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STATE OF NEBRASKA, APPELLEE, V. BOBBY J. JACKSON, APPELLANT.

308 N.W. 2d 527

Filed July 17, 1981. No. 43749.

1. **Criminal Trials: Identification Procedures.** An in-court identification based on the witness' observations at the time of the alleged crime is admissible.
2. ____:____. The criteria for determining whether identification testimony will be admissible after a suggestive lineup are the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.
3. **Sentences: Appeal and Error.** A sentence imposed which is within the statutory limits will not be disturbed on appeal absent an abuse of discretion.
4. **Sentences.** Upon conviction for the use of a firearm to commit a felony, the statute requires that any sentence is to be served consecutive to any other sentence imposed.

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

H. Jerome Kinney for appellant.

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

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

WHITE, J.

The defendant, Bobby J. Jackson, was convicted in the District Court for Douglas County, Nebraska, on an information charging him with the offense of robbery and use of a firearm to commit a felony. The defendant was sentenced to a term of 10 to 15 years in the Nebraska Penal and Correctional Complex for the offense of robbery and to a term of 3 to 5 years in the complex for the use of a firearm, the

sentences to be served consecutively and consecutive to a sentence defendant was then serving for burglary. The defendant appeals to this court and assigns as error: (1) The District Court erred in overruling a motion to suppress the identification of the defendant which the defendant alleges was unduly suggestive and prejudicial; (2) The District Court erred in failing to dismiss both counts of the information for the reason that the evidence was, as a matter of law, insufficient to prove the essential elements of the crimes of robbery and use of a firearm in the commission of a felony; and (3) The sentences were excessive. We affirm.

On March 30, 1980, Bruce Kirk, an employee of the Crest Service Station located at 5717 No. 60th Street, Omaha, Nebraska, was on duty at approximately 8:25 a.m. at Crest. The office of the service station was locked and Kirk was requested by the defendant to be allowed to come into the office to use a pay telephone. Kirk complied. The defendant came into the station, used the telephone, produced a gun, and demanded that Kirk give him money. Kirk was not convinced that the gun was real and informed the robber that he thought he was kidding. When the defendant pointed the firearm at the window of the station and discharged it, causing a bullet to pass through the glass of the service station window, Kirk then produced the bills and the defendant fled. Kirk called the police and described the robber as a black male, approximately 6 feet 2 inches in height, 180 pounds, wearing a long tan coat, a tan stocking cap, and a dark pair of pants. Kirk identified the defendant at trial as the man who had robbed him that morning.

Officer Martha Husebo was on duty in her cruiser that morning in the area of 56th and Ames Streets in Omaha when she received the radio call of the robbery of the Crest Service Station at 5717 No. 60th Street. The robber was described as a black male 6 feet 2 inches, around 190 pounds, wearing a brown

stocking cap, a torn brown overcoat, and dark pants, headed south on 60th Street. Officer Husebo proceeded in her cruiser west on Ames Street to 60th Street and then north on 60th Street. As she neared 5705 No. 60th Street, she observed a black male of the description just received by her over the radio. She pulled into the driveway after giving her radio location to other cruisers, told the man to stop, and the man ran. She pursued and lost him in the area. She identified the man she saw at the driveway as the defendant. When additional police arrived, Officer Husebo returned to the Crest station. Other officers began searching the areas in and around the crime scene, including a vacant lot near 58th and Fort Streets on which a number of large culverts were stored. As Officer Ben McAdams looked into one of the culverts, he saw a black male matching the description of the man who had run from Officer Husebo. McAdams ordered the man from the culvert and placed him under arrest. A search disclosed that at the place where the defendant was lying inside the culvert, the sum of $84 in bills was found. Kirk had testified that $83 or $84 was the amount taken from him in the robbery as determined by the owner of the station. The defendant was then immediately taken to the service station where the attendant Kirk was asked "if this was the man that robbed me," and Kirk answered "yes." The defendant was then taken to the Omaha police station.

At approximately 9:40 a.m. of that same day, after appropriate *Miranda* warnings were given, the defendant gave an exculpatory statement to Officer Frank O'Connor of the Omaha Police Department. The next day the same officer again spoke to the defendant, read him his *Miranda* rights, which were waived by the defendant, and told him he wished to speak to him to clear up some matters. At that time the defendant told the officer that he had been forced to commit the robbery by three other black males who claimed that he owed them some money. He stated that

he had only one bullet in the gun; that he fired the gun through the window to convince the clerk that his robbery intention was serious; that after he came out of the Crest station the three black males who had forced him to commit the robbery were gone; and that he threw the gun away "somewhere, he wasn't sure where." He was eventually arrested.

The testimony of Officer John L. Powers, who is experienced in ballistics, testified that the hole in the window of the Crest station had been caused by someone firing a gun from the inside of the store. No gun was produced at trial.

Essentially, the defense offered by the defendant was that of alibi. The exculpatory and incriminating statements of the defendant were challenged at a pretrial suppression hearing. The trial court found that the defendant had been apprised of his constitutional rights, had waived those rights, and the statements were voluntarily and intelligently given to the police. It denied the suppression motion. The statements were admitted at trial and that ruling is not here attacked.

With respect to the first assignment of error, the trial court held: "I have considered it, went over my notes very carefully covering the circumstances surrounding the identification of the Defendant. The evidence convinces me that constitutional due process rights of the Defendant were in no way infringed and were not violated. I find that there was no substantial likelihood of misidentification, and overrule your motion to suppress the testimony of Bruce Kirk concerning the identification. I find that Bruce Kirk was in such close proximity to the Defendant that he could easily make the identification, he had an opportunity to observe the Defendant, his description as given by him coordinated in essential respects with the general characteristics of the Defendant; that the confrontation occurred very shortly after the alleged crime, that Bruce Kirk

was able to make a positive identification in this courtroom without qualification or limitation; that at the time the confrontation took place the evidence convinces me that Kirk did not know that the money had been recovered, that Kirk, when asked to make the identification, did so without any improper suggestion in terms of being able to view the Defendant for purposes of identification. Your motion is overruled."

We note, in passing, first that the trial was one to the court; that for the purpose of convenience, the trial court consolidated the hearing on the pretrial lineup and the trial in chief. The trial court found, and the record is clear that it had a sufficient basis for doing so, that the witness Kirk had a clear and independent recollection of the defendant quite apart from any pretrial showup. The in-court identification was based on the witness' observations of the defendant at the time of the robbery, not at the time of showup, and it is therefore admissible. *United States v. Wade*, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967).

The criteria for determining whether identification testimony will be admissible after a suggestive lineup are the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. *Manson v. Brathwaite*, 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977); *Neil v. Biggers*, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972). The evidence clearly supports the finding of the trial judge that the in-court identification was admissible. The assignment of error is without merit.

