraska. In addition, the *Altus* court noted that, in Texas, "after the water has been appropriated, the landowner, his lessee or assign, has the right to sell the water to others for use off of the land and outside the basin where produced, just as he could sell any other species of property." *Id.* at 840. In sum, said the *Altus* court, "the general law of the State of Texas . . . recognizes water that has been withdrawn from underground sources as personal property subject to sale and commerce . . . ." *Id.* at 840. Since the only transfers, prohibited by Texas law were interstate transfers, *Altus* found that Texas considered ground water to be an article of commerce, subject to the commands of the commerce clause of the U.S. Constitution. However, intrastate transfers of ground water in Nebraska are permitted only under carefully prescribed conditions and do not resemble a free-market setting. Ground water use is not an unlimited private property

right in Nebraska law. The decision in *Altus* is not controlling. Nebraska ground water is not an article of commerce and thus not subject to the strictures of the commerce clause.

Since the *Altus* case was affirmed without opinion by the U.S. Supreme Court, we must assume that the high court had no quarrel with the District Court's application of the law to the particular facts of *Altus*. However, we need not and do not assume, as appellants would have us do, that *Altus* "overruled *sub silentio*" the 70-year-old holding in *Hudson Water Co. v. McCarter*, 209 U.S. 349, 28 S. Ct. 529, 52 L. Ed. 828 (1908), that a state may, under its police power, forbid or condition the interstate transfer of its water resources without running afoul of the commerce clause. The *Hudson* case upheld the constitutionality of a New Jersey statute prohibiting the transfer of New Jersey surface water out of the state. The court noted that "[a] man cannot acquire a right to property by his desire to use it in commerce among the States," and emphasized that the state as "*quasi*-sovereign and representative of the interests of the public has a standing in court to protect the atmosphere, the water and the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned. . . . It finds itself in possession of what all admit to be a great public good, and what it has it may keep and give no one a reason for its will." *Id.* at 355-57.

There have been other U.S. Supreme Court cases limiting the rights of individual states to put conditions on the interstate transfer of natural resources other than water, such as natural gas and minnows. *Penna v. West Virginia*, 262 U.S. 553, 43 S. Ct. 658, 67 L. Ed. 1117 (1923); *Oklahoma v. Kansas Nat. Gas Co.*, 221 U.S. 229, 31 S. Ct. 564, 55 L. Ed. 716 (1911); *Hughes v. Oklahoma*, 441 U.S. 322, 99 S. Ct. 1727, 60 L. Ed. 2d 250 (1979). However, we note that the natural resources dealt with in those cases have historically

been market items, reducible to private possession and freely exchangeable for value. This has never been the case with underground water in Nebraska. Further, since water is the only natural resource absolutely essential to human survival, the application of rules designed to facilitate commerce in less essential resources to the transfer of water must be done, if at all, with extreme caution. It is this caution which prevents us from holding that Nebraska ground water is an article of commerce. Because the ground water in this case is not an article of commerce, the commerce clause considerations do not apply to the Nebraska statute at issue here.

Appellants also urge that § 46-613.01 violates the due process provisions of the fifth and fourteenth amendments to the Constitution of the United States, which prohibit the United States or an individual state from depriving an individual of life, liberty, or property without due process of law. Although the arguments in the "due process" section of appellants' brief are actually equal protection arguments, we note that conditioning a landowner's right to transfer ground water either within or without Nebraska does not deprive him of a property right, since, under Nebraska common law, ground water may not be transferred off the overlying Nebraska land at all unless the public, owners of the water, grant that right. Not being at liberty to transport ground water without public consent and having no private property right in the water itself, appellants are deprived of neither liberty nor property by § 46-613.01.

Nor does the reciprocity provision of § 46-613.01 violate constitutional guarantees of due process, as appellants claim, by delegating legislative authority to the legislature of another state. The Nebraska Legislature has exercised its legislative authority by determining the public policy of the state with regard to ground water and enacting that determination into law. It has not delegated to any other state's legislature

the right to determine Nebraska public policy. The reciprocity provision is merely one of several conditions to be satisfied before a permit to transport water out of state may be granted. As stated in *Lennox v. Housing Authority of City of Omaha*, 137 Neb. 582, 590, 290 N.W. 451, 457 (1940): "The providing of such contingencies upon which the law might properly be limited to take effect does not constitute a delegation of legislative power. The applicable rule is: The legislature cannot delegate its powers to make a law, but it can make a law to become operative on the happening of a certain contingency or on an ascertainment of a fact upon which the law intends to make its own action depend."

In *State v. Padley*, 195 Neb. 358, 237 N.W.2d 883 (1976), the statute at issue set a 55-mile-per-hour speed limit on the portion of Interstate 80 crossing Nebraska, but declared that when the President terminates the Emergency Highway Energy Conservation Act such speed limit will revert to 75 miles per hour. The *Padley* court held that: "In so doing the Legislature has not delegated its power to make the law but has designed its alternative provision to become effective on the happening of a certain contingency." *Id.* at 360, 237 N.W.2d at 885. That court also stated that the rule set out in *Lennox* "is a well-recognized rule of law." *Id.* at 360, 237 N.W.2d at 885. The granting of a permit to transport water for irrigation out of state is contingent upon, among other things, the receiving state granting its landowners the same right. Each state is free to determine its own public policy with regard to ground water transfers and to condition the right to transfer on one or more contingencies. Thus, there has been no unconstitutional delegation of legislative power by the Nebraska Legislature.

Appellants finally argue that § 46-613.01 violates the equal protection clause of the fourteenth amendment to the U.S. Constitution by virtue of an unreasonable classification. The class upon which

§ 46-613.01 operates consists of those persons wishing to transport Nebraska ground water out of state for irrigation purposes. It is plain from the language of the statute that the classification is reasonable. It is related to a legitimate state interest in preserving, for the beneficial use of its citizens, Nebraska's underground water supply, and it operates equally on all members of the class. Any person wishing to transport ground water out of state for irrigation purposes must apply for a permit to do so and the director of the Nebraska Department of Water Resources is to use the same guidelines in every instance in determining whether or not the permit may issue. That the statute does not apply to irrigators who do not wish to transport ground water out of state hardly makes it violative of equal protection.

The judgment of the District Court is affirmed.

AFFIRMED.

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

While I generally concur with the majority's conclusion that establishing legislative criteria to control the transfer of water from the State of Nebraska to an adjoining state is not a violation of the commerce clause of the U.S. Constitution, I must respectfully dissent from that portion of the majority's opinion which holds that the statutory prohibition against the issuance of the permit, if the adjoining state does not grant reciprocity, is a constitutionally valid act of the Legislature. I believe that that portion of Neb. Rev. Stat. § 46-613.01 (Reissue 1978) which prohibits the Director of Water Resources from issuing a permit solely on the basis that the adjoining state does not grant reciprocity is an unreasonable classification and violates both the Constitution of the United States and the Constitution of the State of Nebraska.

Were the statute in question to provide that no person, firm, city, village, municipal corporation, or any other

entity, including a citizen of the State of Nebraska, could use water from this state on land owned by such entity in both this state and an adjoining state unless and until the Director of Water Resources found that the water request was reasonable, was not contrary to the conservation and use of ground water, and was not otherwise detrimental to the public welfare, I would have no difficulty with the statute. But the statute as it currently exists provides that even though the director might find that the request is reasonable and that to deny it would be unreasonable, that the request is not contrary to the conservation and use of ground water in this state and, to the contrary, is in furtherance of the conservation and use of ground water in this state, and that it is not otherwise detrimental to the public welfare, but in fact is beneficial to the public welfare, he, nevertheless, cannot issue such permit, solely on the basis that the adjoining state does not permit entities, including its own citizens, to transport water into this state.

The issue here is not whether reciprocal legislation is constitutional, but whether a citizen of the State of Nebraska can be prohibited from using water on land owned by that citizen in both this state and in an adjoining state solely on the basis that the adjoining state would not reciprocate. If one were to extend this statute to its logical conclusion, one could find that even though there was an abundance of water in an area in Nebraska, so much so that flooding was imminent, the water could not be transferred to adjoining land because the adjoining state refused to grant reciprocity. It occurs to me that what this statute attempts to do is to absolutely prohibit the transfer of water, without regard to its need or availability, based solely upon the acts of another state over which citizens of this state have no control.

To permit citizens of one part of the state to care for their land situated both in this state and an adjoining state because the adjoining state permits

reciprocity, though it may not have water which can be transferred, while denying that privilege to other citizens of this state solely on the basis of the action of an adjoining state and without regard to either the reasonableness of the prohibition at a particular moment or its need, strikes me as being a violation of Neb. Const. art. III, § 18, and art. I, § 3, and the fifth and fourteenth amendments to the U.S. Constitution. I would have struck down that portion of § 46-613.01 which denies authority to the director if the adjoining state does not otherwise grant reciprocity.

IRENE M. EICH, APPELLEE, V. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, A FOREIGN CORPORATION, APPELLANT, AND DAVID J. WOJCIK, APPELLEE.

305 N.W.2d 621

Filed May 8, 1981. No. 43271.

1. **Insurance: Contracts: Joinder of Actions.** Under the provisions of Neb. Rev. Stat. §§ 25-701 and 25-702 (Reissue 1979), the joinder in a single action of the cause against the uninsured motorist with the insurer carrying the uninsured motorist coverage for the claimant is not permissible.
2. **Insurance: Contracts: Jury Instructions.** In a suit against the uninsured motorist, the amount of uninsured motorist coverage should not be disclosed to the jury.
3. **Insurance: Contracts.** The following exclusion in uninsured motorist coverage does not prevent the stacking of coverage where the insured has separate policies of uninsured motorist coverage on two or more vehicles: "(b) TO *BODILY INJURY* TO AN *INSURED* WHILE *OCCUPYING* OR THROUGH BEING STRUCK BY A LAND MOTOR VEHICLE OWNED BY THE NAMED INSURED OR ANY *RESIDENT* OF THE SAME HOUSEHOLD, IF SUCH VEHICLE IS NOT AN *OWNED MOTOR VEHICLE*," and the policy definition of owned motor vehicle includes the motor vehicle described in the declaration.
4. **Jury Verdicts.** Defects in a verdict which are matters of substance must be corrected before the jury is discharged. Neb. Rev. Stat. § 25-1123 (Reissue 1979).

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Reversed and remanded for further proceedings.

Wayne J. Mark of Fraser, Stryker, Veach, Vaughn, Meusey, Olson and Boyer, P.C., for appellant.

Daniel G. Dolan for appellee Eich. No appearance for appellee Wojcik.

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

CLINTON, J.

Plaintiff Eich brought this action in the District Court for Douglas County, Nebraska, against State Farm Mutual Automobile Insurance Company and David J. Wojcik, an uninsured motorist, to recover damages for personal injuries received in a collision between an automobile driven by the plaintiff and one operated by Wojcik.

In order that the assignments of error hereinafter considered be seen in proper perspective, it is necessary to first summarize more of the background information than is ordinarily required.

State Farm insured the plaintiff's automobile and, in one or more other separate policies, other automobiles in the Eich household. The amended petition upon which the case was tried made the necessary allegations to state a cause of action against Wojcik founded upon his negligence, and further alleged the issuance of two policies of insurance by State Farm which provided uninsured motorist coverage for Eich.

State Farm filed a demurrer to the petition on the ground of misjoinder of causes of action and of parties defendant. This motion was overruled and State Farm was directed to answer.

State Farm, after first denying Wojcik's negligence and alleging contributory negligence on the part of the plaintiff, later filed an amended answer in which it admitted that Wojcik was negligent and

that such negligence was a proximate cause of the accident. It admitted the existence of one certain policy of insurance which afforded uninsured motorist coverage to Eich and admitted that Wojcik was an uninsured motorist. At the same time it filed an offer to confess judgment in the amount of $15,000.

Wojcik defaulted. However, in a deposition he admitted that he drove through a stop sign and collided with the Eich automobile and that he had been drinking at the time. This deposition was later received in evidence at the trial.

The court directed a verdict against Wojcik and State Farm on the issue of liability and left to the jury only the question of the amount of damages proximately caused by the collision. It instructed the jury that State Farm had in force at the time of the accident three policies of insurance under which it was obligated to pay all sums which the plaintiff had sustained as damages, not to exceed $45,000. It further instructed the jury that the amount of the insurance was not a factor to be considered by them in determining the amount of damages to which the plaintiff was entitled.

The form of the verdict prepared by the court for the use of the jury in rendering its verdict was in the following form: "We, the jury duly impaneled and sworn in the above entitled cause, do find for the said plaintiff and assess the amount of plaintiff's recovery as to defendant State Farm in the sum of $___, and as to defendant David J. Wojcik in the sum of $___."

The jury returned a verdict in which it placed in each of the blank spaces in the form the sum of $17,500. The jury was discharged on December 12, 1979. The court entered judgment on the verdict as follows: "Pursuant to verdict of December 12, 1979, ordered, that plaintiff have and recover from the defendants jointly and severally, the sum of $17,500.00, plus plaintiff's taxable costs."

On December 18, 1979, the plaintiff filed a motion in the following form: "Comes now the plaintiff and

respectfully requests the Court to correct a ministerial error of the judgment entry to accurately reflect the intentions of the jury as it was their intention to totally award the plaintiff the sum of $35,000.00 in damages for the injuries sustained as supported by the attached affidavit which is marked Exhibit 'A' and attached hereto." Exhibit A referred to in the motion was an affidavit of the foreman of the jury which stated that it was the intent of the jury panel to award the plaintiff the total amount of $35,000.

The plaintiff filed an alternative motion in the following form: "Comes now the plaintiff and alternatively requests the Court to reassemble the jury to correct or amend their verdict as to the form."

On December 27, 1979, the trial judge reassembled the jury, interrogated each of the jurors, and then entered the following order on the verdict form: "The court orders clerk to correct verdict form to read as follows: 'We, the jury duly impaneled and sworn in the above entitled cause, do find for the said plaintiff and assess the amount of plaintiff's recovery as to defendant State Farm in the sum of $35,000.00 and as to defendant David J. Wojcik in the sum of $35,000.00.' Pursuant to verdict, ordered, that judgment entered December 13, 1979, be and the same is hereby vacated. It is further ordered that the plaintiff have and recover from the defendants, jointly and severally, the sum of $35,000.00, plus plaintiff's taxable costs. Jurors are discharged. /s/ (Buckley)"

State Farm appeals to this court and urges, among other things, that the trial court erred: (1) In overruling the demurrer, based on misjoinder of causes of action and of defendants; (2) In instructing the jury on the policy limits; (3) In giving an instruction which permitted the "stacking" of three policies affording uninsured motorist coverage; and (4) In receiving the jurors' affidavits, and in reassembling the jury and entering a modified verdict.

We sustain the assignments in part, and reverse

and remand for a new trial on the issue of damages only.

We will discuss the claims of error in the order listed.

Could the plaintiff, under the Nebraska statutes governing joinder clauses, combine in one action her cause against her own insurer and the cause against the uninsured motorist? This question is presented to this court for the first time.

Because of inherent and unavoidable conflicts of interest which arise between the insured and the insurer where recovery is sought under uninsured motorist coverage, many procedural problems, including that related to joinder, arise. The courts of the various jurisdictions have not been able to resolve these problems in a uniform way. See Widiss, Uninsured Motorist Coverage §§ 7.2 to 7.15 (1969). Indeed, because of the unique nature of uninsured motorist coverage, it is difficult to resolve these problems by applying logic to established principle. Sometimes merely pragmatic solutions must be reached, and that is what we do in this case.

We conclude, for reasons hereinafter set forth, that the court erred in overruling the demurrer. However, we also conclude that, since there must be a retrial for other reasons and because liability has been admitted by State Farm and clearly established by the evidence against Wojcik, the error in joinder is essentially harmless because, on retrial, the cases may be separately docketed and retrial on the tort action will be on the issue of damages only.

Neb. Rev. Stat. §§ 25-701 and 25-702 (Reissue 1979) lay down the rules as to joinder of causes. Those sections permit joinder only within certain described classes, and with one exception not here applicable the causes united must affect all parties to the action and not require different places of trial. Insofar as the causes before us here are involved, the only classes described in the statute which we must consider are: "(1) The same transaction or transactions connected with the

same subject of action; (2) contracts, express or implied; (3) injuries with or without force . . . ." § 25-701.

The action against Wojcik clearly sounds in tort and comes within class (3). The cause of action against State Farm is clearly founded on contract and comes under class (2). Its contractual obligation depends, however, upon establishing Wojcik's tort liability. At least one court has held that joinder in cases such as this is permissible because the causes relate to the "same subject of action."

Section 25-702 lays down the further requirement that the causes of action so united must affect all the parties to the action. Although it is true that the action against Wojcik affects State Farm, the contractual action against State Farm does not directly affect Wojcik. See *Fuchs v. Parsons Constr. Co.*, 166 Neb. 188, 88 N.W.2d 648 (1958).

We hold that under the above statutes governing joinder, the joinder in a single action of the cause against the uninsured motorist with the insurer carrying the uninsured motorist coverage for the claimant is not permissible. *State ex rel. Cozean v. Meyer*, 449 S.W.2d 377 (Mo. App. 1969) (identical statute and the same relationship of the parties as in the case before us); *Wells v. Hartford Accident and Indemnity Company*, 459 S.W.2d 253 (Mo. 1970); *State v. James*, 263 S.W.2d 402 (Mo. 1953).

On remand, the plaintiff shall be permitted to file separate petitions, which shall be separately docketed under the provisions of Neb. Rev. Stat. § 25-809 (Reissue 1979), and the causes shall proceed without further service.

This opinion should not be understood to hold that the insured may never sue his insurance company without having first obtained a judgment against the uninsured motorist. There are probably instances in which the tort liability may be determined in an action against the insurance carrier, e.g., under "hit-and-run" coverage or in cases where service cannot

be obtained on the uninsured motorist.

As already noted, however, the error in refusing to overrule the demurrer does not require a retrial on all issues. Any prejudice resulting from the prior joinder may be cured simply by trying the damage issue only in the cause against Wojcik. The direction of the verdict on liability against Wojcik was correct. The insurer had its day in court on that issue. The interest of the insurer on the damage issue may properly be protected by its intervention in that action. This court long ago established the method by which the insurer's interest may be protected, and that is by intervention. *Heisner v. Jones*, 184 Neb. 602, 169 N.W.2d 606 (1969). The cause can be retried without disclosing to the jury the insurer's participation in the trial. The court should not instruct the jury as to the existence of the liability insurance or the monetary limits of coverage. *Walls v. Horbach*, 189 Neb. 479, 203 N.W.2d 490 (1973).

Did the District Court err in permitting the uninsured motorist coverage in each of the three policies in which plaintiff was an insured to be "stacked"?

Coverage U of the State Farm policy provided: "To pay all sums which the *insured* or his legal representative shall be legally entitled to recover as damages from the owner or operator of an *uninsured motor vehicle* because of *bodily injury* sustained by the *insured*, caused by accident and arising out of the ownership, maintenance or use of such *uninsured motor vehicle* . . . ." Then follow provisos which require the issues of liability and damages to be determined by submitting to arbitration if agreement cannot be made between the insured and the claimant; that judgment against an uninsured motorist is not conclusive against the company; and a requirement that consent of the company be obtained before the claimant can sue the uninsured motorist. All of these provisos we held void in *Heisner v. Jones*, *supra*. Then followed various exclusions, among which is the following: "(b) TO *BODILY INJURY* TO AN *INSURED* WHILE

OCCUPYING OR THROUGH BEING STRUCK BY A LAND MOTOR VEHICLE OWNED BY THE NAMED INSURED OR ANY *RESIDENT* OF THE SAME HOUSEHOLD, IF SUCH VEHICLE IS NOT AN *OWNED MOTOR VEHICLE.*" Owned motor vehicle, as used in the exclusion, is defined as meaning "the motor vehicle . . . described in the declarations . . . ." The remainder of the definition is not relevant to the question before us.

Neb. Rev. Stat. § 60-509.01 (Reissue 1978) requires that all policies issued contain uninsured motorist coverage. The statute, however, gives the insured the option to reject such coverage.

In support of its position, State Farm relies upon our holdings in *Shipley v. American Standard Ins. Co.*, 183 Neb. 109, 158 N.W.2d 238 (1968), and *Herrick v. Liberty Mut. Fire Ins. Co.*, 202 Neb. 116, 274 N.W.2d 147 (1979). In *Herrick*, the exclusion was as follows: "Exclusions This policy does not apply: * * * Under the Uninsured Motorists Coverage, (q) to bodily injury to an insured while occupying a highway vehicle (other than an insured automobile) owned by the named insured or by any person resident in the same household who is related to the named insured by blood, marriage or adoption, or through being struck by such a vehicle; * * *." In *Shipley*, the exclusion was of similar import. In both of the above cases the insured claimant was operating an owned uninsured motorcycle. In the first case, the claimant owned an insured automobile. In the second, the claimant was an insured in an automobile owned by his parents. Policies in both cases included uninsured motorist coverage. We there upheld the exclusion. The rationale is expressed in the following language from *Herrick*, *supra* at 119, 274 N.W.2d at 149: "It is difficult to find a policy in the statute to protect one uninsured motorist from another uninsured motorist. This is what the Shipley case referred to when it stated: 'An overriding public policy of protecting an owner-operator who inexcusably has

no applicable bodily injury liability coverage is not presently discernible.'

"In Holcomb v. Farmers Ins. Exchange, 254 Ark. 514, 495 S.W.2d 155, the court stated: 'It is a matter of common knowledge that in most automobile use related injuries two automobiles and drivers are involved. Under the broad coverage insisted on by the appellants, by the purchase of single coverage on one automobile an owner could protect himself and his entire family against financial loss caused by uninsured motorists while each of them are themselves driving uninsured . . . automobiles.'"

We believe the controlling decisions of this court are *Bose v. American Family Mut. Ins. Co.*, 186 Neb. 209, 181 N.W.2d 839 (1970); *Protective Fire & Cas. Co. v. Woten*, 186 Neb. 212, 181 N.W.2d 835 (1970).

The language of the exclusion in the case before us is somewhat different from that in *Protective Fire, supra*, and *Bose, supra*, in that it defines owned automobile as one described in the declarations, while in the two above cases the policy referred to an owned automobile (other than an insured automobile).

It is to be noted that in the present case the automobiles are each automobiles described in the declaration of the policy covering the particular vehicle. Each, therefore, was an insured automobile. A premium was paid in each case for uninsured motorist coverage. Had the plaintiff been a pedestrian struck by an uninsured motorist, she would clearly have had coverage under each of the three policies. Logically, State Farm's argument would, in that case, mean that the plaintiff had to elect, when she filed suit, the policy under which she wanted to be covered. We think that *Bose, supra*, and *Protective Fire, supra*, in principle cover the present case.

In *Protective Fire, supra*, the deceased was a guest passenger in an insured automobile. The deceased claimant also had uninsured motorist coverage by reason of being an insured in the policy covering the

family car. In *Bose, supra,* the two claimants were both covered by insurance on two family cars, each in a separate policy. The sum of the damages for personal injuries suffered by each claimant exceeded the minimum coverage afforded to each ($10,000) by a single policy. The defense was "the excess escape" clause. We held it did not apply and permitted recovery under both policies.

Our holding in *Pettid v. Edwards,* 195 Neb. 713, 240 N.W.2d 344 (1976), is, in my judgment, logically irreconcilable with *Bose, supra,* and *Protective Fire, supra.* Nonetheless, even if we adhere to the distinction there made, i.e., multiple car coverage in a single policy as opposed to multiple car coverage in separate policies, that case would not govern here.

The final assignment of error pertains to the reassembling of the jury after its discharge, interrogation of the jury by the judge as to the verdict it intended to render, and modification of the verdict by the judge based upon the interrogation.

Neb. Rev. Stat. § 25-1123 (Reissue 1979) provides: "The verdict shall be written, signed by the foreman, and read by the clerk to the jury, and the inquiry made whether it is their verdict. If any juror disagree, the jury must be sent out again; but if no disagreement be expressed, and neither party requires the jury to be polled, the verdict is complete, and the jury discharged from the case. If, however, the verdict be defective in form only, the same may, with the assent of the jury before they are discharged, be corrected by the court."

This court has long held, without reference to the foregoing statute, that where a defect in a verdict is in form only, the court may direct the jury to amend it, or it may be amended by the court without the consent of the jury before it is discharged. *Davis v. Neligh,* 7 Neb. 78 (1878). Defects which are matters of substance must be corrected before the jury is

discharged. *Forslund v. Swenson*, 110 Neb. 188, 192 N.W. 649 (1923).

It is clear that the amendment in this case was more than a matter of form. It was one of substance. It related to the amount of the verdict against defendants and whether the verdict was several or a joint judgment for a single amount. The plaintiff's claim against the uninsured motorist personally is not limited to the amount of uninsured motorist coverage under his own policy. The liability of the insurer, of course, is limited by the amount of the coverage, as well as by the damages determined to have been actually incurred. It is true, of course, that generally speaking a verdict against the uninsured motorist for more than the amount of the uninsured motorist coverage is uncollectable. However, that is not a limitation on the rights of the claimant against the tort-feasor.

Other jurisdictions under identical or virtually identical statutes have held that, after acceptance of a jury verdict and discharge of the jury, the court is without authority to change the verdict. *M & P Stores v. Taylor*, 326 P.2d 804 (Okla. 1958); *Quarring v. Stratton*, 85 Wash. 333, 148 P. 26 (1915). See, also, *Chicago, Rock Island and Pacific Railroad Co. v. Speth*, 404 F.2d 291 (8th Cir. 1968).

The judgment is reversed and the cause remanded for further proceedings in accordance with this opinion.
REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

BOSLAUGH and WHITE, JJ., concur in result.

KRIVOSHA, C.J., concurring in result.

I concur in the result reached by the majority in this case. I believe, however, that much of the difficulty and confusion which cases of this type create could easily be resolved if we would simply recognize the reality of the matter and permit the insured under an "uninsured motorist" policy provision to directly sue its insurance carrier on the basis that the action really is one arising out of contract, though the right to actually

recover and the amount of recovery is based upon another's negligence. To suggest that we must not utter the words "insurance company" else unsuspecting jurors will reject their statutory duty and cease to be fair and impartial is unsupported in fact and serves no useful purpose.

The inconsistency of the matter is made even clearer when we recognize that we permit the carrier to intervene at *its* discretion, though we must not explain to the jury who the intervenor is or who it is that its counsel represents. The justification for permitting the carrier to intervene is founded upon the provisions of Neb. Rev. Stat. § 25-328 (Reissue 1979) which permit any person who has or claims an interest in the matter in litigation to join either the plaintiff or the defendant. I am, however, unable to find any language in that statute which says that once a party has made that election it may remain anonymous throughout the trial. I acknowledge that that has been our practice; I simply question the authority for doing it.

Those jurisdictions which have simply faced up to the issue appear not to have suffered any significant dire consequences.

The majority suggests that there may be instances where such action as proposed here might be appropriate, such as in the case of "hit-and-run" drivers. I do not perceive the basis for having two rules; one when the negligent driver is known and another when unknown.

VILLAGE OF MCGREW, A MUNICIPAL CORPORATION, APPELLEE, V. ROGER STEIDLEY, APPELLANT.

305 N.W.2d 627

Filed May 8, 1981. No. 43305.

1. **Municipal Corporations: Zoning Powers.** Zoning powers granted to villages under Neb. Rev. Stat. § 19-901 (Reissue 1977) shall be exercised only after the municipal legislative body has appointed a planning commission, received from its planning commission a recommended comprehensive development plan as defined in Neb. Rev. Stat. § 19-903 (Reissue 1977), adopted such comprehensive development plan, and received the specific recommendation of the planning commission on the adoption or amendment of zoning regulations.
2. **Comprehensive Development Plans.** A comprehensive development plan as defined in Neb. Rev. Stat. § 19-903 (Reissue 1977) includes: (1) A land-use element which designates the proposed general distributions, general location, and extent of the uses of land for agriculture, housing, commerce, industry, recreation, education, public buildings and lands, and other categories of public and private use of land; (2) The general location, character, and extent of existing and proposed major roads, streets, and highways, and air and other transportation routes and facilities; and (3) The general location, type, capacity, and area served of present and projected or needed community facilities including recreation facilities, schools, libraries, other public buildings, and public utilities and services.
3. **Municipal Corporations: Public Meetings.** While the right of a municipal governing body to amend its minutes is very broad in cases where, through inadvertence or misapprehension, a record has been made up defectively, the power of a governing body to amend its minutes is not unlimited or unqualified. The rule permitting an amendment of the minutes should be administered with caution, and the effect of omissions or irregularities in the proceedings of the council cannot be avoided under the guise of correction of the records. Corrections made in the minutes or records of a municipal governing body should be made within a reasonable time.
4. **Public Meetings.** The purpose of a nunc pro tunc correction is to make the record speak the truth. Its purpose is not to correct oversights or failures in the performance of mandatory acts.

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

Holtorf, Kovarik, Nuttleman & Ellison, P.C. and

James M. Mathis and Alan D. Carlson for appellant.

Philip M. Kelly of Winner, Nichols, Meister & Douglas for appellee.

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

BRODKEY, J.

Roger Steidley, defendant and appellant herein, appeals to this court from a decree entered by the District Court of Scotts Bluff County, Nebraska, enjoining him from maintaining a mobile home on property located in the Village of McGrew, Nebraska. The court ordered the defendant to comply with village ordinance No. 44, a zoning ordinance, which specifies certain requirements for the installation and maintenance of mobile homes within McGrew. We reverse and remand.

McGrew, Nebraska, is a rural community of approximately 85 people located along the North Platte River 20 miles southeast of Scottsbluff. It appears that on August 5, 1976, the village board of McGrew met to organize a planning commission for the village in order to investigate and develop plans for the long-term growth of the community. The planning commission members were appointed by the village board, and a map of McGrew was forwarded to the State Office of Planning and Programming so it could aid in the completion of the project. Various work sessions followed in which the planning commission considered alternative plans for development and village regulations.

The planning commission drafted and approved a comprehensive development plan which, after a public hearing, was recommended to the village board for adoption. The certificate of the planning commission, dated May 9, 1977, and received in evidence at the trial of this matter, recites: "The Planning Commission of the Village of McGrew, Nebraska,

hereby recommends to the Village Board of McGrew, Nebraska, the acceptance of the Comprehensive Plan and adoption by the Village Board. The Comprehensive Plan shall be known as 'The Comprehensive Plan for McGrew, Nebraska.' The Planning Commission held a public hearing on May 9, 1977 in the Fire Hall in McGrew, Nebraska, and by a roll call vote of 6 ayes and 0 nays voted to accept the Comprehensive Plan and recommend to the Village Board of McGrew, Nebraska." However, as reflected by the minutes of that meeting, the actual motion made and passed by the members of the planning commission was "to pass the Comprehensive Plan of *Zoning* Regulations on to the Village Board. . . ." (Emphasis supplied.) The comprehensive development plan itself, entitled Community Development Plan, was introduced at the trial as exhibit 4. Exhibit 4 contains not only the comprehensive development plan, which complied in full with the requirements of such plans as set out in Neb. Rev. Stat. § 19-903 (Reissue 1977), but also contains the zoning regulations which were the subject matter of ordinance No. 44, admitted as exhibit 1 at trial. Exhibit 1, however, as adopted by the Village of McGrew, was entirely a zoning ordinance and does not contain the development plan recommended by the planning commission. The minutes of the village board meeting held on July 6, 1977, indicate that the board approved by rollcall vote the proposed zoning regulations as village ordinance No. 44. The minutes do not reflect that any action whatsoever was taken with regard to that part of exhibit 4 which constituted the comprehensive development plan prepared by the planning commission.

On Sunday, July 10, 1977, 4 days after the village board adopted ordinance No. 44, defendant Steidley brought a 70-foot-long mobile home into the Village of McGrew, and placed it crosswise on three lots, each of which measured 25 feet in width and 133 feet in depth. It appears that Steidley had tied down

and blocked the mobile home foundation, hooked up the utilities, and had placed a skirt on the backside of the home by July 12, 1977, when he was advised by William Van Pelt, chairman of the village board, that he had not positioned the mobile home in accordance with the requirements set forth in ordinance No. 44. Steidley testified, however, that he had previously been told by other members of the board that his mobile home could be placed on the lots as he had positioned it and that no ordinances or regulations had been passed with regard to its placement.

On March 3, 1978, the Village of McGrew filed a petition in the District Court of Scotts Bluff County, praying that "the Defendant be enjoined from maintaining his mobile home on the premises described herein in violation of the ordinances of the Village of McGrew and that a mandatory injunction issue requiring him to remove the same or to position the mobile home in compliance with and to construct the foundation and tie-downs for the same in compliance with the ordinances of the Village of McGrew, for the cost of this action and for such other and further relief as the Court may deem just and equitable." In his answer, filed March 21, 1978, the defendant challenged the validity of ordinance No. 44, and the proceedings of the planning commission and village board which culminated in its enactment.

This matter came to trial on November 29, 1979. The record reveals, however, that the evening before the trial was to commence, to wit, on November 28, 1979, a special meeting of the village board of McGrew was held, at which meeting a resolution was adopted to amend the minutes of the July 6, 1977, meeting to read as follows: "A motion was made to adopt the Comprehensive Development Plan for the Village of McGrew. Motion approved by roll call vote." At the trial, which commenced the following day, the Village of McGrew called as its first witness Katherine Teppert, who was the village clerk for the Village of

McGrew. She testified with reference to the organization of the planning commission on August 5, 1976, and the adoption of the comprehensive plan by the planning commission and the recommendation to the village board that they accept the comprehensive plan, on May 9, 1977. She also testified with reference to the meeting held on July 6, 1977, as follows: "In July we held a meeting where we passed the Comprehensive Plan and the zoning regulations for the village and adopted them." She was asked whether there was an error in the minutes of the meeting of July 6, 1977, and replied that there was and that the minutes should have read "Comprehensive Planning and Zoning" instead of just "Comprehensive Zoning." She also testified that the village board had taken action to correct the minutes; and when asked when that action was taken, replied: "Last night, November 28th." She testified as to the previous evening as follows: "We had a motion to amend the July 6th minutes and we amended them to read that the motion was made and approved to accept both the planning and the zoning regulations." We point out that the actual minutes do not bear out this statement. As quoted above, they merely refer to adopting the "Comprehensive Zoning Ordinance." She later testified, however, that it was her recollection that the "Comprehensive Plan was adopted by the Village." She later identified this plan as exhibit 4, which she contended was adopted on July 6, 1977. She also identified exhibit 1, ordinance No. 44, which she stated was the comprehensive plan for the Village of McGrew regulating and restricting certain ordinances. She was specifically asked: "Is that the Comprehensive Zoning Plan?" She replied: "Yes, it is." However, the minutes of the meeting of the village board which was held on July 6, 1977, are also in evidence in this case, and they reveal that at the meeting a motion was made and seconded to accept the "Comprehensive Zoning Ordinance for the Village of McGrew," which

they referred to in said minutes as "ordinance 44." The motion was approved by rollcall vote. Nothing was specifically referred to in the minutes of that meeting with regard to that portion of exhibit 4 which constitutes the comprehensive development plan.

Following the trial, at which Katherine Teppert, the village clerk, William Van Pelt, the chairman of the board, and Roger Steidley, the defendant, testified on behalf of the plaintiff, and no witnesses testified on the behalf of the defendant, the trial court, on December 10, 1979, found generally in favor of the plaintiff and against the defendant, and ordered that the defendant be enjoined from further violations of ordinance No. 44 of the Village of McGrew and from maintaining a mobile home on the property in question unless, within 60 days of the decree, he relocated the mobile home to comply with the setback requirements set forth in ordinance No. 44, and otherwise complied with the requirements of that ordinance.

In his brief on appeal, the defendant contends that since the trial court found generally in favor of the village, it necessarily had to find against the defendant on each issue raised by the trial below. Specifically, the defendant principally assigns as error: (1) The trial court erred in finding that ordinance No. 44 was a comprehensive development plan within the meaning of § 19-903; (2) The court erred in finding that the village had adopted a comprehensive development plan prior to attempting to exercise the zoning regulations; (3) The court erred in finding that ordinance No. 44 was a valid comprehensive development plan, because the words "development plan" were not included in its title; (4) The court erred in finding that ordinance No. 44 had been validly adopted, because it was not styled as required by Neb. Rev. Stat. § 17-613 (Reissue 1977); (5) The court erred in failing to find that ordinance No. 44 did not become effective until after defendant's mobile home was placed in its present position, and (6) The court erred in failing

to find that the ordinance had not been published as provided by law.

We begin our discussion of this matter by setting forth the applicable law governing the scope of our review on appeal. This court has held that what is in the public good as it relates to zoning ordinances affecting the use of property is, primarily, a matter lying within the discretion of the municipal body to which the power and function of zoning is committed; and that unless an abuse of this discretion has clearly been shown, it is not the province of this court to interfere. In passing upon the validity of zoning ordinances, an appellate court should give great weight to the determination of local authorities who are especially familiar with local conditions. However, in appeals from the District Court to the Supreme Court in suits in equity, on trial de novo this court will retry the issue or issues of fact involved and reach an independent conclusion as to what findings are required under the pleadings and the evidence, without reference to the conclusions reached in the District Court. *Dundee Realty Co. v. City of Omaha*, 144 Neb. 448, 13 N.W.2d 634 (1944); *Weber v. City of Grand Island*, 165 Neb. 827, 87 N.W.2d 575 (1958); *Bucholz v. City of Omaha*, 174 Neb. 862, 120 N.W.2d 270 (1963); *J. W. Auto Parts, Inc. v. City of Omaha*, 187 Neb. 624, 193 N.W.2d 281 (1971).

In order for this court to make the determination as to whether the Village of McGrew properly enacted ordinance No. 44, we must turn to the applicable statutory provisions which govern the matter before us. In this regard, Neb. Rev. Stat. § 19-901 (Reissue 1977) specifies the requirements for enacting zoning regulations as follows: "(1) For the purpose of promoting health, safety, morals, or the general welfare of the community, the legislative bodies in cities of the first and second class and in villages may adopt zoning regulations which regulate and restrict the height, number of stories, and size of buildings and

other structures, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes.

"(2) Such powers shall be exercised *only after the municipal legislative body has appointed a planning commission, received from its planning commission a recommended comprehensive development plan as defined in section 19-903, adopted such comprehensive development plan, and received the specific recommendation of the planning commission on the adoption or amendment of zoning regulations.*" (Emphasis supplied.)

It is clear from the language found in § 19-901 that a comprehensive *development* plan (as defined in § 19-903) must precede the adoption of any zoning regulations by the village. We note that prior to 1967, neither § 19-901 nor § 19-903 contained the requirement that a comprehensive development plan be adopted by a community prior to enacting zoning regulations; rather, the statute only required that zoning regulations be made "in accordance with a comprehensive plan." See *City of Imperial v. Raile*, 187 Neb. 404, 191 N.W.2d 442 (1971). However, § 19-901 was amended in 1967, and now includes the requirement that a comprehensive *development* plan be adopted *before* the passage of any zoning regulations.

We must therefore turn to § 19-903 in order to determine whether the "Comprehensive Zoning Ordinance," adopted by the Village of McGrew as ordinance No. 44, constitutes a comprehensive *development* plan. Section 19-903 states as follows: "The regulations and restrictions authorized by sections 19-901 to 19-915 shall be made in accordance with a comprehensive development plan which shall consist of both graphic and textual material and shall be designed to accommodate anticipated long-range

future growth which shall be based upon documented population and economic projections. *The comprehensive development plan shall, among other possible elements, include:* (1) A land-use element which designates the proposed general distributions, general location, and extent of the uses of land for agriculture, housing, commerce, industry, recreation, education, public buildings and lands, and other categories of public and private use of land; (2) The general location, character, and extent of existing and proposed major roads, streets, and highways, and air and other transportation routes and facilities; and (3) The general location, type, capacity, and area served of present and projected or needed community facilities including recreation facilities, schools, libraries, other public buildings, and public utilities and services." (Emphasis supplied.)