The second assignment of error is equally without merit. In addition to the eyewitness identification of the defendant and his confession, the defendant was identified and ran from a police officer near the area where the robbery took place; he was found hiding in

the area; and the amount of money, almost identical with the amount claimed as stolen, was recovered. The allegation that there is insufficient evidence to convict on the crime of robbery is so nonmeritorious as to approach being frivolous.

The assignment of error with respect to the alleged insufficient evidence of the crime of use of a firearm in the commission of a felony is equally without merit. Defendant apparently argues that since the revolver was not recovered, a conviction cannot be had with respect to this offense. He argues that there was no proof, other than the testimony of the victim of the robbery, as to when the bullet hole was put in the window of the Crest Service Station. He suggests that while the testimony of the officer established that a bullet had indeed been fired from the inside to the outside of the window, the time when it was fired can only be established by Kirk, the victim, and that somehow this eyewitness testimony is not sufficient. We have recently considered the argument that we should not affirm a conviction where the sole and only evidence with respect to the crime comes from an eyewitness because of the supposed inherent unreliability of eyewitness testimony. We rejected that contention in *State v. Ammons*, 208 Neb. 812, 305 N.W.2d 812 (1981); *State v. Franklin*, *ante* p. 281, 307 N.W.2d 513 (1981). The eyewitness testimony in this case is shown to be greatly reliable. The assignment of error is also without merit.

The third assignment of error suggests that the sentences were excessive in that they are to be served consecutive to each other and consecutive to a sentence defendant was already serving for burglary. Robbery is a Class II felony and is punishable by imprisonment of from 1 year to 50 years. The use of a firearm to commit a felony is a Class III felony punishable by 1 year to 20 years of imprisonment, or a fine of up to $25,000, or both such fine and imprisonment. Each of the sentences was well within the statutory limits.

A sentence imposed which is within the statutory limits will not be disturbed on appeal absent an abuse of discretion. *State v. Kramer*, 203 Neb. 658, 279 N.W.2d 634 (1979). Upon conviction for the use of a firearm to commit a felony, the statute requires that any sentence is to be served consecutive to any other sentence imposed.

The defendant, in addition to a number of convictions for traffic violations, has had two convictions for disorderly conduct and two prior convictions for burglary. The trial judge at sentencing found that the defendant would probably engage in additional criminal conduct if he were not in jail because the crimes he had just been convicted of were committed while he was out on bond on another burglary charge. He found that any lesser sentence would indicate to the public that such crimes were not treated seriously by the court. He expressed concern over the escalation of the crimes committed by the defendant and the continued insistence by defendant that he was not involved. We agree with the trial court. The assignment of error is without merit.

The judgment and sentence of the defendant are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MARK ALLEN LINGLE, APPELLANT.

308 N.W.2d 531

Filed July 17, 1981. No. 43940.

1. **Indictments and Informations: Appeal and Error.** An information first questioned on appeal must be held sufficient unless it is so defective that by no construction can it be said to charge the offense of which the accused was convicted.
2. ____:____. A complaint charging a statutory misdemeanor substantially in the language of the statute will be liberally rather than technically construed, and if a defect is amendable, it will be held sufficient on appeal in the absence of objection in the trial court.

3. **Indictments and Informations.** An information or complaint must inform the accused, with reasonable certainty, of the charge being made against him in order that he may prepare his defense thereto and also be able to plead the judgment rendered thereon as a bar to later prosecution for this same offense.
4. **Criminal Law: Witnesses.** For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admissible if elicited from him or established by public record during cross-examination, but only if the crime was punishable by death or imprisonment in excess of 1 year under the law under which he was convicted, or involved dishonesty or false statement.
5. **Jury Instructions: Appeal and Error.** When complaint is made of the refusal of the District Court to give an instruction asked, the burden is upon the party complaining to show not only that he was probably prejudiced by the refusal of the court to give the instruction, but he must also show that the entire instruction was correct as a proposition of law and applicable to the facts in evidence in the case.
6. **Arrests: Words and Phrases.** In making an arrest, an officer may use whatever force is reasonably necessary. Reasonable force is generally considered to be that which an ordinarily prudent and intelligent person, with the knowledge and in the situation of the arresting officer, would have deemed necessary under the circumstances.
7. **Arrests.** The officer is not required to determine at his peril the precise amount of force necessary in each instance and to use that much and no more, and he may be guided by the reasonable appearances and the nature of the case in determining the amount of force to be used.
8. **Arrests: Juries.** The reasonableness of the force used in effecting an arrest is a question for the jury.
9. **Sentences: Probation and Parole.** When a court sentences an offender to probation, it shall attach such reasonable conditions as it deems necessary or likely to insure that the offender will lead a law-abiding life.
10. **Probation and Parole: Search and Seizure: Constitutional Law.** Conditions in probation orders requiring the probationer to submit to warrantless searches, to the extent that they contribute to the rehabilitation process and are done in a reasonable manner, are valid and constitutional.
11. **Probation and Parole.** While a person is on probation his expectations of privacy are less than those of other citizens not so categorized.
12. **Probation and Parole: Waiver: Extradition.** Requiring the execution of a waiver of extradition as a condition precedent to probation does not render the waiver involuntary without a specific showing of how such a condition was coercive as applied in the particular case.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Affirmed.

H. E. Hurt, Jr., James A. Gallant, and Jeffrey S.

Flores for appellant.

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

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

WHITE, J.

Appellant, Mark A. Lingle, appeals from an order of the District Court for Dodge County, Nebraska, affirming the judgment of conviction entered on the jury verdict in the county court of Dodge County, Nebraska. The jury found the appellant guilty of resisting arrest, disturbing the peace, and obstructing a police officer. The court sentenced defendant to 1 year's probation subject to numerous conditions, including one that he serve 6 months in the Dodge County jail. Appellant appealed to the District Court for Dodge County, which, on November 18, 1980, affirmed the judgment and conviction but remanded the case to the county court for resentencing after finding that the sentence of probation by the county court was not imposed in conformity with the provisions of Neb. Rev. Stat. § 29-2262 (Reissue 1979). On remand, the county court again sentenced defendant to 1 year's probation but reduced the time to be served in the Dodge County jail to 90 days; the rest of the original conditions of probation remain the same after sentencing on remand. Appellant has appealed to this court, assigning numerous errors.

Although the testimony in the record is conflicting, it appears that the facts of this case are as follows. On March 7, 1980, appellant, then age 19, and another man, Brad H. Charter, were tenants in one side of a duplex at 204 So. Clarmar Street, Fremont, Nebraska. Through the course of the evening of March 7, 1980, friends of appellant and his roommate began to gather at this duplex, and by late in the evening

there were, according to the testimony, somewhere between 10 and 30 people at the duplex drinking beer, engaging in conversation, and playing either a stereo or a radio. Police officers testified that they observed some of the guests at the duplex smoking marijuana; however, no arrests for possession of marijuana were made. During the course of this evening, appellant and some friends left the duplex and went to a local lounge where they remained until sometime between 11 p.m. and 1 or 1:30 a.m. While appellant and his friends were at the lounge, the "party" continued at the duplex. Sometime after 10 p.m., a neighbor, one Russell Benjamin, who lived in the other half of the duplex, entered appellant's side of the duplex in an apparent effort to register a complaint as to the noise level in appellant's side of the duplex. Fisticuffs between Benjamin and various guests ensued, and Benjamin left. Shortly thereafter, Benjamin returned with the landlord, Gary Pebley. More fisticuffs ensued between the guests, Benjamin, and the landlord, and police were summoned. Before the police arrived, appellant and his friends arrived at the duplex from the lounge.

It is appellant's testimony, and the testimony of some defense witnesses, that when he returned, he made his way to the basement of the duplex with several other people. At the time appellant returned from the lounge, neither the police nor the landlord had yet arrived. While appellant was still in the basement, Benjamin and the landlord returned and the second incident of fisticuffs ensued. Shortly thereafter, the police arrived. Police Officer Fish testified that after breaking up two fights he went into the kitchen area of the duplex. He was followed, according to his testimony, by a large and rather noisy group of people. He "announced in a large voice that the party was over, that it was creating a disturbance." At this time, the officer testified, Mark Lingle "apparently came through a doorway, yelling and screaming and

waving his hands and comes directly at me, takes both hands and pushes me back against several other parties." There is a great deal of conflict in the testimony of the witnesses as to how the initial contact between the appellant and Officer Fish came about. At any rate, after the initial contact, the officer testified that he believed the appellant was about to hit him, and, as a result, the officer jabbed the appellant in the stomach with his flashlight. As he was bringing the flashlight up to strike the appellant on the chin, the appellant doubled over and the flashlight instead struck the appellant in the forehead, causing a gash which required several stitches to close.

Officer Fish and another Fremont police officer, Reserve Officer Ellis, then placed handcuffs on the appellant, advising him that he was under arrest. There is testimony in the record, although it is contradicted by some defense witnesses, that appellant resisted the officers' attempt to handcuff him. After appellant was handcuffed, he was taken out to the police car and transported to Dodge County Hospital where the wound in his head was stitched. During the time that he was being taken to the police car and to the hospital, the officers testified that he was verbally abusive toward them. After appellant's head wound received medical attention at the Dodge County Hospital, he was taken to the Dodge County jail where he spent several hours in the sobriety cell. When he was released from the sobriety cell, Officer Fish testified that he explained to appellant the charges that had been filed against him and then returned appellant to his home. Appellant was originally charged with third degree assault, resisting arrest, disturbing the peace, and obstructing a peace officer. However, at the end of the State's case during trial, appellant's attorney moved that the assault charge be dismissed since the State had failed to prove that appellant caused bodily injury to Officer Fish. The motion was granted. Following the trial, the jury

found the appellant guilty on the remaining three counts of the complaint. He was sentenced as set out above and has perfected this appeal.

Appellant's first assignment of error is that the trial court erred in failing to dismiss count III of the complaint, disturbing the peace, since it does not allege specifically what defendant did that willfully disturbed the peace. However, defendant concedes that he did not file a demurrer to the pleadings. This court stated in *State v. Haile*, 185 Neb. 421, 423, 176 N.W.2d 232, 234 (1970), that "an information first questioned on appeal must be held sufficient unless it is so defective that by no construction can it be said to charge the offense for which the accused was convicted." The complaint in this case charged that Mark Lingle, on or about the 8th of March 1980, in Dodge County, "did then and there intentionally disturb the peace and quiet of a person, family or neighborhood, to-wit: by shouting at police, and starting to pick a fight with police, after they had ordered all persons to leave a noisy party that Mark Lingle was at . . . ." The statute, Neb. Rev. Stat. § 28-1322 (Reissue 1979), simply states that "[a]ny person who shall intentionally disturb the peace and quiet of any person, family, or neighborhood commits the offense of disturbing the peace." In *State v. Haile, supra* at 424, 176 N.W.2d at 234, we also stated: "A complaint charging a statutory misdemeanor substantially in the language of the statute, will be liberally rather than technically construed, and if a defect is amendable, it will be held sufficient on appeal in the absence of objection in the trial court."

State v. Dreifurst, 204 Neb. 378, 381, 282 N.W.2d 51, 53 (1979), stated: "[A]n information or complaint must inform the accused, with reasonable certainty, of the charge being made against him in order that he may prepare his defense thereto and also be able to plead the judgment rendered thereon as a bar to a later prosecution for the same offense." We believe that

the information charging the appellant with disturbing the peace was sufficient under the standards set out in *State v. Haile, supra,* since we cannot say that it is so defective that by no construction can it be said to charge the offense of disturbing the peace. Furthermore, it is plain from the record that the defendant was able to prepare his defense to the charge of disturbing the peace, and we think it is clear that he would be able to plead the judgment rendered on that charge as a bar to later prosecution for the same offense. The assignment of error is without merit.

Appellant next assigns as error the court's failure to dismiss the counts of resisting arrest and obstructing a police officer on the grounds that there was no evidence of intent to commit either of these offenses. There is sufficient evidence in the record on the question of intent that the trial court's action in sending the issue to the jury was correct. Officers Fish, Ellis, and Seyboth all testified as to the manner in which appellant resisted the arrest, both physically and with verbal abuse directed toward the officers. Although their testimony was contradicted in some respects by testimony of defense witnesses, the resolution of the conflicting evidence was for the jury. Therefore, these assignments of error are likewise without merit.

Appellant next argues that it was error for the trial court to allow the State's attorney to introduce into evidence probation orders for two defense witnesses who, in their testimony, admitted that they had previously been convicted of a felony. Initially, we note that appellant's attorney made no objection when the order of probation of one Rick Goebel was introduced at trial and, thus, has waived that issue on appeal. *State v. Hogan,* 194 Neb. 207, 231 N.W.2d 135 (1975). Thus, the only issue in this assignment of error which we may properly review is whether or not the order of probation of the witness Brad Charter was properly introduced.