Our review of ordinance No. 44, the "Comprehensive Zoning Plan" enacted by the Village of McGrew, convinces us that it does not contain those elements of a comprehensive development plan set forth in § 19-903(1) to (3). Rather, the ordinance states on its face: "AN ORDINANCE ESTABLISHING A COMPREHENSIVE *ZONING* PLAN WITHIN THE VILLAGE OF McGREW, NEBRASKA; AND WITHIN THE CORPORATE LIMITS OF SAID VILLAGE, *REGULATING AND RESTRICTING SIZE OF BUILDINGS AND OTHER STRUCTURES, THE SIZE OF THE YARDS, COURTS AND OTHER OPEN SPACES, THE DENSITY OF THE POPULATION AND THE LOCATIONS AND USE OF BUILDINGS, STRUCTURES AND LAND FOR TRADE, INDUSTRY, RESIDENCE AND OTHER PURPOSES;* ESTABLISHING SET-BACK BUILDING LINES; DIVIDING SAID VILLAGE INTO ZONING DISTRICTS AND WITHIN SUCH DISTRICTS REGULATING AND RESTRICTING ERECTION, CONSTRUCTION, RECONSTRUCTION, ALTERATION, SIZE, REPAIR AND USE

OF BUILDINGS, STRUCTURES AND LAND; PROVIDING THE PROCEDURE FOR THE ISSUANCE OF BUILDING PERMITS AND CERTIFICATE OF OCCUPANCY, PROVIDING FOR ENFORCEMENT OF SAID ORDINANCE AND PRESCRIBING PENALTIES FOR ITS VIOLATION." (Emphasis supplied.)

We note that the above italicized language taken from ordinance No. 44 comes verbatim from § 19-901, the statutory section governing the adoption of zoning ordinances and regulations. Ordinance No. 44 obviously fails to meet the statutory requirements set forth in § 19-903, and therefore cannot be considered to be a comprehensive *development* plan. Therefore, inasmuch as no comprehensive development plan was adopted by the Village of McGrew prior to the enactment of ordinance No. 44, as is required by § 19-901(2), we must conclude that ordinance No. 44 was not properly adopted as a zoning ordinance by the village board and is invalid under the terms of the aforementioned statutory provisions.

We now comment briefly upon the effect of the effort of the village board of McGrew to amend the minutes of the meeting held on July 6, 1977, to show that the board also adopted the comprehensive development plan at that meeting. The minues of the meeting held on that date do not reflect that the comprehensive development plan was adopted, but show that the comprehensive zoning plan was so adopted. We again point out that the special meeting to correct the minutes of the earlier meeting was held the night before the trial in this matter was to commence, which date was approximately 2 years and 4 months after the aforementioned meeting of the village board which adopted the comprehensive zoning plan. The general rules with reference to the right of a municipal governing body to amend its minutes of previous meetings is summarized in 62 C.J.S. *Municipal Corporations* § 409 d at 782-83, as

follows:

"The right of a municipal governing body to amend its minutes is very broad, at least in cases where, through inadvertence or misapprehension, a record has been made up defectively; . . . The power of the governing body to amend its minutes, however, is not unlimited or unqualified. The rule permitting an amendment of the minutes should be administered with caution, and the effect of omissions or irregularities in the proceedings of the council cannot be avoided under the guise of correction of the records. . . .

"If a correction is made in the minutes or records of a municipal governing body it should be made within a reasonable time. . . . A nunc pro tunc entry may be made on the minutes of a succeeding meeting; but in order for minutes to be amended nunc pro tunc the amendment must be based on written or other sufficient data of record, which must be such as itself to furnish evidence that the particular proceedings in fact took place." In this connection, see *Beverly Land Co. v.City of South Sioux City*, 117 Neb. 47, 219 N.W. 385 (1928).

The case of *City of Valentine v. Valentine Motel, Inc.*, 176 Neb. 63, 125 N.W.2d 98 (1963), involved the question of the power of a city council to amend its minutes nunc pro tunc, after the commencement of litigation, for the purpose of complying with the requirements of the applicable annexation statutes, which among other things required that to annex such territory the resolution and vote thereon "shall be spread upon the records of the council or board." In that case the court held that that requirement was a condition precedent which must be strictly complied with, and that the requirement that the record be kept and spread upon the records of the council at the time of its voting on the resolution was mandatory and jurisdictional in character. The court recognized the general rule that a city council may, under some circumstances, correct its own

records, nunc pro tunc, to show the adoption of a resolution or ordinance and to record the truth of how it was voted upon; but that it may not by such action show that the separate requirement that the action be spread upon the record of the minutes of the council was performed prior to the time that the spreading upon the minutes actually took place. In its opinion, this court stated at 68-69, 125 N.W.2d at 102: "We point out that on January 8, 1962, the next council meeting following December 11, 1961, the minutes were recorded and approved 'as written.' Apparent is the square application of the principles above announced. A property owner in the area to be annexed, or any interested citizen inspecting this public record, would be entitled to rely on the law and facts as then represented, and act accordingly on the basis that there was no legal adoption of the annexation resolution. To permit the *recording* of the fact of passage at a later time and for the purposes of litigation would be to permit the violation of the disclosure requirement of the statute as a condition precedent to annexation proceedings, would affect intervening rights of interested parties, and would open up an opportunity for fraud and uncertainty as to something that the very requirement of the statute was designed to prevent."

Also, in *Payne v. Ryan*, 79 Neb. 414, 417, 112 N.W. 599, 600 (1907), which case involved an application to a village board for a license to sell intoxicating liquors in the village, this court stated: "Appellee undertook to avoid the force of the record of the board of trustees relating to the attempted passage of the ordinance in question. Several days after the hearing before the village board, and after it had ordered the license to issue, a special meeting of the village board was called, and it proceeded to enter a *nunc pro tunc* order, whereby it caused a record to be made supplying the omissions in the record relative to the passage of the ordinance in question, notwithstanding that

15 years had elapsed since the attempted passage of the ordinance." The court held that under the evidence offered and adduced at the hearing the village of Exeter, at the time of the granting of the license, did not have any village ordinance authorizing the issuance of a license, and that the village board was therefore without power to issue the license.

Finally, in our recent case of *State ex rel. Schuler v. Dunbar*, *ante* p. 69, 74, 302 N.W.2d 674, 678 (1981), we stated: "The purpose of a nunc pro tunc correction is to make the record speak the truth. Its purpose is not to correct oversights or failures in the performance of mandatory acts," citing *Beverly Land Co. v. City of South Sioux City*, *supra;* and *City of Valentine v. Valentine Motel, Inc.*, *supra.*

From our examination of the record, we are convinced that the Village of McGrew did not adopt the comprehensive development plan at or prior to the meeting of July 6, 1977, as required by the statutes of this state, before the enactment of zoning regulations, and that its efforts to do so by amending the minutes of that meeting 2 years and 4 months after such meeting, on the evening prior to trial, was a valiant but futile effort to correct the deficiency in its zoning ordinance.

In view of our conclusions as expressed above, both that ordinance No. 44 was a zoning ordinance and not a comprehensive development plan, and also that no comprehensive development plan was enacted by the Village of McGrew prior to the adoption of its zoning ordinance, we need not consider other assignments of error alleged by the defendant in his brief on appeal. We conclude that the decree of the District Court, enjoining the defendant from maintaining his mobile home on the property in question, must be reversed and the cause remanded with instructions to dismiss the plaintiff's petition.

REVERSED AND REMANDED WITH INSTRUCTIONS.

CLINTON, J., participated on briefs.

BOSLAUGH, MCCOWN, and CLINTON, JJ., concur in result.

KRIVOSHA, C.J., concurring in result.

I concur in the result reached by the majority in this case. I take a moment to write a separate concurring opinion so that the basis for my action in this case may be clear. I am in full accord with the majority's conclusion that the document considered by the village board of the Village of McGrew and approved by it at its meeting on July 6, 1977, was proposed zoning regulations and not a comprehensive development plan required to be adopted prior to the adoption of a zoning ordinance. Having reached that conclusion, I believe that the balance of the majority's opinion is mere dictum and may in fact cause some unnecessary confusion in the future.

The majority, in reaching its conclusion that the zoning regulations were improperly adopted, cites *Beverly Land Co. v. City of South Sioux City*, 117 Neb. 47, 219 N.W. 385 (1928), and *City of Valentine v. Valentine Motel, Inc.*, 176 Neb. 63, 125 N.W.2d 98 (1963). For reasons more particularly set out in my dissent in the case of *State ex rel. Schuler v. Dunbar*, *ante* p. 69, 302 N.W.2d 674 (1981), I believe that neither the *Beverly Land Co.* case nor the *City of Valentine* case is correct. They should not be followed, except with regard to those statutes which specifically provide that the manner of recording the minutes is a prerequisite to subsequent action to be taken by a governmental subdivision, such as that of an annexation. Such is not the case here. While I agree that the function of nunc pro tunc is to make the record speak the truth and not to correct oversights or failures, I do not believe that there is any time limit when such a correction may be entered. The effect of correcting the record may depend upon whether any intervening interests have accrued. That is not the same as saying that a record may not be corrected to honestly speak the

truth. When a record is so corrected, it dates back to the date the action was taken and should not be disregarded.

ELMER SALTZ, APPELLANT, V.
SCHOOL DISTRICT OF NORFOLK, IN THE COUNTY OF MADISON, IN THE STATE OF NEBRASKA, A POLITICAL SUBDIVISION, APPELLEE.

305 N.W.2d 635

Filed May 8, 1981. No. 43311.

Commission of Industrial Relations: Jurisdiction. The Commission of Industrial Relations' authority to resolve disputes concerning terms, tenure, or conditions of employment is limited to situations in which the parties have not yet reached agreement. Once an agreement is reached and a subsequent breach is alleged to have occurred, the parties are required to litigate their dispute in a competent court having jurisdiction of the matter.

Appeal from the Commission of Industrial Relations. Affirmed.

Theodore L. Kessner and Mark D. McGuire of Crosby, Guenzel, Davis, Kessner & Kuester for appellant.

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

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

CLINTON, J.

This is an appeal from the Commission of Industrial Relations. The plaintiff, Elmer Saltz, is a certificated teacher employed by the School District of Norfolk, in the County of Madison, in the State of Nebraska. During the 1978-79 contract year, the plaintiff's employment was governed by the terms and conditions of an agreement negotiated by the labor organization, of which he was a member, and the school district.

The plaintiff filed a petition with the Commission of Industrial Relations in which he sought an order of the

CIR finding that he was entitled to 1 day of paid personal leave taken in accordance with the negotiated personal leave policy of the school district, and for an order directing the school district to pay to the plaintiff 1/186th of his 1978-79 salary allegedly wrongfully withheld as a result of the school district denying a day of paid personal leave. He also sought an order directing the school district to remove from his personnel file a letter of reprimand. Personal leave policy was governed by the terms of the negotiated labor agreement.

The CIR dismissed the action because it did not have jurisdiction under our holding in *Transport Workers of America v. Transit Auth. of City of Omaha*, 205 Neb. 26, 286 N.W.2d 102 (1979). The plaintiff appeals to this court and urges that *Transport Workers of America* be overruled. Among other arguments made, the plaintiff points out that in the case of *Minshull v. School Dist. of Sutherland*, 198 Neb. 418, 253 N.W.2d 45 (1977), this court affirmed a judgment of the CIR involving a matter similar to that here involved and in principle the same. We simply point out that in *Minshull*, no jurisdictional question or issue as to the definition of industrial dispute was raised by the parties and that decision preceded our decision in *Transport Workers of America*.

In *Transport Workers of America* we held: "The Commission of Industrial Relations' authority to resolve disputes concerning terms, tenure, or conditions of employment is limited to situations in which the parties have not yet reached agreement. Once an agreement is reached and a subsequent breach is alleged to have occurred, the parties are required to litigate their dispute in a competent court having jurisdiction of the matter." (Syllabus of the court.)

We adhere to that holding. The order of the Commission of Industrial Relations dismissing the plaintiff's petition is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JERRY G. OHLER, APPELLANT.

305 N.W.2d 637

Filed May 8, 1981. No. 43375.

1. **Constitutional Law: Search and Seizure.** The capacity of a person to claim the protection of the fourth amendment 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.
2. **Search and Seizure.** A person cannot assert any expectation of privacy in an area in which he gave governmental officials the permission to inspect.
3. ——. The question as to whether or not consent to search was freely and intelligently given is a question of fact to be determined from the totality of all the circumstances surrounding such search.
4. **Appeal and Error: Evidence.** This court will not interfere with a conviction based on evidence unless it is so lacking in probative force that as a matter of law it can be said that it is insufficient to support a verdict of guilt beyond a reasonable doubt.

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

Anthony S. Troia and Alan J. Crivaro of Troia Law Offices, P.C., for appellant.

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

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

PER CURIAM.

The defendant, Jerry G. Ohler, was convicted by a York County District Court jury of a violation of Neb. Rev. Stat. § 28-508(1) (Reissue 1979), possession of burglary tools, a felony, and of a violation of Neb. Rev. Stat. § 28-511(1) (Reissue 1979), possession of stolen property, a misdemeanor. Ohler further was found to be an habitual criminal pursuant to Neb. Rev. Stat. § 29-2221 (Reissue 1979). He was fined $500 for the misdemeanor and was sentenced to a term of 15 years in

the Nebraska Penal and Correctional Complex for the felony. Defendant's motion for a new trial alleged that the verdict was not sustained by the evidence, was contrary to law, and that there were irregularities in the proceedings preventing him from having a fair trial. In this court he assigns as error the action of the trial court in overruling his motion to suppress evidence seized as the result of a warrantless search and in overruling his motion for a new trial. In his brief, Ohler argues only the overruling of his motion to suppress. He makes no claim that the evidence, if properly admitted, did not sustain his conviction. We affirm.

The defendant was arrested on May 3, 1979, in a common areaway or alley located behind several business establishments in York, Nebraska. Ohler had entered several of the businesses through the rear door service entry and made contact with several proprietors and employees. One proprietor testified that Ohler had inquired whether the U.P.S. man had been there; another proprietor testified that Ohler told her that he had just come by to say "hello" and, after some conversation, he said he was looking for a lady with a little child. After the conversation about the U.P.S. man, the proprietor of the drugstore became suspicious and called the police department.

Police Sergeant Ronald Dickerson received the call which described the defendant, and he went to the area where he saw a man matching that description walking toward him in the alley, carrying a cardboard box under his arm. Sergeant Dickerson identified himself and then asked the man for identification. The man put his box down onto the ground and presented the officer with a card identifying himself as Jerry G. Ohler. Shortly thereafter, the chief of police, Franklin D. Valentine, arrived on the scene and, after some conversation, told Ohler that some incidents had occurred 1 to 3 months earlier in which a man had been going around asking the same questions which Ohler had asked on this date and that Ohler matched the description of that

individual. Valentine then told Ohler that, due to the circumstances, he would like Ohler to accompany them down to the police department to check it out further, and Ohler agreed to accompany the officers.

Sergeant Dickerson then asked Ohler what was in the box that he had placed on the ground. Dickerson testified at the preliminary hearing as follows: "Q. And what if anything did he tell you. A. He didn't tell me anything and I opened the --- Q. He didn't make any response at all when you asked him what was in the box. A. Well, he didn't tell me what was in the box he just said it was something, that he had found the box up the alley. Q. And what was -- what happened next. A. Well, I asked him if he had any objections if we looked in the box to see what he had. He was coming out from a store. Q. What was his response? A. Well, as far as I remember *he said that he didn't make any objections.*" (Emphasis supplied.)

The sergeant then opened the box and inside saw two pairs of men's boots which appeared to be new. Ohler was asked if he had a sales slip for the merchandise. The reply was in the negative, and Ohler further explained that he had found the boots near a trash receptacle down the alley. He then took the officers down to where he purportedly found the boots. At that time the officers placed the defendant under arrest for possession of stolen property or theft by unlawful taking. Ohler was patted down for weapons and when he opened his jacket the officer found a spatula with a wooden handle tucked into the waist of his pants. It was bent and had some zigzag marks on it.

Following the arrest, defendant was taken to police headquarters and his automobile was impounded. A search warrant was secured for a search of the car, based on an affidavit of Police Officer Michael Rathje. The affidavit set forth information regarding incidents which occurred in January of 1979 involving a burglary of the Sugar Plum Tree store of a sack of cash and checks. Another incident involved a burglary in an

apartment in the city of York of a large amount of jewelry. The affidavit stated that a man suspected of committing both acts matched the description of a man who had been entering a number of businesses in downtown York in January asking questions and using the same excuses for entering the rear of the store as did the man whom the police had in custody for possession of the stolen boots. The warrant was to search Ohler's car for a black knee-length coat worn by the man in January, one briefcase, and the jewelry stolen from the apartment.

The search uncovered such items as bent and scratched knives, skeleton keys, penlight flashlights, a screwdriver, a sledge hammer, and a steel punch. At trial, experts testified that these items could be and frequently were used as burglary tools.

After the preliminary hearing and prior to trial, Ohler's attorney filed a motion in limine and a motion to suppress all evidence held by the State, alleging that the evidence was obtained by an illegal search and seizure of defendant's person and vehicle. The motion recited that the search was made before defendant was placed under arrest; that the search was made without the consent of defendant; that no probable cause existed for the search, seizure, and arrest; and that defendant has standing to complain that the search was illegal. By stipulation of the parties the search warrant and affidavit and the transcript of the preliminary hearing were admitted as evidence on the motions. No further evidence was adduced at the hearing. We further note that the defendant not only did not testify at the preliminary hearing nor at trial, but neither was any other evidence presented by the defense to contradict the State's witnesses.

The trial court overruled the motion to suppress and the defendant has assigned that action as error. We note initially that there were two separate searches and seizures to which the motion to suppress applies. The first search was of the defendant's box and person in

which the police seized two pairs of boots and the spatula with the wooden handle. The second search and seizure was of the defendant's automobile in which police seized the burglary tools. If, as the defendant contends, the initial search and seizure and arrest were illegal, it is possible that the second search and seizure, although pursuant to a warrant, could be tainted as fruit of the poisonous tree.

We must determine whether the disputed search and seizure infringed an interest of the defendant which the fourth amendment was designed to protect. *Rakas v. Illinois*, 439 U.S. 128, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978). "The interest protected was defined by *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967), where the Supreme Court held that the capacity to claim the protection of the fourth amendment 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*, 207 Neb. 325, 329, 299 N.W.2d 421, 425 (1980). The question we must answer is whether governmental officials violated any legitimate expectation of privacy held by the defendant. *Rawlings v. Kentucky*, 448 U.S. 98, 100 S. Ct. 2556, 65 L. Ed. 2d 633 (1980).

The evidence reveals that the defendant consented to the search of the cardboard box. The defendant cannot assert any expectation of privacy in an area in which he gave governmental officials the permission to inspect. "Whether or not consent to search was freely and intelligently given is a question of fact to be determined from the totality of all the circumstances surrounding it." *State v. French*, 203 Neb. 435, 439, 279 N.W.2d 116, 119 (1979). The State presented evidence that the defendant consented to the search of the box. The defendant did not contradict that testimony, either directly or indirectly, nor was it challenged as being involuntary or coerced. We believe that the State has met its burden.

Since we have determined that the search of the box and seizure of the boots were lawful, the subsequent arrest of the defendant was based upon probable cause and therefore legal. There was no "poisonous tree" to taint the search, pursuant to warrant, of the defendant's car and the seizure of the burglary tools. The trial court was correct in overruling the motion to suppress the evidence.

The lawful owner of the boots identified them as having come from her store, and she further testified that she had not given permission to the defendant to have them in his possession. The tools taken from defendant's car were described by expert testimony to be burglary tools. This evidence was clearly sufficient to support the jury's verdict of guilty as to both crimes. This court will not interfere with a conviction based upon evidence unless it is so lacking in probative force that as a matter of law it can be said that it is insufficient to support a verdict of guilt beyond a reasonable doubt. *State v. Booth*, 202 Neb. 692, 276 N.W.2d 673 (1979).

The judgment and sentence of the District Court were correct and are affirmed.

AFFIRMED.

BRODKEY, J., concurring in result.

While I concur in the result reached by the majority of the court, I must strongly disagree with the grounds upon which the majority opinion is based, to wit, that the search by the police of the unsealed and partially opened cardboard box carried by the defendant and placed by him upon the ground prior to the search was a valid "consent search" pursuant to the voluntary and uncoerced consent and permission of the defendant. Of the various available grounds for affirming the conviction of the defendant in this case, the one selected by the majority of the court is, in my opinion, by far the weakest, and not sustained by the record. There are, however, several other valid grounds not mentioned or referred to in the majority opinion upon which de-

fendant's conviction can and should be sustained, as hereinafter discussed.

The sole and only basis for the conclusion of the majority that the defendant gave his consent to a search of the box is the following testimony of Officer Dickerson given at the preliminary hearing in this matter, as follows: "Q. And what was -- what happened next. A. Well, I asked him if he had any objections if we looked in the box to see what he had. He was coming out from a store. Q. What was his response? A. Well, *as far as I remember* he said that he didn't make any objections." (Emphasis supplied.) It should be noted, however, that when Officer Dickerson testified at the trial regarding the incident, he made no mention of the foregoing alleged consent to search, but only testified that he had asked the defendant what was in the box, but that the defendant did not tell him, and also that the box was partially opened and "we looked inside." He was then asked: "Do you remember testifying back at the Preliminary Hearing, don't you, in this matter? A. Yes, sir. Q. And I believe that on approximately page fifty-three of the Preliminary Hearing testimony, I believe the question was asked, 'What, if anything, did he tell you?' This is after you had stopped him. Then you stated in response, 'He didn't tell me anything and I opened the --' Then you just stopped and the question came back. 'He didn't make any response at all when you asked him what was in the box? Answer: Well, he didn't tell me what was in the box, he just said it was something.'" Officer Dickerson also testified that he was in uniform at that time. Chief of Police Valentine of York, Nebraska, who was also present at the time of the questioning, testified at the trial with reference to the defendant Ohler as follows: "I asked him if that was his box and he stated it was, and at that time, there was another sergeant present, which was *Sergeant Leach* and he opened the box up and it had two pair of boots in it." (Emphasis supplied.)

Even assuming, however, that it was Officer

Dickerson who had the conversation with the defendant immediately prior to the time that he searched the cardboard box, it is clear from the foregoing testimony that the officer, who was in uniform, did not directly and positively testify that the defendant had given him his consent to search the box, but merely testified that "as far as he could remember" the defendant did not make any objections.

"Consent to search is not to be lightly inferred, but should be shown by clear and convincing evidence, and any consent must be voluntary and uncoerced, either physically or psychologically. The government has the burden of proving the alleged consent. And it has been said that courts do not look with favor on the practice of substituting consent for the authorization of a search warrant." 68 Am. Jur. 2d *Searches and Seizures* § 46 at 699 (1973). It is the general rule that "when statements of accused clearly indicate that the search or seizure is made with his voluntary consent he will be held to have waived his rights under the guaranty. Where, however, the surrounding circumstances show that they were not voluntarily made, the courts have generally regarded statements which ostensibly indicated invitation or consent to search as being involuntarily made, and hence not constituting consent or waiver." 79 C.J.S. *Searches and Seizures* § 62 at 821-22 (1952). See, also, note 89 at 822 of the above citation, where particular statements are set out which have been held by the courts not to constitute waiver or consent.

The case of *State v. French*, 203 Neb. 435, 279 N.W.2d 116 (1979), cited in the majority opinion for the proposition that whether or not consent to search was freely and intelligently given is a question of fact to be determined from the totality of all the circumstances surrounding it, is actually and factually more in support of the position of the defendant with reference to his alleged consent to search than it is authority for the State. That case involved the search of the house of the

defendant by two deputy sheriffs, Earhart and Anderson. While Deputy Earhart led the defendant into the open and handcuffed him and put him in the police car, the defendant heard Deputy Anderson break open the kitchen door. While the defendant was sitting in the police car handcuffed he was asked for permission to go into the house, although no purpose for such entry was suggested. The defendant responded: "'Well, yeah. It won't make any difference anyway.'" In its opinion the court stated at 440, 279 N.W.2d at 119: "Even if Deputy Earhart might have believed, at that point, that the defendant had given voluntary, knowing, and intelligent consent to enter the house, Earhart discovered very shortly thereafter that Deputy Anderson had already broken into the house without any authorization whatever. Deputy Earhart was sufficiently uncertain about the consent situation, in view of the circumstances, that he returned to the defendant and said: 'You would have given us consent anyway, wouldn't you?' The defendant answered: 'No.' Earhart confirmed that answer on cross-examination." In that opinion we stated at 441, 279 N.W.2d at 120: "It was neither reasonable nor justifiable for them to conclude that they had the voluntary and intelligent consent of the defendant to make a search. The search was unreasonable. The motion to suppress should have been granted." In this case, notwithstanding the fact that the trial court apparently found that the defendant, by the single ambiguous statement set out above, had consented to the search of the box in question, I believe that the evidence introduced was clearly not sufficient to establish by clear and convincing evidence that the defendant intended to waive his constitutional immunity to an illegal search and seizure.

However, even assuming arguendo that this court could conclude from the foregoing evidence, without straining its credulity, that the foregoing ambiguous statement allegedly made by the defendant was sufficient to constitute a consent to search the cardboard

box, I am of the opinion that the majority of this court might better and should have based its opinion on other and stronger existing grounds, primarily that the defendant's fourth amendment rights were not violated for the reason that he did not have a legitimate expectation of privacy in the unsealed, partially opened cardboard box. The law is now well settled, and is so recognized in the majority opinion, that the capacity to claim the protection of the fourth amendment 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. See, *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967); *Rakas v. Illinois*, 439 U.S. 128, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978); Case Note, 13 Creighton L. Rev. 653 (1979); Case Note, 58 Neb. L. Rev. 1123 (1979). On June 25, 1980, the Supreme Court of the United States in *United States v. Salvucci*, 448 U.S. 83, 100 S. Ct. 2547, 65 L. Ed. 2d 619, expressly overruled the case of *Jones v. United States*, 362 U.S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960), which case had held that defendants charged with crimes of possession were entitled to claim "automatic standing" to challenge the legality of the search which produced the evidence against them, without regard to whether the defendants had an expectation of privacy in the area or premises searched or the property seized. In *Salvucci*, the Supreme Court held, *inter alia*, that defendants charged with crimes of possession may only claim the benefits of the exclusionary rule if their own fourth amendment rights have been violated. In *Rawlings v. Kentucky*, 448 U.S. 98, 100 S. Ct. 2556, 65 L. Ed. 2d 633 (1980), a case announced the same day as *Salvucci*, the court held that a defendant charged with the crime of possession has the burden of proof in establishing that he has a legitimate expectation of privacy in the area searched or the article seized. It is clear from the existing authorities that the defendant did not sustain his burden of proof that he had a legitimate expectation of privacy in the cardboard box

which was searched and the articles contained therein which were seized by the York city police. The courts have differentiated between various types of containers which are entitled to an "expectation of privacy," regardless of their location or the right to possess them. In *United States v. Chadwick*, 433 U.S. 1, 97 S. Ct. 2476, 53 L. Ed. 2d 538 (1977), the court noted that "luggage is intended as a repository of personal effects," and that the defendants, by placing their property in a locked footlocker, "manifested an expectation that the contents would remain free from public examination." Later, in *Arkansas v. Sanders*, 442 U.S. 753, 99 S. Ct. 2586, 61 L. Ed. 2d 235 (1979), the court stated that certain containers such as luggage, suitcases, or footlockers were "inevitably associated with the expectation of privacy," and because of their recognition in society as a repository for personal effects, their presence in a car or having fallen into public hands does not alter the reasonableness of an expectation that they will not be opened by the police. The court also held in that case that not all containers, packages, or parcels deserve the full protection of the fourth amendment, and differentiated their fourth amendment treatment from that associated with personal luggage. An excellent and exhaustive review of the cases differentiating the types of containers which will be afforded the protection of the fourth amendment against unreasonable searches and seizures and indicating the types to which the "expectation of privacy" standard will apply is found in the recent case of *People v. Maldonado*, 76 App. Div. 2d 691, 431 N.Y.S.2d 580 (1980). With reference to the type of container involved in the instant case, the court in *Maldonado* had the following to say at 696, 431 N.Y.S.2d at 583:

"More troublesome are cases which involve searches of containers which are neither luggage nor have any of the attributes thereof. The courts, with the notable exception of the California Supreme Court in *People v Dalton* (24 Cal 3d 850, cert den *sub nom. California*

v Dalton, 445 US 946 [wherein the warrantless search of a large metal box and a 'Longine' box was deemed to be unlawful]), have generally upheld searches of unsecured boxes (*United States v Neumann*, 585 F2d 355; *State v Kahlon*, 172 NJ Super 331), paper bags (*United States v Ross*, __F2d__ [DC Cir, TAMM, J., April 17, 1980]; *United States v Vento*, 533 F2d 838; *Clark v State*, 574 P2d 1261 [Alaska]; *Webb v State*, *supra* [dictum]), and other receptacles such as: plastic bags (*United States v Gooch*, 603 F2d 122; *Flynn v State*, 374 So 2d 1041 [Fla]), a closed but unlocked toolbox (*Wyss v State*, 262 Ark 502), a covered paper cup *People v Diaz*, 101 Cal App 3d 440) and an ice chest (*State v Heberly*, 120 Ariz 541).

"On the other hand, several courts have invalidated searches of nonluggage type containers which are locked (*People v Dalton*, *supra* [metal box]), zippered (*People v Belton*, 50 NY2d 447 [zippered pockets of a jacket found in a car during a warrantless search of the vehicle]; *United States v Markland*, 489 F Supp 932 [an insulated bag]), taped (*United States v Dien*, 609 F2d 1038 [cardboard box]; *People v Spencer*, 74 AD2d 77 [cardboard box]), or fastened shut (*People v Rinaldo*, 80 Ill App 3d 433 [large box with metal straps]).

Among the cases cited in *Maldonado*, *supra*, is *United States v. Neumann*, 588 F.2d 355 (8th Cir. 1978), in which the court considered a warrantless search of a department store box and stated at 360-61: "This court is of the opinion that the warrant requirement in *Chadwick* should not be extended to the facts of this case. There is simply an insufficient expectation of privacy in an unsecured cardboard box sitting in plain view in the passenger compartment of an automobile. The arresting officers merely lifted the lid of the box and discovered a large quantity of pills." The court in *Maldonado* also stated at 700, 431 N.W.S.2d at 585: "While a box of this sort is commonly used to transport

recently purchased clothing, it is hardly comparable to personal luggage which securely encases varied articles of a personal nature. Like the department store box in *Neumann*, the 'Ripley Howard' box was discovered in plain view on the floor of the automobile, and could be opened by merely lifting a lid."

We note in passing, however, that if the defendant in this case would have sealed the cardboard box, or would have securely tied or fastened it in some manner, thereby manifesting a special expectation of privacy, the search by the police would have required the issuance of a search warrant under the law above quoted.

I also think that the majority opinion in this case might well have found that the search in question was one incident to an arrest, notwithstanding the fact that the defendant was arrested after the search was accomplished. The fact is, however, that the arrest was almost contemporaneous with, and immediately followed, the search of the box and the "pat down" of the defendant in which a spatula was discovered on his person. In *Rawlings v. Kentucky*, 448 U.S. 98, 100 S. Ct. 2556, 65 L. Ed. 2d 633 (1980), the U.S. Supreme Court stated at 111: "Where the formal arrest followed quickly on the heels of the challenged search of petitioner's person, we do not believe it particularly important that the search preceded the arrest rather than vise versa."

Finally, I point out that the actual search of the defendant's car, during which the burglary tools were discovered, was done pursuant to a validly issued search warrant. While it conceivably may be argued that this violated the "fruits of the poisonous tree" doctrine, this is entirely conjectural, and I am far from convinced that it did. If it be concluded that a search, and the resulting evidence recovered in such search, was valid and did not constitute the "fruits of the poisonous tree," then such evidence would clearly be sufficient in itself to sustain the conviction of the defendant.

For all of the above stated reasons, I can only concur in the result reached by the majority of this court in its opinion, and strongly believe that the opinion should have been based upon other grounds than it was.

IN RE INTEREST OF WITHERSPOON. STATE OF NEBRASKA, APPELLEE, V. JAMES C. SMITH, APPELLANT.

305 N.W.2d 644

Filed May 8, 1981. No. 43433.

1. **Constitutional Law: Statutes.** Neb. Rev. Stat. § 43-209(6) (Reissue 1978) is sufficiently definite and is not unconstitutionally vague.
2. **Statutes.** One to whose conduct a statute clearly applies may not successfully challenge it for vagueness.
3. **Parental Rights.** The right of a parent to maintain the custody of his or her child is a natural right subject only to the paramount interest which the public has in the protection of the rights of a child.
4. ____ In a proceeding to terminate parental rights under Neb. Rev. Stat. § 43-209(6) (Reissue 1978), there must be a determination that the child is one described in subsection (1) or (2) of Neb. Rev. Stat. § 43-202 (Reissue 1978), and that reasonable efforts, under the direction of the court, have failed to correct the conditions leading to that determination.
5. ____ Parental rights may be forfeited by substantial, continuous, and repeated neglect of a child and a failure to discharge the duties of parental care and protection.

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

Patrick H. McDonnell for appellant.

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

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

MCCOWN, J.

This is a proceeding to terminate the parental rights of an unmarried father. The District Court terminated the father's parental rights and the father has appealed.

James Witherspoon was born December 18, 1976. His mother and his father, the appellant here, were unmarried. The parents lived together for some undisclosed period of time after the birth of the child, but the relationship was a stormy one, and by sometime early in 1978 they were living apart and the son remained with his mother. The father provided some support for the son during the time they were living together but did not furnish any support after the mother and father separated.

The mother had an older child by a different father and had severe psychological, drug, and alcohol problems. On June 2, 1978, the mother called the police and asked them to pick up the children because she thought she was about to have a nervous breakdown. Thereafter the county attorney filed a petition under Neb. Rev. Stat. § 43-202(1) (Reissue 1978) to have the children declared homeless and without proper support. The children were placed in the temporary custody of Douglas County Social Services for temporary foster care. The only child involved in the present appeal is James.

On August 30, 1978, an adjudication hearing was held. The juvenile court found that James was the son of the appellant and found that James was homeless or destitute and without proper support through no fault of his parents within the meaning of § 43-202(1). The court retained custody in the Douglas County Social Services and granted the parents reasonable rights of visitation.

On October 3, 1978, a review hearing was had. At that time the appellant was living with a sister in Omaha and was employed and earning an income of $950 per month. The appellant proposed that he be given custody of James and stated that he could keep the child at his sister's home. The juvenile court ordered James' custody

to remain as previously ordered and also ordered that the appellant become involved in counseling at the Family Services on a regular basis and pay child support in the sum of $40 per month. The court also made extensive orders with respect to the mother.

On March 26, 1979, the juvenile court held another review hearing. The appellant had not paid any child support as ordered, nor had he attempted to comply with the order for counseling at Family Services. The appellant testified that his employer had reduced his hours and that he had no money left to pay child support. The juvenile court ordered appellant to participate in a positive parenting group on a weekly basis, to find and maintain adequate independent housing, and to maintain an adequate source of income for himself and his son. The court also ordered that he maintain regular visitation and pay child support of $40 per month.

On November 15, 1979, the State filed a motion to terminate the parental rights of both the mother and the father under Neb. Rev. Stat. § 43-209(6) (Reissue 1978). The mother executed a voluntary relinquishment and her parental rights were terminated on February 21, 1980.

Hearings were held on January 10 and February 5, 1980. The evidence for the State established that the appellant had failed to make any child support payments, had failed to attend parenting classes, did not obtain adequate housing independent from his sister, and had failed and refused to cooperate with the court services officer. There was also evidence that the appellant had quit his job because he did not receive a promotion he desired. The appellant's evidence was that he had various bills for which his wages were being garnished, that he had been unable to obtain other employment, and that he had failed to attend parenting classes because he already knew how to take care of children.

Following the hearings the matter was taken under advisement by the juvenile court, and on March 3, 1980,

the appellant applied to the court for custody of James upon the ground that he had been offered a job in Louisiana where he had relatives who would assist in raising James. He admitted on cross-examination that he had failed to comply with the previous orders of the court. On March 6, 1980, the juvenile court denied the application for custody and terminated the parental rights of the appellant. This appeal followed.

The appellant contends that § 43-209(6) is unconstitutionally vague. This court has previously held that the statute meets constitutional standards. 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).

The right of custody and control creates a duty of care and support. *State v. Logan*, 204 Neb. 204, 281 N.W.2d 753 (1979). In the case at bar the appellant stipulated in the original proceeding that James was without proper support. The court entered an order requiring the appellant to pay $40 per month child support. For more than a year, even while he was regularly employed, appellant completely failed to comply with that order as well as with the other orders of the court. While the appellant was fully aware of what was required of him in regard to his basic parental responsibilities, he failed to make even a good faith effort to comply. Under such facts the appellant is in no position to challenge the statute as unconstitutionally vague. One to whose conduct a statute clearly applies may not successfully challenge it for vagueness. *State v. Shiffbauer*, 197 Neb. 805, 251 N.W.2d 359 (1977).

The appellant contends that parental rights may be terminated only upon presentation of clear and convincing evidence, and that the evidence is not clear and convincing that the appellant is unfit or that he has forfeited his parental rights. The right of a parent to maintain the custody of his or her child is a natural right subject only to the paramount interest which the public has in the protection of the rights of a child. In a proceeding to terminate parental rights under § 43-209(6),

there must be a determination that the child is one described in subsection (1) or (2) of § 43-202, and that reasonable efforts, under the direction of the court, have failed to correct the conditions leading to that determination. *In re Interest of Kimsey, ante* p. 193, 196, 302 N.W.2d 707, 709 (1981).

We have repeatedly held that in such cases the best interests of the child are paramount and that parental rights may be forfeited by substantial, continuous, and repeated neglect of a child and a failure to discharge the duties of parental care and protection. *State v. Jenkins*, 198 Neb. 311, 252 N.W.2d 280 (1977).

In the case at bar the evidence was clear and convincing and the trial court did not abuse its discretion in entering its order terminating the parental rights of the appellant.

AFFIRMED.

CLINTON, J., participating on briefs.

KRIVOSHA, C.J., dissenting.

I continue to believe that we are using "overkill" in these cases coming before us involving the termination of parental rights. While we concede that before parental rights may be terminated there must be clear and convincing evidence to support the need for such drastic action, we nevertheless continue to terminate rights on evidence which I believe to be less than clear and convincing. See, dissent of Krivosha, C.J., *In re Interest of Goodon, ante* p. 256, 303 N.W.2d 278 (1981); *In re Interest of Cook, ante* p. 549, 304 N.W.2d 390 (1981).

As noted by the majority in this case: "The evidence for the State established that the appellant had failed to make any child support payments, had failed to attend parenting classes, did not obtain adequate housing independent from his sister, and had failed and refused to cooperate with the court services officer." While, to be sure, the failure of appellant to pay child support is not worthy of praise and requires the court to take appropriate action, the failings of the appellant herein

appear to be not dissimilar to those of others found within our society whose parental rights are not terminated.

Moreover, appellant's failure to attend parenting classes and his failure and refusal to cooperate with a court service officer may be contrary to the court's order. The record, however, fails to disclose how that failure has in fact affected the child. Finally, I am unable to ascertain what error was committed by the appellant sufficient to terminate parental rights by reason of his failing to obtain adequate housing independent from his sister. I know of no rule of law or reason which suggests that a child is adversely affected by living with other members of the family so long as such housing is adequate for all.

The record does support the view that the appellant could perform better as a parent and that the child probably will be better cared for by another family with greater education and income. That, however, is not the criteria which we should use in terminating parental rights. I would have continued to supervise the care of the child but would not have terminated parental rights.

ROBERT I. KULLY, APPELLEE, V. WILLIAM A. GOLDMAN, APPELLANT.

305 N.W.2d 800

Filed May 15, 1981. No. 43242.

1. **Trusts.** Mere expectancies cannot be held in trust.
2. ____. No trust can be created unless there exists some property interest which may be held by the trustee for the claimant.
3. **Trusts: Specific Performance.** In order for equity to recognize a promise to create a trust in the future when a property or property interest comes into existence, the promise must be supported by a consideration. If no consideration exists, the promise is not specifically enforceable.

Appeal from the District Court for Douglas County: D. NICK CAPORALE, Judge. Affirmed in part, and in part reversed with directions to dismiss.

John F. Thomas of McGrath, North, O'Malley & Kratz, P.C., for appellant.

Bennett G. Hornstein of Taylor, Hornstein & Peters for appellee.

Heard before BOSLAUGH, CLINTON, and BRODKEY, JJ., and REIMER and HIPPE, District Judges.

CLINTON, J.

This action was brought in the District Court for Douglas County by the plaintiff, Robert I. Kully, against the defendant, William A. Goldman, asking the court to temporarily and permanently enjoin Goldman from withholding "the transfer to plaintiff" annually of season tickets to four specific seats to the University of Nebraska varsity football games and from doing anything to prejudice Goldman's "future ability to receive such tickets from the University." The prayer further asked that Goldman be declared trustee of said tickets for Kully's use.

The action is based upon an oral agreement alleged to have been made in 1961 in which Goldman agreed to acquire for Kully four season tickets as well as four for himself. The action is founded upon the alternative theories of (1) a trust, either express, resulting, or constructive; (2) an agreement of agency to annually purchase and transfer the tickets; and (3) a breach of contract to annually purchase and transfer the tickets.