Neb. Rev. Stat. § 27-609(1) (Reissue 1979) states: "For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination, but only if the crime (a) was punishable by death or imprisonment in excess of one year under the law under which he was convicted or (b) involved dishonesty or false statement regardless of the punishment." This statute, passed in 1975, repealed the former statute on this point which was found at Neb. Rev. Stat. § 25-1214 (Reissue 1964): "A witness may be interrogated as to his previous conviction for a felony, but no other proof of such conviction is competent except the record thereof." Under the former statute, we stated in the case of *State v. Kallos*, 193 Neb. 113, 121, 225 N.W.2d 553, 557-58 (1975), that "where a witness on cross-examination admits previous conviction of a felony, it is error to allow further inquiry on the subject or permit the record of the conviction to be introduced." The wording of the new statute states only that evidence of a prior conviction may be admitted if elicited from the witness or established by public record, but it neither directly adopts nor rejects the holding of *State v. Kallos, supra.*

In the case of *State v. Reinert*, 197 Neb. 379, 248 N.W.2d 782 (1977), the prosecuting attorney, after eliciting from the witness an admission that he had been previously convicted of a felony, then questioned the witness about his present incarceration. Objection to the question was sustained. On appeal we said: "The question regarding his present incarceration for the admitted felony, although improper, was not prejudicial as it added no additional detrimental information." *Id.* at 380, 248 N.W.2d at 784. The same principle holds true in this case. If it was error for the trial court to admit the order of probation after the witness Charter's admission that he had been convicted of a felony, the order of probation itself did not add

any detrimental information bearing on the credibility of the witness that was not already present by his answer on cross-examination. Thus, we find that the admission of the order of probation, if error it was, constituted no more than harmless error and is not grounds for reversal. A number of other witnesses testified to the same or a similar version of the events as the witness Charter, and thus, any damage to Charter's credibility resulting from the admission of the probation order was not prejudicial to a substantial right of the appellant. The assignment of error is without merit.

Appellant next argues that it was error for the trial court to refuse to give the following instruction: "The use of force by an officer in making an arrest is not justifiable unless such officer makes known to the person to be arrested the purpose of the arrest. The use of deadly force by an officer in making an arrest is not justifiable unless the arrest is for a felony." We note first that appellant is under a threefold burden in making this complaint. As was said in *Phillips v. State*, 154 Neb. 790, 800, 49 N.W.2d 698, 705 (1951): "'"When complaint is made of the refusal of the district court to give an instruction asked, the burden is upon the party complaining to show, not only that he was probably prejudiced by the refusal of the court to give the instruction, but he must also show that the entire instruction was correct as a proposition of law and applicable to the facts in evidence in the case."'" Appellant fails in meeting this burden with regard to the requested instruction because the instruction is not correct as a proposition of law.

According to *Breese v. Newman*, 179 Neb. 878, 880-81, 140 N.W.2d 805, 808 (1966), "[i]n making an arrest, an officer may use whatever force is reasonably necessary. Reasonable force is generally considered to be that which an ordinarily prudent and intelligent person, with the knowledge and in the situation

of the arresting officer, would have deemed necessary under the circumstances." Further, "[t]he officer is not required to determine at his peril the precise amount of force necessary in each instance and to use that much and no more, and he may be guided by the reasonable appearances and the nature of the case in determining the amount of force to be used." 6A C.J.S. *Arrest* § 49 at 114 (1975). The reasonableness of the force used in effecting an arrest is a question for the jury. *Breese v. Newman, supra.* The trial court's refusal to give the instruction requested by appellant was correct and this assignment is without merit.

Appellant also argues that it was error for the court to include, as a condition of his probation, paragraph 15 of the order of probation which states: "That he shall be subject to the search of his personal and real property at any time, day or night, by any law enforcement or probation officer without the issuance of a search warrant." The statute under which the trial court was authorized to place the defendant on probation, Neb. Rev. Stat. § 29-2262 (Reissue 1979), states: "(1) When a court sentences an offender to probation, it shall attach such reasonable conditions as it deems necessary or likely to insure that the offender will lead a law-abiding life." This statute also states: "(2) The court, as a condition of its sentence, may require the offender: . . . (p) To satisfy any other conditions reasonably related to the rehabilitation of the offender."

This court recently, in the case of *State v. Morgan*, 206 Neb. 818, 295 N.W.2d 285 (1980), considered a condition in the appellant's probation which required him to submit to a search of his person or property at any time, by any law enforcement officer, with or without probable cause, for controlled substances. The appellant in *Morgan* had been convicted of possession of controlled substances. In *Morgan* at 826-27, 295 N.W.2d at 289, this court stated that

"conditions in probation orders requiring the probationer to submit to warrantless searches, to the extent that they contribute to the rehabilitation process and are done in a reasonable manner, are valid and constitutional." This court in the *Morgan* case relied to some extent on the case of *State v. Montgomery*, 115 Ariz. 583, 566 P.2d 1329 (1977), which stated that a condition similar to the one at issue here "is a restriction upon the defendant's privacy, but this does not make the condition unconstitutional. While defendant is on probation his expectations of privacy are less than those of other citizens not so categorized. It is not an unreasonable or an unconstitutional limitation upon his right to be free from unreasonable searches and seizures." *Montgomery* at 584, 566 P.2d at 1330.

The Dodge County Court, in ordering probation for the appellant, added certain other conditions, including ones that he refrain from the use of alcoholic beverages and that he refrain from the use or possession of narcotics. The warrantless search condition is reasonably related to enforcement of the other conditions of appellant's probation, and we feel that all these conditions are reasonably related to the rehabilitation of appellant. It is apparent from the record that the use of alcoholic beverages contributed to a large extent to the disturbance which led to appellant's arrest, and the presentence investigation conducted into appellant's background disclosed that he used alcohol and controlled substances on a rather regular basis. It was well within the trial court's discretion to consider the information in the presentence investigation when sentencing the appellant. *State v. Kramer*, 203 Neb. 658, 279 N.W.2d 634 (1979). This assignment of error is without merit.

Appellant next argues that the trial court erred in requiring defendant, as a condition of probation, to sign a waiver of extradition in the event he is charged with violation of probation. We note first

that it does not appear that the waiver of extradition is, in fact, a condition of probation. However, were we to consider it as such, the weight of authority holds that such waivers are valid. In *Pierson v. Grant*, 527 F.2d 161 (8th Cir. 1975), where the appellant signed a waiver of extradition as a condition precedent to parole, the court stated at 164: "Requiring the execution of a waiver of extradition as a condition precedent to parole does not render the waiver involuntary without a specific showing of how such a condition was coercive as applied in the particular case." In 35 C.J.S. *Extradition* § 2 at 382 (1960), it is stated: "Since the purpose of extradition is the return of a fugitive, none of his constitutional rights, other than his right to personal liberty, are involved." In *Forester v. California Adult Authority*, 510 F.2d 58, 61 (8th Cir. 1975), the court stated that "Forester claims that conditioning his parole upon the execution of an extradition waiver was per se coercion. This is not the law. Parole is an act of grace and reasonable conditions may be imposed in connection therewith. . . . Nor has Forester demonstrated how such a condition was coercive as applied to him." Appellant has made no showing that the waiver of extradition which he signed was involuntary or coercive as applied to him. Therefore, this assignment of error is likewise without merit.