The petition prayed for special relief as to the tickets for the remainder of the 1979 season (the action being tried in the early fall of 1979), and asked for immediate relief so that Kully might use those tickets pending final determination.

The trial court found that as to the tickets for the

remainder of the 1979 season, the parties had entered into an accord and satisfaction and denied the requested relief. As to tickets for future seasons, it found that an implied trust existed and that upon execution by Kully of an undertaking with sufficient sureties in the sum of $500, Goldman be mandatorily enjoined, on being tendered by Kully the actual retail price then charged Goldman by the University of Nebraska to obtain from the university the described tickets "for all future seasons of the University of Nebraska varsity football team home games for the use and benefit of Plaintiff."

We affirm the judgment insofar as it pertains to the 1979 tickets. As to the balance of the judgment, we reverse and direct dismissal of the action. In so doing, even though this matter is tried de novo in this court, we accept the factual findings of the trial court that in about 1961 the parties made an agreement that Goldman would obtain from the University of Nebraska Athletic Department four season tickets for his own use and four for the use of Kully; that ticket reservations were made in Goldman's name; and that from the time the agreement was made in about 1961 until 1979, with the exception of the year 1972, Goldman purchased the four tickets and was paid annually by Kully either before or after the tickets were obtained.

The reason for the partial reversal is that the record establishes that there exists no legally recognized res which may be the subject of a present resulting trust and, secondly, no continuing annually resulting trust could arise where the promise is not supported by consideration. Furthermore, specific performance of an agreement ought not to be granted if it can be made nugatory by the action of a third party.

It is fundamental that in order for a present trust, whether express, resulting, or constructive, to be created, there must be a defined interest or ascertainable object of ownership. Bogert, Trusts and

Trustees §§ 111, 113 (2d ed. 1965), and § 451 (Rev. 2d ed. 1977). An agreement to create a trust in the future in order to be specifically enforceable must be supported by a consideration. *Op. cit.* § 113 at 578-79; Restatement (Second) of Trusts § 26, Comment m (1959). In order for a resulting trust of the purchase money type to arise, the trust claimant must prove payment of the purchase money at the time of or before title is acquired by the trustee. Bogert, Trusts and Trustees § 456 (Rev. 2d ed. 1977).

In this case the evidence shows that Goldman had no contractual right with the university which bound it to annually, for any period of time, sell him tickets upon tender by him of the purchase price. Because Goldman was on the list of annual purchasers, his prospect of obtaining the same seats and the same number of seats each year was good. It was not, however, a property right which he could enforce. The university could, at any time if it chose, refuse to sell tickets to Goldman. Although it is undoubtedly true that the university, barring some change in circumstances, was most likely to continue to sell Goldman tickets, it was not required to do so. In 1971 Kully sought to have the four season tickets transferred to his own name. The university's agent declined to do so, saying: "At the time I talked to you, I did not realize that the seats in question were in the east stadium.

"Several years ago we were faced with the problem of the ever increasing student body, and upon direction of the Board of Regents agreed not [to] reassign any seats in the east stadium, but rather to hold them for the students. In this way it has been possible to continue throughout the last few years *without taking seats away from old season ticket holders.*

"For this reason I cannot comply with your request to transfer the seats in section 104 to you." (Emphasis supplied.) This clearly indicates that the university considered itself as having the option not to honor

future reservations. No attempt was made by Kully to prove otherwise and his own testimony acknowledges the fact that Goldman had no contractual rights to tickets in future seasons.

In a memorandum accompanying its order the court impliedly found that there was no consideration for Goldman's promise to Kully to acquire tickets. The court, in its memorandum, stated: "Consideration is not a legal requirement of implied trusts." Kully introduced no evidence that there was an agreement to pay a consideration for Goldman's services.

It appears to be the universal rule that mere expectancies cannot be held in trust. Restatement (Second) of Trusts § 86 (1959); Bogert, Trusts and Trustees § 113 (2d ed. 1965). The courts have uniformly held that no trust can be created unless there exists some property interest which may be held by the trustee for the claimant. *American Sodium Co. v. Shelley*, 51 Nev. 344, 276 P. 11 (1929) (a revocable permit); *Voelkel et al. v. Tohulka et al.*, 236 Ind. 588, 141 N.E.2d 344 (1957) (a mere expectancy); *Hise v. Grasty*, 159 Va. 535, 166 S.E. 567 (1932) (an idea); *Edgar v. Fitzpatrick*, 377 S.W.2d 314 (Mo. 1964) (an interest not yet in existence). In *New England Trust Co. v. Sanger*, 337 Mass. 342, 348, 149 N.E.2d 598, 602 (1958), the court said: "It is equally plain that there can be no trust unless there is an existing trust res (Restatement: Trusts, § 74), and that an interest which has not come into existence cannot be held in trust. *Bennett v. Littlefield*, 177 Mass. 294, 300. Restatement: Trusts, § 75."

In order for equity to recognize a promise to create a trust in the future when a property or property interest comes into existence, the promise must be supported by a consideration. Restatement (Second) of Trusts § 75, Comment b, § 86, Comments b and c (1959). If no consideration exists the promise is not specifically enforceable. Restatement of Contracts § 366 (1932). The authors of the Nebraska annota-

tions to the Restatement cite in support of the foregoing proposition cases of options to purchase which are not supported by a consideration. See Annot. to § 366 (Supp. II 1933).

The above principles are implicit in our holding in *Valentine Oil Co. v. Powers*, 157 Neb. 71, 59 N.W.2d 150 (1953). That was an action to compel specific performance of an escrow agreement for the delivery of certain oil and gas leases upon compliance with certain conditions. The documents themselves, although still held in escrow, had terminated because there had been a failure to pay delay rentals or to commence the drilling of a well within the required time period. We there said at 86-87, 59 N.W.2d at 160: "'Based on the general equitable doctrine that equity will not render a decree which it is impractical to carry out, and because equity will not do a vain thing, a decree for the specific performance of a contract will not be granted if it would be, or could be made, nugatory . . . .'"

In the case before us, the court's decree directing specific performance was improper because there was no existing res which could be the subject of a present trust and because, insofar as a promise related to acquisition of tickets for "all" future seasons, it was unsupported by a consideration. Without question, of course, where one person furnishes money to another to purchase tickets for him and the latter does so, the purchaser does hold the tickets in resulting trust for the one furnishing the funds and such trust could, in otherwise appropriate circumstances, be specifically enforced. Kully's two other theories of recovery are not supportable because of the absence of consideration and lack of proof of monetary damage. In addition, a contract to act as agent is not usually specifically enforceable in equity. *Bethlehem Engineering Export Co. v. Christie*, 105 F.2d 933 (2d Cir. 1939); *Ice Cream Co. v. Dept. of L.C.*, 154 Ohio St. 357, 96

N.E.2d 203 (1950); *The Case of Mary Clark*, 1 Blackf. 122, 12 Am. Decs. 213 (1821).

AFFIRMED IN PART, AND IN PART REVERSED WITH DIRECTIONS TO DISMISS.

REIMER, District Judge, dissenting.

I respectfully dissent from the majority opinion, and would have affirmed, in part, the decision of the District Court and remanded the matter to the District Court with directions to partition in kind the subject matter of the litigation and set over to the plaintiff whatever right to renew the tickets for the four seats plaintiff has used for the past 17 years as might exist in the defendant.

In this case, the majority makes much of the absence of a monetary consideration, but in the past has not expressed so great a concern. In *Litz v. Wilson*, *ante* p. 483, 304 N.W.2d 48 (1981), a nominal recitation of a $1 downpayment was sufficient monetary consideration for a $100,000 contract; and in *Kinkenon v. Hue*, 207 Neb. 698, 301 N.W.2d 77 (1981), a "live-in" arrangement which had already been performed by the promisee was sufficient consideration for transfer of a home for life use. The real consideration in each of the referenced cases is the mutuality of the promises exchanged, and the same is true in the instant case with some 17 years of recognition.

KASSANDRA AIMEE KELLIE, A MINOR CHILD, EX REL. HER PARENTS AND NEXT FRIENDS, KATHLEEN ANN KELLIE AND ALAN SHIELDS, APPELLANT, V. LUTHERAN FAMILY AND SOCIAL SERVICE OF NEBRASKA, INC., APPELLEE.

305 N.W.2d 874

Filed May 15, 1981. No. 43248.

1. **Adoption.** Strict compliance with adoption statutes is required.
2. ——. A duly executed revocation of a relinquishment and consent to adoption delivered to a licensed child placement agency within a reasonable time after execution of the relinquishment and before the agency has, in writing, accepted full responsibility for the child, as required by statute, is effective to invalidate the original relinquishment and consent.

Appeal from the District Court for Lancaster County: SAMUEL VAN PELT, Judge. Reversed and remanded with directions to issue writ of habeas corpus in accordance with this opinion.

Nelson & Morris for appellant.

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

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

MCCOWN, J.

In this habeas corpus case the unmarried parents of a minor child sought to regain custody of the minor child from a licensed child placement agency. The District Court denied the writ and the parents have appealed.

Kassandra Kellie is the daughter of the relators, Kathleen Ann Kellie and Alan Shields. She was born on September 24, 1973. Her parents were then and are now unmarried. The mother, Kathleen, counseled with a social worker of the respondent, Lutheran Family and Social Service of Nebraska, Inc., at the

time Kassandra was born and ultimately decided to raise the child as a single parent.

On May 10, 1974, the District Court for Lancaster County entered a decree ordering Alan Shields to pay $90 per month child support for Kassandra and giving him reasonable rights of visitation. Kathleen maintained custody of the child from her birth until late in 1978 when the events material to this controversy arose.

During the early years of Kassandra's life Alan paid the child support required but visited his daughter only a few times. Beginning in June 1978 he voluntarily increased his child support payments to $200 per month and began visiting Kassandra much more frequently in an effort to establish a closer relationship with his daughter since he was then working in Lincoln.

Kathleen has occasionally had psychiatric treatment for depression. In the fall of 1978 she began to feel that she was not providing a suitable home for Kassandra and that her daughter would be better off if she lived in a home with both a mother and a father.

On November 2, 1978, Kathleen telephoned Steven Bryant, a social worker at the Lincoln office of Lutheran Family Service, who had previously given her advice, and told him she wanted to discuss the possibility of placing Kassandra for adoption. On November 6, 1978, she met with Bryant at his office, told him that she felt incapable of caring for the child and that someone else might do a better job, and on November 8 she reviewed the files of prospective adoptive families. She selected a tentative adoptive family, Larry and Patricia Randolph, who lived in Bridgeport, Nebraska, and asked to meet them.

On November 11, 1978, a meeting took place at Bryant's office between Kathleen and the Randolphs. Bryant and the Randolphs' son were also present. Adoption and adoption procedures were discussed. On November 17, 1978, the Randolphs returned to

Lincoln with their young son and Kathleen and Kassandra went to dinner with them. The next morning, November 18, 1978, the Randolphs returned and took Kassandra out for a drive because Kathleen felt she needed to know Kassandra's reaction to the Randolphs when her mother was not present. The Randolphs returned about noon with Kassandra.

Kathleen and Kassandra went to Bryant's office on the afternoon of Saturday, November 18, 1978. At that time Kathleen began to express some uncertainty about her own feelings. Bryant told her that she was going to have to make a decision as to the Randolphs as an adoptive family on that day and Kathleen then decided to place the child for adoption.

Bryant explained the nature of the relinquishment and told Kathleen that the relinquishment was irrevocable. Kathleen then signed the relinquishment and consent to adoption. The acceptance of the relinquishment was not signed. The child was delivered to Lutheran Family and Social Service of Nebraska, Inc., and later placed with the Randolphs.

The father, Alan Shields, never talked to Bryant or anyone else from Lutheran Family Service. Bryant knew that Shields was Kassandra's father and told Kathleen that he wanted a relinquishment from Shields but no relinquishment from Shields was ever obtained.

Three days after signing the relinquishment Kathleen called Bryant and told him that she had made a mistake and wanted Kassandra back. Bryant advised her that she could not get Kassandra back. Kathleen called Bryant again on Thanksgiving Day and went to Bryant's office twice thereafter trying to obtain Kassandra's return. On December 26, 1978, Kathleen telephoned the Randolphs and asked them to voluntarily return Kassandra and they refused.

On December 27, 1978, Kathleen personally delivered a written and notarized revocation of relinquishment to Lutheran Family and Social Service

of Nebraska, Inc., at their Lincoln office. At that time Kathleen asked to see the relinquishment and requested a copy. At that time neither copy of the relinquishment had been signed by Lutheran Family and Social Service of Nebraska, Inc. The parties have stipulated that the acceptance of the relinquishment was not signed by Lutheran Family and Social Service of Nebraska, Inc., until January 12, 1979.

On January 2, 1979, the natural parents filed this action to regain custody of Kassandra. Alan testified that he desired Kathleen to have sole physical custody of the child, but that if she failed to obtain custody he desired custody himself. At the conclusion of the trial the District Court found that Kathleen freely and voluntarily signed the relinquishment but had revoked it prior to acceptance by the respondent and that Kathleen and the Randolphs were all fit and proper persons to have custody of the child. The court also found that because Kathleen had set in motion the events which resulted in the legal proceedings by executing the relinquishment, she had forfeited her superior parental rights and that it was in the best interests of the child to remain with the Randolphs. The court made no finding as to the parental rights or fitness of Alan Shields. The District Court then denied the petition for a writ of habeas corpus and this appeal followed.

The critical section of the Nebraska adoption statutes involved here is Neb. Rev. Stat. § 43-106.01 (Reissue 1978). That section provides in part: "When a child shall have been relinquished by written instrument, as provided by sections 43-104 and 43-106, to the Department of Public Welfare or to a licensed child placement agency and the agency has, in writing, accepted full responsibility for the child, the person so relinquishing shall be relieved of all parental duties toward and all responsibilities for such child and have no rights over such child."

In the case at bar Lutheran Family Service has two executive directors and only an executive director is authorized to sign the acceptance of a relinquishment. No one signed the acceptance here on behalf of Lutheran Family Service until January 12, 1979, approximately 2 weeks after the relinquishment had been revoked by Kathleen and more than a week after this action had been commenced.

Lutheran takes the position that the statutory requirement of written acceptance is only a technical requirement and that they accepted in fact when they accepted the child at the time the relinquishment was signed.

Courts have traditionally required substantial if not strict compliance with all statutory requirements with respect to the formalities of execution of a parent's consent to adoption or relinquishment of parental rights. A consent or relinquishment which fails to meet statutory requirements cannot be given legal effect. See 2 Am. Jur. *Adoption* § 43 (1962). In this state we have followed the rule that strict compliance with the adoption statutes is required. In *McCauley v. Stewart*, 177 Neb. 759, 131 N.W.2d 174 (1964), this court affirmed the vacation of an adoption decree previously entered in the county court on the ground that the signatures on the relinquishments had not been acknowledged before a notary public at the time the relinquishments were signed. The matter of adoption is statutory, and the manner of procedure and terms are all specifically prescribed and must be followed. *In re Petition of Ritchie*, 155 Neb. 824, 53 N.W.2d 753 (1952).

This court has noted that a licensed child placement agency is required to accept responsibility for the child, in writing, under § 43-106.01. See *Kane v. United Catholic Social Services*, 187 Neb. 467, 191 N.W.2d 824 (1971).

The respondent contends that to require strict compliance with the statute will place an undue burden

upon a licensed child placement agency and create uncertainty during the time period between execution of a relinquishment and its acceptance. We disagree. Arrangements for prompt and strict compliance with the statute can obviously be made by proper administrative procedures.

A duly executed revocation of a relinquishment and consent to adoption delivered to a licensed child placement agency within a reasonable time after execution of the relinquishment and before the agency has, in writing, accepted full responsibility for the child, as required by statute, is effective to invalidate the original relinquishment and consent. Basic principles of offer and acceptance, as well as the statute, dictate that result. In the present case Kathleen attempted to revoke within 3 days after execution of the relinquishment, continued her efforts repeatedly, and delivered the duly executed revocation less than 6 weeks after the original relinquishment was signed. Under the circumstances here it was within a reasonable time.

In the case at bar the District Court quite properly found that Kathleen had the right to revoke the relinquishment and consent to adoption and that she revoked it before Lutheran had accepted, in writing, full responsibility for the child. That determination was also determinative of the habeas corpus proceeding here. Under the rules set out in *McCauley*, once the invalidity of the relinquishment and consent to adoption was established, the fitness of the natural or prospective adoptive parents, and which of them could best provide for the child, was not in issue.

It should also be pointed out that since the very recent case of *Cox v. Hendricks*, *ante* p. 23, 302 N.W.2d 35 (1981), an unmarried father may well have parental rights. In this case it is clear that Alan Shields has neither waived nor relinquished any parental rights but, instead, has joined with Kathleen in the petition for writ of habeas corpus.

The petition of the relators for a writ of habeas corpus should have been granted and the legal custody of Kassandra should have been returned to Kathleen Kellie.

REVERSED AND REMANDED WITH DIRECTIONS TO ISSUE WRIT OF HABEAS CORPUS IN ACCORDANCE WITH THIS OPINION.

WHITE, J., participating on briefs.

BRODKEY, J., concurs in result.

HASTINGS, J., dissenting.

The result of the majority opinion ignores the fundamental question which is present in every habeas corpus case involving child custody. That is, what is in the best interests of the child.

The opinion relies heavily upon *McCauley v. Stewart*, 177 Neb. 759, 131 N.W.2d 174 (1964), a proceeding in an adoption case which involved a consent and relinquishment which was void because it had not been acknowledged. The trial court had held that the suitability of the natural parents to have custody of the child would not be an issue if the adoption were invalid and there had been no abandonment. Although this court held the decree of adoption was invalid, the judgment was modified and *that portion of the decree which awarded custody of the minor child to the natural parents was not affirmed.*

In *Gray v. Maxwell*, 206 Neb. 385, 293 N.W.2d 90 (1980), we determined that a relinquishment to a private party was invalid, but went further and held that under the circumstances there must be an independent determination of the fitness of the natural parent and that an award of custody was to be founded upon the best interests of the child.

The majority today has determined that the relinquishment to an agency, if found invalid, will be treated differently than an invalid relinquishment to a private party. The fate of a child should not be

subject to such a fine distinction. The cause should be remanded for a determination of custody based upon the best interests of the child.

BOSLAUGH, J., joins in this dissent.

WHITE, J., concurring.

While I concur in the result reached by the majority in this case, I do so on the basis of the plain wording of Neb. Rev. Stat. § 43-106.01 (Reissue 1978) which requires written acceptance of responsibility for the child by the agency as well as written relinquishment by the parent in order to result in loss of parental rights. The relinquishment document itself does not operate to terminate parental rights, and the Legislature itself has determined that any time prior to written acceptance by the agency constitutes a reasonable time within which to revoke a relinquishment in favor of an agency. However, the majority is attempting to second-guess the Legislature by its statement that, even in the absence of a signed acceptance by the agency, the parent has only a "reasonable time" within which to validly revoke a relinquishment document. This gratuitous injection of a separate "reasonable time" requirement for revocation is an act not within the power of this court, since "[i]t is not within the province of a court to read a meaning into a statute that is not warranted by legislative language. Neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute." *City of Lincoln v. Nebraska Liquor Control Commission*, *ante* p. 630, 634, 304 N.W.2d 922, 925 (1981).

KRIVOSHA, C.J., and CLINTON, J., join in this concurrence.

ANNE GUYNAN, APPELLEE, V. BERNARD EDWARD GUYNAN, APPELLANT, AND LARRY AND VICKIE OSTRANDER, APPELLEES.

305 N.W.2d 882

Filed May 15, 1981. No. 43260.

1. **Trusts.** The existence of a constructive trust is to be determined by the particular facts, circumstances, and conditions of the individual case.
2. ____. A resulting trust is a trust created by act or construction of law; in its more restricted sense, and contradistinguished from a constructive trust, it is one raised by implication of law and presumed to have been contemplated by the parties, the intention as to which is to be found in the nature of their transactions but not expressed in the instrument of conveyance.
3. ____. It is generally held that the foundation of resulting trusts lies in the ownership and payment of purchase money by one when title is taken in the name of another. The payment of consideration is the key issue.
4. **Trial: Appeal and Error.** Questions not presented or passed upon by the trial court will not be considered by this court on appeal.
5. **Adverse Possession.** Possession by permission of the owner will not ripen into title by adverse possession unless the change in the character of such possession has been brought home to the adverse party.
6. **Decedents' Estates.** When one claims an estate of a deceased person under an alleged oral contract, the evidence of such agreement must be clear, satisfactory, and unequivocal.
7. **Specific Performance.** One seeking specific performance of an oral contract to leave property to another has the burden of proving not only the contract but also that he has performed the obligations imposed upon him thereunder.
8. **Real Estate: Trusts.** No estate or interest in land, other than leases for a term of 1 year from the making thereof, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by operation of law, or by deed of conveyance in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same. Neb. Rev. Stat. § 36-103 (Reissue 1978).
9. **Decedents' Estates: Wills: Trusts.** Neb. Rev. Stat. § 36-103 (Reissue 1978) shall not be construed to affect in any manner the power of a testator in the disposition of his real estate by a last will and testament, nor to prevent any trust from arising or being extinguished by implication or operation of law. Neb. Rev. Stat. § 36-104 (Reissue 1978).

10. **Specific Performance.** Nothing contained in Neb. Rev. Stat. §§ 36-101 to 36-106 (Reissue 1978) shall be construed to abridge the powers of a court of equity to compel the specific performance of agreements in cases of part performance. Neb. Rev. Stat. § 36-106 (Reissue 1978).
11. ——. Before specific performance of an oral contract to convey real estate will be decreed, the acts claimed to be in part performance themselves must unequivocally indicate the existence of the contract.

Appeal from the District Court for Keith County: HUGH STUART, Judge. Affirmed.

Firmin Q. Feltz for appellant.

C. Kenneth Spady and J. A. Lane of McGinley, Lane, Mueller, Shanahan & McQuillan for appellee Anne Guynan.

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

BRODKEY, J.

Anne Guynan (Anne), plaintiff and appellee herein, brought this action of ejectment in the District Court of Keith County, Nebraska, against her son, Bernard Edward Guynan (Edward), the defendant and appellant herein, to recover certain real estate and a basement house constructed thereon, described as Lot 12, Clarkson's Subdivision to Paxton, Nebraska. Also named as defendants in this action are Larry and Vickie Ostrander, tenants of Edward at the time of trial. The trial court found generally in favor of the plaintiff and ordered each of the defendants to deliver possession of the real estate to Anne. We affirm.

The record discloses that prior to 1955 the real estate in question was owned by Bernard J. Guynan, the husband of Anne and the father of Edward. The property in question, together with adjoining real estate owned by Bernard J. Guynan, consisted of 77 acres of grassland north of Paxton, which has been used as pasturage and for dryfarming purposes. In September of 1955, Edward obtained the permission

from his father to construct a basement house on a portion of the property. Construction of the house was completed in 1956, at a cost of $9,188.51, paid for by Edward. The house measured 28 feet x 50 feet with a 7-foot ceiling, and was constructed of concrete block which was plastered on the outside and paneled on the interior walls. It appears that Edward resided in the house from 1957 to 1960, and since that time has leased the house and has received the rentals therefrom. The record indicates that during this same period all of the real estate taxes on the property have been paid by the father, Bernard J. Guynan, or his wife, Anne.

On April 16, 1970, Bernard J. Guynan died and Anne obtained title to the property in question under the provisions of her late husband's will, which gave her the election to take either a fee simple title or a life estate in this and other real estate. Anne allowed Edward to remain in possession of the premises and to continue renting it to others as he had done in the past. However, a disagreement subsequently arose between them which led Anne to demand the property, and eventually to file this ejectment action. Edward alleged in his answer and cross-petition that he is the equitable owner of the property, for the reason that his father had promised to convey the premises to him; and that in reliance upon such promise to convey, he had expended time, materials, and money in the construction of the basement home on the property.

In their brief on appeal, the defendants assign as error: (1) That the trial court erred in failing to impose a constructive trust upon the real estate in question in favor of Edward; (2) That the court erred in failing to impress a resulting trust upon said premises; (3) The court erred in failing to find that Edward had been in adverse possession of the premises for more than the statutory period, and in failing to quiet the title in Edward; (4) The court erred in requiring the defendants to surrender possession of the premises to Anne;

(5) The court erred in failing to find that Anne was estopped from claiming title and possession to the premises; and (6) The court erred in failing to find that Edward had no intention of annexing the basement house to the real estate in question.

We first consider appellant's contention that the trial court should have imposed a trust upon the property in question, particularly a constructive trust. The appellant cites as his authority for such contention our recent case of *Kuhlman v. Cargile*, 200 Neb. 150, 262 N.W.2d 454 (1978), in which case, under the facts there presented, we did impose a constructive trust upon property deeded to a woman, Molly Lind, by her daughter and son-in-law in contemplation of the proposed forthcoming marriage of Molly to Dave Kuhlman. Although the parties in that case never married, they did build a house in which they planned to live. Kuhlman paid for the costs of construction in the sum of approximately $24,000, and Molly approximately $6,000. It appears that Kuhlman was quite advanced in years and unfamiliar with business practices. He attempted to obtain a loan upon the house and discovered that the title had been placed in the name of Molly and that she would not permit him to make the loan. The marriage between the two never materialized. We imposed a constructive trust in that case upon the theory that there had been an unjust enrichment of Molly, notwithstanding there was no direct and positive evidence of fraud or misrepresentation. In this case, the appellant also urges us to impose a constructive trust on the ground of unjust enrichment. In *Kuhlman v. Cargile, supra*, we held that a constructive trust is a relationship, with respect to property, subjecting the person who holds title to the property to an equitable duty to convey it to another on the ground that his acquisition or retention of the property would constitute unjust enrichment. We specifically stated, however, that each case involving the existence of a constructive

trust is to be determined on the particular facts, circumstances, and conditions presented therein. We did not state that we would impose a constructive trust in every case of alleged unjust enrichment. That is a matter for the determination of the trial judge with respect to whether the facts of the particular case necessitate the imposition of a constructive trust under equitable principles.

We believe that the factual situation contained in *Marco v. Marco*, 196 Neb. 313, 242 N.W.2d 867 (1976), is more similar to the present case. In that case, two sons were in business with their father. One son built a home and another building and the other son made improvements to his home, all of which were located on real property which is owned jointly by their father and their stepmother. All buildings and improvements were purchased with personal funds belonging to the sons. The sons testified that they were told by their father that they would get the property and their own houses and building when he died. They stated that their father told them he did not deed the property to them because if they should be divorced their wives were likely to get the property. In that case this court declined to impose a constructive trust upon the property and, quoting from *Paul v. McGahan*, 152 Neb. 578, 42 N.W.2d 172 (1950), stated as follows: "Constructive trusts arise from actual or constructive fraud or imposition, committed by one party on another. Thus if one person procures the legal title to property from another by fraud or misrepresentation, or by an abuse of some influential or confidential relation which he holds toward the owner of the legal title, obtains such title from him upon more advantageous terms than he could otherwise have obtained it, the law constructs a trust in favor of the party upon whom the fraud or imposition has been practiced." *Id.* at 316, 242 N.W.2d at 871. Although the trial court in the instant case did not specifically pass upon the issue of imposing a constructive trust,

by virtue of the fact that it found generally in favor of the plaintiff and against the defendants, it must have inferentially decided that issue against the defendants. We conclude from a review of the evidence in the case that the trial court was correct in not imposing a constructive trust upon the property in question under the facts existing in the record which has been reviewed by us. This is particularly true considering the fact that there is not one scintilla of evidence in the record to substantiate Edward's claim that Bernard J. Guynan, his father, had promised to give him the real estate during his lifetime. We conclude that Edward's first assignment of error is without merit.

We reach the same conclusion with regard to Edward's second assignment of error in which he claims a resulting trust in the property. We believe there is even less evidence to justify a resulting trust than to establish a constructive trust. A resulting trust is a trust created by act or construction of law; in its more restricted sense, and contradistinguished from a constructive trust, it is one raised by implication of law and presumed to have been contemplated by the parties, their intention as to which is to be found in the nature of their transactions but not expressed in the instrument of conveyance. It is generally held that the foundation of resulting trusts lies in the ownership and payment of purchase money by one when title is taken in the name of another. *Norton v. Brink*, 75 Neb. 575, 110 N.W. 669 (1906); *Cowles v. Cowles*, 89 Neb. 327, 131 N.W. 738 (1911). The payment of consideration is the key issue. There is clearly no resulting trust arising from the facts of this case, and Edward's second assignment of error is without merit.

We now address appellant's claim to the premises in question based upon adverse possession. We note at the outset that this issue was not raised or addressed before the trial court, but rather is raised for

the first time on appeal. The rule is well settled that questions not presented or passed upon by the trial court will not be considered by this court on appeal. *Powers v. Chizek*, 204 Neb. 759, 285 N.W.2d 501 (1979); *State Fire Marshal v. Schaneman*, 203 Neb. 413, 279 N.W.2d 101 (1979); *Von Seggern v. Freeland*, 200 Neb. 570, 264 N.W. 2d 436 (1978). This court will not decide an issue raised for the first time on appeal. *Edquist v. Commercial Sav. & Loan Assn.*, 191 Neb. 618, 217 N.W.2d 82 (1974). However, even if the issue were before us in this appeal, we think it is clear that it is without merit. Without discussing in detail the required elements to establish adverse possession, we need only state that it is clear from the record in this case that the possession of Edward of the premises in question is, at the most, permissive in character, and not adverse either to his father or mother. There is no evidence that his original permissive use ever changed to a hostile use sufficient to support a claim of adverse possession. The law is well established that possession by permission of the owner can never ripen into title by adverse possession unless the change of such possession has been brought home to the adverse party. *McDermott v. Boman*, 165 Neb. 429, 86 N.W.2d 62 (1957). Even after his mother received title to the property in question under the will of Bernard J. Guynan, Edward's possession remained permissive and, so far as the record discloses, was not adverse to his mother until he refused his mother's demand for possession approximately 2 years prior to trial. The requisite 10-year period for adverse possession had not expired at the time the action was commenced.

We are convinced from a review of the record that notwithstanding the claims of the appellant that his father had promised and agreed to convey the property to him, there is nothing in the record to substantiate his claim. The evidence that appears in this regard is Edward's testimony on direct examination, as follows: "Q. During your father's lifetime did

you think that he would convey it to you? A. Yes. He told me he would. MR. LANE: Objected to and ask that it be stricken, Your Honor. THE COURT: The objection is sustained, and the answer is stricken." There is nothing further in the record whatsoever which would substantiate Edward's claim that his father promised to convey the property to him, unless it be the fact that Edward did build the house upon the property with his father's apparent permission. In his cross-petition Edward prays, in addition to asking the court to impose a constructive trust upon the property, that the court order the plaintiff to convey the said premises to him "and for such other, further and different relief as to the court may seem just and equitable." It therefore would appear that Edward is claiming the property in question under an alleged oral contract with his father. In this connection, we have held that when one claims an estate of a deceased person under an alleged oral contract, the evidence of such agreement must be clear, satisfactory, and unequivocal. *Eagan v. Hall*, 159 Neb. 537, 68 N.W.2d 147 (1955); *Wyrick v. Wyrick*, 162 Neb. 105, 75 N.W.2d 376 (1956); *Vermaas v. Fagan*, 167 Neb. 465, 93 N.W.2d 381 (1958); *Kimmel v. Roberts*, 179 Neb. 8, 136 N.W.2d 208 (1965). We have also held that one seeking specific performance of an oral contract to leave property to another has the burden of not only proving the contract but also that he has performed the obligations imposed upon him thereby. *Sopcich v. Tangeman*, 153 Neb. 506, 45 N.W.2d 478 (1951); *Drew v. Hawley*, 164 Neb. 141, 82 N.W.2d 4 (1957).

In connection with oral contracts to convey real estate, we must also consider the requirements of our statute of frauds relative to conveyances of real estate. Neb. Rev. Stat. § 36-103 (Reissue 1978) provides: "No estate or interest in land, other than leases for a term of one year from the making thereof, nor any trust or power over or concerning lands, or in any manner

relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by operation of law, or by deed of conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same." It is clear that in this case there was no writing of any nature subscribed by any of the parties. Neb. Rev. Stat. § 36-104 (Reissue 1978) also provides: "Section 36-103 shall not be construed to affect in any manner the power of a testator in the disposition of his real estate by a last will and testament, nor to prevent any trust from arising or being extinguished by implication or operation of law." As will be noted above, we have disposed of the contention that a trust was created in this property, and also that no challenge was made with reference to the effect of the testator's will under which Anne elected to take a fee simple interest in the property in question. Finally, we note that Neb. Rev. Stat. § 36-106 (Reissue 1978) provides: "Nothing contained in sections 36-101 to 36-106 shall be construed to abridge the powers of a court of equity to compel the specific performance of agreements in cases of part performance." However, we have also held that before specific performance of an oral contract to convey real estate will be decreed, the acts claimed to be in part performance themselves must unequivocally indicate the existence of the contract. *Crnkovich v. Crnkovich*, 144 Neb. 904, 15 N.W.2d 66 (1944).

Our review of the record convinces us that there was no oral contract between Edward and his father that Edward's father would leave him the property, nor, as previously indicated, was there any evidence of a promise by the father to do so.

The record shows that Edward received the permission of his father to build the basement house on the property in 1955, and at no time during his father's life did Edward make a claim to the property in question. In fact, the appellant testified at trial

that he was aware of the fact that a home which is attached to real estate normally becomes part of the freehold. Upon the death of his father in 1970, Edward was named special administrator of his father's estate. The record shows that at no time during the probate proceedings did Edward ever make claim to the property in question. In fact, he testified that he was the special administrator who helped compile the inventory of assets from which his mother, Anne, made her election as to the property under the provisions of said will. No claim to the property in question was made at that time, nor did Edward challenge his mother's right to elect said property under the terms of the will. In light of his failure to assert his claim to the premises at the time of probate, it is difficult to conceive how Edward can now claim that the property belongs to him under an alleged oral agreement with his father.

In light of the record before us, we conclude that Edward has not met his burden of establishing an oral agreement to devise the property in question, and, therefore, he is not entitled to specific performance of such alleged contract, nor is he entitled to have a trust imposed thereon.

For the reasons stated, the judgment of the trial court ordering the defendants to deliver possession of the real estate to plaintiff must be, and hereby is, affirmed.

AFFIRMED.

WILLIAM P. WINTER, JR., APPELLANT, V. HARRY (PETE) PETERSON, DIRECTOR OF THE DEPARTMENT OF MOTOR VEHICLES, STATE OF NEBRASKA, APPELLEE.

305 N.W.2d 803

Filed May 15, 1981. No. 43328.

1. **Implied Consent Law: Blood, Breath, and Urine Tests: Right to Counsel.** Under the Nebraska implied consent statutes a driver is not entitled to consult with a lawyer prior to taking a test, nor is the test required to be delayed by a request of an arrested motorist that he be permitted to contact a lawyer.
2. **Implied Consent Law: Blood, Breath, and Urine Tests.** A single request to submit to a test is sufficient. There is no requirement that a second request be made if the person arrested refuses to submit to the test.
3. ____:____. A conditional or qualified refusal to take a test to determine the alcohol content of body fluids under the implied consent law is not sanctioned by the act and such refusal is a refusal to submit to the test within the meaning of the act.
4. ____:____. A refusal to submit to a chemical test occurs within the meaning of the implied consent law when the licensee, after being asked to submit to a test, so conducts himself as to justify a reasonable person in the requesting officer's position in believing that the licensee understood that he was asked to submit to a test and manifested an unwillingness to take it.
5. ____:____. To constitute a refusal to submit to a chemical test required under the implied consent statute, the only understanding required by the licensee is an understanding that he has been asked to take a test. It is no defense to refusal that he does not understand the consequences of refusal or is not able to make a reasoned judgment as to what course of action to take.

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

Greg C. Harris of Munro & Munro, P.C., for appellant.

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

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

McCOWN, J.

The appellant appeals from a judgment of the District Court for Buffalo County affirming an order of the Director of the Department of Motor Vehicles revoking the appellant's driver's license for 6 months under the implied consent law.

The facts in this case were stipulated and are not in dispute. An officer of the Kearney Police Department placed the appellant under arrest at approximately 1:45 a.m., November 9, 1978, for the offense of driving while under the influence of alcohol. The officer transported the appellant directly to the Kearney police station for the purpose of having the appellant submit to a breath test. Upon arrival at the Kearney police station at approximately 1:50 a.m., the appellant was read the implied consent form and the officer asked the appellant to submit to a Breathalyzer test. The consent form embodied the information required under the implied consent law but did not contain *Miranda* warnings, nor any reference to any right to counsel. The appellant did not submit to the test at that time but asked permission to call his attorney. Appellant's attorney arrived at the police station shortly thereafter and, after a delay of 5 or 10 minutes, conferred with the appellant, and the appellant then requested that the test be administered and stated that he would sign the implied consent form. The officer then refused to give the test for the reason that the appellant had already refused. It was then 2:25 a.m.

It was further stipulated that the amount of alcohol metabolized by the appellant during the 35-minute waiting time was not more than .009 of 1 percent.

The District Court found that the appellant refused to take the test when requested and that the request was properly made with the required warnings given to the appellant as to the consequences of refusing to submit. The District Court affirmed the

order of revocation and this appeal followed. We affirm the judgment of the District Court.

The appellant rests his contentions here on the case of *Sedlacek v. Pearson*, 204 Neb. 625, 284 N.W.2d 556 (1979). The facts in that case are essentially the same as the facts in this case up to the point at which the driver, after a conditional refusal and a delay to consult counsel, later requested that the test be administered. In *Sedlacek* the test was administered on the second occasion and Sedlacek was then charged with driving while under the influence of alcohol based on the results of the test, and also with refusal to submit to a test under the implied consent law. This court held that in a proceeding before the Director of the Department of Motor Vehicles under the implied consent law, where the evidence shows that a test was in fact performed which established a blood alcohol content in excess of that prescribed by statute, the sanction prescribed by the statute for refusal to consent to the test should not be imposed. *Sedlacek* recognized that the preliminary request to consult with a lawyer constituted a conditional refusal to submit to the test, although it recognized the fact that a subsequent request by the driver to take the test might be granted by the police and the test given. *Sedlacek* does not apply to a case in which no test was given.

This court has consistently recognized that under the Nebraska implied consent statutes a driver is not entitled to consult with a lawyer prior to taking a test, nor is the test required to be delayed by a request of an arrested motorist that he be permitted to contact a lawyer. See, *Stevenson v. Sullivan*, 190 Neb. 295, 207 N.W.2d 680 (1973); *Wiseman v. Sullivan*, 190 Neb. 724, 211 N.W.2d 906 (1973).

A single request to submit to a test is sufficient. There is no requirement that a second request be made if the person arrested refuses to submit to the test.

Heffernan v. Kissack, 192 Neb. 637, 223 N.W.2d 486 (1974).

A conditional or qualified refusal to take a test to determine the alcohol content of body fluids under the implied consent law is not sanctioned by the act and such refusal is a refusal to submit to the test within the meaning of the act. *Wohlgemuth v. Pearson*, 204 Neb. 687, 285 N.W.2d 102 (1979).

A refusal to submit to a chemical test occurs within the meaning of the implied consent law when the licensee, after being asked to submit to a test, so conducts himself as to justify a reasonable person in the requesting officer's position in believing that the licensee understood that he was asked to submit to a test and manifested an unwillingness to take it. *Wohlgemuth v. Pearson, supra.*

To constitute a refusal to submit to a chemical test required under the implied consent statute, the only understanding required by the licensee is an understanding that he has been asked to take a test. It is no defense to refusal that he does not understand the consequences of refusal or is not able to make a reasoned judgment as to what course of action to take. *Wohlgemuth v. Pearson, supra.*

In the case at bar the appellant's request to consult with an attorney constituted a qualified or conditional refusal to take the test, and the police officer, the Director of the Department of Motor Vehicles, and the District Court all found that there was a refusal to take the test. The only issue here is whether there was a refusal to take the test, and the issue of possible prejudice to the State from the delay is immaterial.

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

AFFIRMED.

LYNETTE LUM, APPELLANT, V. DENNIS MATTLEY ET AL., APPELLEES.

305 N.W.2d 878

Filed May 15, 1981. No. 43364.

1. **Records: Appeal and Error.** Where there is no bill of exceptions on appeal, this court is limited to a determination of whether the pleadings support the judgment of the trial court.
2. **Adoption.** In the absence of threats, coercion, fraud, or duress, a properly executed relinquishment of parental rights and consent to adoption form signed by a natural parent knowingly, intelligently, and voluntarily is valid.
3. ____ A valid relinquishment terminates voluntarily the signer's parental rights, including the superior right of a fit and proper parent to custody of the child.
4. ____ A natural parent seeking to revoke a valid relinquishment has the burden of showing that the best interests of the child require revocation.
5. **Records: Appeal and Error.** In the absence of a bill of exceptions, the findings of the trial court with respect to the best interests of the child must be taken as correct.
6. **Habeas Corpus: Jurisdiction: Courts: Adoption.** The determination by the District Court in a habeas corpus case does not control the proper exercise of the jurisdiction of the county court in a later adoption proceeding.

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

Mary L. Zemyan of Western Nebraska Legal Services for appellant.

Paul D. Empson for appellee.

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

WHITE, J.

Plaintiff, Lynette Lum, the natural mother of Ruby Nohelani Lum, a child born out of wedlock on November 21, 1979, brought an action in habeas corpus in the District Court for Box Butte County, Nebraska, alleging that a relinquishment signed January 15, 1980, in favor of Dennis R. and Virginia M. Mattley,

a married couple, was void because it was obtained by threats, coercion, and fraud and that the best interests of the child required that the plaintiff mother regain custody. Dennis R. and Virginia M. Mattley answered, admitting custody and denying all other allegations of the petition. The trial court found for the defendants. Plaintiff appeals.

Plaintiff assigns two errors: (1) That the trial court erred in determining that, while a natural mother may revoke her relinquishment and consent to adoption at any time prior to the adoption, the right is subject to the court's determination that the return of the custody to the natural mother is in the best interests of the child; and (2) That the trial court erred in not holding that a natural mother who has relinquished custody is entitled to return of the child's custody before adoption absent an affirmative finding of unfitness.

We note the absence of a bill of exceptions. Under our cases, where there is no bill of exceptions the court is limited to a sole question: whether the pleadings support the judgment of the trial court. *Pauley v. Scheer*, 168 Neb. 343, 95 N.W.2d 672 (1959); *Bednar v. Bednar*, 146 Neb. 726, 21 N.W.2d 438 (1946).

The trial court in its findings held that the relinquishment was voluntary and that plaintiff was neither coerced nor subjected to duress. The plaintiff does not question those findings here and they will not be further discussed.

Implicit in the question of whether the pleadings support the findings of the court is the determination of the extent of the right, if any, of a parent, after a valid relinquishment to a private person has been executed and custody delivered, to revoke the relinquishment and compel the delivery of the child.

The District Court here found that the relinquishment signed by plaintiff was made knowingly, intelligently, and voluntarily, without threats, coercion, fraud, or duress. In addition, the relinquish-

ment form appears to be valid on its face. Thus, we find that the relinquishment of parental rights and consent to adoption form signed by plaintiff is valid.

Under Nebraska law, our focus now shifts to the best interests of the child in determining the right to custody. The rule in Nebraska is that a natural parent "can, by agreement, surrender the custody of his infant children to another, so as to make the custody of that other legal, and he cannot thereafter repudiate such agreement and retain the custody of the children, unless he can show a clear breach of the agreement, or an abuse of the child, or that the best interest of the child requires it." *State v. Nebraska Children's Home Society*, 94 Neb. 255, 263, 143 N.W. 203, 206 (1913). In the wake of a valid relinquishment, then, it is incumbent upon the petitioner to show that the best interests of the child *require* that it be returned to her custody.

We are convinced that this is the proper rule to follow in cases such as the present one. In *Contreras v. Alsidez*, 200 Neb. 773, 775, 265 N.W.2d 452, 453 (1978), a habeas corpus action in which there had been no voluntary relinquishment of parental rights, we noted that: "'When a controversy arises as to the custody of a minor child between a parent and a third person, the custody of the child is to be determined by the best interests of the child with due regard for the superior rights, as between the parties, of a fit, proper, and suitable parent.'"

However, by the terms of the valid relinquishment in the present case, petitioner has voluntarily terminated her own parental rights, including "the superior rights . . . of a fit, proper, and suitable parent." Thus, petitioner's parental rights are no longer in issue here and the parties now stand on an equal footing with respect to determining custody. The rule of *State v. Nebraska Children's Home Society, supra*, properly shifts our focus now to the best interests of the child. The party demanding that custody be

changed naturally must bear the burden of affirmatively demonstrating that "the best interests of the child require" that she regain custody.

The rule's focus on the child's best interests recognizes that it is the child who will bear the brunt of the impact of revoking a valid relinquishment, by being uprooted and shifted from home to home. To focus instead upon any "right" of a relinquishing parent to change her mind would ignore the fact that parental rights are no longer an issue after a valid relinquishment and would further abrogate our responsibility to the best interests of the child. Even parental rights which are fully intact are not inalienable because of the "paramount interest" of society in the protection of the child's best interests. *State v. Duran*, 204 Neb. 546, 554, 283 N.W.2d 382, 387 (1979). Where, as here, parental rights are no longer at issue, the best interests of the child can be our only concern in determination of custody. Thus, the trial court was correct in requiring that petitioner make an affirmative showing that the child's best interests require her return to petitioner, and the assignments of error are without merit.

The trial court made detailed findings with respect to the best interests of the child requiring custody to remain with the prospective adoptive parents. In the absence of a bill of exceptions, those findings must be taken as correct.

The determination by the District Court in this habeas corpus case does not in any fashion control the proper exercise of the jurisdiction of the county court in the adoption proceeding itself.

The judgment of the District Court in this habeas corpus action is affirmed.

AFFIRMED.

KRIVOSHA, C.J., dissenting.

I find that I must dissent from the majority in this case. We have today decided the case of *Kellie v.*

Lutheran Family & Social Services, *ante* p. 767, 305 N.W.2d 874 (1981). In the *Kellie* case we held that if the adoption involved a licensed agency a natural parent could revoke an earlier executed relinquishment of her child if done before the adopting agency had accepted full responsibility for the child as required by statute. In doing so, we said at 772, 305 N.W.2d at 877: "Basic principles of offer and acceptance, as well as the statute, dictate that result."

In the instant case, we have now, in effect, held that while what we said in *Kellie* may be true with regard to a licensed agency, the situation with regard to a private placement is otherwise. I think the distinction is not valid.

The obvious intent of the statute with regard to the licensed agency is to ensure that the licensed agency accepts the responsibility of caring for the child once the child's custody is taken by the agency. Even if the agency is unable to find an appropriate home and adoptive parents for the child, it will remain responsible for the child.

Why do we require something less when dealing with a private adoption? If, as the majority in *Kellie* has suggested, principles of contract such as "offer and acceptance" apply, then why should we not also impose principles of contract such as "mutuality"? Under the majority view in this case, if the proposed adoptive parents change their minds prior to the time that the county court enters an order approving the adoption, the proposed parents incur no liability or responsibility and, at their option, may either return the child to the natural parent or turn the child over to the state as a child without parent or home. How can the natural parent, on the one hand, be bound while the adoptive parent, on the other, is without any binding obligation? I would hold that the natural parent in a private placement has the right to withdraw the relinquishment until the county court has approved the adoption and made the adop-

tive parents responsible for the child. I am not unmindful of the fact that this would introduce a measure of uncertainty into the private placement as opposed to the certainty of the licensed agency. That, in and of itself, may not be such a bad result for either the natural parents who are giving up their child or the child itself, both of whom should be assured that under any circumstance the person or entity selected by the natural parents will remain legally responsible for the child until another person or entity is approved by the county court. I would have found for the appellant and held that the attempt to revoke the relinquishment was effective.

JOSEPH KRAMER, APPELLANT, V.
DOUG SWANSON, DOING BUSINESS AS
MID-STATE BUILDING AND SUPPLY CO., ET AL.,
APPELLEES.

305 N.W.2d 806

Filed May 15, 1981. No. 43449.

1. **Summary Judgment: Motions for New Trial: Appeal and Error.** In an appeal from an order granting a motion for summary judgment, a motion for new trial is necessary in order for the court on appeal to review alleged errors in evidence.
2. **Motions for New Trial: Appeal and Error.** When a motion for new trial is not filed in a law action, the court on appeal will examine the record only for the purpose of determining whether or not the judgment of the trial court is supported by the pleadings.
3. **Pleadings.** Exhibits not identified as an attachment to any pleading nor as part of an order or entry of any kind are not part of the pleadings.

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

John O. Sennett for appellant.

Kay & Kay for appellees.

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

WHITE, J.

The plaintiff-appellant, Joseph Kramer, brought this action in the District Court for Logan County, Nebraska, against the defendants-appellees, Doug Swanson, doing business as Mid-State Building and Supply Co., and Chief Industries, Inc. (hereafter Chief). Plaintiff alleged in his petition that he purchased a grain storage building for installation on his farm, which was manufactured, constructed, and sold by the defendant Chief through its agent, defendant Swanson, and that defendant Chief had breached express and implied warranties as to fitness for the particular purpose requested by plaintiff, i.e., grain storage, since, after grain was stored in the building, the building leaked, the sides began to bulge, and the doors did not work properly, resulting in damage to the plaintiff. Defendant Chief filed a general denial and then a motion for summary judgment. The trial court granted Chief's motion for summary judgment based on findings that Swanson was not Chief's agent and that no warranties had been made or breached by Chief. We affirm.

We note at the outset that plaintiff failed to file a motion for new trial. In an appeal from an order granting a motion for summary judgment, a motion for new trial is necessary in order for the court on appeal to review alleged errors in evidence. *Valentine Production Credit Assn. v. Spencer Foods, Inc.*, 196 Neb. 119, 241 N.W.2d 541 (1976); *Ingersoll v. Montgomery Ward & Co., Inc.*, 171 Neb. 297, 106 N.W.2d 197 (1960). When a motion for new trial is not filed in a law action, the court on appeal will examine the record only for the purpose of determining whether or not the judgment of the trial court is supported by the pleadings. *Sempek v. Sempek*, 198 Neb. 300, 252 N.W.2d 284 (1977); *Nebraska Children's Home*

Soc. v. Collins, 195 Neb. 531, 239 N.W.2d 258 (1976). Exhibits not identified as an attachment to any pleading nor as part of an order or entry of any kind are not part of the pleadings. *Connor v. State*, 175 Neb. 140, 120 N.W.2d 916 (1963).

The allegations in plaintiff's petition amount to a claim that because Swanson was allegedly an agent of Chief, both Chief and Swanson are liable for the defective construction of the building. It is undisputed that the materials which were furnished by Chief were not defective. However, the contract between plaintiff and defendant Swanson, which is incorporated in the petition, does not support the allegation of agency. Nothing in the contract mentions Chief, nor does it even state that the structure to be sold to plaintiff was to be a Chief building. Although the contract does refer to defendant Swanson as an authorized vendor of farm grain storage buildings, it does not elaborate as to the source of this authority and certainly does not give any indication of an agency relationship between Swanson and Chief. This document appears to constitute the entire agreement between plaintiff and Swanson, and we therefore find nothing in the pleadings to support a claim of agency.

Similarly, plaintiff's petition contains certain statements which it alleges were warranties in the form of representations made by Chief as to the fitness of the building for grain storage. Nowhere does the contract between plaintiff and Swanson allude to any such representations by Chief, and nothing else contained in the pleadings, apart from the bare allegation, demonstrates that such representations were ever made or breached by Chief.

We find that the judgment of the trial court is supported by the pleadings and thus affirm the granting of summary judgment in favor of Chief.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WILLIE AMMONS, APPELLANT.

305 N.W.2d 808

Filed May 15, 1981. No. 43450.

1. **Criminal Defendants: Witnesses.** Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.
2. ____: ____. The constitutional right of a defendant to call witnesses in his defense mandates that they must be called without intimidation.
3. **Prosecuting Attorneys: Witnesses.** A prosecutor may impeach a witness in court but he may not intimidate him in or out of court.

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

Rodney W. Smith for appellant.

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

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

MCCOWN, J.

The defendant was found guilty by a jury of robbery and use of a firearm in the commission of a felony, and was sentenced to imprisonment for not less than 8 nor more than 15 years on the robbery count and not less than 2 nor more than 3 years on the firearm count, the sentences to run consecutively.

On November 6, 1979, a Safeway store in Omaha, Nebraska, was robbed by two black males. One man approached the courtesy booth in a corner of the store with a gun and demanded all the money from the clerk in the booth. The clerk put $700 to $800 in an envelope and the robber left the store with his accomplice, who had been standing a few feet away. The man with the gun was described as being approximately 5 feet 6 inches tall and weighing approximately 140 pounds. The accomplice was described as quite a bit

taller, 6 feet at least and perhaps 6 feet 2 inches. The robbery took approximately 3 minutes and the only evidence against the defendant was the eyewitness testimony of the clerk in the courtesy booth.

Following the robbery the clerk called the police and gave them a description of the robbers. The day following the robbery the clerk was shown a spread of approximately 8 to 10 photographs of police suspects. The clerk picked a photograph of Glen Harrington as looking like the robber, but made no positive identification. No police record was kept as to what other pictures were included in the spread, nor whether the defendant's picture was included. On November 29, 1979, the clerk viewed a police lineup of four black males. Michael Harrington, a brother of Glen Harrington, was one of the individuals in the lineup. The clerk was unable to identify anyone in the lineup. Both Glen and Michael Harrington are approximately the same height and size as the defendant. On December 4, 1979, the clerk was again shown a spread of eight police photographs. The clerk picked one photograph as a possible suspect but could not make a positive identification. On December 19, 1979, the police held a lineup of three individuals, including the defendant. The defendant was the only short man in the lineup. The clerk immediately identified the defendant as the man with the gun who had robbed him, and identified him again at preliminary hearing and at the trial. He testified that his identification was based on his observation of the defendant at the time of the robbery.

An information against the defendant was filed and on January 10, 1980, a plea of not guilty was entered and the cause was set for trial to the next jury panel. On March 7, 1980, the defendant filed a motion to suppress all pretrial identifications of the defendant, and the motion was scheduled for hearing on March 24, 1980. On March 11, 1980, the defendant was advised that his case would be called for trial

the following morning and suppression hearing would be held prior to the commencement of trial. The defendant made a motion for continuance which was overruled on March 12, 1980, together with the motion to suppress identifications.

Trial commenced and the State presented its case which rested entirely on the identification of the defendant by the clerk. At the conclusion of the State's case a hearing was held in chambers outside the presence of the jury and a record made of the proceedings. The prosecutor, defendant and his counsel, and a prospective witness, Michael Harrington, and his counsel were present. At the request of the defendant, Harrington had been brought to court from the penal complex where he was incarcerated.

Harrington's counsel stated that he had been notified a day or two previously that the defendant intended to call Harrington as a witness, and that he understood that the testimony of Harrington, if he took the stand, would incriminate him with respect to the offense for which the defendant was being tried. He also stated that Harrington was presently serving a 3-year sentence in the penal complex which began approximately 1 month before. Harrington's counsel also stated that that sentence was the result of pleading guilty to the charge of assault in the second degree and that there was an agreement made with the prosecutor in that case that two burglaries would be dismissed, and further that Harrington would clear up some robberies in which he was a suspect. Harrington's counsel also stated, and Harrington confirmed, that in Harrington's discussions with the prosecutor in the assault case he admitted his guilt in the robbery for which the defendant was being tried, and was assured by that prosecutor that no prosecution would result as long as he pleaded guilty to the second degree assault.

The trial judge in this case, who had also been the judge at the time of Harrington's guilty plea, in

response to an inquiry by Harrington, stated that his recollection was: "If you pled guilty to that charge, no other charge would be filed. That was the agreement, as I understood it, between you and the State."

Harrington's counsel had advised Harrington that he was not positive whether or not the State would treat Harrington's testifying in this case as a nullification of the agreement and file charges against Harrington based on the admissions he made on the witness stand, and that he had advised Harrington that the only way he could assure him there would be no prosecution would be for Harrington to take the fifth amendment if he was called as a witness.

The trial judge explained to Harrington that the court had nothing to say about whether the State brought a charge or not and that such decisions were entirely up to the prosecution, and advised Harrington that he could not tell him whether or not the county attorney was going to file a charge if Harrington testified. The prosecutor then stated for the record that the State would prosecute. The prosecutor stated his feeling that any agreement the prosecutor in the Harrington case made was "out the window" if Harrington took the stand in the present case and testified in open court that he committed the robbery.

Harrington then decided that he would take the fifth amendment and refuse to answer any questions. The prosecutor requested that Harrington not be sworn in front of the jury, and the court asked Harrington if he was called as a witness would he refuse to answer any questions about the robbery involved in this case, and upon receiving Harrington's affirmative answer, stated that Harrington had invoked his constitutional privilege, and concluded the hearing.

When the trial resumed the defendant took the stand as the only witness for the defense and denied any knowledge of or participation in the crime. He also testified that he had previously been convicted of two felonies. The jury returned a verdict of guilty and this

appeal followed.

The defendant contends that the failure to grant immunity to the witness Harrington and the actions of the prosecutor in threatening Harrington with prosecution if he took the stand and admitted committing the robbery improperly interfered with the fact-finding process and denied the defendant a fair trial. The essence of defendant's argument in this court is that the trial judge should have granted immunity to the witness Harrington. That issue was not raised at the trial level, but even if it had been such claims for defense witness immunity have been almost uniformly rejected by the courts. See *United States v. Alessio*, 528 F.2d 1079 (9th Cir. 1976), *cert. denied* 426 U.S. 948, 96 S. Ct. 3167, 49 L. Ed. 2d 1184 (1976).

The valid basis for objection here is not that the court failed to grant Harrington immunity as a witness. Instead, the issue is whether or not the prosecution intimidated Harrington and caused him to refuse to testify as a witness. The constitutional right of a defendant to call witnesses in his defense mandates that they must be called without intimidation. A prosecutor may impeach a witness in court but he may not intimidate him in or out of court. See *People v. Pena*, 383 Mich. 402, 175 N.W.2d 767 (1970). The principles set out in *Pena* were approved in the very recent case of *State v. Ivy*, 300 N.W.2d 310 (Iowa 1981). In that case, although the court declined to reverse the conviction because of the absence of prejudice, the court said: "We agree with the rationale of these cases which hold it is improper to intimidate a witness. We agree, too, that, if prejudice results, a defendant is deprived of due process." *Id.* at 314.

The foundational case for establishing the right of a defendant to present his own witnesses to establish a defense as a fundamental element of due process of law under the sixth amendment right to compulsory process is *Washington v. Texas*, 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). That case held that

just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Typical of cases holding that where the government has prevented a defendant's witness from testifying freely before the jury it cannot be held that the jury would not have believed the testimony or that the error is harmless is *United States v. Morrison*, 535 F.2d 223 (3d Cir. 1976). In that case the prosecutor repeatedly warned a prospective defense witness about the possibility of a perjury charge if she testified falsely, where charges against her in the matter had previously been dropped when it was disclosed that she had been under 18 years old at the time. She understood that with the dropping of the charges she was free from prosecution for her role, which was not true. In that case the Third Circuit not only reversed the defendant's conviction but held that where prosecutorial misconduct caused the defendant's prime witness to withhold, out of fear of self-incrimination, testimony which would otherwise have been available to the defendant, due process demanded that the government at a new trial request use immunity for that witness.

The same principles which apply to prosecutorial intimidation were also applied to intimidation of a single defense witness by a judge in the case of *Webb v. Texas*, 409 U.S. 95, 93 S. Ct. 351, 34 L. Ed. 2d 330 (1972). In that case the Supreme Court of the United States concluded that the judge's threatening remarks directed only at the single witness for the defense effectively drove that witness off the stand and thus deprived the petitioner of due process of law under the fourteenth amendment.

In *United States v. Thomas*, 488 F.2d 334 (6th Cir. 1973), the court held that the actions of the prosecutor, in gratuitously admonishing a witness of the possibility

that he might be prosecuted for misprision of felony if he testified, constituted prejudicial error, even though evidence of defendant's guilt was overwhelming. The court also held that the government's later statement that the witness would not be prosecuted was not sufficient to overcome the prejudice. The court held that the action of the prosecutor involved in that case substantially interfered with any free and uninhibited determination the witness might have made as to whether to testify and, if so, the content of that testimony.

In the case at bar the record is clear that the prosecutor's threat to Harrington caused Harrington to refuse to testify and resulted in depriving the defendant of that testimony. Courts are divided as to whether reversal is required for intimidation in the absence of a showing of prejudice. In the case at bar the prejudice is clear. Where the only real issue in the case involved the identification of the robber and a witness was prevented from testifying that he was the robber, it is difficult to imagine a clearer case of prejudice.

It is unnecessary to discuss the remaining issues raised by the defendant in this appeal.

REVERSED.

CLINTON, J., dissents.

HASTINGS, J., concurring.

I concur with the result reached by the majority on the ground, and only on the ground, that the State failed to honor what I believe was an enforceable plea bargain. I do not want to suggest that a judge or prosecutor who warns a witness of the possibility of self-incrimination or of the penalties for perjury has engaged in witness intimidation.

BOSLAUGH, J., joins in this concurrence.

RICHARD E. REEVES, APPELLEE, V. BRIAN R. WATKINS, APPELLANT.

305 N.W.2d 815

Filed May 15, 1981. No. 43467.

1. **Quantum Meruit: Pleadings.** A party cannot recover upon a quantum meruit where he pleads and relies during the trial solely upon an expressed contract.
2. **Mechanics' Liens.** A contractor cannot successfully assert a mechanic's lien upon property where there has been only part performance or a lack of substantial performance of the contract.
3. ——. Objections which go to the validity or existence of the lien or the debt on which it is based may be set up in defense to an action to enforce the lien, and damages for the lienholder's default in performance under the contract giving rise to the debt and lien may be set up to defeat the lien or to reduce the amount collected under it.
4. **Trial: Judicial Notice.** Where cases are interwoven and interdependent and the controversy involved has already been considered and determined in a prior proceeding involving one of the parties now before the court, the court has the right to examine its own records and take judicial notice of its own proceedings and judgment in the prior action.
5. **Collateral Estoppel.** Collateral estoppel may be applied if the identical issue was decided in a prior action, there was a judgment on the merits which was final, the party against whom the rule is to be applied was a party or in privity with the party to the prior action, and there was an opportunity to fully and fairly litigate the issue in the prior action.
6. **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.

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

Steven D. Keist of Watkins, Osborne, Scott & Keist for appellant.

James M. Kelley of Kelley & Thorough for appellee.

Heard before KRIVOSHA, C.J., MCCOWN, WHITE, and HASTINGS, JJ., and RICHLING, District Judge.

KRIVOSHA, C.J.

The appellant, Brian R. Watkins (Watkins), appeals from an order entered by the District Court for

Lancaster County, Nebraska, affirming a previous order entered by the municipal court of the city of Lincoln, Nebraska, sustaining a motion for summary judgment filed by the appellee, Richard E. Reeves (Reeves). We affirm.

The record discloses that Watkins, a partner in a joint venture known as Venture "78" Ltd., personally entered into a contract with Reeves for architectural services in connection with the design and construction of an office complex to be constructed and owned by Venture "78." The contract, as disclosed by the evidence, is a standard AIA Document B141, Owner-Architect Agreement, and contains in Article 8 of the agreement a specific provision for liquidated damages. Article 8 of the agreement provides as follows:

"8.1 This Agreement may be terminated by either party upon seven days' written notice should the other party fail substantially to perform in accordance with its terms through no fault of the party initiating the termination.

"8.2 In the event of termination due to the fault of parties other than the Architect, the Architect shall be paid his compensation for services performed to termination date, including Reimbursable Expenses then due and all termination expenses.

"8.3 Termination Expenses are defined as Reimbursable Expenses directly attributable to termination, plus an amount computed as a percentage of the total compensation earned to the time of termination, as follows: 20 percent if termination occurs during the Schematic Design Phase; or 10 percent if termination occurs during the Design Development Phase; or 5 percent if termination occurs during any subsequent phase."

The evidence further discloses that sometime after the contract between Watkins and Reeves was entered into on July 22, 1978, and before the project was completed, a mortgage foreclosure involving the project property was filed by the United States

National Bank of Omaha against Venture "78" in the District Court for Lancaster County, Nebraska.

Thereafter, Reeves intervened and filed an answer and cross-petition in the mortgage foreclosure. In his cross-petition he alleged the execution of the contract between himself and Watkins and the existence of a valid mechanic's lien which he sought to foreclose. Furthermore, Reeves alleged that he had "performed all of the duties imposed upon him under the terms of the contract evidenced by Exhibit 'A.'" He further alleged, as he was required to do, that he had caused to be filed in the office of the Register of Deeds of Lancaster County, Nebraska, a mechanic's lien which had attached to it a copy of the written agreement between Reeves and Watkins. Watkins answered the cross-petition by filing a general denial.

On May 18, 1979, the District Court for Lancaster County, Nebraska, entered a decree of foreclosure in favor of the United States National Bank as first lienholder. The court further found in its decree that Reeves claimed a lien but that a dispute existed as to the validity of the alleged lien. The court therefore determined that the dispute should be resolved, and if resolved in favor of Reeves, should constitute a third lien against the property, the second lien being in favor of First Savings Company of Lincoln.

The parties then entered into a trial stipulation in the foreclosure action in which Watkins acknowledged executing the agreement with Reeves, and further acknowledged that a mechanic's lien with attachments, including the contract, was filed in the office of the Register of Deeds of Lancaster County, Nebraska. Watkins further stipulated that the joint venture had paid to Reeves, under the terms of the agreement, the sum of $33,674.88.

Trial was then had on the validity of Reeves' mechanic's lien, and on May 29, 1979, judgment was entered by the District Court for Lancaster County, Nebraska, in the foreclosure action in favor of Reeves

and against Watkins. In its judgment, the court specifically found that the mechanic's lien filed by Reeves was a valid mechanic's lien and should be foreclosed against the joint venture for the amount of $1,744.25. The parties acknowledge that the sum included in the mechanic's lien foreclosure did not include any part of the liquidated damages now being sought.

Reeves thereafter filed a petition in the municipal court of the city of Lincoln seeking to recover the termination fee in the amount of 5 percent of $36,043.85 as provided for in Article 8.3 of the contract. By way of answer, Watkins admitted the execution of the contract but denied all of the other allegations of Reeves' petition. Watkins further filed a counterclaim in which he acknowledged that Reeves had previously been paid $36,043.85 but maintained that Reeves had overcharged Watkins and had not given him credit for the overcharge. Furthermore, Watkins alleged that the termination was not due to any act of Watkins but solely due to the acts of Reeves. Watkins also alleged that Reeves had not performed all of the services required to be performed by him in a timely manner and that these delays caused construction cost increases in an amount which Watkins was unable at that time to determine. Watkins further alleged that Reeves failed to perform all of the requirements of the contract, specifically failing to obtain approval of the project by the Lower South Platte Natural Resources District. The contract, however, makes no provision for the work to be done at a specific time, nor does it require the architect to obtain the approval of the Lower South Platte Natural Resources District.

Based in part upon the facts determined between the parties in the mechanic's lien foreclosure and in part on Watkins' admission that he had paid to Reeves the sum of $36,043.85, Reeves filed a motion for summary judgment in the municipal court. The municipal court granted the motion for summary judgment

and Watkins appealed to the District Court. After consideration of the matter, the District Court affirmed the judgment of the municipal court. It is from this order by the District Court for Lancaster County, Nebraska, that Watkins appeals, maintaining that the trial court erred in sustaining the motion for summary judgment.

Specifically, Watkins assigns as error the fact that the court could not and should not have found that Watkins was collaterally estopped from objecting to the validity of the contract by virtue of the decree of foreclosure which related only to "work actually performed" by Reeves and did not decide any issues regarding the validity of the contract and the rights of the parties as to termination charges. Watkins further maintains that the trial court erred in sustaining the motion for summary judgment as there were genuine issues of fact which could not be decided by a motion for summary judgment, though, in his assignment of error, he does not set out what those genuine issues of fact are.

We turn first to Watkins' contention that the findings made by the trial court in the mechanic's lien foreclosure brought by Reeves did not collaterally estop Watkins from denying the enforceability of the contract, including the provisions of Article 8.3.

We believe that Watkins' position is taken by him because he does not fully appreciate the significance of the mechanic's lien foreclosure. Mechanic's liens are purely creatures of statute, and in Nebraska are governed by the provisions of Neb. Rev. Stat. §§ 52-101 et seq. (Reissue 1978). For one to be entitled to a mechanic's lien under the act, the person claiming the lien must perform labor or furnish material "by virtue of an open running account or a contract or agreement, expressed or implied, with the owner thereof or his agents." § 52-101. *Barry v. Barry*, 147 Neb. 1067, 26 N.W.2d 1 (1947). It is clear, therefore, that before one may claim a mechanic's lien, one

must have a contract, expressed or implied. In this case, the mechanic's lien was claimed by virtue of an express, executed contract. Watkins makes some contention that the mechanic's lien foreclosure established only that Reeves had performed work for which he was entitled to recover. Watkins asserts that neither the existence of the written contract nor its validity was determined by the earlier foreclosure action. That, of course, cannot be. Nebraska has traditionally refused to permit one to sue on an expressed contract and recover on an implied contract. We have, on more than one occasion, said that a party cannot recover upon a quantum meruit where he pleads and relies during the trial solely upon an expressed contract. See, 17A C.J.S. *Contracts* § 569a (1963); *Lincoln Service & Supply, Inc. v. Lorenzen*, 171 Neb. 671, 107 N.W.2d 333 (1961); *Starbird v. McShane Timber Co.*, 94 Neb. 79, 142 N.W. 683 (1913); *Dorrington v. Powell*, 52 Neb. 440, 72 N.W. 587 (1897); *Mayer v. Ver Bryck*, 46 Neb. 221, 64 N.W. 691 (1895); *Powder River Live Stock Co. v. Lamb*, 38 Neb. 339, 56 N.W. 1019 (1893). There is no way, therefore, that we could reach any other conclusion except to find that the judgment in the mechanic's lien foreclosure was based upon the trial court's finding that the contract between Watkins and Reeves, attached to the mechanic's lien and sued upon later in the municipal court, was a validly executed document enforceable between Watkins and Reeves.

Moreover, the fact that the court permitted the mechanic's lien to be foreclosed establishes that Reeves proved that he had "performed all of the duties imposed upon him under the terms of the contract," as alleged in his cross-petition in the mechanic's lien foreclosure action. That is so because the general rule is to the effect that "[a] contractor cannot successfully assert a mechanic's lien upon the property where there has been only part performance or a lack of substantial performance of the contract." See, 53 Am.

Jur. 2d *Mechanics' Liens* § 51 (1970); *Bonsall v. Sterrett*, 197 Neb. 753, 250 N.W.2d 910 (1977); *Lincoln Stone & Supply Co. v. Ludwig*, 94 Neb. 722, 144 N.W. 782 (1913); *Hahn v. Bonacum*, 76 Neb. 837, 107 N.W. 1001 (1906). Furthermore, it was incumbent upon Watkins to raise the invalidity or nonperformance of the contract in the mechanic's lien foreclosure. "Objections which go to the validity or existence of the lien or the debt on which it is based may be set up in defense to an action to enforce the lien." 57 C.J.S. *Mechanics' Liens* § 273 (1948). Damages for the lienholder's default in performance under the contract giving rise to the debt and lien may be set up to defeat the lien or to reduce the amount collected under it. See 57 C.J.S. *Mechanics' Liens* § 277 (1948).

We must therefore conclude that following the trial in the District Court involving the mechanic's lien, the trial court found, as a part of foreclosing Reeves' mechanic's lien, that Watkins and Reeves had entered into the written contract pleaded; that Reeves had substantially performed all of the duties imposed upon him under the contract; and that Watkins had no defense to invalidate the agreement. Those findings between these two parties may not again be litigated under the doctrine of collateral estoppel.

In *Johnson v. Marsh*, 146 Neb. 257, 19 N.W.2d 366 (1945), we held that where cases are interwoven and interdependent and the controversy involved has already been considered and determined in a prior proceeding involving one of the parties now before the court, the court has the right to examine its own records and take judicial notice of its own proceedings and judgment in the prior action.

Furthermore, in *Peterson v. The Nebraska Nat. Gas Co.*, 204 Neb. 136, 139, 281 N.W.2d 525, 527 (1979), we said: "Generally, mutuality of estoppel is no longer considered to be a requirement for the application of collateral estoppel. It is now generally held that

collateral estoppel may be applied if the identical issue was decided in a prior action, there was a judgment on the merits which was final, the party against whom the rule is to be applied was a party or in privity with the party to the prior action, and there was an opportunity to fully and fairly litigate the issue in the prior action." The issue of the validity of the contract and its enforceability, having been determined in the mechanic's lien foreclosure, is no longer open to debate in the action in the municipal court.

The mere fact that Watkins maintains that a trial may disclose some genuine issue of fact is not sufficient to prevent the court from entering summary judgment. In *French v. Cornwell*, 202 Neb. 569, 575, 276 N.W.2d 216, 220 (1979), we said: "'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. Properly used it can accomplish that purpose.'" And in *Watters v. Foreman*, 204 Neb. 670, 677, 284 N.W.2d 850, 854 (1979), we said: "Where there exists no genuine issue of a material fact and a litigant is entitled to judgment as a matter of law, it is error for the trial court to overrule the litigant's motion for summary judgment."

Based upon the pleadings and the affidavits of the parties as presented to us, we are unable to discern any genuine issue of fact and believe that Reeves is entitled to judgment as a matter of law. We therefore must conclude, as the trial court concluded, that Reeves was entitled to summary judgment. The trial court, therefore, was correct in affirming the municipal court's action granting the motion for summary judgment in favor of Reeves and against Watkins. The judgment is affirmed.

AFFIRMED.

RICHLING, District Judge, concurs in result.

STATE OF NEBRASKA, APPELLEE, V. WILLIE AMMONS, APPELLANT.

305 N.W.2d 812

Filed May 15, 1981. No. 43514.

1. **Criminal Trials: Witnesses.** Except in certain crimes such as sexual assault, a conviction may rest upon the testimony of a single eyewitness.
2. **Witnesses.** Generally, expert testimony is admissible only if it will be of assistance to the jury in its deliberations and relates to an area not within the competency of ordinary citizens.

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

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

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

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

BOSLAUGH, J.

The defendant appeals from a sentence to imprisonment for 16 2/3 to 50 years for robbery and a consecutive sentence of 5 to 10 years for use of a firearm to commit a felony. The assignments of error are that the evidence was insufficient to sustain the conviction; the trial court erred in failing to sustain the defendant's motion for a mistrial; in refusing to permit the defendant to introduce expert evidence as to the unreliability of eyewitness identification; and in refusing to grant immunity to a defense witness.

The evidence shows that on December 13, 1979, the defendant and an unidentified companion entered the Safeway store at 5755 Redick Avenue in Omaha, Nebraska, and at gunpoint took approximately $12,000 in cash from the safe and cash drawers in the office or check cashing booth in the store. The manager of

the store, who was forced to open the safe by the defendant, positively identified the defendant at the trial as the person who committed the robbery.

The defendant was arrested 6 days later. The officer who made the arrest was asked on direct examination if he had occasion to go to the City National Bank in Omaha on that day. The officer replied that the police had received information that a suspect wanted in regard to the robbery "was currently at the parole office up there." No objection or motion to strike was made at that time, but after the State had rested, the defendant moved for a mistrial because the witness had testified the defendant was arrested at the parole office. The defendant argues that this prevented him from having a fair trial because it implied that he had a criminal record.

The trial court felt that the evidence as to the place of arrest was harmless because there were a number of reasons why the defendant might be at the probation office and the statement of the witness did not necessarily imply that the defendant had been previously convicted of a crime. A motion for a mistrial is addressed to the sound discretion of the trial court, and its ruling will not be disturbed in the absence of a showing of an abuse of discretion. *Kenyon & Larsen v. Deyle*, 205 Neb. 209, 286 N.W.2d 759 (1980). The ruling was within the discretion of the trial court, and the failure to grant a mistrial was not an abuse of discretion.

The defendant contends the evidence was not sufficient to support the finding of guilty because the identification of the defendant as the robber was based upon the testimony of only one eyewitness to the crime. The defendant argues that corroborative evidence should be required where the identification of the person who committed the crime is based on the testimony of a single eyewitness.

It has long been the rule in this state that except in certain crimes such as sexual assault, a conviction may

rest upon the testimony of a single eyewitness. *Lee v. State*, 124 Neb. 165, 245 N.W. 445 (1932); *Schultz v. State*, 88 Neb. 613, 130 N.W. 105 (1911); *Cherpinsky v. State*, 122 Neb. 52, 238 N.W. 917 (1931); *Froding v. State*, 125 Neb. 322, 250 N.W. 91 (1933); *Small v. State*, 165 Neb. 381, 85 N.W.2d 712 (1957). See, also, *State v. Konvalin*, 179 Neb. 95, 136 N.W.2d 227 (1965); *Wilshusen v. State*, 149 Neb. 594, 31 N.W.2d 544 (1948); *State v. Cannon*, 185 Neb. 149, 174 N.W.2d 181 (1970); *Buckley v. State*, 79 Neb. 86, 112 N.W. 283 (1907). The eyewitness in this case, the manager of the store, had a good opportunity to view the defendant at close range while the robbery was being committed. There was ample foundation for his testimony and the evidence was sufficient to sustain a finding of guilty beyond a reasonable doubt.

The defendant produced a psychologist as an expert witness and offered his testimony to prove that eyewitness identification testimony tends to be inaccurate and unreliable. After an offer of proof had been made outside the presence of the jury, the trial court sustained a motion in limine made by the State and refused to admit the testimony. The trial court found that the prejudicial effect of the testimony outweighed its probative value; that the issue was not a proper subject for expert testimony; and that the evidence would usurp the function of the jury.

The general rule is that expert testimony is admissible only if it will be of assistance to the jury in its deliberations and relates to an area not within the competency of ordinary citizens. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, expert testimony may be admissible. Neb. Rev. Stat. § 27-702 (Reissue 1979). The expert testimony offered by the defendant in this case met none of those requirements. The accuracy or inaccuracy of eyewitness observation is a common experience of daily life. Such testimony would invade the province of the

jury. It is not surprising that almost no authority can be found to support the defendant's contention. The trial court did not err in sustaining the motion in limine.

The final assignment of error relates to the refusal of the trial court to grant immunity to Walter L. Goodwin, a witness tendered by the defense. According to defendant's counsel, if immunity had been granted, Goodwin would have testified that he had been a participant in the robbery and the defendant had not participated in the robbery.

Apparently, Goodwin was the otherwise unidentified companion of the defendant in the robbery. Goodwin was not prosecuted because evidence against him, which had been seized by the State, had been suppressed; and as a result of threats made to an identification witness, that witness refused to testify. Under the circumstances of this case, even if it be assumed that the trial court had the power to grant immunity to a defense witness, it was not error to refuse immunity to Goodwin in this case.

In *State v. McCown*, 189 Neb. 495, 203 N.W.2d 445 (1973), we recognized that immunity is an investigative tool that is solely a prerogative of the government. Its purpose is to permit the prosecution of offenses which could not otherwise be investigated or prosecuted.

It is generally held that immunity can be granted only pursuant to statutory authorization. See *United States v. Lenz*, 616 F.2d 960 (6th Cir. 1980). Under the Nebraska statute, Neb. Rev. Stat. § 29-2011.01 (Reissue 1979), the right to ask for immunity is conferred upon the prosecution only.

In *State v. Ammons*, *ante* p. 797, 305 N.W.2d 808 (1981), we noted that claims for defense witness immunity have been almost uniformly rejected by the courts.

There being no error, the judgment of the District Court is affirmed.

AFFIRMED.

McCOWN, J., concurs in result.

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Accreditation.

Where all the acts necessary to effect accreditation of a school district have been met prior to the statutory board ordering the transfer, and in fact the formal certification is granted prior to the time the children begin school and prior to the time the District Court acts on the appeal, the issue of the accreditation of the new district must be considered to have become moot and the transfer deemed to be permitted on the question of accreditation. Miller v. School Dist. No. 69 290

Administrative Agencies.

1. Enactment of the Environmental Protection Act does not divest district courts of subject matter jurisdiction to enjoin proposed solid waste disposal areas alleged to be in violation of county zoning ordinances. Omaha Fish and Wildlife Club, Inc. v. Community Refuse, Inc. 110
2. The Department of Environmental Control and county zoning officials are not indispensable parties in a suit against a licensee for a solid waste disposal area where the suit is to enjoin against an alleged violation of a county zoning ordinance. Omaha Fish and Wildlife Club, Inc. v. Community Refuse, Inc. 110
3. In proceedings to review an order of the State Real Estate Commission, the questions to be determined are whether the order of the Commission is supported by substantial evidence, whether the Commission acted within the scope of its authority, and whether its action was arbitrary, capricious, or unreasonable. Wright v. State ex rel. State Real Estate Comm. 467
4. The Nebraska Liquor Control Commisson has broad discretion in determining whether applications for licenses should be granted or denied and courts are without authority to interfere with that discretion unless it has been abused. City of Lincoln v. Nebraska Liquor Control Comm. 630
5. The courts, in reviewing decisions of the Nebraska Liquor Control Commission, do not exercise independent judgment on fact and policy, but must give due deference to the decisions made by the commission if the same are based upon evidence in the record. City of Lincoln v. Nebraska Liquor Control Comm. 630

Adoption.