The final assignment of error by appellant which we will consider here assigns as error numerous evidentiary rulings of the trial court whereby objections of appellant's attorney to questions by the State's attorney were overruled. In his brief to this court, appellant's attorney concedes "that no one [of these rulings] would be enough to unduly prejudice the rights of the defendant. It doesn't take but a few, however, to give the impression to the jury that the court has formed an opinion favorable to the State's case." We have reviewed these rulings and find that the facts which the challenged testimony was intended

to elicit were amply established by other testimony to which there was no objection. Additionally, in its instructions to the jury, the trial court included the standard cautionary instruction that the jury "must not construe any statements, actions, or rulings of the court in the trial of this case . . . as reflecting an opinion of the court as to how this case should be decided." This cautionary instruction has long been held sufficient under our adversary system of justice to cure the problem which appellant raises. This assignment of error, like the others, is without merit.

We have reviewed appellant's remaining assignments of error referring to improper charging of the defendant, selective law enforcement, etc. We find that these assignments of error are nonmeritorious, to the point of being frivolous. The verdict of the jury and the judgment and sentence of the trial court were correct in all respects and are affirmed.

AFFIRMED.

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

I generally concur in the majority opinion in this case. I must, however, dissent from that portion of the majority opinion which holds that conditions in a probation order requiring the probationer to submit to warrantless searches and requiring the execution of a waiver of extradition as a condition precedent to probation do not deny to the probationer those constitutional rights which he retains notwithstanding his conviction of a crime.

I have already set out my reasons for so holding in my dissent in *State v. Morgan*, 206 Neb. 818, 295 N.W.2d 285 (1980), and will not repeat them here.

Carrying the arguments of both *State v. Morgan* and the instant case to a possible conclusion, one could argue that an individual placed on probation could be required as a condition of probation to give up all of one's constitutional rights. I do not believe

that such a requirement is lawful. I would hold that such requirements as those contained in the instant order of probation were invalid and should not be enforceable under the conditions presented in the instant case.

STATE OF NEBRASKA, APPELLEE, V. HERSCHEL J. SMITH, APPELLANT.

308 N.W.2d 820

Filed July 24, 1981. No. 43180.

1. **Confessions.** The standards to determine the admissibility of statements made after an illegal arrest are: (1) The administration of the *Miranda* warnings prior to the statement; (2) The temporal proximity of the arrest and the confession; (3) The intervening circumstances between the initial detention and the challenged statements; (4) The purpose and flagrancy of the official misconduct; and (5) The voluntariness of the statement must be established.
2. ——. Where there is one confession by a defendant properly admitted into evidence and there was strong corroborative evidence of the guilt of the defendant, the admission of another confession, even though it should have been excluded, is harmless error.

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 Mark D. Starr for appellee.

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

HASTINGS, J.

The defendant, Herschel J. Smith, was convicted by a jury of robbery of a liquor store and was sentenced by

the District Court for Douglas County to serve 5 to 7 years in the Nebraska Penal and Correctional Complex. The only assignment of error is that the District Court erred in failing to suppress the confessions given by the defendant, based on an unlawful arrest. We affirm.

On August 24, 1979, a black male entered Bricks Liquor Store at about 11:10 p.m., and asked the owner, Edward Adam, for some beer. As Mr. Adam bent down to reach for the beer, he observed two more black males enter the store, and one pulled out a gun, went toward Mrs. Adam, who was in the back of the store, and told her to hang up the telephone receiver. The third man had what the Adams described as a sawed-off shotgun, and what the defendant has described as a stick made to look like a shotgun. Mr. Adam was told to open the cash register, which he did, and the money was placed in a paper sack. One of the men grabbed some cigarettes, and the three ran out the back door of the store.

A man who was in his pickup saw the three men running down the alley and began to chase them. After driving down the alley the man apparently lost track of them, although while circling around the block he noticed one black male in a car which hurriedly pulled out of a nearby parking lot. The witness gave the description of the vehicle and the license number to police officers. The automobile was traced and found to belong to Billy Berrian.

Berrian was arrested on Sunday, August 26, 1979, for suspicion of robbery, and identified another person who was involved in the robbery, known to him as "Hershey." Berrian told officers that he did not know Hershey's last name, but did know where he lived, although he could not give the exact address. On Monday, August 27, police officers drove Berrian to a house which he pointed out as Hershey's residence. The police took Berrian back to the detention center and returned to the neighborhood, where they questioned neighbors and learned that a family named Smith lived

at that address. On Tuesday, August 28, at approximately 8:10 a.m., three officers went to the Smith residence to arrest Herschel Smith. The officers did not secure an arrest warrant, although they believed that at that time they had enough information to arrest Herschel.

Two officers went to the front door and one went to the back. The officers knocked on the front door, and it was opened by Samuel Smith, Herschel's younger brother. The officers entered the house and began searching the residence for Herschel Smith. Samuel Smith testified that he assumed the men entering the house were police officers, although they were dressed in plain suits and did not identify themselves. He repeatedly asked them if they had a warrant to search his mother's house, although he did not know what the purpose of their visit was. The officers did not answer Samuel's questions and they told him to sit down and shut up. Within a few minutes, Herschel emerged from the bedroom where he had been sleeping and told officers to stop harassing his little brother. The officers then arrested Herschel and allowed him to get dressed before transporting him to police headquarters. The defendant was informed of his *Miranda* rights and he agreed to talk about the robbery. At approximately 9:10 a.m., Herschel gave a taped statement describing his involvement in the incident.

The next day, Wednesday, August 29, at approximately 9:27 a.m., police officers again informed the defendant of his rights and again took a taped statement. About an hour later the police interviewed Berrian regarding the robbery. After the questioning of the two men, police officers determined that there were inconsistencies between the stories regarding the extent of their involvement and the roles they played in the incident. In order to clear up the inconsistencies, the police decided to bring the two men together. It is in dispute as to what occurred at that point in time. According to the officers present, the two men had

about a 5-minute discussion about their respective roles in the incident. According to both defendants, who testified at the suppression hearing, they did not have a discussion of any sort. Berrian stated: "I did not speak to him. Herschel Smith walked in the office and one officer said that Berrian said this and Herschel Smith said he is telling a damn lie, or something like that, and walked away." Smith agreed that the incident occurred the way Berrian described it.

After the two men were separated, Smith again gave a taped statement regarding his involvement in the robbery. According to Officer Frank T. O'Connor, Smith gave the third statement in order to clear up the inconsistencies. "Mr. Smith stated that he wanted to set the record straight and he wanted to tell how it went down and what his participation was in it and what had taken place." The last statement was given after the defendant had been again informed of his *Miranda* rights and agreed to waive them. The second tape was destroyed by officers at the request of the defendant because it was not accurate. The third tape was much more complete than the first tape and for the first time Smith admitted to carrying a stick which was made to resemble a shotgun. The first and the third tapes were admitted into evidence and played for the jury over the objection of defense counsel and after the trial court refused to suppress those statements.

The defense argues on appeal that the two taped confessions should have been suppressed as being fruits of an unlawful arrest and therefore in violation of his constitutional rights. Defendant relies on the recent U.S. Supreme Court decision in *Payton v. New York, Riddick v. New York*, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980), which held that, absent exigent circumstances, the fourth amendment prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest. In the case at bar, there was no warrant secured for the defendant's arrest, and no exigent cir-

cumstances existed, as there was ample time to secure a warrant. The State argues on appeal that there was consent given by Samuel Smith when he opened the door to police officers after they knocked. The record does not support the conclusion that there was consent. Only one officer testified that Samuel Smith consented to the officer's search of the house for his brother. That officer was the one stationed at the back door of the house and he did not go in until called by the officers who had gone to the front door. He could not have known what transpired between the two officers and Samuel Smith at the front door after the officers knocked and entered. The State has not met its burden of proving that there was consent by an occupant of the house. Therefore, if *Payton and Riddick* is applicable to this situation, the arrest of the defendant was unlawful.

Payton and Riddick was decided some 7½ months after the arrest of the defendant. We believe that it is open to question as to whether or not *Payton and Riddick* is to be applied retroactively. See *Michigan v. DeFillippo*, 443 U.S. 31, 99 S. Ct. 2627, 61 L. Ed. 2d 343 (1979). However, assuming arguendo that *Payton and Riddick* is controlling, there still remains a reason why this case should be affirmed.

Defendant contends that because the confessions were made pursuant to an unlawful arrest, they therefore were fruits of the poisonous tree which required their suppression. Such a result does not necessarily follow, as we recognized in *State v. Smith*, 207 Neb. 263, 298 N.W.2d 162 (1980). The U.S. Supreme Court has consistently held that not all evidence is fruit of the poisonous tree simply because it would not have come to light but for the illegal actions of the police. The question in such a case is whether the evidence objected to has been discovered by exploitation of the primary illegality or has been instead discovered by means sufficiently distinguishable to be purged of the primary taint. *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct.

407, 9 L. Ed. 2d 441 (1963). As the Supreme Court has recognized, it is entirely possible that persons arrested illegally may decide to confess, as an act of free will unaffected by the initial illegality. *Brown v. Illinois*, 422 U.S. 590, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975). "The question whether a confession is the product of a free will under *Wong Sun* must be answered on the facts of each case. No single fact is dispositive. The workings of the human mind are too complex, and the possibilities of misconduct too diverse, to permit protection of the Fourth Amendment to turn on such a talismanic test. The *Miranda* warnings are an important factor, to be sure, in determining whether the confession is obtained by exploitation of an illegal arrest. But they are not the only factor to be considered. The temporal proximity of the arrest and the confession, the presence of intervening circumstances, see *Johnson v. Louisiana*, 406 U.S. 356, 365 (1972), and, particularly, the purpose and flagrancy of the official misconduct are all relevant. See *Wong Sun v. United States*, 371 U.S., at 491. The voluntariness of the statement is a threshold requirement." *Brown v. Illinois*, 422 U.S. at 603-04.

The standards to determine admissibility of statements made after an illegal arrest as set forth in *Brown* were reaffirmed recently in *Rawlings v. Kentucky*, 448 U.S. 98, 100 S. Ct. 2556, 65 L. Ed. 2d 633 (1980). The five factors are: (1) The administration of the *Miranda* warnings to the defendant prior to the statement; (2) The temporal proximity of the arrest and the confession; (3) The intervening circumstances between the initial detention and the challenged statements; (4) The purpose and flagrancy of the official misconduct; and (5) The voluntariness of the statement must be established.

The first statement given by the defendant does not meet the test for admissibility as set forth in *Brown* and *Rawlings*, and should have been suppressed. Although the *Miranda* warnings were given to the defendant prior to the confession and the rights waived, the

temporal proximity of the arrest and the confession is much like the situation in *Brown.* The first statement was separated from the unlawful arrest by approximately 1 hour and there was no intervening event of significance.

The third statement given by defendant, the only other one admitted, was given over 27 hours after the arrest. The *Miranda* warnings were administered to the defendant immediately preceding the statement and were made part of the taped confession. The intervening circumstances were very significant and apparently convinced the defendant to give a more complete statement to clear up inconsistencies. In answer to the question from the interviewer as to whether the confession he was giving was voluntary, Smith answered: "It's a voluntary statement and it's given to the best of my knowledge. I'm not trying, I'm not trying to make it seems like that I'm, you know, just trying to get my ownself off, but I just want the truth, you know. I want my side of the story, 'cause before anybody else, you know, come in here and say, I did this, I did that, you know, which isn't, hey."

It is quite apparent that the final statement was given after the defendant realized that Berrian was telling a different version of the incident and implicating Smith in a manner which Smith wanted cleared up and his "side of the story" known.

The fourth factor to be considered is the purpose and flagrancy of the official misconduct. In this instance, the officers were acting legitimately and under apparent authority of Neb. Rev. Stat. §§ 29-404.02 and 29-411 (Reissue 1979). "Police are charged to enforce laws until and unless they are declared unconstitutional. The enactment of a law forecloses speculation by enforcement officers concerning its constitutionality . . . ." *Michigan v. DeFillippo,* 443 U.S. 31, 38, 99 S. Ct. 2627, 61 L. Ed. 2d 343 (1979). As was the situation in *Rawlings,* "the conduct of the police here does not rise to the level of conscious or flagrant misconduct requir-

ing prophylactic exclusion of petitioner's statements." *Rawlings v. Kentucky*, 448 U.S. at 110.

The final factor to consider is whether the voluntariness of the confession has been established. The defendant has not argued on appeal that the confession was involuntary. There is no evidence that the defendant was subjected to any threats or promises or that the statement was coerced in any manner whatsoever. The motivating factor appears to be the defendant's desire to get at the truth and make sure his side of the story was told to avoid any untruthful accusations by Berrian. We believe that the final statement given by the defendant meets the test of *Brown* and the primary taint of the unlawful arrest was purged.

Since we have determined that the final statement of the defendant was correctly admitted into evidence and that statement encompassed everything in the first statement given by the defendant, admission of the first statement was not prejudicial and is therefore harmless error. "Where there is one confession by a defendant properly admitted into evidence and there was strong corroborative evidence of the guilt of the defendant, the admission of another confession, even though it should have been excluded upon objection, is harmless error." *Kelley v. State*, 366 So. 2d 1145, 1150 (Ala. Crim. App. 1979).