1. Strict compliance with adoption statutes is required. Kellie v. Lutheran Family & Social Service 767
2. A duly executed revocation of a relinquishment and consent

to adoption delivered to a licensed child placement agency within a reasonable time after execution of the relinquishment and before the agency has, in writing, accepted full responsibility for the child, as required by statute, is effective to invalidate the original relinquishment and consent. Kellie v. Lutheran Family & Social Service 767
3. In the absence of threats, coercion, fraud, or duress, a properly executed relinquishment of parental rights and consent to adoption form signed by a natural parent knowingly, intelligently, and voluntarily is valid. Lum v. Mattley 789
4. A valid relinquishment terminates voluntarily the signer's parental rights, including the superior right to a fit and proper parent to custody of the child. Lum v. Mattley 789
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6. The determination by the District Court in a habeas corpus case does not control the proper exercise of the jurisdiction of the county court in a later adoption proceeding. Lum v. Mattley 789

Adverse Possession.

1. A claim of title to land by adverse possession must be proved by actual, open, exclusive, and continuous possession under claim of ownership for a full period of 10 years.
   Nebraska State Bank v. Gaddis 136
   Weiss v. Meyer 429
2. Where one enters upon and takes possession of land of another under mistake as to the true boundary line, claiming the land as his own to a definite and certain boundary, he acquires title thereto by adverse possession by actual, open, exclusive, and continuous possession thereof under such claim for 10 years or more. Nebraska State Bank v. Gaddis 136
3. It is the visible and hostile possession, with an intention to possess land occupied under a belief that it belongs to the possessor, that constitutes its adverse character. Nebraska State Bank v. Gaddis 136
4. When a claimant occupies the land of another by actual, open, exclusive, and continuous possession, the owner is placed on notice that his ownership is endangered; and unless he takes proper action within 10 years to protect himself, he is barred from action thereafter and the title of the claimant is complete. It is the nature of the hostile possession that constitutes the warning, not the intent of the claimant when he takes possession. Nebraska State Bank v. Gaddis 136

5. In Nebraska the law is settled that the operation of the statute of limitations is to vest absolute title in the occupant, when he has maintained an actual, continued, notorious, and adverse possession under claim of ownership for the statutory period. Weiss v. Meyer 429
6. In determining the rights of an adverse owner, the entry and possession of his tenant, expressly authorized to act, is the entry and possession of such owner. Weiss v. Meyer 429
7. "Claim of ownership" as used in the law of adverse possession means nothing more than the intention of the occupant to appropriate and use the land as his own to the exclusion of all others, irrespective of any semblance or shadow of actual right or title. Weiss v. Meyer 429
8. Adverse possession is founded upon the intent with which an occupant held possession, and can best be determined by his acts. Weiss v. Meyer 429
9. The intent, even though mistaken, is sufficient as where the claimant occupies to the wrong line believing it to be the true line and even though he does not intend to claim more than that described in the deed. Weiss v. Meyer 429
10. The real purpose of prescribing the manner in which an adverse holding will be manifested is to give notice to the real owner that his title or ownership is in danger so that he may, within the period of limitation, take action to protect his interest. It is the nature of the hostile possession that constitutes the warning, not the intent of the claimant when he takes possession. Weiss v. Meyer 429
11. The law does not require that possession shall be evidenced by a complete enclosure, nor by persons remaining continuously upon the land and constantly from day to day performing acts of ownership thereon. It is sufficient if the land is used continuously for the purposes to which it may be in its nature adapted. In this respect, ordinarily the law does not undertake to specify the particular acts of occupation by which alone title by adverse possession may be acquired since the existence and establishment of the continuity must necessarily depend greatly on the circumstances of each case, and the use to which the property is adapted, the actual manner of its use, the circumstances of the occupant, and to some extent his intention must be considered. It is enough, however, that the land be devoted to the ordinary uses of the adverse claimant, provided the uses are such as to put the true proprietor on notice. Weiss v. Meyer 429
12. Land may be generally adapted to more than one use, and if the land is used for one or more of the major purposes for which it may in its nature be adapted, then that use will be

sufficient to establish continuity of possession, provided such use is sufficient to put the titleholder on notice. Weiss v. Meyer 429
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1. Contempts may be prosecuted by affidavit, and such an affidavit serves the purpose of a pleading. State v. Wostoupal 555
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2. There is no mathematical formula by which awards for alimony or division of property in an action for dissolution of marriage can be precisely determined. They are to be determined by the facts of each case and the court will consider all pertinent facts in reaching an award that is just and equitable. Cole v. Cole 562
3. This court, on appeal, is not precluded from modifying an alimony award made by the District Court where such award is patently unfair on the record. An award of alimony may be altered on appeal where the record reflects good cause. Cole v. Cole 562
4. When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties. Cole v. Cole 562
5. It is the general rule in this state that allowances of alimony in the form of an annuity or requiring the husband to pay a fixed sum for an indefinite period of time are not favored. Cole v. Cole 562

Appeal and Error.

1. In an appeal to this court, the findings of fact made by the Workmen's Compensation Court shall have the same force and effect as a jury verdict in a civil case. Chrisman v. Greyhound Bus Lines, Inc. 6
2. In a trial to the court in a law action, the findings and judgment of the trial court on the facts have the same force as a jury verdict and will not be set aside if there is sufficient competent evidence to support them, and the findings of the court will not be disturbed on appeal unless clearly wrong.
   Koperski v. Husker Dodge, Inc. 29
   Aguallo v. Western Potato, Inc. 66
3. A motion for new trial on the ground of newly discovered evidence is addressed to the sound discretion of the trial court and, unless an abuse of discretion is shown, its determination will not be disturbed. State v. Record 90
4. We review a child custody order de novo, giving due regard to the trial court which observed the witnesses and their manner of testifying, and will not ordinarily disturb such order unless there is a clear abuse of discretion or it is clearly against the weight of the evidence.
   In re Interest of Goldfaden 93
   Ritchey v. Ritchey 100
   In re Interest of Goodon 256
   Meysenburg v. Meysenburg 456
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5. The mentally disordered sex offender act, Neb. Rev. Stat. §§ 29-2911 to 29-2921 (Reissue 1979), does not authorize the courts of this state to review criminal proceedings unrelated to a defendant's status as a sex offender. State v. Irwin 123
6. In the absence of an abuse of discretion, a sentence imposed within statutory limits will not be disturbed on appeal.
   State v. Irwin 123
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7. For a question of constitutionality of a statute to be considered in this court, it must be properly raised in the trial court. If it is not raised in the trial court, it will be considered as waived in this court. State v. Irwin 123
8. The law requires this court in determining an appeal in an equity action involving questions of fact to reach an independent conclusion without reference to the findings of the District Court. In determining the weight of the evidence where there is an irreconcilable conflict on material issues of fact, this court will consider the fact that the trial court observed the witnesses and their manner of testifying.
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9. 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 will not be set aside unless clearly wrong. In determining the sufficiency of the evidence to sustain a judgment in a law action, it must be considered most favorably to the successful party, and every controverted fact must be resolved in that party's favor, and such party must have the benefit of any inferences reasonably deducible from it.
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10. Where a certain theory has been adopted and relied upon by the parties during the trial, such theory will be adhered to on appeal regardless of whether it is correct. Rieschick Drilling Co. v. American Cas. Co. 142
11. On appeal to this court, a case will be considered upon the theory upon which the case was tried below, even though not pleaded, where the parties have acquiesced in the theory and the case was submitted to the trial court on that basis. Rieschick Drilling Co. v. American Cas. Co. 142
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14. The verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. State v. Pena 250
15. Where a trial court judge sustains a motion for a new trial without specifying his reasons therefor, the appellant fulfills his burden by submitting the records to the Supreme Court and contending there is no prejudicial error. The burden shifts to the appellee to identify any prejudicial error in the record justifying a new trial. Belitz v. Suhr 280
16. The amount of attorney fees and the amount of referee fees rest in the sound judicial discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. Sweet v. Fairbairn 286
17. The action of the statutory board under Neb. Rev. Stat. § 79-403 (Reissue 1976) is an exercise of quasi-judicial power, equitable in character, and upon appeal therefrom to the District Court the cause is triable de novo as though it had been originally instituted in such court, and upon appeal from the District Court to this court it is triable

de novo as in any other equitable action. Miller v. School Dist. No. 69 290
18. 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 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.
Tibbs v. Fisher 306
State v. Rust 320
19. 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. Rust 320
20. An appeal from the separate juvenile court involving termination of parental rights is determined de novo upon the record by this court.
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In re Interest of Campbell 374
In re Interest of McKee 623
21. An error proceeding has for its purpose the removal of the record from an inferior to a superior tribunal to determine if the judgment or final order entered is in accordance with law. Hollingsworth v. Board of Education 350
22. In an appeal to the District Court from the action of the county board of equalization fixing the value of real property for tax purposes, the court shall affirm the action taken by the board unless evidence is adduced establishing that the action of the board was unreasonable or arbitrary, or unless evidence is adduced to establish that the property of the appellant is assessed too low. Bumgarner v. County of Valley 361
23. In an appeal to the county board of equalization or to the District Court, and from the District Court to this court, the burden of proof imposed on the complaining taxpayer is not met by showing a mere difference of opinion unless it is established by clear and convincing evidence that the valuation placed upon his property when compared with valuations placed on other similar property is grossly excessive and is the result of a systematic exercise of intentional will or failure of plain duty and not mere errors of judgment. Bumgarner v. County of Valley 361
24. A jury verdict will not be disturbed unless it is clearly erroneous and against the preponderance of the evidence. Krug v. Laughlin 367
25. In the absence of a judgment or order finally disposing of

a case, the Supreme Court has no authority nor jurisdiction to act, and in the absence of such judgment or order the appeal will be dismissed. Knoell Constr. Co., Inc. v. Hanson 373

26. An order overruling a motion for leave to amend pleadings is interlocutory and not appealable. Knoell Constr. Co., Inc. v. Hanson 373

27. A decision on the amount to be awarded as child support rests in the sound discretion of the trial court and will not be disturbed on appeal unless it appears that the court abused its discretion. Meysenburg v. Meysenburg 456

28. In proceedings to review an order of the State Real Estate Commission, the questions to be determined are whether the order of the Commission is supported by substantial evidence, whether the Commission acted within the scope of its authority, and whether its action was arbitrary, capricious, or unreasonable.
Wright v. State ex rel. State Real Estate Comm. 467
AFSCME Local 2088 v. County of Douglas 511

29. An appeal in a dissolution of marriage action is reviewed de novo by this court. Burnham v. Burnham 498

30. Attempting to arrive at comparables requires granting some discretion to the Commission of Industrial Relations; and unless there is no substantial evidence upon which the Commission of Industrial Relations could have concluded that the counties used by the Commission of Industrial Relations did, indeed, provide comparables, we may not as a matter of law disallow the action taken by the Commission of Industrial Relations. AFSCME Local 2088 v. County of Douglas 511

31. Questions not presented to or passed upon by the trial court will not be considered on appeal.
Nielsen v. SID No. 229 542
Guynan v. Guynan 775

32. Relief from the overassessment of property for tax purposes is by appeal to the District Court from the order of the county board of equalization fixing the assessed value of the property, and the remedy thus given is full, adequate, and exclusive. Jones v. Valley County Board of Equalization 559

33. The courts, in reviewing decisions of the Nebraska Liquor Control Commission, do not exercise independent judgment on fact and policy, but must give due deference to the decisions made by the commission if the same are based upon evidence in the record. City of Lincoln v. Nebraska Liquor Control Comm. 630

34. This court will not interfere with a conviction based on evidence unless it is so lacking in probative force that as a

matter of law it can be said that it is insufficient to support a verdict of guilt beyond a reasonable doubt. State v. Ohler 742
35. Where there is no bill of exceptions on appeal, this court is limited to a determination of whether the pleadings support the judgment of the trial court. Lum v. Mattley 789
36. In the absence of a bill of exceptions, the findings of the trial court with respect to the best interests of the child must be taken as correct. Lum v. Mattley 789
37. In an appeal from an order granting a motion for summary judgment, a motion for new trial is necessary in order for the court on appeal to review alleged errors in evidence. Kramer v. Swanson 794
38. When a motion for new trial is not filed in a law action, the court on appeal will examine the record only for the purpose of determining whether or not the judgment of the trial court is supported by the pleadings. Kramer v. Swanson 794

Arrests.

1. The test of probable cause for a warrantless arrest is whether at the moment the facts and circumstances within the officers' knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense. State v. Jones 641
2. Knowledge on the part of law enforcement officers of previous law violations of a suspect is a factor to be considered in establishing probable cause for search or arrest for a similar crime. State v. Jones 641

Assault.

1. A dangerous instrument within the meaning of Neb. Rev. Stat. § 28-309 (Reissue 1979) is any instrumentality which, because of its nature and the manner and intention of its use, is capable of inflicting bodily injury, and need not be an instrument which is inherently dangerous and capable of inflicting injury. State v. Hatwan 450
2. The infliction of *serious* bodily injury is not a necessary element of assault in the second degree as defined by Neb. Rev. Stat. § 28-309(1)(a) (Reissue 1979). Neither is it an element of third degree assault under Neb. Rev. Stat. § 28-310 (Reissue 1979). State v. Hatwan 450
3. Where an accused is convicted of both second and third degree assault, it is not necessarily an abuse of discretion to impose a more severe sentence for the lesser assault than that imposed for the greater. State v. Hatwan 450

Attorney Fees.

1. The award of attorney fees and the taxing of costs are discretionary with the District Court.
   Ritchey v. Ritchey 100
   Rieschick Drilling Co. v. American Cas. Co. 142
2. In all cases where the beneficiary, or other person entitled thereto, brings an action upon any type of insurance policy except workmen's compensation insurance, or upon any certificate issued by a fraternal beneficiary association, against any company, person, or association doing business in this state, the court, upon rendering judgment against such company, person, or association, shall allow the plaintiff a reasonable sum as an attorney fee in addition to the amount of his recovery, to be taxed as part of the costs. Neb. Rev. Stat. § 44-359 (Reissue 1978). Rieschick Drilling Co. v. American Cas. Co. 142
3. If the shares confirmed by the judgment in partition and the existence of all encumbrances of which the plaintiff had actual or constructive notice were accurately pleaded in the original petition of the plaintiff, attorney fees shall be awarded entirely to the attorney for the plaintiff. This amount as well as a reasonable fee for the referee shall be taxed as costs in the proceedings. Sweet v. Fairbairn 286
4. Neb. Rev. Stat. § 48-646 (Reissue 1978) requires that the amount of attorney fees charged by a lawyer to his client be approved by the Commissioner of Labor. It does not authorize the District Court to award attorney fees for which approval by the commissioner has not been sought. School Dist. No. 20 v. Commissioner of Labor 663
5. The right to tax attorney fees is purely statutory in a workmen's compensation case. Savage v. Hensel Phelps Constr. Co. 676

Auctions.

An auction of real estate without reserve is within the statute of frauds. Neb. Rev. Stat. § 36-105 (Reissue 1978). Benson v. Ruggles & Burtch v. Benson 330

Bankruptcy.

1. Prior to October 1, 1979, before the 1978 Bankruptcy Act took effect, the bankruptcy court had summary jurisdiction over controversies with respect to property passing to the trustee under the act when the property was within the actual or constructive possession of the bankruptcy court or when the adverse claimant to the property consented to jurisdiction. Nicola v. Peters 439
2. The bankruptcy court could adjudicate title and right to possession of the crane in the turnover proceeding but in

that proceeding could not determine the amount due the trustee from the defendant under lease because the defendant did not consent to the summary jurisdiction of the bankruptcy court. Nicola v. Peters 439
3. Where an agreement has been fully performed by one party and the only performance due from the other is payment, the contract is no longer "executory" as that term is used in the Bankruptcy Act. Nicola v. Peters 439

Blood, Breath, and Urine Tests.
1. Under the Nebraska implied consent statutes a driver is not entitled to consult with a lawyer prior to taking a test, nor is the test required to be delayed by a request of an arrested motorist that he be permitted to contact a lawyer. Winter v. Peterson 785
2. A single request to submit to a test is sufficient. There is no requirement that a second request be made if the person arrested refuses to submit to the test. Winter v. Peterson 785
3. A conditional or qualified refusal to take a test to determine the alcohol content of body fluids under the implied consent law is not sanctioned by the act and such refusal is a refusal to submit to the test within the meaning of the act. Winter v. Peterson 785
4. A refusal to submit to a chemical test occurs within the meaning of the implied consent law when the licensee, after being asked to submit to a test, so conducts himself as to justify a reasonable person in the requesting officer's position in believing that the licensee understood that he was asked to submit to a test and manifested an unwillingness to take it. Winter v. Peterson 785
5. To constitute a refusal to submit to a chemical test required under the implied consent statute, the only understanding required by the licensee is an understanding that he has been asked to take a test. It is no defense to refusal that he does not understand the consequences of refusal or is not able to make a reasoned judgment as to what course of action to take. Winter v. Peterson 785

Board of Pardons.
Our holding in *Johnson & Cunningham v. Exon*, 199 Neb. 154, 256 N.W.2d 869 (1977), that approval of the Board of Pardons was required to apply L.B. 567 retroactively pertained only to those changes in the statute which would result in discharge from custody of the prisoner at an earlier date than before the amendments made by L.B. 567. Gochenour v. Bolin 444

Bonds.

1. The purpose of Neb. Rev. Stat. § 52-118 (Reissue 1978) is to secure payment to those furnishing labor, material, and equipment rental in the construction or repairing of any public building, structure, or improvement where the general provisions of the mechanic's lien laws do not apply. Dukane Corp. v. Sides Constr. Co. 227
2. Within the meaning of a payment bond which imposed the duty to pay for labor and materials "used or reasonably required for use in the performance of the contract," the phrase "reasonably required for use" was no more than a clause protecting the surety from excessive and unreasonable claims. Dukane Corp. v. Sides Constr. Co. 227

Brokers' Licenses.

1. Real estate licenses shall be granted only to persons who bear a good reputation of honesty, trustworthiness, integrity, and competence to transact the business of broker or salesman in such manner as to safeguard the interests of the public, and only after satisfactory proof of such qualifications has been presented to the commission. Neb. Rev. Stat. § 81-885.12 (Reissue 1976). Wright v. State ex rel. State Real Estate Comm. 467
2. The State Real Estate Commission may, upon its own motion, and shall, upon the sworn complaint in writing of any person, investigate the actions of any broker and shall have power to revoke or suspend any license or certificate issued under Neb. Rev. Stat. §§ 81-885.01 to 81-885.47 (Reissue 1976) whenever the license or certificate has been obtained by false or fraudulent representation or the licensee or certificate holder has been found guilty of the following unfair trade practice, i.e., demonstrating unworthiness or incompetency to act as a broker, associate broker, or salesman. Neb. Rev. Stat. § 81-885.24(28) (Reissue 1976). Wright v. State ex rel. State Real Estate Comm. 467
3. A real estate broker's license may be suspended or revoked for misconduct occurring in a real estate transaction whether the broker is acting for himself or others. Wright v. State ex rel. State Real Estate Comm. 467

Case Overruled.

1. An appeal from a judgment in an equitable action does not require the filing of a motion for new trial for a de novo review in this court of alleged errors in the findings and judgment of the trial court. To the extent that it conflicts herewith, *McClintock v. Nemaha Valley Schools*, 198 Neb. 477, 253 N.W.2d 304 (1977), is overruled. Petersen v. Petersen 1

2. In the absence of a motion to quash, an information which alleges an attempt to commit an act or acts which if successful would constitute a statutory crime sufficiently charges an attempted crime so as to withstand a jurisdictional attack made for the first time on appeal. To the extent that *Gandy v. The State*, 13 Neb. 445, 14 N.W. 143 (1882), is in conflict with this opinion, it is overruled. State v. Sodders 504

Child Custody.

1. In a paternity action where paternity has been admitted and the natural father has demonstrated a familial relationship with the child and has fulfilled parental responsibilities of support and maintenance, the fact that the child was born out of wedlock should be disregarded, and custody and visitation of minor children should be determined on the basis of the best interests of the children. In determining with which of the natural parents the children shall remain, the standards set out in Neb. Rev. Stat. § 42-364 (Reissue 1978) are to be applied. Cox v. Hendricks .. 23
2. The exclusive original jurisdiction given to the county court sitting as a juvenile court is not diminished by Neb. Rev. Stat. § 43-201 (Reissue 1978) where the child's custody is the subject of a preexisting District Court order issued pursuant to divorce proceedings. In re Interest of Goldfaden 93
3. The juvenile court can intervene between the parents and the child only if the child's condition requires the state to use its power to protect the welfare of the child. The circumstances of the child must come within the juvenile statutes. In re Interest of Goldfaden 93
4. We review a child custody order de novo, giving due regard to the trial court which observed the witnesses and their manner of testifying, and will not ordinarily disturb such order unless there is a clear abuse of discretion or it is clearly against the weight of the evidence.
   In re Interest of Goldfaden 93
   Ritchey v. Ritchey 100
5. Custody of minor children is to be determined by their best interests. In making this determination, the sexual misconduct of a parent is only one of several factors to be considered. Other factors are general considerations of the moral fitness of the parents; the emotional relationships between the children and their parents; and the age, sex, and health of the children. Ritchey v. Ritchey 100
6. While there may be no direct affirmative evidence of child abuse, where there is ample evidence of neglect and a lack of proper parental care directly and adversely in-

jurious to the health, safety, and well-being of the child, the best interests of the child become paramount. In re Interest of Kimsey 193
7. Above all other considerations in determining the question of who should have custody of a minor child upon the dissolution of a marriage, the paramount consideration is the best interests and welfare of the child. Meysenburg v. Meysenburg 456
8. Where the issue of child custody is involved, both the mother and the father have an equal right to the custody of their children. The test for determining custody is the best interests of the child. Burnham v. Burnham 498
9. In determining which parent shall be awarded custody of the children, the court shall not give preference to either parent based on the sex of the parent. Burnham v. Burnham 498
10. Although the courts should preserve an attitude of impartiality between religions and will not disqualify a parent solely because of his or her religious beliefs, we do have a duty to consider whether such beliefs threaten the health and well-being of a child. Burnham v. Burnham 498
11. In determining the best interests of a child in awarding custody, the court must consider myriad factors in working toward this goal, and to hold that it may not consider religious factors under any circumstances would blind courts to important elements bearing on the best interests of the child. Burnham v. Burnham 498
12. In determining the question of custody of a child, it is proper for a court to examine the impact of the parent's beliefs on the child. Burnham v. Burnham 498
13. The determination of the trial court with respect to changing the custody of minor children will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. Soukup v. Soukup 672

Child Support.

1. A decision on the amount to be awarded as child support rests in the sound discretion of the trial court and will not be disturbed on appeal unless it appears that the court abused its discretion. Meysenburg v. Meysenburg 456
2. Accrued child support payments are not subject to modification. Conrad v. Conrad 588
3. Remarriage of mother before decree of dissolution became final and her removal of child from the jurisdiction without consent of the court held not to estop mother from collecting accrued child support payments. Conrad v. Conrad 588
4. A decree fixing child support payments is not subject to

modification in the absence of a material change in circumstances occurring subsequent to the entry of the decree requiring modifications in the best interests of the children. Soukup v. Soukup 672
5. In determining whether a modification of child support is warranted, the circumstances of the parents as well as those of the children must be considered. Soukup v. Soukup 672

Circumstantial Evidence.
Ordinarily, in a case charging first degree murder, where there is no eyewitness to the act, and the evidence is largely circumstantial, the jury should be instructed as to the law governing murder in the first degree, second degree, and manslaughter. State v. Ellis 379

Collateral Attack.
1. As a general rule, domestic judgments cannot be collaterally attacked or impeached by the parties for fraud or collusion not going to the jurisdiction, and consent judgments are as conclusive on collateral attack as judgments rendered after trial. Nielsen v. SID No. 229 542
2. A collateral attack may be made upon an assessment of property for tax purposes only if the assessment or some part thereof is wholly void. Jones v. Valley County Board of Equalization 559

Collateral Estoppel.
Collateral estoppel may be applied if the identical issue was decided in a prior action, there was a judgment on the merits which was final, the party against whom the rule is to be applied was a party or in privity with the party to the prior action, and there was an opportunity to fully and fairly litigate the issue in the prior action. Reeves v. Watkins 804

Commission of Industrial Relations.
1. The standard of review by the Supreme Court of orders and decisions of the Commission of Industrial Relations is generally restricted to considering whether the Commission of Industrial Relations order is supported by substantial evidence, whether the Commission of Industrial Relations acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable. AFSCME Local 2088 v. County of Douglas 511
2. Determinations made by the Commission of Industrial Relations in accepting or rejecting claimed comparables are within the field of expertise of the Commission of Industrial

Relations and should be given due deference. AFSCME Local 2088 v. County of Douglas 511
3. Factors most often used to determine comparability are geographic proximity, population, job descriptions, job skills, and job conditions. AFSCME Local 2088 v. County of Douglas 511
4. Attempting to arrive at comparables requires granting some discretion to the Commission of Industrial Relations; and unless there is no substantial evidence upon which the Commission of Industrial Relations could have concluded that the counties used by the Commission of Industrial Relations did, indeed, provide comparables, we may not as a matter of law disallow the action taken by the Commission of Industrial Relations. AFSCME Local 2088 v. County of Douglas 511
5. Where there are local comparisons which can or should be made, they may not be disregarded if in fact it appears from the evidence that the local employers are comparable in that they meet the requirements of Neb. Rev. Stat. § 48-818 (Reissue 1978). AFSCME Local 2088 v. County of Douglas 511
6. Whenever there is another employer in the same market hiring employees to perform same or similar skills, the salaries paid to those employees must be considered by the Commission of Industrial Relations unless evidence establishes that there are substantial differences which cause the work or conditions of employment to be dissimilar. AFSCME Local 2088 v. County of Douglas 511
7. No public employer shall withhold pay raises otherwise determined to be granted to public employees in a given year solely on the basis that they are then engaged in a labor dispute over a previous year's wages. AFSCME Local 2088 v. County of Douglas 511
8. The Commission of Industrial Relations' authority to resolve disputes concerning terms, tenure, or conditions of employment is limited to situations in which the parties have not yet reached agreement. Once an agreement is reached and a subsequent breach is alleged to have occurred, the parties are required to litigate their dispute in a competent court having jurisdiction of the matter. Saltz v. School Dist. of Norfolk 740

Comprehensive Development Plans.

A comprehensive development plan as defined in Neb. Rev. Stat. § 19-903 (Reissue 1977) includes: (1) A land-use element which designates the proposed general distributions, general location, and extent of the uses of land for agriculture, housing, commerce, industry, recreation, education, public buildings and lands, and other categories

of public and private use of land; (2) The general location, character, and extent of existing and proposed major roads, streets, and highways, and air and other transportation routes and facilities; and (3) The general location, type, capacity, and area served of present and projected or needed community facilities including recreation facilities, schools, libraries, other public buildings, and public utilities and services. Village of McGrew v. Steidley 726

Confessions.

To be admissible in evidence a confession must be free and voluntary and must not have been extracted by any sort of threat or violence, nor may it have been obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. State v. Jones 641

Conflict of Interest.

1. Unless the trial court knows or reasonably should know that a particular conflict of interest between defendants represented by the same counsel in a criminal trial exists, the court need not initiate an inquiry. State v. Hudson and Maeberry 649
2. Without special circumstances which would create a duty of inquiry, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance in order to gain reversal of a conviction. State v. Hudson and Maeberry 649
3. Where the trial court recognizes a divergence between the respective roles played by defendants in an alleged crime, special circumstances then exist which require a voluntary inquiry by the court into a possible conflict of defendants' interests. State v. Hudson and Maeberry 649
4. Where a potential conflict in interest arises, the proper course of action for the trial judge is to conduct a hearing to determine whether a conflict exists to the degree that a defendant may be prevented from receiving advice and assistance sufficient to afford him the quality of representation guaranteed by the sixth amendment. State v. Hudson and Maeberry 649

Consideration.

Under the Uniform Commercial Code, no consideration is necessary for an instrument given as security for a debt already owed by the party giving it or by a third person. Newman Grove Creamery Co. v. Deaver 178

Constitutional Law.

1. Where a defendant in a civil case refuses to testify on the

ground that the evidence may incriminate him, the trier of fact may draw an adverse inference from his refusal. State ex rel. Schuler v. Dunbar 69
2. For a question of constitutionality of a statute to be considered in this court, it must be properly raised in the trial court. If it is not raised in the trial court, it will be considered as waived in this court. State v. Irwin 123
3. A person may attack the constitutionality of a statute only when and so far as it is being or is about to be applied to his disadvantage; and to raise the question he must show that the alleged unconstitutional feature of the statute injures him and so operates as to deprive him of a constitutional right. A party to a suit will not ordinarily be permitted to attack the constitutionality of a statute in a case where his rights and interests are not invaded or affected by its provisions. State v. Irwin 123
4. The Nebraska death penalty statutes, Neb. Rev. Stat. §§ 29-2519 to 29-2546 (Reissue 1979), do not violate the provisions of the U.S. or Nebraska Constitutions. State v. Harper 568
5. In order for the commerce clause of the U.S. Constitution to apply to state regulation of a commodity, that commodity must be an article of commerce. State ex rel. Douglas v. Sporhase 703
6. The Nebraska Constitution declares water for irrigation purposes in the State of Nebraska to be a natural want. State ex rel. Douglas v. Sporhase 703
7. Since ground water in Nebraska is not an article of commerce, the commerce clause of the U.S. Constitution does not apply to Neb. Rev. Stat. § 46-613.01 (Reissue 1978). State ex rel. Douglas v. Sporhase 703
8. Neb. Rev. Stat. § 46-613.01 (Reissue 1978) does not deprive affected persons of liberty or property without due process of law. State ex rel. Douglas v. Sporhase 703
9. The capacity of a person to claim the protection of the fourth amendment 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. Ohler 742
10. Neb. Rev. Stat. § 43-209(6) (Reissue 1978) is sufficiently definite and is not unconstitutionally vague. In re Interest of Witherspoon 755

Contempt.

1. Contempts may be prosecuted by affidavit, and such an affidavit serves the purpose of a pleading. State v. Wostoupal 555
2. Where the reading of an affidavit for contempt clearly indicates that the alleged violation of a court order was

willful, the failure to use that express word does not render the affidavit defective. State v. Wostoupal 555
3. The voluntary entry of a plea of guilty to a charge of contempt waives formal defects in the information, affidavit, or accusation. State v. Wostoupal 555

Contractors and Subcontractors.

1. Any person having direct contractual relationship with a subcontractor but no contractual relationship, express or implied, with the contractor furnishing such bond shall have a right of action upon the bond upon giving written notice to the contractor within 4 months from the date on which such person did or performed the last of the labor, or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Neb. Rev. Stat. § 52-118.01 (Reissue 1978). Rieschick Drilling Co. v. American Cas. Co. 142
2. There being no specific standard by which reasonable value of labor and materials furnished shall be proved, prima facie proof thereof is made where a reasonable inference of such value flows from the evidence adduced. Rieschick Drilling Co. v. American Cas. Co. 142
3. The purpose of Neb. Rev. Stat. § 52-118 (Reissue 1978) is to secure payment to those furnishing labor, material, and equipment rental in the construction or repairing of any public building, structure, or improvement where the general provisions of the mechanic's lien laws do not apply. Dukane Corp. v. Sides Constr. Co. 227
4. Where the general mechanic's lien laws are applicable the lien of a materialman for materials furnished for the erection of a building by virtue of an agreement with the contractor extends to such materials only as are used in or delivered at the building for use therein. Dukane Corp. v. Sides Constr. Co. 227
5. With certain exceptions, the employer of an independent contractor is not liable for physical harm caused to another by the acts or omissions of the contractor or his servants. Sullivan v. Geo. A. Hormel and Co. 262
6. The term "independent contractor" includes building contractors erecting a building for a fixed sum according to specifications and not subject to the owner's control over the method of accomplishment. Sullivan v. Geo. A. Hormel and Co. 262
7. An employer of an independent contractor may, without changing the status of the parties, exercise such control as is necessary to assure performance of the contract in

accordance with its terms. Sullivan v. Geo. A. Hormel and Co. 262
8. The general contractor, in control of the premises where work performance under a contract with the owner is being carried out, owes a duty to persons rightfully on the premises to keep the premises in a reasonably safe condition while the contract is in the course of performance. Sullivan v. Geo. A. Hormel and Co. 262
9. Under the terms of the construction contract here involved, including the general conditions contained in AIA document A201, April 1970 edition, especially the provisions relating to initiating, maintaining, and supervising all safety precautions and programs in connection with the work, including those with reference to safety and cleanup, the relationship of owner and independent contractor was not converted to that of master and servant. Sullivan v. Geo. A. Hormel and Co. 262

Contracts.

1. In construing a contract, the instrument must be read as a whole, giving force and effect to all its provisions to determine whether or not any ambiguity exists and whether, if such ambiguity does exist, the contract is confusing and uncertain in its terms. Lavalleur v. State Automobile & Cas. Underwriters 82
2. Any person having direct contractual relationship with a subcontractor but no contractual relationship, express or implied, with the contractor furnishing such bond shall have a right of action upon the bond upon giving written notice to the contractor within 4 months from the date on which such person did or performed the last of the labor, or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Neb. Rev. Stat. § 52-118.01 (Reissue 1978). Rieschick Drilling Co. v. American Cas. Co. 142
3. In all cases where the beneficiary, or other person entitled thereto, brings an action upon any type of insurance policy except workmen's compensation insurance, or upon any certificate issued by a fraternal beneficiary association, against any company, person, or association doing business in this state, the court, upon rendering judgment against such company, person, or association, shall allow the plaintiff a reasonable sum as an attorney fee in addition to the amount of his recovery, to be taxed as part of the costs. Neb. Rev. Stat. § 44-359 (Reissue 1978). Rieschick Drilling Co. v. American Cas. Co. 142

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5. Under the terms of the construction contract here involved, including the general conditions contained in AIA document A201, April 1970 edition, especially the provisions relating to initiating, maintaining, and supervising all safety precautions and programs in connection with the work, including those with reference to safety and cleanup, the relationship of owner and independent contractor was not converted to that of master and servant. Sullivan v. Geo. A. Hormel and Co. 262
6. Probationary teachers in Class I, II, III, and VI schools are not entitled to notice of conditions constituting just cause for termination because their contracts are not continuing and no cause need be shown to terminate them. Meyer v. Board of Education 302
7. Generally, a party who has failed or refused to perform the terms and conditions imposed upon him by a contract, or has not been ready, willing, and able to perform the same, cannot recover for a breach thereof by the other party. Tibbs v. Fisher 306
8. There is implied in every contract for work or services a duty to perform it skillfully, carefully, diligently, and in a workmanlike manner. Tibbs v. Fisher 306
9. Substantial performance is shown in a building contract when all of the essentials necessary to the full accomplishment of the purposes for which the thing contracted for has been constructed and performed with such an approximation to complete performance that the owner obtains substantially what is called for by the contract. Tibbs v. Fisher 306
10. A guarantor is entitled to be subrogated to the benefit of all the security and means of payment under the creditor's control, and, in the absence of assent, waiver, or estoppel, the guarantor is generally released by an act of the creditor which deprives the guarantor of such right. Southwest Bank of Omaha v. Herting 347
11. The promise in a land sales contract for the seller to convey real estate is consideration for the promise of the buyer to purchase the real estate. Litz v. Wilson 483
12. Where a land sales contract is executory and the vendee makes default, the remedies of the vendor are to rescind, specific performance, foreclosure of the contract as a mortgage, or bring suit for damages for the breach. Litz v. Wilson 483

13. As a general rule, where a valid contract exists, which is definite and certain in its terms, mutual in obligation, and free from unfairness, fraud, or overreaching, a court will grant a decree of specific performance where the remedy at law is inadequate and specific performance will not be inequitable or unjust. Litz v. Wilson 483
14. A court of equity will refuse to enforce a contract when it is not clearly satisfied that it embodies the real understanding of the parties. Litz v. Wilson 483
15. A subsequent contract which does not completely cover the same subject matter of a prior agreement and does not contain terms inconsistent with the former contract so that the two cannot stand together does not supersede or substitute for the earlier contract and become the only agreement of the parties. Hagerbaumer v. Hagerbaumer Brothers, Inc. 613
16. A contract complete in itself will be conclusively presumed to supersede and discharge another one made prior thereto between the same parties concerning the same subject matter, where the terms of the latter are inconsistent with those of the former so that they cannot subsist together. Hagerbaumer v. Hagerbaumer Brothers, Inc. 613
17. Under the provisions of Neb. Rev. Stat. §§ 25-701 and 25-702 (Reissue 1979), the joinder in a single action of the cause against the uninsured motorist with the insurer carrying the uninsured motorist coverage for the claimant is not permissible. Eich v. State Farm Mut. Automobile Ins. Co. 714
18. In a suit against the uninsured motorist, the amount of uninsured motorist coverage should not be disclosed to the jury. Eich v. State Farm Mut. Automobile Ins. Co. . 714
19. The following exclusion in uninsured motorist coverage does not prevent the stacking of coverage where the insured has separate policies of uninsured motorist coverage on two or more vehicles: "(b) TO *BODILY INJURY* TO AN *INSURED* WHILE *OCCUPYING* OR THROUGH BEING STRUCK BY A LAND MOTOR VEHICLE OWNED BY THE NAMED INSURED OR ANY *RESIDENT* OF THE SAME HOUSEHOLD, IF SUCH VEHICLE IS NOT AN *OWNED MOTOR VEHICLE*," and the policy definition of owned motor vehicle includes the motor vehicle described in the declaration. Eich v. State Farm Mut. Automobile Ins. Co. 714

Costs.

The award of attorney fees and the taxing of costs are discretionary with the District Court. Ritchey v. Ritchey 100

Courts.

1. The mentally disordered sex offender act, Neb. Rev. Stat. §§ 29-2911 to 29-2921 (Reissue 1979), does not authorize the courts of this state to review criminal proceedings unrelated to a defendant's status as a sex offender. State v. Irwin 123
2. The action of the statutory board under Neb. Rev. Stat. § 79-403 (Reissue 1976) is an exercise of quasi-judicial power, equitable in character, and upon appeal therefrom to the District Court the cause is triable de novo as though it had been originally instituted in such court, and upon appeal from the District Court to this court it is triable de novo as in any other equitable action. Miller v. School Dist. No. 69 290
3. The purpose of an order nunc pro tunc is to correct the record so that it will truly reflect action actually taken, but which through inadvertence or mistake has not been truly recorded. State v. Al-Hafeez 681
4. The limited remedy available in an application for an order nunc pro tunc will not be extended to question the constitutionality of the actions taken or declined to be taken by the trial court, but is limited to the specific purpose of the proceeding, that is, to correct the record to accurately reflect what actually happened in the proceedings. State v. Al-Hafeez 681
5. The determination by the District Court in a habeas corpus case does not control the proper exercise of the jurisdiction of the county court in a later adoption proceeding. Lum v. Mattley 789

Criminal Attempt.

1. In order to constitute an attempt to commit a crime under Neb. Rev. Stat. § 28-201 (Reissue 1979), there must be an intentional act on the part of the defendant which would constitute a substantial step toward the completion of the allegedly attempted crime, assuming that the circumstances at the time were as the defendant believed them to be. State v. Sodders 504
2. The determination of whether the defendant's conduct constituted a substantial step toward the completion of the crime is a question of fact. State v. Sodders 504
3. In the absence of a motion to quash, an information which alleges an attempt to commit an act or acts which if successful would constitute a statutory crime sufficiently charges an attempted crime so as to withstand a jurisdictional attack made for the first time on appeal. To the extent that *Gandy v. The State*, 13 Neb. 445, 14 N.W. 143 (1882), is in

conflict with this opinion, it is overruled.
State v. Sodders 504
State v. Meredith 637

Criminal Defendants.

1. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law. State v. Ammons 797
2. The constitutional right of a defendant to call witnesses in his defense mandates that they must be called without intimidation. State v. Ammons 797

Criminal Law.