In a habeas corpus proceeding before the U.S. Supreme Court, the petitioner challenged the introduction at trial of a pretrial confession he made to a police officer posing as a fellow prisoner. "[P]etitioner sought to have his conviction set aside on the ground that the statements he made to police officer Langford should not have been admitted against him. Our review of the record, however, leaves us with no reasonable doubt that the jury at petitioner's 1958 trial would have reached the same verdict without hearing Langford's testimony. . . . [W]e do not close our eyes to the reality of overwhelming evidence of guilt fairly established in the state court 14 years ago by use of evidence not chal-

lenged here; the use of the additional evidence challenged in this proceeding and arguably open to challenge was, beyond reasonable doubt, harmless." *Milton v. Wainwright*, 407 U.S. 371, 377-78, 92 S. Ct. 2174, 33 L. Ed. 2d 1 (1972).

The third statement of the defendant left no question as to his guilt in this instance. Although neither of the victims could identify the robbers, their testimony corroborated in many details the facts related by Smith. The judgment of the District Court is affirmed.

AFFIRMED.

McCOWN, J., concurs in result.

HERMAN BROS., INC., ET AL., APPELLEES, V. SPECTOR INDUSTRIES, INC., ET AL., APPELLANTS.

308 N.W.2d 720

Filed July 24, 1981. No. 43392.

1. **Public Service Commission: Appeal and Error.** On an appeal to the Supreme Court from an order of the Nebraska Public Service Commission, administrative or legislative in nature, the only questions to be determined are whether the commission acted within the scope of its authority and if the order complained of is reasonable and not arbitrarily made.
2. ____:____. The determination of what is consistent with the public interest, or public convenience and necessity, is one that is peculiarly for the determination of the Nebraska Public Service Commission. If there is evidence to sustain the finding of the commission, this court cannot intervene.
3. **Public Service Commission: Motor Carriers.** Where commission approval of a transfer of authority is requested under Neb. Rev. Stat. § 75-318 (Reissue 1976), and an issue of dormancy is properly raised, the Nebraska Public Service Commission must determine both the fact of dormancy and, on the basis of the evidence, whether the public convenience and necessity require the transfer.
4. ____:____. There are no mechanical rules for determining when rights have become dormant, and the test of substantiality must be used to resolve the issue. Pertinent factors include whether the rights involve general or specified commodities, the character of the area served in terms of industry and population, the number of carriers involved in a

similar service, whether the rights are radial or nonradial, and whether the financial and material capabilities of the carrier have been utilized as far as practicable.

Appeal from the Nebraska Public Service Commission. Affirmed.

Rodney Peake of Peake & Navis, P.A., for appellants.

James E. Ryan of Ryan & Williams, P.C., for appellees.

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

BRODKEY, J.

Peake, Inc. (Peake), a motor carrier incorporated in Nebraska, and Spector Industries, Inc. (Spector), a motor carrier incorporated in Delaware, appellants herein, appeal to this court from an order entered by the Nebraska Public Service Commission denying an application to transfer to Peake the intrastate operating authority issued to Spector. The certificate of authority held by Spector authorized the transportation of bulk cement, limestone, and limestone products between all points in Nebraska over irregular routes. Peake, the wholly owned subsidiary of Ruan Transport Company of Des Moines, Iowa (Ruan), operates under authority to transport petroleum products, molasses, fertilizers, agricultural insecticides, and other chemicals over designated routes in Nebraska. We affirm.

The record in this case indicates that Peake entered into an agreement with Spector whereby Spector would sell its transportation authority to Peake at an agreed price of $20,000, subject to the approval of the Nebraska Public Service Commission. An application requesting authority to transfer Spector's operating rights was filed with the commission in February of 1979. Notice of the application was subsequently published on March 2, 1979, in response to which two formal protests were filed with the commission on March 30, 1979, on behalf

of Herman Bros., Inc., and Dokter Trucking Corporation. On April 24, 1979, the protestants filed a formal complaint alleging that Spector had allowed its certificate of authority to become dormant in that Spector did not perform the services authorized by the certificate. The protestants prayed that the commission revoke the certificate held by Spector. This matter came on for a public hearing before the commission on June 28, 1979, at which time evidence was presented on behalf of the parties herein. On February 12, 1980, the commission entered its order finding that the certificate of authority held by Spector was dormant and that the transfer of the authority to Peake was not supported by a showing of public need. Specifically, the commission found that Spector had entered into lease arrangements with Ruan whereby all shipments made by Spector were transported in equipment owned and operated by Ruan. The commission concluded that these operations were being conducted by Ruan in order to keep the Spector authority active prior to the proposed transfer of the certificate of authority to Peake. The commission held that the lease arrangement resulted in an unlawful use by Ruan of Spector's authority without the requisite approval of the commission as required by statute. In its opinion and findings, the commission stated:

"Mr. Kessler testified that Ruan leased equipment to Spector on a flat-fee basis. The fee was $5.00 per load for the use of the authority. Kessler testified that this was not a normal arrangement in that usually the fee is based on revenue with a split of 60% to 75% depending upon the amount and type of equipment. He characterized that as a 'normal leasing practice[']' insofar as the trucking industry is concerned. The flat-fee of $5.00 per load resulted in a payment of less than 1% of the total revenues derived.

. . . .

"Only minimal traffic has been transported under the authority and that transportation was done by Ruan. In 1977, 14 loads of bulk cement were transported under

the authority in Ruan equipment; in 1978, 45 loads; and in 1979, 24 loads. No loads of bulk cement or limestone were trucked prior to 1977. This means that only 73 [sic] loads of bulk cement have been transported under the subject authority.

"There was no evidence of any limestone traffic moving under the subject certificate nor was there any evidence submitted with respect to any traffic, either cement or limestone, originating at Omaha or Superior, Nebraska.

. . . .

"*In short, Mr. Distefano has described a leasing operation that is about as illegal as one could be.* Article 7 of the Motor Carrier Rules of this Commission require that each equipment lease be filed and approved before the lease becomes operative. The evidence shows that rule was violated. The rules [Section (2) (a) (vi)] require that the lessee have complete control of the equipment and that the lessee assume complete responsibility for the control and use of the equipment. The evidence shows that Ruan used its own equipment without any control being exercised by Spector, used it as it pleased, and hauled under its own insurance, all in violation of the rules. These practices completely negate the aims and purposes of the Motor Carrier Act which is to assure the shipping public that the carrier who undertakes common carriage of a commodity has sufficient insurance in force to cover any losses that might occur

will have direct means of holding the carrier responsible. Spector's operations in concert with Ruan constitute an irresponsible, inept attempt to subvert Section 75-318, R.R.S. 1943 which precludes lease of authority without approval of this Commission." (Emphasis supplied.) (Citations to record omitted.)