1. The standard for determining whether defense counsel has rendered constitutionally required effective assistance is whether counsel has performed at least as well as a lawyer with ordinary training and skill in the criminal law in that area and has conscientiously protected the interests of his client.
   State v. Shepard 188
   State v. Rust 320
2. In order for one to maintain ineffective counsel the record must affirmatively support the claim.
   State v. Shepard 188
   State v. Pankey 377
3. In determining the sufficiency of the evidence to sustain a conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass upon the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence, as such matters are for the jury.
   State v. Pena 250
   State v. Rust 320
4. Evidence of a defendant's fingerprints has probative value; and it is for the jury to determine, in light of all other evidence, whether such evidence permits an inference to be drawn that beyond a reasonable doubt defendant was the person who committed the offense in question. State v. Pena 250
5. The amendment of a statute under which an accused was convicted does not affect the legitimacy of his conviction or the propriety of his sentence. State v. Rust 320
6. The determination of sufficiency of counsel must be made within the context of the facts of a particular case, and we

will not require defense counsel to develop ridiculous trial tactics because they are suggested by the defendant. State v. Rust 320
7. In order for something to be considered a mitigating factor it must be probative of any aspect of the defendant's character or record or any of the circumstances of the offense that could be proffered as a basis for a sentence less than death. State v. Rust 320
8. Error or prejudice allegedly resulting from the ineffective assistance of counsel cannot be established where witnesses were not called, absent a showing in the record of the beneficial nature of such witnesses' testimony. State v. Pankey 377
9. The "other-crimes" rule, Neb. Rev. Stat. § 27-404(2) (Reissue 1979), is a rule of relevance and such evidence is ordinarily prejudicial because prior criminal activity is irrelevant to the proof of a specific crime. State v. Ellis 379
10. 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. Ellis 379
11. A not guilty plea places in issue every relevant fact, and the prosecution should not be precluded from introducing evidence on a certain element of the alleged crime because there was already some other evidence in the case tending to establish the same, until and unless the trial court, in the exercise of its discretion, determines that further evidence on that point is irrelevant. State v. Ellis 379
12. A purported showing of a paucity of evidence does not prove that a trial court abused its discretion in balancing the probative value against the prejudicial effect of a particular item of disputed evidence. In fact, a lack of other relevant evidence may in some instances increase the probative value of the evidence available. State v. Ellis 379
13. The admissibility of evidence of other crimes lies largely within the discretion of the trial court. State v. Ellis 379
14. Evidence of other crimes, if relevant to the issue, is not made inadmissible simply because they occurred at a time after that of the principal charge. State v. Ellis 379
15. In order to comport with due process of law, a criminal statute must be reasonably clear and definite. State v. Sodders 504
16. A defendant has no standing to challenge as vague a portion of the language of a statute which does not apply to his conduct when an unambiguous section of the statute clearly applies to such conduct.

State v. Sodders 504
State v. Meredith 637
17. 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. Harper 568
18. A sentencing judge has broad discretion as to the source and type of evidence or information which may be used as assistance in determining the kind and extent of the punishment to be imposed, and the judge may consider probation officer reports, police reports, affidavits, and other information, including his own personal observations. State v. Stranghoener 598
19. A sentencing judge is not bound by the recommendations of the probation officer in determining the sentence to be imposed. State v. Stranghoener 598
20. Among the factors meriting consideration when sentence is imposed are the family ties, age, mentality, education, experience, and social and cultural background of the convicted criminal; his willingness to work at honest labor; his past criminal record or law-abiding conduct; the motivation for the offense, the nature of the offense, and the amount of violence, if any, involved in the commission of the offense. State v. Stranghoener 598

Criminal Trials.

1. Unless the trial court knows or reasonably should know that a particular conflict of interest between defendants represented by the same counsel in a criminal trial exists, the court need not initiate an inquiry. State v. Hudson and Maeberry 649
2. Without special circumstances which would create a duty of inquiry, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance in order to gain reversal of a conviction. State v. Hudson and Maeberry 649
3. Where the trial court recognizes a divergence between the respective roles played by defendants in an alleged crime, special circumstances then exist which require a voluntary inquiry by the court into a possible conflict of defendants' interests. State v. Hudson and Maeberry 649
4. Where a potential conflict in interest arises, the proper course of action for the trial judge is to conduct a hearing to determine whether a conflict exists to the degree that a defendant may be prevented from receiving advice and assistance sufficient to afford him the quality of representa-

tion guaranteed by the sixth amendment. State v. Hudson and Maeberry 649
5. Except in certain crimes such as sexual assault, a conviction may rest upon the testimony of a single eyewitness. State v. Ammons 812

Crops.

In general, the word "crops" means all products of the soil that are grown and raised annually and gathered in a single season. O'Neill Production Credit Assn. v. Schnoor .. 105

Damages.

1. If an actor's conduct is negligent as creating an unreasonable risk of causing either bodily harm or emotional disturbance to another and it results in such emotional disturbance alone without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance. Fournell v. Usher Pest Control Co. 684
2. Under the circumstances here, conduct involving the failure of the defendant to discover termite damage to plaintiffs' house did not create an unreasonable risk of causing bodily harm as a matter of law. Fournell v. Usher Pest Control Co. 684

Death Penalty.

1. The Nebraska death penalty statutes, Neb. Rev. Stat. §§ 29-2519 to 29-2546 (Reissue 1979), do not violate the provisions of the U.S. or Nebraska Constitutions. State v. Harper 568
2. In the context of Neb. Rev. Stat. Ch. 29, art. 25 (Reissue 1979), the word "sentence" in § 29-2521.03 is construed to mean a sentence of death, and the provisions of that section directing the determination by the Supreme Court of the propriety of a "sentence" by comparison with previous cases are applicable only in a case where a sentence of death has been imposed. State v. Harper 568
3. Where a death sentence has been imposed and the Supreme Court is required to determine the propriety of that sentence in such case, the determination of which previous first degree murder cases involve the same or similar circumstances and are therefore comparable will be made by this court on a case-by-case basis. State v. Harper 568

Decedents' Estates.

1. When one claims an estate of a deceased person under an alleged oral contract, the evidence of such agreement must be clear, satisfactory, and unequivocal. Guynan v. Guynan 775

2. Neb. Rev. Stat. § 36-103 (Reissue 1978) shall not be construed to affect in any manner the power of a testator in the disposition of his real estate by a last will and testament, nor to prevent any trust from arising or being extinguished by implication or operation of law. Neb. Rev. Stat. § 36-104 (Reissue 1978). Guynan v. Guynan 775

Declaratory Judgments.

A declaratory judgment action is not an appropriate remedy to attack an assessment of real property made by the county board of equalization. Jones v. Valley County Board of Equalization 559

Defense Counsel.

1. Unless the trial court knows or reasonably should know that a particular conflict of interest between defendants represented by the same counsel in a criminal trial exists, the court need not initiate an inquiry. State v. Hudson and Maeberry 649
2. Without special circumstances which would create a duty of inquiry, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance in order to gain reversal of a conviction. State v. Hudson and Maeberry 649
3. Where the trial court recognizes a divergence between the respective roles played by defendants in an alleged crime, special circumstances then exist which require a voluntary inquiry by the court into a possible conflict of defendants' interests. State v. Hudson and Maeberry 649
4. Where a potential conflict in interest arises, the proper course of action for the trial judge is to conduct a hearing to determine whether a conflict exists to the degree that a defendant may be prevented from receiving advice and assistance sufficient to afford him the quality of representation guaranteed by the sixth amendment. State v. Hudson and Maeberry 649

Delayed Sentences.

1. Upon a delayed sentencing for a sexual offense, credit must be given for time spent in confinement under a commitment as a sexual sociopath based on the same sexual offense. State v. Moore 240
2. Where delayed consecutive sentences for sexual offenses are pronounced, credit for time served under a prior sexual sociopath commitment based on the same sexual offenses is to be applied to the first sexual sentence to be served. Only excess credit, if any, is to be applied to any consecutive sexual sentence to be served later. Credit

shall not be applied on any sentence until the defendant commences to serve the sentence. State v. Moore 240

Demurrer.

1. A demurrer ore tenus is a permissible practice; and if a pleading to which it is addressed is totally defective, it is error to admit any evidence under such pleading. Newman Grove Creamery Co. v. Deaver 178
2. Generally, it constitutes an abuse of discretion to sustain a demurrer without leave to amend where there is a reasonable possibility that the defect can be cured by amendment. Newman Grove Creamery Co. v. Deaver 178

Derivative Actions.

In a derivative action by a taxpayer on behalf of a sanitary and improvement district the taxpayer has no rights greater than the rights the district itself possesses. Nielsen v. SID No. 229 542

Directed Verdict.

1. The party against whom a verdict is directed is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence. It is only when the facts are conceded, undisputed, or are such that reasonable minds can draw but one conclusion therefrom that the trial court must decide the question as a matter of law and not submit it to a jury.
   Simet v. Sage 13
   Esbenshade v. National Life Ins. Co. 216
   Krug v. Laughlin 367
2. It is a well-established rule that if there is any evidence which will sustain a finding for the litigant having the burden of proof in a cause, the trial court may not disregard it and decide the case as a matter of law. Esbenshade v. National Life Ins. Co. 216
3. To test the evidence for a jury question, the trial court must resolve every controverted fact in favor of the party against whom a verdict is sought and give that party the benefit of every inference which can reasonably be drawn from the evidence presented. Krug v. Laughlin 367
4. In all actions brought to recover damages for injuries to a person or his property, all questions of negligence and contributory negligence shall be for the jury. Neb. Rev. Stat. § 25-1151 (Reissue 1979). Krug v. Laughlin 367

Divorce.

1. Above all other considerations in determining the question

of who should have custody of a minor child upon the dissolution of a marriage, the paramount consideration is the best interests and welfare of the child. Meysenburg v. Meysenburg 456
2. We review the record de novo, giving due regard to the trial court which had the opportunity to observe the witnesses.
Meysenburg v. Meysenburg 456
Burnham v. Burnham 498
3. There is no mathematical formula by which awards for alimony or division of property in an action for dissolution of marriage can be precisely determined. They are to be determined by the facts of each case and the court will consider all pertinent facts in reaching an award that is just and equitable. Cole v. Cole 562
4. This court, on appeal, is not precluded from modifying an alimony award made by the District Court where such award is patently unfair on the record. An award of alimony may be altered on appeal where the record reflects good cause. Cole v. Cole 562
5. When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties. Cole v. Cole 562
6. It is the general rule in this state that allowances of alimony in the form of an annuity or requiring the husband to pay a fixed sum for an indefinite period of time are not favored. Cole v. Cole 562

Double Jeopardy.

The granting of a new trial because of errors occurring at the original trial does not necessarily constitute double jeopardy. Addison v. Parratt 459

Due Process.

In order to comport with due process of law, a criminal statute must be reasonably clear and definite. State v. Sodders 504

Easements.

1. Where an easement such as a right-of-way is granted without fixing its exact location, the location may be subsequently fixed by express agreement between the parties, or by an implied agreement arising out of the use of a particular way. Graves v. Gerber 209
2. The failure of a grant to definitely locate an easement does not give the grantee the right to use the servient estate without limitation. In such a case the grantor may

designate the location, and if he fails to do so the grantee may then make the designation which, in either case, must be reasonable. Graves v. Gerber 209
3. Under certain circumstances, a court of equity may fix the location of a way which the grant does not specifically describe. Graves v. Gerber 209
4. The use of an easement existing by an express grant must be confined to the terms and purposes of the grant. Graves v. Gerber 209
5. An easement of necessity does not arise from an express grant, but is an easement arising either by implied grant or reservation. Such implied easements ordinarily arise in cases where the land owned by one entity is divided by sale of a portion and the beneficial use of one tract or the other depends on an easement for ingress or egress or other purpose. Graves v. Gerber 209

Effectiveness of Counsel.
1. The standard for determining whether defense counsel has rendered constitutionally required effective assistance is whether counsel has performed at least as well as a lawyer with ordinary training and skill in the criminal law in that area and has conscientiously protected the interests of his client.
State v. Shepard 188
State v. Rust 320
2. In order for one to maintain ineffective counsel the record must affirmatively support the claim.
State v. Shepard 188
State v. Pankey 377
3. The determination of sufficiency of counsel must be made within the context of the facts of a particular case, and we will not require defense counsel to develop ridiculous trial tactics because they are suggested by the defendant. State v. Rust 320
4. Error or prejudice allegedly resulting from the ineffective assistance of counsel cannot be established where witnesses were not called, absent a showing in the record of the beneficial nature of such witnesses' testimony. State v. Pankey 377

Eminent Domain.
1. Zoning ordinances are inapplicable to governmental projects for the construction of which the agency in question has the power to condemn or appropriate lands by the power of eminent domain. Witzel v. Village of Brainard 231
2. The general rule is that the propriety of a taking of property by eminent domain is not defeated by the fact that the

purpose for which the property is taken is a use prohibited by the zoning regulations. Witzel v. Village of Brainard 231
3. In an eminent domain proceeding a wide discretion is granted the trial judge in determining the admissibility of sales, and the evidence should not be admitted where there is a marked difference in the situation of the properties or unless the judge is satisfied that the price paid was sufficiently voluntary to be a reasonable index of value. Damme v. Nebraska P.P. Dist. 478

Employer and Employee.
1. A Workmen's Compensation Court determination of employee status, not independent contractor, is affirmed where substantial evidence supports the conclusion and it is not clearly wrong. Employers Ins. of Wausau v. Greater Omaha Trans. Co. 276
2. Under the facts of the case, an injured cabdriver is an employee of the cab campany and entitled to workmen's compensation benefits even though written arrangement is denominated a lease of the cab rather than an employment contract. Employers Ins. of Wausau v. Greater Omaha Trans. Co. 276

Employment Contracts.
1. Where an employer lawfully terminates the employment of an employee, such term of employment is not extended by the receipt of severance pay benefits provided by the employer. The payment of severance pay by the employer and the acceptance of the same by the employee generally manifests a termination of the employment relationship. Feola v. Valmont Industries, Inc. 527
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 hiring. 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. Feola v. Valmont Industries, Inc. 527
3. A provision in a contract of employment providing that the employee should have the privilege of terminating his employment at any time, with or without cause, upon written notice, and that the employer should have the same privilege, constitutes a hiring at will. Feola v. Valmont Industries, Inc. 527

Employment Security Law.

1. Under the Nebraska Employment Security Law, Neb. Rev. Stat. §§ 48-601 et seq. (Reissue 1978), the contribution type of financing as provided by § 48-649 and reimbursement financing under § 48-660.01 are separate and distinct systems, and a nonprofit organization must elect to use one or the other. West Nebraska General Hospital v. Hanlon 173
2. The Employment Security Law does not allow a reimbursing employer to acquire the experience account of its contributing predecessor and apply such account against its reimbursement charges. West Nebraska General Hospital v. Hanlon 173
3. The exemption from the term "employment" in Neb. Rev. Stat. § 48-604(6)(o) (Reissue 1978) includes participation in a voluntary work-study program as long as grades and credits received are applied toward the high school degree and it is a part of an approved course of study. Seldin Development & Management Co. v. Chizek 315
4. When a school has certified to an employer that work-study is an integral part of its educational program, the employer should be allowed to rely on that assurance, particularly when such conclusion is adequately supported by the record. Seldin Development & Management Co. v. Chizek 315
5. An employee who desires to retain his employment but resigns or quits because the employer has clearly indicated that if he does not his employment will be terminated has not left his employment "voluntarily," as that term is used in Neb. Rev. Stat. § 48-628(a) (Reissue 1978). School Dist. No. 20 v. Commissioner of Labor 663
6. Neb. Rev. Stat. § 48-646 (Reissue 1978) requires that the amount of attorney fees charged by a lawyer to his client be approved by the Commissioner of Labor. It does not authorize the District Court to award attorney fees for which approval by the commissioner has not been sought. School Dist. No. 20 v. Commissioner of Labor 663

Equity.

1. An appeal from a judgment in an equitable action does not require the filing of a motion for new trial for a de novo review in this court of alleged errors in the findings and judgment of the trial court. To the extent that it conflicts herewith, *McClintock v. Nemaha Valley Schools*, 198 Neb. 477, 253 N.W.2d 304 (1977), is overruled. Petersen v. Petersen 1
2. The law requires this court in determining an appeal in an equity action involving questions of fact to reach an

independent conclusion without reference to the findings of the District Court. In determining the weight of the evidence where there is an irreconcilable conflict on material issues of fact, this court will consider the fact that the trial court observed the witnesses and their manner of testifying.
Nebraska State Bank v. Gaddis 136
Weiss v. Meyer 429
3. A prayer for general equitable relief is to be construed liberally, and will often justify granting relief in addition to that contained in the specific prayer, provided it fairly conforms to the case made by the petition and the evidence. Daugherty v. Ashton Feed & Grain Co., Inc. 159
4. A court of equity which has obtained jurisdiction for any purpose may retain jurisdiction for the purpose of administering complete relief between the parties with respect to the subject matter.
Daugherty v. Ashton Feed & Grain Co., Inc. 159
Graves v. Gerber 209
5. Under certain circumstances, a court of equity may fix the location of a way which the grant does not specifically describe. Graves v. Gerber 209
6. It is the general rule that if a court of equity has properly acquired jurisdiction in a suit for equitable relief, it may make complete adjudication of all matters properly presented and involved in the case and grant relief, legal or equitable, as may be required and thus avoid unnecessary litigation. Miller v. School Dist. No. 69 290
7. It is a common principle of equity that equity delights to do justice and that not by halves, and when equity once acquires jurisdiction it will retain it so as to afford complete relief. Miller v. School Dist. No. 69 290
8. Equity seeks the real and substantial rights of the parties, and applies the remedy in such manner as to relieve those having the controlling equities. Miller v. School Dist. No. 69 290
9. Technicalities are not favorites of law or equity. Courts relish them as instruments to prevent injustice, but not to defeat justice. Miller v. School Dist. No. 69 290
10. Equity looks through forms to substance, or as stated in similar language, a court of equity goes to the root of a matter and is not deterred by forms. Miller v. School Dist. No. 69 290
11. A court of equity will refuse to enforce a contract when it is not clearly satisfied that it embodies the real understanding of the parties. Litz v. Wilson 483

Estoppel.

In order to create an equitable estoppel, the party pleading it must have suffered a loss of a substantial character or been induced to alter his position for the worse in some material respect. Benson v. Ruggles & Burtch v. Benson ... 330

Evidence.

1. Newly discovered evidence must be of such a nature that if it had been offered and admitted at the former trial it probably would have produced a substantially different result. State v. Record 90
2. In determining the sufficiency of the evidence to sustain a conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass upon the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence, as such matters are for the jury.
   State v. Pena 250
   Tibbs v. Fisher 306
3. Evidence of a defendant's fingerprints has probative value; and it is for the jury to determine, in light of all other evidence, whether such evidence permits an inference to be drawn that beyond a reasonable doubt defendant was the person who committed the offense in question. State v. Pena 250
4. Where different minds may reasonably draw different conclusions or inferences from the evidence adduced concerning the issues of negligence or contributory negligence and the degree thereof when one is compared with the other, such issues must be submitted to the jury. Sullivan v. Geo. A. Hormel and Co. 262
5. An expert, properly qualified, may give an opinion as to the speed of vehicles involved in an automobile accident. However, neither an expert nor lay witness may testify as to his opinion of speed based solely on the fact that a collision occurred. Belitz v. Suhr 280
6. The function of the lay witness is to describe what he has observed and the trier of fact will draw the conclusion from the facts observed and reproduced by the witness. Belitz v. Suhr 280
7. In determining the sufficiency of the evidence to sustain a judgment in a law action, it must be considered most favorably to the successful party, every controverted fact must be resolved in that party's favor, and he must have the benefit of any inferences reasonably deducible from it. Tibbs v. Fisher 306
8. 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. Ellis 379

9. A not guilty plea places in issue every relevant fact, and the prosecution should not be precluded from introducing evidence on a certain element of the alleged crime because there was already some other evidence in the case tending to establish the same, until and unless the trial court, in the exercise of its discretion, determines that further evidence on that point is irrelevant. State v. Ellis 379
10. A purported showing of a paucity of evidence does not prove that a trial court abused its discretion in balancing the probative value against the prejudicial effect of a particular item of disputed evidence. In fact, a lack of other relevant evidence may in some instances increase the probative value of the evidence available. State v. Ellis 379
11. The admissibility of evidence of other crimes lies largely within the discretion of the trial court. State v. Ellis 379
12. Evidence of other crimes, if relevant to the issue, is not made inadmissible simply because they occurred at a time after that of the principal charge. State v. Ellis 379
13. In proceedings to review an order of the State Real Estate Commission, the questions to be determined are whether the order of the Commission is supported by substantial evidence, whether the Commission acted within the scope of its authority, and whether its action was arbitrary, capricious, or unreasonable. Wright v. State ex rel. State Real Estate Comm. 467
14. In an eminent domain proceeding a wide discretion is granted the trial judge in determining the admissibility of sales, and the evidence should not be admitted where there is a marked difference in the situation of the properties or unless the judge is satisfied that the price paid was sufficiently voluntary to be a reasonable index of value. Damme v. Nebraska P.P. Dist. 478
15. Improper evidence is not made admissible merely because it is designed to meet other evidence, and this is true regardless of the propriety of the other evidence. Damme v. Nebraska P.P. Dist. 478
16. Determinations made by the Commission of Industrial Relations in accepting or rejecting claimed comparables are within the field of expertise of the Commission of Industrial Relations and should be given due deference. AFSCME Local 2088 v. County of Douglas 511

17. Factors most often used to determine comparability are geographic proximity, population, job descriptions, job skills, and job conditions. AFSCME Local 2088 v. County of Douglas 511
18. Attempting to arrive at comparables requires granting some discretion to the Commission of Industrial Relations; and unless there is no substantial evidence upon which the Commission of Industrial Relations could have concluded that the counties used by the Commission of Industrial Relations did, indeed, provide comparables, we may not as a matter of law disallow the action taken by the Commission of Industrial Relations. AFSCME Local 2088 v. County of Douglas 511
19. Where there are local comparisons which can or should be made, they may not be disregarded if in fact it appears from the evidence that the local employers are comparable in that they meet the requirements of Neb. Rev. Stat. § 48-818 (Reissue 1978). AFSCME Local 2088 v. County of Douglas 511
20. Whenever there is another employer in the same market hiring employees to perform same or similar skills, the salaries paid to those employees must be considered by the Commission of Industrial Relations unless evidence establishes that there are substantial differences which cause the work or conditions of employment to be dissimilar. AFSCME Local 2088 v. County of Douglas 511
21. Where the essential facts presented in a case are undisputed, the decision becomes a question of law to be decided by the court, and the findings of the trial court are essentially conclusions of law. Feola v. Valmont Industries, Inc. 527
22. 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. Harper 568
23. This court will not interfere with a conviction based on evidence unless it is so lacking in probative force that as a matter of law it can be said that it is insufficient to support a verdict of guilt beyond a reasonable doubt. State v. Ohler 742

Expert Witnesses.

1. Fingerprint identity testified to by a qualified expert is perhaps the best known method of the highest probative value in establishing identification. State v. Pena 250
2. An expert, properly qualified, may give an opinion as to the speed of vehicles involved in an automobile accident.

However, neither an expert nor lay witness may testify as to his opinion of speed based solely on the fact that a collision occurred. Belitz v. Suhr 280

Fees.

The amount of attorney fees and the amount of referee fees rest in the sound judicial discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. Sweet v. Fairbairn 286

Governmental Subdivisions.

Where the governmental subdivision does not act on a claim within 2 years after the claim accrued and the claimant does not withdraw the claim within 2 years after the claim accrued, all suits permitted by the Political Subdivisions Tort Claims Act are barred and the additional 6-month period granted under particular circumstances does not apply. Ragland v. Norris P.P. Dist. 492

Guaranty.

A guarantor is entitled to be subrogated to the benefit of all the security and means of payment under the creditor's control, and, in the absence of assent, waiver, or estoppel, the guarantor is generally released by an act of the creditor which deprives the guarantor of such right. Southwest Bank of Omaha v. Herting 347

Habeas Corpus.

The determination by the District Court in a habeas corpus case does not control the proper exercise of the jurisdiction of the county court in a later adoption proceeding. Lum v. Mattley 789

Habitual Criminals.

1. An enhanced sentence imposed under the provisions of the habitual criminal laws, Neb. Rev. Stat. §§ 29-2221 and 29-2222 (Reissue 1979), is not a new jeopardy or additional penalty for the same crime. It is simply a stiffened penalty for the latest crime which is considered to be an aggravated offense because it is a repetitive one. Addison v. Parratt 459
2. Record examined and disclosed that pleas of guilty utilized to prove the defendant to be an habitual criminal, as well as his waiver of counsel, were entered freely, voluntarily, and knowingly. Addison v. Parratt 459

Highways.

1. A motorist approaching a highway protected by stop signs must stop before going upon the highway, must look to

his left and to his right, and must permit a motor vehicle which is proceeding along the highway protected by stop signs to pass if it is at a distance and is traveling at a speed making it imprudent for the motorist to proceed into the intersection. Pickett v. Parks 310
2. The duty of a motorist to look for vehicles approaching on a highway protected by stop signs implies the obligation to see what is in plain view. Pickett v. Parks 310
3. A motorist entering an intersection of highways is obligated to look for approaching automobiles and to see any vehicle within that radius which denotes the limit of danger. Pickett v. Parks 310
4. A traveler on highways may assume, unless and until he has warning, notice, or knowledge to the contrary, that any other user of the highways will use them in a lawful manner, and until he has such warning, notice, or knowledge, he may govern his acts in accordance with such assumption. Pickett v. Parks 310

Homicide.

1. Under present statutes, upon conviction for second degree murder, the court is not authorized to pronounce an indeterminate sentence. The court may impose a sentence of a definite term of years, not less than the minimum authorized by law; or, in the alternative, may impose a sentence of life imprisonment.
   State v. Randall 248
   State v. Stranghoener 598
2. Ordinarily, in a case charging first degree murder, where there is no eyewitness to the act, and the evidence is largely circumstantial, the jury should be instructed as to the law governing murder in the first degree, second degree, and manslaughter. State v. Ellis 379

Identification Procedures.

Fingerprint identity testified to by a qualified expert is perhaps the best known method of the highest probative value in establishing identification. State v. Pena 250

Impeachment.

The crime of petit larceny without proof that the manner in which it was accomplished involved deceit or deception so as to be classified as "crimen falsi" is not such a crime as may be used to impeach a witness' veracity under Neb. Rev. Stat. § 27-609 (Reissue 1979). State v. Ellis 379

Implied Consent Law.

1. Under the Nebraska implied consent statutes a driver

is not entitled to consult with a lawyer prior to taking a test, nor is the test required to be delayed by a request of an arrested motorist that he be permitted to contact a lawyer. Winter v. Peterson 785
2. A single request to submit to a test is sufficient. There is no requirement that a second request be made if the person arrested refuses to submit to the test. Winter v. Peterson 785
3. A conditional or qualified refusal to take a test to determine the alcohol content of body fluids under the implied consent law is not sanctioned by the act and such refusal is a refusal to submit to the test within the meaning of the act. Winter v. Peterson 785
4. A refusal to submit to a chemical test occurs within the meaning of the implied consent law when the licensee, after being asked to submit to a test, so conducts himself as to justify a reasonable person in the requesting officer's position in believing that the licensee understood that he was asked to submit to a test and manifested an unwillingness to take it. Winter v. Peterson 785
5. To constitute a refusal to submit to a chemcial test required under the implied consent statute, the only understanding required by the licensee is an understanding that he has been asked to take a test. It is no defense to refusal that he does not understand the consequences of refusal or is not able to make a reasoned judgment as to what course of action to take. Winter v. Peterson 785

Indictments and Informations.

1. It is only where there is a total failure of competent proof in a criminal case to support a material allegation in the information, or where the testimony adduced is of so weak or doubtful a character that a conviction based thereon could not be sustained, that the trial court will be justified in directing a verdict of not guilty. State v. Ellis 379
2. In the absence of a motion to quash, an information which alleges an attempt to commit an act or acts which if successful would constitute a statutory crime sufficiently charges an attempted crime so as to withstand a jurisdictional attack made for the first time on appeal. To the extent that *Gandy v. The State*, 13 Neb. 445, 14 N.W. 143 (1882), is in conflict with this opinion, it is overruled.
State v. Sodders 504
State v. Meredith 637

Injunction.

1. Nonobjection to trivial breaches of a restrictive covenant does not result in loss of the right to enforce the covenant. Meierhenry v. Smith 88

2. Injunction is an appropriate remedy for violation of a restrictive covenant. Meierhenry v. Smith 88
3. Enactment of the Environmental Protection Act does not divest district courts of subject matter jurisdiction to enjoin proposed solid waste disposal areas alleged to be in violation of county zoning ordinances. Omaha Fish and Wildlife Club, Inc. v. Community Refuse, Inc. 110
4. The Department of Environmental Control and county zoning officials are not indispensable parties in a suit against a licensee for a solid waste disposal area where the suit is to enjoin against an alleged violation of a county zoning ordinance. Omaha Fish and Wildlife Club, Inc. v. Community Refuse, Inc. 110
5. An action for a permanent injunction is heard de novo on appeal. Where an action in equity is appealed, it is the duty of this court to try the issues de novo and to reach an independent conclusion without reference to the findings of the District Court. Daugherty v. Ashton Feed & Grain Co., Inc. 159
6. An injunction against a nuisance is an extraordinary remedial process which is granted not as a matter of right but in the exercise of the sound discretion of the court, to be determined on a consideration of all the circumstances of each case. Daugherty v. Ashton Feed & Grain Co., Inc. 159

Insurance.

1. Insurance companies have the same right as individuals to limit their liability. Lavalleur v. State Automobile & Cas. Underwriters 82
2. In construing a contract, the instrument must be read as a whole, giving force and effect to all its provisions to determine whether or not any ambiguity exists and whether, if such ambiguity does exist, the contract is confusing and uncertain in its terms. Lavalleur v. State Automobile & Cas. Underwriters 82
3. In all cases where the beneficiary, or other person entitled thereto, brings an action upon any type of insurance policy except workmen's compensation insurance, or upon any certificate issued by a fraternal beneficiary association, against any company, person, or association doing business in this state, the court, upon rendering judgment against such company, person, or association, shall allow the plaintiff a reasonable sum as an attorney fee in addition to the amount of his recovery, to be taxed as part of the costs. Neb. Rev. Stat. § 44-359 (Reissue 1978). Rieschick Drilling Co. v. American Cas. Co. 142
4. Where an excess insurance clause in a driver's automobile

liability policy and a no-liability clause in the automobile owner's liability policy apparently conflict, the no-liability clause is ineffective and the driver's insurance excess. Jensen v. Universal Underwriters Ins. Co. 487
5. Under the provisions of Neb. Rev. Stat. §§ 25-701 and 25-702 (Reissue 1979), the joinder in a single action of the cause against the uninsured motorist with the insurer carrying the uninsured motorist coverage for the claimant is not permissible. Eich v. State Farm Mut. Automobile Ins. Co. 714
6. In a suit against the uninsured motorist, the amount of uninsured motorist coverage should not be disclosed to the jury. Eich v. State Farm Mut. Automobile Ins. Co. 714
7. The following exclusion in uninsured motorist coverage does not prevent the stacking of coverage where the insured has separate policies of uninsured motorist coverage on two or more vehicles: "(b) TO *BODILY INJURY* TO AN *INSURED* WHILE *OCCUPYING* OR THROUGH BEING STRUCK BY A LAND MOTOR VEHICLE OWNED BY THE NAMED INSURED OR ANY *RESIDENT* OF THE SAME HOUSEHOLD, IF SUCH VEHICLE IS NOT AN *OWNED MOTOR VEHICLE*," and the policy definition of owned motor vehicle includes the motor vehicle described in the declaration. Eich v. State Farm Mut. Automobile Ins. Co. 714

Intent.

1. The provisions and conditions of a will are to be construed by the courts with a view to carrying out the intention of the testator, and the cardinal rule in construing a will is to ascertain and effectuate that intention. Olson v. Sampson ... 18
2. The intention of the testator is to be determined from the language of all the pertinent provisions of the will and, where applicable, the circumstances under which the will was made. Olson v. Sampson 18
3. In searching for the intention of the testator, the court must examine the entire will, consider each of its provisions, give words their generally accepted literal and grammatical meaning, and indulge the presumption that the testator understood the meaning of the words used. Olson v. Sampson 18
4. The intention of the testator must be found within the will, and that intention is the one the testator expressed by the language of the will and not an entertained but unexpressed intention. Olson v. Sampson 18
5. It is the visible and hostile possession, with an intention to possess land occupied under a belief that it belongs to the possessor, that constitutes its adverse character. Nebraska State Bank v. Gaddis 136

6. When a claimant occupies the land of another by actual, open, exclusive, and continuous possession, the owner is placed on notice that his ownership is endangered; and unless he takes proper action within 10 years to protect himself, he is barred from action thereafter and the title of the claimant is complete. It is the nature of the hostile possession that constitutes the warning, not the intent of the claimant when he takes possession. Nebraska State Bank v. Gaddis 136
7. "Claim of ownership" as used in the law of adverse possession means nothing more than the intention of the occupant to appropriate and use the land as his own to the exclusion of all others, irrespective of any semblance or shadow of actual right or title. Weiss v. Meyer 429
8. Adverse possession is founded upon the intent with which an occupant held possession, and can best be determined by his acts. Weiss v. Meyer 429
9. The intent, even though mistaken, is sufficient as where the claimant occupies to the wrong line believing it to be the true line and even though he does not intend to claim more than that described in the deed. Weiss v. Meyer 429
10. In order to constitute an attempt to commit a crime under Neb. Rev. Stat. § 28-201 (Reissue 1979), there must be an intentional act on the part of the defendant which would constitute a substantial step toward the completion of the allegedly attempted crime, assuming that the circumstances at the time were as the defendant believed them to be. State v. Sodders 504

Invitor-Invitee.

The general contractor, in control of the premises where work performance under a contract with the owner is being carried out, owes a duty to persons rightfully on the premises to keep the premises in a reasonably safe condition while the contract is in the course of performance. Sullivan v. Geo. A. Hormel and Co. 262

Issue Preclusion.

1. For the theory of issue preclusion to bar further litigation on a specific issue, the issue concluded must be identical, must have been raised and litigated in the prior action, must have been material and relevant to the disposition of the prior action, and the determination made of the issue in the prior action must have been necessary and essential to the resulting judgment. JED Constr. Co., Inc. v. Lilly 607
2. Identity of parties is not necessary to give validity to a claim of issue preclusion. JED Constr. Co., Inc. v. Lilly 607

3. A stranger to a primary suit can assert the theory of issue preclusion as a defense in a subsequent suit provided other elements of the theory of issue preclusion coincide. JED Constr. Co., Inc. v. Lilly 607

Joinder of Actions.

Under the provisions of Neb. Rev. Stat. §§ 25-701 and 25-702 (Reissue 1979), the joinder in a single action of the cause against the uninsured motorist with the insurer carrying the uninsured motorist coverage for the claimant is not permissible. Eich v. State Farm Mut. Automobile Ins. Co. 714

Judges.

1. By creating a classification of "traffic infractions" by Neb. Rev. Stat. § 39-602(107) (Cum. Supp. 1980), it was not the intention of the Legislature to deprive the nonlawyer associate judges of jurisdiction over this particular classification of offenses. Miller v. Peterson 658
2. "Traffic infractions" are misdemeanors for the purpose of determining the authority of nonlawyer associate judges under the provisions of Neb. Rev. Stat. § 24-519 (Reissue 1979). Miller v. Peterson 658

Judgments.

1. In a trial to the court in a law action, the findings and judgment of the trial court on the facts have the same force as a jury verdict and will not be set aside if there is sufficient competent evidence to support them, and the findings of the court will not be disturbed on appeal unless clearly wrong. Koperski v. Husker Dodge, Inc. 29
2. 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 will not be set aside unless clearly wrong. In determining the sufficiency of the evidence to sustain a judgment in a law action, it must be considered most favorably to the successful party, and every controverted fact must be resolved in that party's favor, and such party must have the benefit of any inferences reasonably deducible from it.
   Rieschick Drilling Co. v. American Cas. Co. 142
   Tibbs v. Fisher 306
3. An unqualified allowance of alimony in gross made before July 6, 1972, whether payable immediately in full or periodically in installments, and whether intended solely as a property settlement or as an allowance for support, or both, is not subject to modification. Watley v. Watley 155
4. In the absence of a judgment or order finally disposing of a case, the Supreme Court has no authority nor jurisdiction to act, and in the absence of such judgment or order the

appeal will be dismissed. Knoell Constr. Co., Inc. v. Hanson 373
5. As a general rule, domestic judgments cannot be collaterally attacked or impeached by the parties for fraud or collusion not going to the jurisdiction, and consent judgments are as conclusive on collateral attack as judgments rendered after trial. Nielsen v. SID No. 229 542
6. In cases involving public interests where the public was a party merely by representation, the persons represented may show fraud or collusion in obtaining the judgment. Nielsen v. SID No. 229 542
7. The purpose of an order nunc pro tunc is to correct the record so that it will truly reflect action actually taken, but which through inadvertence or mistake has not been truly recorded. State v. Al-Hafeez 681
8. The limited remedy available in an application for an order nunc pro tunc will not be extended to question the constitutionality of the actions taken or declined to be taken by the trial court, but is limited to the specific purpose of the proceeding, that is, to correct the record to accurately reflect what actually happened in the proceedings. State v. Al-Hafeez 681

Judicial Notice.

1. This court will not take judicial notice of a municipal ordinance which does not appear in the record. State v. Shea 17
2. Where cases are interwoven and interdependent and the controversy involved has already been considered and determined in a prior proceeding involving one of the parties now before the court, the court has the right to examine its own records and take judicial notice of its own proceedings and judgment in the prior action. Reeves v. Watkins 804

Juries.

1. Where different minds may reasonably draw different conclusions from the evidence as to whether or not they establish negligence, the issues are for the jury. Esbenshade v. National Life Ins. Co. 216
2. In all actions brought to recover damages for injuries to a person or his property, all questions of negligence and contributory negligence shall be for the jury. Neb. Rev. Stat. § 25-1151 (Reissue 1979). Krug v. Laughlin 367

Jurisdiction.

1. The District Court in an action to establish paternity has jurisdiction to award reasonable visitation rights to the

father in an appropriate case. Cox v. Hendricks 23
2. Where a statute provides an adequate remedy at law, equity will not entertain jurisdiction, and the statutory remedy must be exhausted before equity may be resorted to. Koperski v. Husker Dodge, Inc. 29
3. The exclusive original jurisdiction given to the county court sitting as a juvenile court is not diminished by Neb. Rev. Stat. § 43-201 (Reissue 1978) where the child's custody is the subject of a preexisting District Court order issued pursuant to divorce proceedings. In re Interest of Goldfaden 93
4. The juvenile court can intervene between the parents and the child only if the child's condition requires the state to use its power to protect the welfare of the child. The circumstances of the child must come within the juvenile statutes. In re Interest of Goldfaden 93
5. Enactment of the Environmental Protection Act does not divest district courts of subject matter jurisdiction to enjoin proposed solid waste disposal areas alleged to be in violation of county zoning ordinances. Omaha Fish and Wildlife Club, Inc. v. Community Refuse, Inc. 110
6. A court of equity which has obtained jurisdiction for any purpose may retain jurisdiction for the purpose of administering complete relief between the parties with respect to the subject matter.
Daugherty v. Ashton Feed & Grain Co., Inc. 159
Graves v. Gerber 209
7. It is the general rule that if a court of equity has properly acquired jurisdiction in a suit for equitable relief, it may make complete adjudication of all matters properly presented and involved in the case and grant relief, legal or equitable, as may be required and thus avoid unnecessary litigation. Miller v. School Dist. No. 69 290
8. It is a common principle of equity that equity delights to do justice and that not by halves, and when equity once acquires jurisdiction it will retain it so as to afford complete relief. Miller v. School Dist. No. 69 290
9. By creating a classification of "traffic infractions" by Neb. Rev. Stat. § 39-602(107) (Cum. Supp. 1980), it was not the intention of the Legislature to deprive the nonlawyer associate judges of jurisdiction over this particular classification of offenses. Miller v. Peterson 658
10. The Commission of Industrial Relations' authority to resolve disputes concerning terms, tenure, or conditions of employment is limited to situations in which the parties have not yet reached agreement. Once an agreement is reached and a subsequent breach is alleged to have occurred,

the parties are required to litigate their dispute in a competent court having jurisdiction of the matter. Saltz v. School Dist. of Norfolk 740
11. The determination by the District Court in a habeas corpus case does not control the proper exercise of the jurisdiction of the county court in a later adoption proceeding. Lum v. Mattley 789

Juror Qualifications.

Qualified jurors need not be totally ignorant of the facts and issues involved. It is sufficient as to competency to serve if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. State v. Ellis 379

Jury Instructions.

1. Where negligence is pleaded and there is no competent evidence to support it, it is prejudicial error to submit such issue to the jury. Simet v. Sage 13
2. A party may not complain that a court erroneously rejected his requested instructions when the substance of the instructions requested is contained in other instructions given by the court. Belitz v. Suhr 280
3. Ordinarily, in a case charging first degree murder, where there is no eyewitness to the act, and the evidence is largely circumstantial, the jury should be instructed as to the law governing murder in the first degree, second degree, and manslaughter. State v. Ellis 379
4. In a suit against the uninsured motorist, the amount of uninsured motorist coverage should not be disclosed to the jury. Eich v. State Farm Mut. Automobile Ins. Co. 714

Jury Verdicts.

1. The verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. State v. Pena 250
2. A jury verdict will not be disturbed unless it is clearly erroneous and against the preponderance of the evidence. Krug v. Laughlin 367
3. It is only where there is a total failure of competent proof in a criminal case to support a material allegation in the information, or where the testimony adduced is of so weak or doubtful a character that a conviction based thereon could not be sustained, that the trial court will be justified in directing a verdict of not guilty. State v. Ellis 379

4. Defects in a verdict which are matters of substance must be corrected before the jury is discharged. Neb. Rev. Stat. § 25-1123 (Reissue 1979). Eich v. State Farm Mut. Automobile Ins. Co. 714

Juvenile Courts.

1. The exclusive original jurisdiction given to the county court sitting as a juvenile court is not diminished by Neb. Rev. Stat. § 43-201 (Reissue 1978) where the child's custody is the subject of a preexisting District Court order issued pursuant to divorce proceedings. In re Interest of Goldfaden 93
2. The juvenile court can intervene between the parents and the child only if the child's condition requires the state to use its power to protect the welfare of the child. The circumstances of the child must come within the juvenile statutes. In re Interest of Goldfaden 93
3. An appeal of a juvenile case is heard by trial de novo upon the record. 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 Goodon 256
   In re Interest of McKee 623
4. An appeal from the separate juvenile court involving termination of parental rights is determined de novo upon the record by this court. In re Interest of Moen 337
5. Where a court order pursuant to Neb. Rev. Stat. § 43-209(6) (Reissue 1978) requires presence of a parent within the jurisdiction of the court for its compliance, a parent who voluntarily leaves the state, making compliance impossible, cannot avail himself of his absence as a basis for setting aside the termination order. In re Interest of Moen 337

Legislative Delegation.

The Legislature cannot delegate its powers to make a law, but it can make a law to become operative on the happening of a certain contingency or on an ascertainment of fact upon which the law intends to make its own action depend. State ex rel. Douglas v. Sporhase 703

Legislative Power.

The Legislature has the power to determine public policy with regard to ground water. State ex rel. Douglas v. Sporhase 703

Legislature.

1. Since the Nebraska common law of ground water permits use of the water only on the overlying land, legislative action is necessary to allow for transfers off the overlying land. State ex rel. Douglas v. Sporhase 703
2. Ground water may be transferred from the overlying land only with the consent of and to the extent prescribed by the public through its elected representatives. State ex rel. Douglas v. Sporhase 703

Liability.

Insurance companies have the same right as individuals to limit their liability. Lavalleur v. State Automobile & Cas. Underwriters 82

Libel and Slander.

Notice consisting solely of a statement of the termination of a prior business or professional relationship is not by itself libelous or slanderous. Tibbs v. Fisher 306

Licenses.

Whenever a guilty plea is utilized to support a judgment of conviction used to support an order revoking a motor vehicle operator's license under Neb. Rev. Stat. § 39-669.27 (Reissue 1978), and it is challenged in District Court, it must appear from the record that there was a judicial acceptance of that plea. Miller v. Peterson 658

Liens.

If an otherwise unperfected lien is not filed at all the proper places at the time of filing, but through the passage of time or change in character of the property becomes a proper filing under the provisions of the Uniform Commercial Code, the lien also becomes properly perfected and has superior rights over all other liens not otherwise perfected prior to the time that the previous security lien was perfected. Genoa Nat. Bank v. Sorensen 423

Liquor Licenses.

1. A liquor license is a purely personal privilege, does not constitute property, and vests no property rights in a licensee which can be transferred. City of Lincoln v. Nebraska Liquor Control Comm. 630
2. Under the statutes of Nebraska, liquor licenses are issued to a single entity and, when so issued, may not be used by anyone else or transferred to anyone else. City of Lincoln v. Nebraska Liquor Control Comm. 630
3. The Nebraska Liquor Control Commission has broad

discretion in determining whether applications for licenses should be granted or denied and courts are without authority to interfere with that discretion unless it has been abused. City of Lincoln v. Nebraska Liquor Control Comm. 630

4. Absence of need alone is not a sufficient reason to deny an otherwise proper application for a liquor license. City of Lincoln v. Nebraska Liquor Control Comm. 630

Master and Servant.

Under the terms of the construction contract here involved, including the general conditions contained in AIA document A201, April 1970 edition, especially the provisions relating to initiating, maintaining, and supervising all safety precautions and programs in connection with the work, including those with reference to safety and cleanup, the relationship of owner and independent contractor was not converted to that of master and servant. Sullivan v. Geo. A. Hormel and Co. 262

Mechanics' Liens.

1. The purpose of Neb. Rev. Stat. § 52-118 (Reissue 1978) is to secure payment to those furnishing labor, material, and equipment rental in the construction or repairing of any public building, structure, or improvement where the general provisions of the mechanic's lien laws do not apply. Dukane Corp. v. Sides Constr. Co. 227
2. Where the general mechanic's lien laws are applicable the lien of a materialman for materials furnished for the erection of a building by virtue of an agreement with the contractor extends to such materials only as are used in or delivered at the building for use therein. Dukane Corp. v. Sides Constr. Co. 227
3. A contractor cannot successfully assert a mechanic's lien upon property where there has been only part performance or a lack of substantial performance of the contract. Reeves v. Watkins 804
4. Objections which go to the validity or existence of the lien or the debt on which it is based may be set up in defense to an action to enforce the lien, and damages for the lienholder's default in performance under the contract giving rise to the debt and lien may be set up to defeat the lien or to reduce the amount collected under it. Reeves v. Watkins.. 804

Mental Health.

1. Under the Nebraska Mental Health Commitment Act, the determination of whether an act of violence is recent must be decided on the basis of all the surrounding facts and circumstances. In re Interest of Blythman 51

2. In order for a past act of violence to have any evidentiary value under such act, it must form some reasonable basis for a prediction of future dangerousness and be probative of that issue. In re Interest of Blythman 51
3. An act occurring 5 years prior to the mental health commitment hearing is recent within the meaning of Neb. Rev. Stat. § 83-1009 (Cum. Supp. 1980) where: (a) There is evidence that the act is still probative of the subject's future dangerousness; (b) The subject has not had an opportunity to commit a more recent act because he has been in confinement; and (c) There is reliable medical evidence that there is a high probability of repetition of such act by the subject. In re Interest of Blythman 51

Mortgages.

The interest of a party claiming under the mortgagor but prior to the mortgage may be determined in an action to foreclose the mortgage. Lakeshore Comm. Finance Corp. v. North Platte H.J. Motel, Inc. 63

Motion to Vacate.

A motion to vacate a judgment and sentence under the Post Conviction Act cannot be used as a substitute for an appeal or to secure a further review of issues already litigated.
State v. Rust 320
State v. Peery 639

Motions for New Trial.

1. An appeal from a judgment in an equitable action does not require the filing of a motion for new trial for a de novo review in this court of alleged errors in the findings and judgment of the trial court. To the extent that it conflicts herewith, *McClintock v. Nemaha Valley Schools*, 198 Neb. 477, 253 N.W.2d 304 (1977), is overruled. Petersen v. Petersen 1
2. A motion for new trial on the ground of newly discovered evidence is addressed to the sound discretion of the trial court and, unless an abuse of discretion is shown, its determination will not be disturbed. State v. Record 90
3. Newly discovered evidence must be of such a nature that if it had been offered and admitted at the former trial it probably would have produced a substantially different result. State v. Record 90
4. Where a trial court judge sustains a motion for a new trial without specifying his reasons therefor, the appellant fulfills his burden by submitting the records to the Supreme Court and contending there is no prejudicial error. The

burden shifts to the appellee to identify any prejudicial error in the record justifying a new trial. Belitz v. Suhr 280
5. In an appeal from an order granting a motion for summary judgment, a motion for new trial is necessary in order for the court on appeal to review alleged errors in evidence. Kramer v. Swanson 794
6. When a motion for new trial is not filed in a law action, the court on appeal will examine the record only for the purpose of determining whether or not the judgment of the trial court is supported by the pleadings. Kramer v. Swanson 794

Motor Vehicles.
1. An expert, properly qualified, may give an opinion as to the speed of vehicles involved in an automobile accident. However, neither an expert nor lay witness may testify as to his opinion of speed based solely on the fact that a collision occurred. Belitz v. Suhr 280
2. A motorist approaching a highway protected by stop signs must stop before going upon the highway, must look to his left and to his right, and must permit a motor vehicle which is proceeding along the highway protected by stop signs to pass if it is at a distance and is traveling at a speed making it imprudent for the motorist to proceed into the intersection. Pickett v. Parks 310
3. The duty of a motorist to look for vehicles approaching on a highway protected by stop signs implies the obligation to see what is in plain view. Pickett v. Parks 310
4. A motorist entering an intersection of highways is obligated to look for approaching automobiles and to see any vehicle within that radius which denotes the limit of danger. Pickett v. Parks 310
5. If a motorist entering an intersection looks for approaching vehicles but fails to see one which is favored over him under the rules of the road, he is guilty of negligence as a matter of law. Pickett v. Parks 310
6. Where an excess insurance clause in a driver's automobile liability policy and a no-liability clause in the automobile owner's liability policy apparently conflict, the no-liability clause is ineffective and the driver's insurance excess. Jensen v. Universal Underwriters Ins. Co. 487
7. Whenever a guilty plea is utilized to support a judgment of conviction used to support an order revoking a motor vehicle operator's license under Neb. Rev. Stat. § 39-669.27 (Reissue 1978), and it is challenged in District Court, it must appear from the record that there was a judicial acceptance of that plea. Miller v. Peterson 658
8. By creating a classification of "traffic infractions" by Neb. Rev. Stat. § 39-602(107) (Cum. Supp. 1980), it was not the

intention of the Legislature to deprive the nonlawyer associate judges of jurisdiction over this particular classification of offenses. Miller v. Peterson 658
9. "Traffic infractions" are misdemeanors for the purpose of determining the authority of nonlawyer associate judges under the provisions of Neb. Rev. Stat. § 24-519 (Reissue 1979). Miller v. Peterson 658

Municipal Corporations.
1. Zoning powers granted to villages under Neb. Rev. Stat. § 19-901 (Reissue 1977) shall be exercised only after the municipal legislative body has appointed a planning commission, received from its planning commission a recommended comprehensive development plan as defined in Neb. Rev. Stat. § 19-903 (Reissue 1977), adopted such comprehensive development plan, and received the specific recommendation of the planning commission on the adoption or amendment of zoning regulations. Village of McGrew v. Steidley 726
2. While the right of a municipal governing body to amend its minutes is very broad in cases where, through inadvertence or misapprehension, a record has been made up defectively, the power of a governing body to amend its minutes is not unlimited or unqualified. The rule permitting an amendment of the minutes should be administered with caution, and the effect of omissions or irregularities in the proceedings of the council cannot be avoided under the guise of correction of the records. Corrections made in the minutes or records of a municipal governing body should be made within a reasonable time. Village of McGrew v. Steidley 726

Municipal Ordinances.
1. This court will not take judicial notice of a municipal ordinance which does not appear in the record. State v. Shea 17
2. The existence of a valid ordinance creating the offense charged will be presumed where the ordinance is not properly set forth in the record. State v. Shea 17

Negligence.
1. Where negligence is pleaded and there is no competent evidence to support it, it is prejudicial error to submit such issue to the jury. Simet v. Sage 13
2. An alleged negligent act or omission is not actionable under the state Tort Claims Act unless it was the proximate cause of an injury. Miller v. State 170
3. Where different minds may reasonably draw different conclusions from the evidence as to whether or not they

establish negligence, the issues are for the jury.
Esbenshade v. National Life Ins. Co. 216
Sullivan v. Geo. A. Hormel and Co. 262
4. With certain exceptions, the employer of an independent contractor is not liable for physical harm caused to another by the acts or omissions of the contractor or his servants. Sullivan v. Geo. A. Hormel and Co. 262
5. The general contractor, in control of the premises where work performance under a contract with the owner is being carried out, owes a duty to persons rightfully on the premises to keep the premises in a reasonably safe condition while the contract is in the course of performance. Sullivan v. Geo. A. Hormel and Co. 262
6. If a motorist entering an intersection looks for approaching vehicles but fails to see one which is favored over him under the rules of the road, he is guilty of negligence as a matter of law. Pickett v. Parks 310
7. In a product liability action under a negligence theory, a plaintiff must establish a duty, a breach, causation, and damages. Morris v. Chrysler Corp. 341
8. When dealing with the liability of a manufacturer of a finished product who puts it on the market to be used without inspection by his customers, if he is negligent, where danger is to be foreseen, there is liability. Morris v. Chrysler Corp. 341
9. The manufacturer's liability extends to the vendee, to all persons whose right or privilege to use the article is derived from him, to any person to whom the vendee sells or gives the chattel or to whom such subvendee or donee sells or gives the chattel, to damage to property caused by the manufacturer's negligence, and also to damage sustained by the negligently manufactured chattel itself. Morris v. Chrysler Corp. 341
10. Proof that the chattel left the manufacturer in a defective state, though not conclusive, is evidence of negligence. Morris v. Chrysler Corp. 341
11. An action for negligence is based on a legal duty owed by the plaintiff to the defendant which has been breached by the plaintiff. Southwest Bank of Omaha v. Herting 347
12. In all actions brought to recover damages for injuries to a person or his property, all questions of negligence and contributory negligence shall be for the jury. Neb. Rev. Stat. § 25-1151 (Reissue 1979). Krug v. Laughlin 367
13. If an actor's conduct is negligent as creating an unreasonable risk of causing either bodily harm or emotional disturbance to another and it results in such emotional disturbance alone without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance. Fournell v. Usher Pest Control Co. 684

14. Under the circumstances here, conduct involving the failure of the defendant to discover termite damage to plaintiffs' house did not create an unreasonable risk of causing bodily harm as a matter of law. Fournell v. Usher Pest Control Co. 684

New Trial.

1. The ordering of a new trial by the trial court is an appropriate discretionary method of granting post conviction relief under Neb. Rev. Stat. § 29-3001 (Reissue 1979). Addison v. Parratt 459
2. The fact that a defendant has served the full sentence imposed for a particular crime is not necessarily a bar to the granting of a new trial because of errors appearing in the earlier conviction. Addison v. Parratt 459
3. The granting of a new trial because of errors occurring at the original trial does not necessarily constitute double jeopardy. Addison v. Parratt 459

Nonprofit Organizations.

1. Under the Nebraska Employment Security Law, Neb. Rev. Stat. §§ 48-601 et seq. (Reissue 1978), the contribution type of financing as provided by § 48-649 and reimbursement financing under § 48-660.01 are separate and distinct systems, and a nonprofit organization must elect to use one or the other. West Nebraska General Hospital v. Hanlon 173
2. The Employment Security Law does not allow a reimbursing employer to acquire the experience account of its contributing predecessor and apply such account against its reimbursement charges. West Nebraska General Hospital v. Hanlon 173

Notice.

1. Any person having direct contractual relationship with a subcontractor but no contractual relationship, express or implied, with the contractor furnishing such bond shall have a right of action upon the bond upon giving written notice to the contractor within 4 months from the date on which such person did or performed the last of the labor, or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Neb. Rev. Stat. § 52-118.01 (Reissue 1978). Rieschick Drilling Co. v. American Cas. Co. 142
2. The real purpose of prescribing the manner in which an

adverse holding will be manifested is to give notice to the real owner that his title or ownership is in danger so that he may, within the period of limitation, take action to protect his interest. It is the nature of the hostile possession that constitutes the warning, not the intent of the claimant when he takes possession. Weiss v. Meyer 429

Nuisances.

1. An injunction against a nuisance is an extraordinary remedial process which is granted not as a matter of right but in the exercise of the sound discretion of the court, to be determined on a consideration of all the circumstances of each case. Daugherty v. Ashton Feed & Grain Co., Inc. 159
2. Generally, noise is not a nuisance per se, but it may be of such a character as to constitute a nuisance in fact, which may serve as the basis of an action at law or in equity, even though it arises from the operation of a factory, industrial plant, or other lawful business or occupation. Daugherty v. Ashton Feed & Grain Co., Inc. 159
3. Whether noise is sufficient to constitute a nuisance depends upon its effect upon an ordinary reasonable man, that is, a normal person of ordinary habits and sensibilities. Relief cannot be based solely upon the subjective likes and dislikes of a particular plaintiff, and relief must be based upon an objective standard of reasonableness. Daugherty v. Ashton Feed & Grain Co., Inc. 159
4. To justify abatement of a claimed nuisance, the annoyance must be such as to cause actual physical discomfort to one of ordinary sensibilities. There is a presumption, in the absence of evidence to the contrary, that a plaintiff in an action for abatement of a nuisance has ordinary sensibilities. Daugherty v. Ashton Feed & Grain Co., Inc. 159

Parental Duties.

Both parents have duties to their children; a father cannot delegate those duties to the mother of his children and expect to be held harmless if she neglects the children. In re Interest of Kimsey 193

Parental Rights.

1. Under Neb. Rev. Stat. § 43-209 (Reissue 1978), a person's parental rights may be terminated only upon presentation of clear and convincing evidence.
   In re Interest of Kimsey 193
   In re Interest of Goodon 256
   In re Interest of McKee 623
2. The right of parents to maintain the custody of their child is a natural right subject only to the paramount

interest which the public has in the protection of the rights of a child.
In re Interest of Kimsey 193
In re Interest of Witherspoon 755
3. Parental rights may be forfeited by substantial, continuous, and repeated neglect of a child and a failure to discharge the duties of parental care and protection.
In re Interest of Kimsey 193
In re Interest of Witherspoon 755
4. The juvenile court may terminate all parental rights of parents when the court finds such action to be in the best interests of the child or children and it appears by the evidence that one or more of the conditions set out in Neb. Rev. Stat. § 43-209 (Reissue 1978) exist. In re Interest of Goodon 256
5. Parental rights may be terminated where the record shows the parents have continuously and repeatedly neglected the children, have refused to give the children necessary parental care and protection, and such action is in the best interests of the children.
In re Interest of Moen 337
In re Interest of Campbell 374
In re Interest of Cook 549
6. Where a court order pursuant to Neb. Rev. Stat. § 43-209(6) (Reissue 1978) requires presence of a parent within the jurisdiction of the court for its compliance, a parent who voluntarily leaves the state, making compliance impossible, cannot avail himself of his absence as a basis for setting aside the termination order. In re Interest of Moen 337
7. Proceedings involving the termination of parental rights are reviewed de novo in this court. In re Interest of Campbell 374
8. When natural parents cannot rehabilitate themselves within a reasonable time after the adjudication hearing, the best interests of the child require that a final disposition be made without delay. In re Interest of McKee 623
9. In a proceeding to terminate parental rights under Neb. Rev. Stat. § 43-209(6) (Reissue 1978), there must be a determination that the child is one described in subsection (1) or (2) of Neb. Rev. Stat. § 43-202 (Reissue 1978), and that reasonable efforts, under the direction of the court, have failed to correct the conditions leading to that determination. In re Interest of Witherspoon 755

Parties.

1. The interest of a party claiming under the mortgagor but prior to the mortgage may be determined in an action

to foreclose the mortgage. Lakeshore Comm. Finance Corp. v. North Platte H.J. Motel, Inc. 63
2. The Department of Environmental Control and county zoning officials are not indispensable parties in a suit against a licensee for a solid waste disposal area where the suit is to enjoin against an alleged violation of a county zoning ordinance. Omaha Fish and Wildlife Club, Inc. v. Community Refuse, Inc. 110
3. The granting of leave to file a third-party complaint is a matter entirely within the discretion of the trial court. Bank of Valley v. Shunk 200

Partition.

1. The restrictive provisions of a warranty deed from a father to his children which provided that none of the grantees could mortgage any part of said lands except to one of the other grantees and giving each grantee the option to purchase a part of the land in the event one of the grantees should desire to sell his share, it being the intention of the grantor that said property remain within the family, are satisfied by the voluntary execution of warranty deeds by all the grantees to the grandchildren of the original grantor. Thus, there is no bar to an action in partition between the two grandchildren of the original grantor. Sweet v. Fairbairn 286
2. If the shares confirmed by the judgment in partition and the existence of all encumbrances of which the plaintiff had actual or constructive notice were accurately pleaded in the original petition of the plaintiff, attorney fees shall be awarded entirely to the attorney for the plaintiff. This amount as well as a reasonable fee for the referee shall be taxed as costs in the proceedings. Sweet v. Fairbairn 286
3. The amount of attorney fees and the amount of referee fees rest in the sound judicial discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. Sweet v. Fairbairn 286

Paternity.

1. In a paternity action where paternity has been admitted and the natural father has demonstrated a familial relationship with the child and has fulfilled parental responsibilities of support and maintenance, the fact that the child was born out of wedlock should be disregarded, and custody and visitation of minor children should be determined on the basis of the best interests of the children. In

determining with which of the natural parents the children shall remain, the standards set out in Neb. Rev. Stat. § 42-364 (Reissue 1978) are to be applied. Cox v. Hendricks .. 23
2. The District Court in an action to establish paternity has jurisdiction to award reasonable visitation rights to the father in an appropriate case. Cox v. Hendricks 23

Petit Larceny.

The crime of petit larceny without proof that the manner in which it was accomplished involved deceit or deception so as to be classified as "crimen falsi" is not such a crime as may be used to impeach a witness' veracity under Neb. Rev. Stat. § 27-609 (Reissue 1979). State v. Ellis 379

Pleadings.

1. Where negligence is pleaded and there is no competent evidence to support it, it is prejudicial error to submit such issue to the jury. Simet v. Sage 13
2. Where a certain theory has been adopted and relied upon by the parties during the trial, such theory will be adhered to on appeal regardless of whether it is correct. Rieschick Drilling Co. v. American Cas. Co. 142
3. On appeal to this court, a case will be considered upon the theory upon which the case was tried below, even though not pleaded, where the parties have acquiesced in the theory and the case was submitted to the trial court on that basis. Rieschick Drilling Co. v. American Cas. Co. .. 142
4. A prayer for general equitable relief is to be construed liberally, and will often justify granting relief in addition to that contained in the specific prayer, provided it fairly conforms to the case made by the petition and the evidence. Daugherty v. Ashton Feed & Grain Co., Inc. 159
5. A demurrer ore tenus is a permissible practice; and if a pleading to which it is addressed is totally defective, it is error to admit any evidence under such pleading. Newman Grove Creamery Co. v. Deaver 178
6. Under our system of code pleading, a party is required to plead the fact, not the theory of recovery or defense; and generally speaking, the pleading of legal conclusions is insufficient to raise an issue of fact. Newman Grove Creamery Co. v. Deaver 178
7. Where an objection that a pleading does not state a cause of action or a defense is interposed for the first time during the trial of a cause or after verdict, the pleading must be liberally construed in light of the entire record, and, if possible, sustained. Newman Grove Creamery Co. v. Deaver 178
8. Generally, it constitutes an abuse of discretion to sustain

a demurrer without leave to amend where there is a reasonable possibility that the defect can be cured by amendment. Newman Grove Creamery Co. v. Deaver 178
9. The granting of leave to file a third-party complaint is a matter entirely within the discretion of the trial court. Bank of Valley v. Shunk 200
10. An order overruling a motion for leave to amend pleadings is interlocutory and not appealable. Knoell Constr. Co., Inc. v. Hanson 373
11. Exhibits not identified as an attachment to any pleading nor as part of an order or entry of any kind are not part of the pleadings. Kramer v. Swanson 794
12. A party cannot recover upon a quantum meruit where he pleads and relies during the trial solely upon an expressed contract. Reeves v. Watkins 804

Pleas.

1. The standard for determining the validity of a guilty plea is whether or not it represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. State v. Shepard 188
2. A not guilty plea places in issue every relevant fact, and the prosecution should not be precluded from introducing evidence on a certain element of the alleged crime because there was already some other evidence in the case tending to establish the same, until and unless the trial court, in the exercise of its discretion, determines that further evidence on that point is irrelevant. State v. Ellis 379
3. Record examined and disclosed that pleas of guilty utilized to prove the defendant to be an habitual criminal, as well as his waiver of counsel, were entered freely, voluntarily, and knowingly. Addison v. Parratt 459
4. The voluntary entry of a plea of guilty to a charge of contempt waives formal defects in the information, affidavit, or accusation. State v. Wostoupal 555
5. Whenever a guilty plea is utilized to support a judgment of conviction used to support an order revoking a motor vehicle operator's license under Neb. Rev. Stat. § 39-669.27 (Reissue 1978), and it is challenged in District Court, it must appear from the record that there was a judicial acceptance of that plea. Miller v. Peterson 658

Political Subdivisions.

1. The provisions of a statute requiring the spreading upon the record of the governing body the vote on an action taken are intended to require an indisputable record of the action actually taken, so that the public might have

an opportunity to know how the elected officials voted thereon. State ex rel. Schuler v. Dunbar 69
2. A governing body may, under some circumstances, correct its own record, nunc pro tunc, to show the adoption of a motion, resolution, or ordinance, and to record the truth of how it was voted upon. It may not, however, by such action show that the separate requirement that these actions be spread upon the record of the minutes of the governing body was performed prior to the time that the spreading upon the minutes actually took place. State ex rel. Schuler v. Dunbar 69
3. The provisions of Neb. Rev. Stat. § 84-1413(2) (Reissue 1976), providing: "The record shall state how each member voted, or if the member was absent or not voting," cannot be satisfied by a nunc pro tunc amendment showing the recording of the vote in the minutes was performed prior to the time the actual recording in the minutes took place. State ex rel. Schuler v. Dunbar 69

Post Conviction.

1. Matters relating to sentences imposed within statutory limits and matters already litigated or which could have been raised are not properly included in an action seeking post conviction relief. State v. Shepard 188
2. A defendant in a post conviction proceeding may not raise questions which could have been raised on direct appeal and which do not involve questions making the judgment of conviction void or voidable under the state or federal Constitutions. State v. Shepard 188
3. In a post conviction proceeding, the petitioner has the burden of establishing a basis for relief.
   State v. Shepard 188
   State v. Pankey 377
4. A motion to vacate a judgment and sentence under the Post Conviction Act cannot be used as a substitute for an appeal or to secure a further review of issues already litigated.
   State v. Rust 320
   State v. Peery 639
5. 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. Rust 320
6. The ordering of a new trial by the trial court is an appropriate discretionary method of granting post conviction relief under Neb. Rev. Stat. § 29-3001 (Reissue 1979). Addison v. Parratt 459

Presentence Reports.

Any presentence report or psychiatric examination shall be privileged and shall not be disclosed directly or indirectly to anyone other than a judge, probation officers to whom an offender's file is duly transferred, or others entitled by law to receive such information. The court may permit inspection of the report or examination of parts thereof by the offender or his attorney, or other persons having a proper interest therein, whenever the court finds it is in the best interest of a particular offender. The court may allow fair opportunity for an offender to provide additional information for the court's consideration. Neb. Rev. Stat. § 29-2261(5) (Reissue 1979). State v. Stranghoener 598

Presumptions.

The existence of a valid ordinance creating the offense charged will be presumed where the ordinance is not properly set forth in the record. State v. Shea 17

Pretrial Conferences.

The purpose of a pretrial conference is to simplify and to narrow the issues of the case and to avoid traps and surprises. Newman Grove Creamery Co. v. Deaver 178

Principal and Surety.

Within the meaning of a payment bond which imposed the duty to pay for labor and materials "used or reasonably required for use in the performance of the contract," the phrase "reasonably required for use" was no more than a clause protecting the surety from excessive and unreasonable claims. Dukane Corp. v. Sides Constr. Co. 227

Prior Acts.

1. Under the Nebraska Mental Health Commitment Act, the determination of whether an act of violence is recent must be decided on the basis of all the surrounding facts and circumstances. In re Interest of Blythman 51
2. In order for a past act of violence to have any evidentiary value under such act, it must form some reasonable basis for a prediction of future dangerousness and be probative of that issue. In re Interest of Blythman 51
3. An act occurring 5 years prior to the mental health commitment hearing is recent within the meaning of Neb. Rev. Stat. § 83-1009 (Cum. Supp. 1980) where: (a) There is evidence that the act is still probative of the subject's future dangerousness; (b) The subject has not had an opportunity to commit a more recent act because he has been

in confinement; and (c) There is reliable medical evidence that there is a high probability of repetition of such act by the subject. In re Interest of Blythman 51

Probable Cause.

1. The test of probable cause for a warrantless arrest is whether at the moment the facts and circumstances within the officers' knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense. State v. Jones 641
2. Knowledge on the part of law enforcement officers of previous law violations of a suspect is a factor to be considered in establishing probable cause for search or arrest for a similar crime. State v. Jones 641

Product Liability.

1. The theory of strict liability in tort should be distinguished from the theories of liability based on negligence or on breach of warranty, express or implied, in a product liability action. Morris v. Chrysler Corp. 341
2. In a product liability action under a negligence theory, a plaintiff must establish a duty, a breach, causation, and damages. Morris v. Chrysler Corp. 341
3. When dealing with the liability of a manufacturer of a finished product who puts it on the market to be used without inspection by his customers, if he is negligent, where danger is to be foreseen, there is liability. Morris v. Chrysler Corp. 341
4. The manufacturer's liability extends to the vendee, to all persons whose right or privilege to use the article is derived from him, to any person to whom the vendee sells or gives the chattel or to whom such subvendee or donee sells or gives the chattel, to damage to property caused by the manufacturer's negligence, and also to damage sustained by the negligently manufactured chattel itself. Morris v. Chrysler Corp. 341
5. Proof that the chattel left the manufacturer in a defective state, though not conclusive, is evidence of negligence. Morris v. Chrysler Corp. 341

Proof.

1. The burden of proof is upon the plaintiff to show by a preponderance of the evidence that the disability sustained was caused by or related to the accident and was not the result of the normal progression of plaintiff's preexisting condition. Aguallo v. Western Potato, Inc. 66
2. There being no specific standard by which reasonable

value of labor and materials furnished shall be proved, prima facie proof thereof is made where a reasonable inference of such value flows from the evidence adduced. Rieschick Drilling Co. v. American Cas. Co. 142

3. In a post conviction proceeding, the petitioner has the burden of establishing a basis for relief.
   State v. Shepard 188
   State v. Rust 320
   State v. Pankey 377
4. 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. Ellis 379
5. 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 a claim of ownership for a full period of 10 years. Weiss v. Meyer 429
6. Adverse possession is founded upon the intent with which an occupant held possession, and can best be determined by his acts. Weiss v. Meyer 429
7. The defendant has the burden of proving nonwaiver and he must show by a preponderance of the evidence that he did not intelligently and understandingly waive that right. State v. Rogers 464
8. The determination of whether the defendant's conduct constituted a substantial step toward the completion of the crime is a question of fact. State v. Sodders 504

Property.

1. The promise in a land sales contract for the seller to convey real estate is consideration for the promise of the buyer to purchase the real estate. Litz v. Wilson 483
2. Where a land sales contract is executory and the vendee makes default, the remedies of the vendor are to rescind, specific performance, foreclosure of the contract as a mortgage, or bring suit for damages for the breach. Litz v. Wilson 483

Property Division.

1. There is no mathematical formula by which awards for alimony or division of property in an action for dissolution of marriage can be precisely determined. They are to be determined by the facts of each case and the court will consider all pertinent facts in reaching an award that is just and equitable. Cole v. Cole 562

2. When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties. Cole v. Cole 562

Prosecuting Attorneys.

A prosecutor may impeach a witness in court but he may not intimidate him in or out of court. State v. Ammons 797

Prosecutorial Misconduct.

Whether misconduct on the part of a prosecuting attorney is prejudicial to the defendant depends largely upon the facts of each particular case. State v. Ellis 379

Public Meetings.

1. The provisions of a statute requiring the spreading upon the record of the governing body the vote on an action taken are intended to require an indisputable record of the action actually taken, so that the public might have an opportunity to know how the elected officials voted thereon. State ex rel. Schuler v. Dunbar 69
2. A governing body may, under some circumstances, correct its own record, nunc pro tunc, to show the adoption of a motion, resolution, or ordinance, and to record the truth of how it was voted upon. It may not, however, by such action show that the separate requirement that these actions be spread upon the record of the minutes of the governing body was performed prior to the time that the spreading upon the minutes actually took place. State ex rel. Schuler v. Dunbar 69
3. The provisions of Neb. Rev. Stat. § 84-1413(2) (Reissue 1976), providing: "The record shall state how each member voted, or if the member was absent or not voting," cannot be satisfied by a nunc pro tunc amendment showing the recording of the vote in the minutes was performed prior to the time the actual recording in the minutes took place. State ex rel. Schuler v. Dunbar 69
4. While the right of a municipal governing body to amend its minutes is very broad in cases where, through inadvertence or misapprehension, a record has been made up defectively, the power of a governing body to amend its minutes is not unlimited or unqualified. The rule permitting an amendment of the minutes should be administered with caution, and the effect of omissions or irregularities in the proceedings of the council cannot be avoided under the guise of correction of the records. Corrections made in the minutes or records of a municipal governing body should be made within a reasonable time. Village of McGrew v. Steidley 726

5. The purpose of a nunc pro tunc correction is to make the record speak the truth. Its purpose is not to correct oversights or failures in the performance of mandatory acts. Village of McGrew v. Steidley 726

Public Officers and Employees.

No public employer shall withhold pay raises otherwise determined to be granted to public employees in a given year solely on the basis that they are then engaged in a labor dispute over a previous year's wages. AFSCME Local 2088 v. County of Douglas 511

Quantum Meruit.

A party cannot recover upon a quantum meruit where he pleads and relies during the trial solely upon an expressed contract. Reeves v. Watkins 804

Questions of Law.

Where the essential facts presented in a case are undisputed, the decision becomes a question of law to be decided by the court, and the findings of the trial court are essentially conclusions of law. Feola v. Valmont Industries, Inc. 527

Real Estate.

No estate or interest in land, other than leases for a term of 1 year from the making thereof, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by operation of law, or by deed of conveyance in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same. Neb. Rev. Stat. § 36-103 (Reissue 1978). Guynan v. Guynan 775

Records.

1. Where there is no bill of exceptions on appeal, this court is limited to a determination of whether the pleadings support the judgment of the trial court. Lum v. Mattley 789
2. In the absence of a bill of exceptions, the findings of the trial court with respect to the best interests of the child must be taken as correct. Lum v. Mattley 789

Res Judicata.

1. For purposes of res judicata, a judgment decides all issues essential to support it and those assumed or decided in leading to and supporting the final conclusion as well as the ultimate decision. Nielsen v. SID No. 229 542
2. Any right, fact, or matter in issue, and directly adjudicated

upon, or necessarily involved in, the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies whether the claim or demand, purpose, or subject matter of the two suits is the same or not. Nielsen v. SID No. 229 542

Restrictive Covenants.

1. Nonobjection to trivial breaches of a restrictive covenant does not result in loss of the right to enforce the covenant. Meierhenry v. Smith 88
2. Injunction is an appropriate remedy for violation of a restrictive covenant. Meierhenry v. Smith 88

Revocation.

1. Under Neb. U.C.C. § 2-608 (Reissue 1971), the buyer may revoke his acceptance of a lot or commercial unit where nonconformity substantially impairs its value to him if he has accepted it on the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured. Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it. Koperski v. Husker Dodge, Inc. 29
2. Under the Uniform Commercial Code, the questions of whether goods are substantially impaired by nonconformity or whether revocation of acceptance is given within a reasonable time are questions of fact to be determined by the jury or trier of facts. Koperski v. Husker Dodge, Inc. 29
3. The State Real Estate Commission may, upon its own motion, and shall, upon the sworn complaint in writing of any person, investigate the actions of any broker and shall have power to revoke or suspend any license or certificate issued under Neb. Rev. Stat. §§ 81-885.01 to 81-885.47 (Reissue 1976) whenever the license or certificate has been obtained by false or fraudulent representation or the licensee or certificate holder has been found guilty of the following unfair trade practice, i.e., demonstrating unworthiness or incompetency to act as a broker, associate broker, or salesman. Neb. Rev. Stat. § 81-885.24(28) (Reissue 1976). Wright v. State ex rel. State Real Estate Comm. 467
4. A real estate broker's license may be suspended or revoked for misconduct occurring in a real estate transaction whether the broker is acting for himself or others. Wright v. State ex rel. State Real Estate Comm. 467

Right to Counsel.

1. An accused may waive his right to counsel where such waiver is made intelligently and understandingly, with knowledge of the right to counsel. State v. Rogers 464
2. The defendant has the burden of proving nonwaiver and he must show by a preponderance of the evidence that he did not intelligently and understandingly waive that right. State v. Rogers 464
3. One may insist upon representing himself no matter how foolhardy that decision is, if made knowingly and intelligently; and once that decision is made, the individual making that choice must accept the consequences of his election. State v. Rogers 464
4. Under the Nebraska implied consent statutes a driver is not entitled to consult with a lawyer prior to taking a test, nor is the test required to be delayed by a request of an arrested motorist that he be permitted to contact a lawyer. Winter v. Peterson 785

Rules of Evidence.

The "other-crimes" rule, Neb. Rev. Stat. § 27-404(2) (Reissue 1979), is a rule of relevance and such evidence is ordinarily prejudicial because prior criminal activity is irrelevant to the proof of a specific crime. State v. Ellis 379

Sales.

1. Under Neb. U.C.C. § 2-316(3) (Reissue 1971), all implied warranties are excluded by expressions like "as is," "with all faults," or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty. Koperski v. Husker Dodge, Inc. 29
2. Where an action is based upon defendant's express representation made to the particular plaintiff in advertising or otherwise, courts generally hold that the plaintiff need not be in privity with the defendant to recover under breach of express warranty. The only limitation is that the plaintiff must be a party whom the defendant could expect to act upon the representation. Koperski v. Husker Dodge, Inc. 29
3. Under Neb. U.C.C. § 2-719 (Reissue 1971), a warranty agreement may provide for remedies in addition to or in substitution for those provided in this article and may limit or alter the measure of damages recoverable under this article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts. Koperski v. Husker Dodge, Inc. 29

4. Language of a warranty limiting the buyer's remedies to repair and replacement of defective parts is not, on its face, unconscionable. Koperski v. Husker Dodge, Inc. 29
5. The promise in a land sales contract for the seller to convey real estate is consideration for the promise of the buyer to purchase the real estate. Litz v. Wilson 483
6. Where a land sales contract is executory and the vendee makes default, the remedies of the vendor are to rescind, specific performance, foreclosure of the contract as a mortgage, or bring suit for damages for the breach. Litz v. Wilson 483

Sanitary and Improvement Districts.

1. In a derivative action by a taxpayer on behalf of a sanitary and improvement district the taxpayer has no rights greater than the rights the district itself possesses. Nielsen v. SID No. 229 542
2. In order to render an assessment for improvements valid, the improvements may be constructed only on land in which the public has title or at least a valid easement. Nielsen v. SID No. 229 542

Schools and School Districts.

1. The action of the statutory board under Neb. Rev. Stat. § 79-403 (Reissue 1976) is an exercise of quasi-judicial power, equitable in character, and upon appeal therefrom to the District Court the cause is triable de novo as though it had been originally instituted in such court, and upon appeal from the District Court to this court it is triable de novo as in any other equitable action. Miller v. School Dist. No. 69 290
2. Where all the acts necessary to effect accreditation of a school district have been met prior to the statutory board ordering the transfer, and in fact the formal certification is granted prior to the time the children begin school and prior to the time the District Court acts on the appeal, the issue of the accreditation of the new district must be considered to have become moot and the transfer deemed to be permitted on the question of accreditation. Miller v. School Dist. No. 69 290
3. Probationary teachers in Class I, II, III, and VI schools are not entitled to notice of conditions constituting just cause for termination because their contracts are not continuing and no cause need be shown to terminate them. Meyer v. Board of Education 302

Search and Seizure.

1. Knowledge on the part of law enforcement officers of

previous law violations of a suspect is a factor to be considered in establishing probable cause for search or arrest for a similar crime. State v. Jones 641
2. The capacity of a person to claim the protection of the fourth amendment 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. Ohler 742
3. A person cannot assert any expectation of privacy in an area in which he gave governmental officials the permission to inspect. State v. Ohler 742
4. The question as to whether or not consent to search was freely and intelligently given is a question of fact to be determined from the totality of all the circumstances surrounding such search. State v. Ohler 742

Self-Incrimination.

It is not error for a trial court to limit cross-examination of a witness concerning a subject wherein the witness has claimed the privilege against self-incrimination. State v. Ellis 379

Sexual Assault.

1. The mentally disordered sex offender act, Neb. Rev. Stat. §§ 29-2911 to 29-2921 (Reissue 1979), does not authorize the courts of this state to review criminal proceedings unrelated to a defendant's status as a sex offender. State v. Irwin 123
2. Upon a delayed sentencing for a sexual offense, credit must be given for time spent in confinement under a commitment as a sexual sociopath based on the same sexual offense. State v. Moore 240
3. Where delayed consecutive sentences for sexual offenses are pronounced, credit for time served under a prior sexual sociopath commitment based on the same sexual offenses is to be applied to the first sexual sentence to be served. Only excess credit, if any, is to be applied to any consecutive sexual sentence to be served later. Credit shall not be applied on any sentence until the defendant commences to serve the sentence. State v. Moore 240

Sexual Misconduct.

Custody of minor children is to be determined by their best interests. In making this determination, the sexual misconduct of a parent is only one of several factors to be considered. Other factors are general considerations of the moral fitness of the parents; the emotional relationships between the children and their parents; and the age, sex, and health of the children. Ritchey v. Ritchey 100

Sexual Sociopath.

1. Upon a delayed sentencing for a sexual offense, credit must be given for time spent in confinement under a commitment as a sexual sociopath based on the same sexual offense. State v. Moore 240
2. Where delayed consecutive sentences for sexual offenses are pronounced, credit for time served under a prior sexual sociopath commitment based on the same sexual offenses is to be applied to the first sexual sentence to be served. Only excess credit, if any, is to be applied to any consecutive sexual sentence to be served later. Credit shall not be applied on any sentence until the defendant commences to serve the sentence. State v. Moore 240

Sentences.

1. In the absence of an abuse of discretion, a sentence imposed within statutory limits will not be disturbed on appeal.
   State v. Irwin 123
   State v. Wredt 184
2. Matters relating to sentences imposed within statutory limits and matters already litigated or which could have been raised are not properly included in an action seeking post conviction relief. State v. Shepard 188
3. A sentence validly imposed takes effect from the time it is pronounced and a subsequent sentence, fixing a different term, is a nullity.
   State v. Cousins 245
   State v. Sliva 647
4. The general rule applies to valid sentences even where the sentencing judge indicates that the change is intended only to correct an ambiguity or a prior misstatement. State v. Cousins 245
5. Under present statutes, upon conviction for second degree murder, the court is not authorized to pronounce an indeterminate sentence. The court may impose a sentence of a definite term of years, not less than the minimum authorized by law; or, in the alternative, may impose a sentence of life imprisonment.
   State v. Randall 248
   State v. Stranghoener 598
6. 1975 Neb. Laws, L.B. 567, made no changes in the provisions for consolidation of consecutive sentences and the pertinent provisions of Neb. Rev. Stat. § 83-1,110(2) (Reissue 1976) pertaining to consolidation are to be applied to consecutive sentences whether imposed before or after the effective date of L.B. 567. Gochenour v. Bolin 444
7. Our holding in *Johnson & Cunningham v. Exon*, 199 Neb. 154, 256 N.W.2d 869 (1977), that approval of the Board of

Pardons was required to apply L.B. 567 retroactively pertained only to those changes in the statute which would result in discharge from custody of the prisoner at an earlier date than before the amendments made by L.B. 567. Gochenour v. Bolin 444

8. Where an accused is convicted of both second and third degree assault, it is not necessarily an abuse of discretion to impose a more severe sentence for the lesser assault than that imposed for the greater. State v. Hatwan 450
9. The fact that a defendant has served the full sentence imposed for a particular crime is not necessarily a bar to the granting of a new trial because of errors appearing in the earlier conviction. Addison v. Parratt 459
10. An enhanced sentence imposed under the provisions of the habitual criminal laws, Neb. Rev. Stat. §§ 29-2221 and 29-2222 (Reissue 1979), is not a new jeopardy or additional penalty for the same crime. It is simply a stiffened penalty for the latest crime which is considered to be an aggravated offense because it is a repetitive one. Addison v. Parratt 459
11. The crediting of prior jail time to a sentence imposed for the minimum sentence permitted by statute is discretionary with the sentencing judge. Addison v. Parratt 459
12. A sentencing judge has broad discretion as to the source and type of evidence or information which may be used as assistance in determining the kind and extent of the punishment to be imposed, and the judge may consider probation officer reports, police reports, affidavits, and other information, including his own personal observations. State v. Stranghoener 598
13. A sentencing judge is not bound by the recommendations of the probation officer in determining the sentence to be imposed. State v. Stranghoener 598
14. Among the factors meriting consideration when sentence is imposed are the family ties, age, mentality, education, experience, and social and cultural background of the convicted criminal; his willingness to work at honest labor; his past criminal record or law-abiding conduct; the motivation for the offense, the nature of the offense, and the amount of violence, if any, involved in the commission of the offense. State v. Stranghoener 598

Special Assessments.

In order to render an assessment for improvements valid, the improvements may be constructed only on land in which the public has title or at least a valid easement. Nielsen v. SID No. 229 542

Specific Performance.

1. As a general rule, where a valid contract exists, which is definite and certain in its terms, mutual in obligation, and free from unfairness, fraud, or overreaching, a court will grant a decree of specific performance where the remedy at law is inadequate and specific performance will not be inequitable or unjust. Litz v. Wilson 483
2. The burden is on the party seeking specific performance to show his right in equity and good conscience to the relief sought by clear and satisfactory evidence. Litz v. Wilson 483
3. In order for equity to recognize a promise to create a trust in the future when a property or property interest comes into existence, the promise must be supported by a consideration. If no consideration exists, the promise is not specifically enforceable. Kully v. Goldman 760
4. One seeking specific performance of an oral contract to leave property to another has the burden of proving not only the contract but also that he has performed the obligations imposed upon him thereunder. Guynan v. Guynan 775
5. Nothing contained in Neb. Rev. Stat. §§ 36-101 to 36-106 (Reissue 1978) shall be construed to abridge the powers of a court of equity to compel the specific performance of agreements in cases of part performance. Neb. Rev. Stat. § 36-106 (Reissue 1978). Guynan v. Guynan 775
6. Before specific performance of an oral contract to convey real estate will be decreed, the acts claimed to be in part performance themselves must unequivocally indicate the existence of the contract. Guynan v. Guynan 775

Speedy Trial.

The requirement of Neb. Rev. Stat. § 29-1207 (Reissue 1979) that a defendant be brought to trial within 6 months of the filing of the information refers to 6 calendar months, not 180 days. State v. Jones 641

Statute of Frauds.

An auction of real estate without reserve is within the statute of frauds. Neb. Rev. Stat. § 36-105 (Reissue 1978). Benson v. Ruggles & Burtch v. Benson 330

Statute of Limitations.

1. In Nebraska the law is settled that the operation of the statute of limitations is to vest absolute title in the occupant, when he has maintained an actual, continued, notorious, and adverse possession under claim of ownership for the statutory period. Weiss v. Meyer 429

2. Where the governmental subdivision does not act on a claim within 2 years after the claim accrued and the claimant does not withdraw the claim within 2 years after the claim accrued, all suits permitted by the Political Subdivisions Tort Claims Act are barred and the additional 6-month period granted under particular circumstances does not apply. Ragland v. Norris P.P. Dist. 492

Statutes.

1. Where a statute provides an adequate remedy at law, equity will not entertain jurisdiction, and the statutory remedy must be exhausted before equity may be resorted to. Koperski v. Husker Dodge, Inc. 29
2. A statute is not to be read as if open to construction as a matter of course. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning. In the absence of anything to indicate the contrary, words must be given their ordinary meaning. It is not within the province of the court to read a meaning into a statute that is not warranted by the legislative language. Neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute.
   O'Neill Production Credit Assn. v. Schnoor 105
   Ragland v. Norris P.P. Dist. 492
   City of Lincoln v. Nebraska Liquor Control Comm. 630
3. Generally speaking, a statute should be construed so that an ordinary person reading it would get from it the usual accepted meaning. Rules of interpretation are resorted to for the purpose of resolving an ambiguity, not of creating it. O'Neill Production Credit Assn. v. Schnoor 105
4. In construing a statute, the court must look to the objective to be accomplished, and the purpose to be served, and to place on it a reasonable construction which will best effect its purpose, rather than a construction which will defeat it. West Nebraska General Hospital v. Hanlon ... 173
5. The amendment of a statute under which an accused was convicted does not affect the legitimacy of his conviction or the propriety of his sentence. State v. Rust 320
6. 1975 Neb. Laws, L.B. 567, made no changes in the provisions for consolidation of consecutive sentences and the pertinent provisions of Neb. Rev. Stat. § 83-1,110(2) (Reissue 1976) pertaining to consolidation are to be applied to consecutive sentences whether imposed before or after the effective date of L.B. 567. Gochenour v. Bolin 444
7. Our holding in *Johnson & Cunningham v. Exon*, 199 Neb. 154, 256 N.W.2d 869 (1977), that approval of the Board of

Pardons was required to apply L.B. 567 retroactively pertained only to those changes in the statute which would result in discharge from custody of the prisoner at an earlier date than before the amendments made by L.B. 567. Gochenour v. Bolin 444

8. In order to comport with due process of law, a criminal statute must be reasonably clear and definite. State v. Sodders 504
9. Difficulty in determining the meaning of the language of a statute does not automatically render it unconstitutionally vague and ambiguous. State v. Sodders 504
10. A defendant has no standing to challenge as vague a portion of the language of a statute which does not apply to his conduct when an unambiguous section of the statute clearly applies to such conduct.
State v. Sodders 504
State v. Meredith 637
11. Unless the context shows otherwise, whenever the word "month" is used in a statute it means a calendar month. State v. Jones 641
12. It is a fundamental rule of construction that in construing statutes this court will, if possible, try to avoid a construction which leads to absurd, unjust, or unconscionable results. Miller v. Peterson 658
13. A sensible construction will be placed upon a statute to effectuate the object of the legislation rather than a literal meaning that would have the effect of defeating the legislative intent. In order to determine this intent the reasons for the enactment of the statute and the purposes and objects of an act, as obtained from an examination of the legislative history, may be used as guides in an attempt to give effect to the main intent of lawmakers. Miller v. Peterson 658
14. Since ground water in Nebraska is not an article of commerce, the commerce clause of the U.S. Constitution does not apply to Neb. Rev. Stat. § 46-613.01 (Reissue 1978). State ex rel. Douglas v. Sporhase 703
15. Neb. Rev. Stat. § 43-209(6) (Reissue 1978) is sufficiently definite and is not unconstitutionally vague. In re Interest of Witherspoon 755
16. One to whose conduct a statute clearly applies may not successfully challenge it for vagueness. In re Interest of Witherspoon 755

Subrogation.

A guarantor is entitled to be subrogated to the benefit of all the security and means of payment under the creditor's control, and, in the absence of assent, waiver, or estoppel,

the guarantor is generally released by an act of the creditor which deprives the guarantor of such right. Southwest Bank of Omaha v. Herting 347

Summary Judgment.

1. The moving party is not entitled to summary judgment except where there exists no genuine issue as to any material fact and where, under the facts, he is entitled to judgment as a matter of law. Bank of Valley v. Shunk 200
2. Summary judgment is an extreme remedy and should be awarded only when the issue is clear beyond all doubt. Any reasonable doubt touching the existence of a material issue of fact must be resolved against the moving party. Bank of Valley v. Shunk 200
3. Upon a motion for summary judgment the court examines the evidence not to decide any issue of fact but to discover if any real issue of fact exists. In this respect the court should take that view of the evidence most favorable to the party against whom the motion is directed, giving to that party the benefit of all favorable inferences which may reasonably be drawn from the evidence. Bank of Valley v. Shunk 200
4. In an appeal from an order granting a motion for summary judgment, a motion for new trial is necessary in order for the court on appeal to review alleged errors in evidence. Kramer v. Swanson 794
5. 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. Reeves v. Watkins 804

Taxation.

1. The classification of land as to kind or character of use does not alone establish the actual value of the land. The classification is only one of many factors to be considered in determining the actual value. Bumgarner v. County of Valley 361
2. In an appeal to the District Court from the action of the county board of equalization fixing the value of real property for tax purposes, the court shall affirm the action taken by the board unless evidence is adduced establishing that the action of the board was unreasonable or arbitrary, or unless evidence is adduced to establish that the property of the appellant is assessed too low. Bumgarner v. County of Valley 361
3. In an appeal to the county board of equalization or to the District Court, and from the District Court to this court, the burden of proof imposed on the complaining taxpayer is

not met by showing a mere difference of opinion unless it is established by clear and convincing evidence that the valuation placed upon his property when compared with valuations placed on other similar property is grossly excessive and is the result of a systematic exercise of intentional will or failure of plain duty and not mere errors of judgment. Bumgarner v. County of Valley 361
4. A claim of disproportionate assessment is not sustained when supported only by opinion evidence that the property is assessed at a higher proportion to its actual value than some other property. Such a contention must be sustained by evidence that the valuation is arbitrary or capricious or so wholly out of line with actual values as to give rise to an inference that the assessor and county board of equalization have not properly discharged their duties. Bumgarner v. County of Valley 361
5. Relief from the overassessment of property for tax purposes is by appeal to the District Court from the order of the county board of equalization fixing the assessed value of the property, and the remedy thus given is full, adequate, and exclusive. Jones v. Valley County Board of Equalization 559
6. A collateral attack may be made upon an assessment of property for tax purposes only if the assessment or some part thereof is wholly void. Jones v. Valley County Board of Equalization 559
7. A declaratory judgment action is not an appropriate remedy to attack an assessment of real property made by the county board of equalization. Jones v. Valley County Board of Equalization 559

Teacher Contracts.

1. There are few, if any, objective criteria for evaluating teacher performance or for determining what constitutes just cause for terminating teaching contracts of tenured teachers. Each case must, therefore, be assessed on its own facts. Hollingsworth v. Board of Education 350
2. As used in Neb. Rev. Stat. § 79-1254 (Reissue 1976), the term just cause shall mean incompetency, neglect of duty, unprofessional conduct, insubordination, immorality, physical or mental incapacity, or other conduct which interferes substantially with the continued performance of duty. Hollingsworth v. Board of Education 350
3. Incompetency or neglect of duty is not measured in a vacuum nor against a standard of perfection, but, instead, must be measured against the standard required of others performing the same or similar duties. Hollingsworth v. Board of Education 350

Tenants in Common.

1. Tenants in common can deal with third parties just as fully as owners of property held individually, including the right to terminate a lease as to the cotenant's interest. Ahrens v. Dye 129
2. A nonleasing tenant in common who does not himself wish to cultivate the property may not prevent his cotenant's lessee from doing so. Ahrens v. Dye 129

Tenure.

1. Probationary teachers in Class I, II, III, and VI schools are not entitled to notice of conditions constituting just cause for termination because their contracts are not continuing and no cause need be shown to terminate them. Meyer v. Board of Education 302
2. There are few, if any, objective criteria for evaluating teacher performance or for determining what constitutes just cause for terminating teaching contracts of tenured teachers. Each case must, therefore, be assessed on its own facts. Hollingsworth v. Board of Education 350

Termination of Employment.

1. Where an employer lawfully terminates the employment of an employee, such term of employment is not extended by the receipt of severance pay benefits provided by the employer. The payment of severance pay by the employer and the acceptance of the same by the employee generally manifests a termination of the employment relationship. Feola v. Valmont Industries, Inc. 527
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 hiring. 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. Feola v. Valmont Industries, Inc. 527

Testimony.

A motion to strike all the testimony of a witness should be overruled unless the entire testimony of the witness is objectionable. Damme v. Nebraska P.P. Dist. 478

Time.

1. Under Neb. U.C.C. § 2-608 (Reissue 1971), the buyer may revoke his acceptance of a lot or commercial unit

where nonconformity substantially impairs its value to him if he has accepted it on the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured. Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it. Koperski v. Husker Dodge, Inc. 29
2. Under the Uniform Commercial Code, the questions of whether goods are substantially impaired by nonconformity or whether revocation of acceptance is given within a reasonable time are questions of fact to be determined by the jury or trier of facts. Koperski v. Husker Dodge, Inc. 29
3. The requirement of Neb. Rev. Stat. § 29-1207 (Reissue 1979) that a defendant be brought to trial within 6 months of the filing of the information refers to 6 calendar months, not 180 days. State v. Jones 641
4. Generally, the period of time within which an act is to be done in any action or proceeding shall be computed by excluding the day of the act, event, or default after which the designated period of time begins to run. State v. Jones ... 641
5. Where a reasonable controversy exists between the parties as to the payment of compensation, an injured employee is not entitled to the statutory penalties for waiting time. Savage v. Hensel Phelps Constr. Co. 676

Tort Claims Act.

1. An alleged negligent act or omission is not actionable under the state Tort Claims Act unless it was the proximate cause of an injury. Miller v. State 170
2. The statutory provisions authorizing the transfer of an action where the venue is improper are not applicable to suits under the state Tort Claims Act. Miller v. State ... 170
3. Where the governmental subdivision does not act on a claim within 2 years after the claim accrued and the claimant does not withdraw the claim within 2 years after the claim accrued, all suits permitted by the Political Subdivisions Tort Claims Act are barred and the additional 6-month period granted under particular circumstances does not apply. Ragland v. Norris P.P. Dist. 492

Trial.

1. In a trial to the court in a law action, the findings and judgment of the trial court on the facts have the same force as a jury verdict and will not be set aside if there is sufficient competent evidence to support them, and the findings of the court will not be disturbed on appeal unless clearly wrong. Koperski v. Husker Dodge, Inc. 29
2. Where an objection that a pleading does not state a cause

of action or a defense is interposed for the first time during the trial of a cause or after verdict, the pleading must be liberally construed in light of the entire record, and, if possible, sustained. Newman Grove Creamery Co. v. Deaver 178
3. Improper evidence is not made admissible merely because it is designed to meet other evidence, and this is true regardless of the propriety of the other evidence. Damme v. Nebraska P.P. Dist. 478
4. Questions not presented or passed upon by the trial court will not be considered by this court on appeal. Guynan v. Guynan 775
5. Where cases are interwoven and interdependent and the controversy involved has already been considered and determined in a prior proceeding involving one of the parties now before the court, the court has the right to examine its own records and take judicial notice of its own proceedings and judgment in the prior action. Reeves v. Watkins 804

Trusts.

1. Mere expectancies cannot be held in trust. Kully v. Goldman 760
2. No trust can be created unless there exists some property interest which may be held by the trustee for the claimant. Kully v. Goldman 760
3. In order for equity to recognize a promise to create a trust in the future when a property or property interest comes into existence, the promise must be supported by a consideration. If no consideration exists, the promise is not specifically enforceable. Kully v. Goldman 760
4. The existence of a constructive trust is to be determined by the particular facts, circumstances, and conditions of the individual case. Guynan v. Guynan 775
5. A resulting trust is a trust created by act or construction of law; in its more restricted sense, and contradistinguished from a constructive trust, it is one raised by implication of law and presumed to have been contemplated by the parties, their intention as to which is to be found in the nature of their transactions but not expressed in the instrument of conveyance. Guynan v. Guynan 775
6. It is generally held that the foundation of resulting trusts lies in the ownership and payment of purchase money by one when title is taken in the name of another. The payment of consideration is the key issue. Guynan v. Guynan 775
7. No estate or interest in land, other than leases for a term of 1 year from the making thereof, nor any trust or power

over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by operation of law, or by deed of conveyance in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same. Neb. Rev. Stat. § 36-103 (Reissue 1978). Guynan v. Guynan .. 775

8. Neb. Rev. Stat. § 36-103 (Reissue 1978) shall not be construed to affect in any manner the power of a testator in the disposition of his real estate by a last will and testament, nor to prevent any trust from arising or being extinguished by implication or operation of law. Neb. Rev. Stat. § 36-104 (Reissue 1978). Guynan v. Guynan 775

Uniform Commercial Code.

1. The Nebraska Uniform Commercial Code does not use the term "rescission," but refers to that remedy under its statutory provisions as "revocation of acceptance." Koperski v. Husker Dodge, Inc. 29
2. Under Neb. U.C.C. § 2-608 (Reissue 1971), the buyer may revoke his acceptance of a lot or commercial unit where nonconformity substantially impairs its value to him if he has accepted it on the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured. Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it. Koperski v. Husker Dodge, Inc. 29
3. Under the Uniform Commercial Code, the questions of whether goods are substantially impaired by nonconformity or whether revocation of acceptance is given within a reasonable time are questions of fact to be determined by the jury or trier of facts. Koperski v. Husker Dodge, Inc. 29
4. Under Neb. U.C.C. § 1-201(10) (Reissue 1971), the term "conspicuous" is defined to mean a term or clause so written that a reasonable person against whom it is to operate ought to have noticed it. Koperski v. Husker Dodge, Inc. 29
5. Under Neb. U.C.C. § 2-316(3) (Reissue 1971), all implied warranties are excluded by expressions like "as is," "with all faults," or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty. Koperski v. Husker Dodge, Inc. 29
6. Under Neb. U.C.C. § 2-719 (Reissue 1971), a warranty agreement may provide for remedies in addition to or in substitution for those provided in this article and may limit or alter the measure of damages recoverable under this article, as by limiting the buyer's remedies to return

of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts. Koperski v. Husker Dodge, Inc. 29
7. Under the Uniform Commercial Code, no consideration is necessary for an instrument given as security for a debt already owed by the party giving it or by a third person. Newman Grove Creamery Co. v. Deaver 178
8. Courts are to construe and apply the Uniform Commercial Code liberally to promote its underlying purposes and policies. Genoa Nat. Bank v. Sorensen 423
9. If an otherwise unperfected lien is not filed at all the proper places at the time of filing, but through the passage of time or change in character of the property becomes a proper filing under the provisions of the Uniform Commercial Code, the lien also becomes properly perfected and has superior rights over all other liens not otherwise perfected prior to the time that the previous security lien was perfected. Genoa Nat. Bank v. Sorensen 423

Unjust Enrichment.

A person is enriched if he has received a benefit, and he is unjustly enriched if the retention of the benefit would be unjust. Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another. Ahrens v. Dye 129

Valuation.

1. The classification of land as to kind or character of use does not alone establish the actual value of the land. The classification is only one of many factors to be considered in determining the actual value. Bumgarner v. County of Valley 361
2. In an appeal to the District Court from the action of the county board of equalization fixing the value of real property for tax purposes, the court shall affirm the action taken by the board unless evidence is adduced establishing that the action of the board was unreasonable or arbitrary, or unless evidence is adduced to establish that the property of the appellant is assessed too low. Bumgarner v. County of Valley 361
3. In an appeal to the county board of equalization or to the District Court, and from the District Court to this court, the burden of proof imposed on the complaining taxpayer is not met by showing a mere difference of opinion unless it is established by clear and convincing evidence that the valuation placed upon his property when compared with valuations placed on other similar property is grossly excessive and is the result of a systematic exercise of

intentional will or failure of plain duty and not mere errors of judgment. Bumgarner v. County of Valley 361
4. A claim of disproportionate assessment is not sustained when supported only by opinion evidence that the property is assessed at a higher proportion to its actual value than some other property. Such a contention must be sustained by evidence that the valuation is arbitrary or capricious or so wholly out of line with actual values as to give rise to an inference that the assessor and county board of equalization have not properly discharged their duties. Bumgarner v. County of Valley 361

Venue.

1. The statutory provisions authorizing the transfer of an action where the venue is improper are not applicable to suits under the state Tort Claims Act. Miller v. State 170
2. Questions of venue may be established by circumstantial evidence as well as direct evidence. State v. Ellis 379

Visitation.

1. In a paternity action where paternity has been admitted and the natural father has demonstrated a familial relationship with the child and has fulfilled parental responsibilities of support and maintenance, the fact that the child was born out of wedlock should be disregarded, and custody and visitation of minor children should be determined on the basis of the best interests of the children. In determining with which of the natural parents the children shall remain, the standards set out in Neb. Rev. Stat. § 42-364 (Reissue 1978) are to be applied. Cox v. Hendricks .. 23
2. The District Court in an action to establish paternity has jurisdiction to award reasonable visitation rights to the father in an appropriate case. Cox v. Hendricks 23

Waiver.

1. Nonobjection to trivial breaches of a restrictive covenant does not result in loss of the right to enforce the covenant. Meierhenry v. Smith 88
2. An accused may waive his right to counsel where such waiver is made intelligently and understandingly, with knowledge of the right to counsel. State v. Rogers 464
3. The defendant has the burden of proving nonwaiver and he must show by a preponderance of the evidence that he did not intelligently and understandingly waive that right. State v. Rogers 464
4. The voluntary entry of a plea of guilty to a charge of contempt waives formal defects in the information, affidavit, or accusation. State v. Wostoupal 555

Warranty.

1. Under Neb. U.C.C. § 2-316(3) (Reissue 1971), all implied warranties are excluded by expressions like "as is," "with all faults," or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty. Koperski v. Husker Dodge, Inc. 29
2. Where an action is based upon defendant's express representation made to the particular plaintiff in advertising or otherwise, courts generally hold that the plaintiff need not be in privity with the defendant to recover under breach of express warranty. The only limitation is that the plaintiff must be a party whom the defendant could expect to act upon the representation. Koperski v. Husker Dodge, Inc. 29
3. Under Neb. U.C.C. § 2-719 (Reissue 1971), a warranty agreement may provide for remedies in addition to or in substitution for those provided in this article and may limit or alter the measure of damages recoverable under this article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts. Koperski v. Husker Dodge, Inc. 29
4. Language of a warranty limiting the buyer's remedies to repair and replacement of defective parts is not, on its face, unconscionable. Koperski v. Husker Dodge, Inc. 29

Warranty Deeds.

The restrictive provisions of a warranty deed from a father to his children which provided that none of the grantees could mortgage any part of said lands except to one of the other grantees and giving each grantee the option to purchase a part of the land in the event one of the grantees should desire to sell his share, it being the intention of the grantor that said property remain within the family, are satisfied by the voluntary execution of warranty deeds by all the grantees to the grandchildren of the original grantor. Thus, there is no bar to an action in partition between the two grandchildren of the original grantor. Sweet v. Fairbairn 286

Waters.

1. Nebraska's common law of ground water permits the overlying landowner to appropriate subterranean waters found under his land, but he cannot extract and appropriate them in excess of a reasonable and beneficial use upon the land which he owns, especially if such use is injurious to others who have substantial rights to the waters; and if

the natural underground supply is insufficient for all owners, each is entitled to a reasonable proportion of the whole. State ex rel. Douglas v. Sporhase 703
2. The Nebraska Constitution declares water for irrigation purposes in the State of Nebraska to be a natural want. State ex rel. Douglas v. Sporhase 703
3. Since the Nebraska common law of ground water permits use of the water only on the overlying land, legislative action is necessary to allow for transfers off the overlying land. State ex rel. Douglas v. Sporhase 703
4. The Legislature has the power to determine public policy with regard to ground water. State ex rel. Douglas v. Sporhase 703
5. Ground water may be transferred from the overlying land only with the consent of and to the extent prescribed by the public through its elected representatives. State ex rel. Douglas v. Sporhase 703
6. Free transfer and exchange of ground water in a market setting have never been permitted in this state. State ex rel. Douglas v. Sporhase 703
7. The public may limit or deny the right of private parties to freely use the water when it determines that the welfare of the state and its citizens is at stake. State ex rel. Douglas v. Sporhase 703
8. Nebraska ground water is not an article of commerce. State ex rel. Douglas v. Sporhase 703
9. Since water is the only natural resource absolutely essential to human survival, the application of rules designed to facilitate commerce in less essential resources to the transfer of water must be done, if at all, with extreme caution. State ex rel. Douglas v. Sporhase 703
10. Since ground water in Nebraska is not an article of commerce, the commerce clause of the U.S. Constitution does not apply to Neb. Rev. Stat. § 46-613.01 (Reissue 1978). State ex rel. Douglas v. Sporhase 703
11. Neb. Rev. Stat. § 46-613.01 (Reissue 1978) does not deprive affected persons of liberty or property without due process of law. State ex rel. Douglas v. Sporhase 703
12. The reciprocity provision of Neb. Rev. Stat. § 46-613.01 (Reissue 1978) merely states one of several conditions which must be satisfied before a permit to transfer ground water out of state may issue. State ex rel. Douglas v. Sporhase 703
13. Neb. Rev. Stat. § 46-613.01 (Reissue 1978) sets up a reasonable classification of persons which is reasonably related to a legitimate state interest in preserving, for the beneficial use of its citizens, Nebraska's underground water supply, and it operates equally on all members of the affected class. State ex rel. Douglas v. Sporhase 703

Wills.

1. The provisions and conditions of a will are to be construed by the courts with a view to carrying out the intention of the testator, and the cardinal rule in construing a will is to ascertain and effectuate that intention. Olson v. Sampson 18
2. The intention of the testator is to be determined from the language of all the pertinent provisions of the will and, where applicable, the circumstances under which the will was made. Olson v. Sampson 18
3. In searching for the intention of the testator, the court must examine the entire will, consider each of its provisions, give words their generally accepted literal and grammatical meaning, and indulge the presumption that the testator understood the meaning of the words used. Olson v. Sampson 18
4. The intention of the testator must be found within the will, and that intention is the one the testator expressed by the language of the will and not an entertained but unexpressed intention. Olson v. Sampson 18
5. It is a natural presumption that a testator making his will intended to dispose of his whole estate and not to die intestate as to any part of it, and in construing doubtful expressions this presumption has weight, but it cannot supply the actual intent of the testator to be derived from the language of the will. Allemand v. Weaver 618
6. It is not the province of the courts by construction to supply omissions or to write residuary clauses for testators who neglect to do so. Allemand v. Weaver 618
7. The object and purpose of the court is to carry out and enforce the true intention of the testator as shown by the will itself, in the light of attendant circumstances under which it was made. Allemand v. Weaver 618
8. Ordinarily, a class gift is a gift to two or more persons who are not named and who have one or more characteristics in common by which they are indicated or who answer to a general description. Allemand v. Weaver 618
9. If the gift is made to beneficiaries by name, the gift is, prima facie, not one to a class, even if the individuals who are named possess some quality or characteristic in common. This is particularly true if the beneficiaries are not described as having some quality or attribute in common. Allemand v. Weaver 618
10. Where the language of a will is not conclusive but rather ambiguous, the court must determine the intent of the testator to the extent possible from the terms of the will itself. Allemand v. Weaver 618
11. Neb. Rev. Stat. § 36-103 (Reissue 1978) shall not be construed

to affect in any manner the power of a testator in the disposition of his real estate by a last will and testament, nor to prevent any trust from arising or being extinguished by implication or operation of law. Neb. Rev. Stat. § 36-104 (Reissue 1978). Guynan v. Guynan 775

Wiretaps.

1. Neb. Rev. Stat. § 86-705 (Reissue 1976) requires that each application for a wiretap shall be made in writing upon oath or affirmation to a judge of the District Court, and shall include a full and complete statement of the facts and circumstances relied upon to justify the applicant's belief that an order should be issued. The application shall give a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed. State v. Holmes and Beardslee 114
2. Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that: (a) There is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in Neb. Rev. Stat. § 86-703 (Reissue 1976); (b) There is probable cause for belief that particular communications concerning that offense will be obtained through such interception; (c) Normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous; and (d) There is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person. Neb. Rev. Stat. § 86-705(3) (Reissue 1976). State v. Holmes and Beardslee 114
3. Neb. Rev. Stat. § 86-705(1)(c) (Reissue 1976) does not require the exhaustion of all possible or reasonable avenues of investigation. The statutory requirements are stated in the alternative, i.e., that other methods must have been tried and failed "or" that other procedures are unlikely to succeed or are too dangerous. State v. Holmes and Beardslee 114

Witnesses.

1. Where a defendant in a civil case refuses to testify on the

ground that the evidence may incriminate him, the trier of fact may draw an adverse inference from his refusal. State ex rel. Schuler v. Dunbar 69
2. The function of the lay witness is to describe what he has observed and the trier of fact will draw the conclusion from the facts observed and reproduced by the witness. Belitz v. Suhr 280
3. It is not error for a trial court to limit cross-examination of a witness concerning a subject wherein the witness has claimed the privilege against self-incrimination. State v. Ellis 379
4. A motion to strike all the testimony of a witness should be overruled unless the entire testimony of the witness is objectionable. Damme v. Nebraska P.P. Dist. 478
5. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law. State v. Ammons 797
6. The constitutional right of a defendant to call witnesses in his defense mandates that they must be called without intimidation. State v. Ammons 797
7. A prosecutor may impeach a witness in court but he may not intimidate him in or out of court. State v. Ammons . 797
8. Except in certain crimes such as sexual assault, a conviction may rest upon the testimony of a single eyewitness. State v. Ammons 812
9. Generally, expert testimony is admissible only if it will be of assistance to the jury in its deliberations and relates to an area not within the competency of ordinary citizens. State v. Ammons 812

Words and Phrases.

1. The terms "injury" and "personal injuries" do not include disability or death due to natural causes but occurring while the employee is at work, nor an injury, disability, or death that is the result of a natural progression of any preexisting condition. Chrisman v. Greyhound Bus Lines, Inc. 6
2. The Nebraska Uniform Commercial Code does not use the term "rescission," but refers to that remedy under its statutory provisions as "revocation of acceptance." Koperski v. Husker Dodge, Inc. 29
3. Under Neb. U.C.C. § 1-201(10) (Reissue 1971), the term "conspicuous" is defined to mean a term or clause so written that a reasonable person against whom it is to operate ought to have noticed it. Koperski v. Husker Dodge, Inc. 29
4. In general, the word "crops" means all products of the

soil that are grown and raised annually and gathered in a single season. O'Neill Production Credit Assn. v. Schnoor . 105
5. Within the meaning of a payment bond which imposed the duty to pay for labor and materials "used or reasonably required for use in the performance of the contract," the phrase "reasonably required for use" was no more than a clause protecting the surety from excessive and unreasonable claims. Dukane Corp. v. Sides Constr. Co. 227
6. The term "independent contractor" includes building contractors erecting a building for a fixed sum according to specifications and not subject to the owner's control over the method of accomplishment. Sullivan v. Geo. A. Hormel and Co. 262
7. The word "void" means null; ineffectual; nugatory; having no legal force or binding effect; unable, in law, to support the purpose for which it was intended. Miller v. School Dist. No. 69 290
8. The word "voidable" means that which may be avoided, or declared void; not absolutely void, or void in itself; that which operates to accomplish the thing sought to be accomplished, until the fatal vice in the transaction has been judicially ascertained and declared. It imports a valid act which may be avoided rather than an invalid act which may be confirmed. Miller v. School Dist. No. 69 290
9. There is this difference between the two words "void" and "voidable": void in the strict sense means that an instrument or transaction is nugatory and ineffectual so that nothing can cure it; voidable exists when an imperfection or defect can be cured by the act or confirmation of him who could take advantage of it. Miller v. School Dist. No. 69 290
10. The exemption from the term "employment" in Neb. Rev. Stat. § 48-604(6)(o) (Reissue 1978) includes participation in a voluntary work-study program as long as grades and credits received are applied toward the high school degree and it is a part of an approved course of study. Seldin Development & Management Co. v. Chizek 315
11. As used in Neb. Rev. Stat. § 79-1254 (Reissue 1976), the term just cause shall mean incompetency, neglect of duty, unprofessional conduct, insubordination, immorality, physical or mental incapacity, or other conduct which interferes substantially with the continued performance of duty. Hollingsworth v. Board of Education 350
12. "Claim of ownership" as used in the law of adverse possession means nothing more than the intention of the occupant to appropriate and use the land as his own to the exclusion of all others, irrespective of any semblance or shadow of actual right or title. Weiss v. Meyer 429
13. A dangerous instrument within the meaning of Neb. Rev.

Stat. § 28-309 (Reissue 1979) is any instrumentality which, because of its nature and the manner and intention of its use, is capable of inflicting bodily injury, and need not be an instrument which is inherently dangerous and capable of inflicting injury. State v. Hatwan 450

14. The infliction of *serious* bodily injury is not a necessary element of assault in the second degree as defined by Neb. Rev. Stat. § 28-309(1)(a) (Reissue 1979). Neither is it an element of third degree assault under Neb. Rev. Stat. § 28-310 (Reissue 1979). State v. Hatwan 450
15. In the context of Neb. Rev. Stat. Ch. 29, art. 25 (Reissue 1979), the word "sentence" in § 29-2521.03 is construed to mean a sentence of death, and the provisions of that section directing the determination by the Supreme Court of the propriety of a "sentence" by comparison with previous cases are applicable only in a case where a sentence of death has been imposed. State v. Harper 568
16. Unless the context shows otherwise whenever the word "month" is used in a statute it means a calendar month. State v. Jones 641
17. A calendar month is a period terminating with the day of the succeeding month, numerically corresponding to the day of its beginning, less one. State v. Jones 641
18. "Traffic infractions" are misdemeanors for the purpose of determining the authority of nonlawyer associate judges under the provisions of Neb. Rev. Stat. § 24-519 (Reissue 1979). Miller v. Peterson 658
19. An employee who desires to retain his employment but resigns or quits because the employer has clearly indicated that if he does not his employment will be terminated has not left his employment "voluntarily," as that term is used in Neb. Rev. Stat. § 48-628(a) (Reissue 1978). School Dist. No. 20 v. Commissioner of Labor 663

Workmen's Compensation.

1. The terms "injury" and "personal injuries" do not include disability or death due to natural causes but occurring while the employee is at work, nor an injury, disability, or death that is the result of a natural progression of any preexisting condition. Chrisman v. Greyhound Bus Lines, Inc. 6
2. 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. Chrisman v. Greyhound Bus Lines, Inc. 6
3. In an appeal to this court, the findings of fact made by the Workmen's Compensation Court shall have the same

force and effect as a jury verdict in a civil case.
Chrisman v. Greyhound Bus Lines, Inc. 6
Aguallo v. Western Potato, Inc. 66
4. The burden of proof is upon the plaintiff to show by a preponderance of the evidence that the disability sustained was caused by or related to the accident and was not the result of the normal progression of plaintiff's preexisting condition. Aguallo v. Western Potato, Inc. 66
5. A Workmen's Compensation Court determination of employee status, not independent contractor, is affirmed where substantial evidence supports the conclusion and it is not clearly wrong. Employers Ins. of Wausau v. Greater Omaha Trans. Co. 276
6. Under the facts of the case, an injured cabdriver is an employee of the cab company and entitled to workmen's compensation benefits even though written arrangement is denominated a lease of the cab rather than an employment contract. Employers Ins. of Wausau v. Greater Omaha Trans. Co. 276
7. The Workmen's Compensation Court may, as a condition of awarding compensation to an injured employee, require the employee, if appropriate, to submit himself for evaluation to determine if the employee may be retrained and thereby gainfully employed in the future. Savage v. Hensel Phelps Constr. Co. 676
8. Where a reasonable controversy exists between the parties as to the payment of compensation, an injured employee is not entitled to the statutory penalties for waiting time. Savage v. Hensel Phelps Constr. Co. 676
9. The right to tax attorney fees is purely statutory in a workmen's compensation case. Savage v. Hensel Phelps Constr. Co. 676

Zoning.

1. Enactment of the Environmental Protection Act does not divest district courts of subject matter jurisdiction to enjoin proposed solid waste disposal areas alleged to be in violation of county zoning ordinances. Omaha Fish and Wildlife Club, Inc. v. Community Refuse, Inc. 110
2. The Department of Environmental Control and county zoning officials are not indispensable parties in a suit against a licensee for a solid waste disposal area where the suit is to enjoin against an alleged violation of a county zoning ordinance. Omaha Fish and Wildlife Club, Inc. v. Community Refuse, Inc. 110
3. Zoning ordinances are inapplicable to governmental projects for the construction of which the agency in question has the power to condemn or appropriate lands by the

power of eminent domain. Witzel v. Village of Brainard 231
4. The general rule is that the propriety of a taking of property by eminent domain is not defeated by the fact that the purpose for which the property is taken is a use prohibited by the zoning regulations. Witzel v. Village of Brainard 231

Zoning Powers.

Zoning powers granted to villages under Neb. Rev. Stat. § 19-901 (Reissue 1977) shall be exercised only after the municipal legislative body has appointed a planning commission, received from its planning commission a recommended comprehensive development plan as defined in Neb. Rev. Stat. § 19-903 (Reissue 1977), adopted such comprehensive development plan, and received the specific recommendation of the planning commission on the adoption or amendment of zoning regulations. Village of McGrew v. Steidley 726