The commission found that the loads transported by Ruan under the Spector authority consisted of less than 1/10 of 1 percent of the total loads transported in 1977, less than 4/10 of 1 percent of the loads transported in

1978, and less than 8/10 of 1 percent of the loads available for transport through June of 1979. Evidence in the record also reveals that Spector only made minimal efforts to solicit business, principally through social contacts.

In their brief on appeal, appellants make the following assignments of error: (1) The commission erred in finding that appellants willfully failed to comply with the law; (2) The commission erred in finding the certificate dormant; (3) The commission erred in refusing to transfer the certificate to Peake; (4) The commission erred in completely disregarding the prior decisions of this court regarding this certificate; (5) The commission erred in not issuing the requested order; and (6) The commission erred in misconstruing the purposes and intent of the Nebraska Motor Carrier Act.

The general rule which governs our review in this matter has been stated as follows: "'On an appeal to the Supreme Court from an order of the Nebraska State Railway Commission [now Public Service Commission] administrative or legislative in nature, the only questions to be determined are whether the commission acted within the scope of its authority and if the order complained of is reasonable and not arbitrarily made.' . . . 'The determination of what is consistent with the public interest, or public convenience and necessity, is one that is peculiarly for the determination of the Nebraska State Railway Commission. If there is evidence to sustain the finding of the commission, this court cannot intervene.'" *Dahlsten v. Harris*, 191 Neb. 714, 722, 217 N.W.2d 813, 818 (1974). See, also, *Neb. Public Service Commission v. Grand Island Mov. & Stor. Co., Inc.*, 203 Neb. 356, 278 N.W.2d 762 (1979); *Neylon v. Petersen & Petersen, Inc.*, 183 Neb. 813, 164 N.W.2d 452 (1969); *Andrews Van Lines, Inc. v. Nielsen & Petersen, Inc.*, 180 Neb. 764, 145 N.W.2d 584 (1966). It has also been held that where commission approval of a transfer of authority is requested under Neb. Rev. Stat. § 75-318 (Reissue 1976), and an issue of dormancy

is properly raised, the Nebraska Public Service Commission must determine both the fact of dormancy and, on the basis of the evidence, whether the public convenience and necessity require the transfer. *Dahlsten v. Harris, supra.*

Section 75-318 provides that the commission may authorize the transfer of operating rights as follows, in pertinent part: "It shall be lawful, only under the conditions specified in this section, for any motor carrier or nonmotor carrier, or two or more motor carriers to: . . . (2) Purchase, lease, or contract to operate the properties, or any part thereof, certificates, permits or any part thereof, of another motor carrier . . . .

"Whenever a consolidation, merger, purchase, lease, operating contract, or acquisition of control of the properties, certificates, or permits is proposed, the carrier or carriers or person seeking authority therefor shall present an application to the commission, and thereupon the commission shall notify such carriers and other parties known to have an interest of the time and place for a public hearing in accordance with such rules as the commission shall adopt. If, after such hearing, the commission finds that the transaction proposed will be consistent with the public interest and does not unduly restrict competition and that the applicant is fit, willing, and able to properly perform the proposed service, it may enter an order approving and authorizing such consolidation, merger, purchase, lease, operating contract, or acquisition of control of the properties, or any part thereof, certificates or permits or the whole, or any part thereof, upon such terms and conditions as it shall find to be just and reasonable; *Provided,* that if any of the certificates or permits proposed to be merged, consolidated, transferred, or leased are dormant the commission may approve an application for consolidation, merger, transfer, or lease *only upon proof of and a finding that such merger, consolidation, transfer, or lease is or will be required by the present and future public convenience and necessity,* in the same manner as

provided in section 75-311; *and provided further*, that if the proposed merger, consolidation, transfer, or lease of the certificates or permits will permit or result in a new or different service or operation as to territorial scope than that which is or may be rendered or engaged in by the respective parties, or, as to passenger motor carriers, will tend to enlarge competition over that then existing, the commission may approve such an application for merger, consolidation, transfer, or lease only upon the basis of proof of and a finding that the proposed merger, consolidation, transfer or lease is or will be required by the present and future public convenience and necessity, in the same manner as provided in section 75-311. Any restrictions, qualifications, or conditions applicable to and contained in a particular certificate of public convenience and necessity or a permit at the time of the issuance thereof or thereafter made a part of such certificate or permit, excluding hereby any restrictions, qualifications, or conditions of general application, applicable to all motor carriers or a segment thereof as a class, and imposed by regulation of the commission, proposed to be merged, consolidated, transferred, or leased shall not be changed, altered, or removed without the proof required in section 75-311 for certificates and permits." (Emphasis supplied.)

The principal issue raised in this appeal is whether the certificate of authority held by Spector is dormant. The determination of the question of dormancy is a difficult one involving many factors. A persuasive and well-reasoned case discussing the various aspects of the problem is *Wright Trucking, Inc., v. United States*, 403 F. Supp. 119 (D. Mass. 1975), where the court held that the underlying premise of "dormancy" in determining whether a motor carrier should be allowed to purchase operating rights held by another carrier is that if the selling carrier's activity has become minimal or nonexistent, the area's shippers are presumed already to be receiving adequate service from other carriers, who will have adjusted their operations to meet these needs,

and that in determining what factors will promote or retard public interest, the Interstate Commerce Commission has authority to adopt a standard of "dormancy" in determining whether a motor carrier should be allowed to purchase the operating rights of another carrier. In that case, the court stated at 120:

"The ICC denied the Wright-Bonded application because it found that Bonded's operating rights had become 'dormant.' Dormancy is a concept the Commission developed in the course of its statutory oversight of the transfer of operating rights. The underlying premise is that if a selling carrier's activity has become minimal or nonexistent, the area's shippers are presumed already to be receiving adequate service from other carriers, who will have adjusted their own operations to meet these needs. *See Gregg Cartage & Storage Co. v. United States*, 316 U.S. 74, 83, 62 S. Ct. 932, 86 L. Ed. 1283 (1942). A purchaser of dormant rights is seen as aggressively seeking to expand the vendor's relinquished business, *C & H Transportation Co.-Purchase (Portion)-Ferguson Trucking Co.*, 93 M.C.C. 741 (1964), thus inciting a struggle among carriers in the area with damage either to 'the public interest or to intervening or protesting carriers who conducted operations during the interruption of said services,' *Arrow Transp. Co. v. United States*, 300 F. Supp. 813, 818 (D.R.I. 1969).

"While dormancy is not a term found either in the statute or in Commission regulations, it is the sort of standard the Commission is authorized to adopt, having plenary responsibility for administering the national transportation policy, and for determining what factors will promote or retard the public interest. *McLean Trucking Co. v. United States*, 321 U.S. 67, 79-88, 64 S. Ct. 370, 88 L. Ed. 544 (1944)."

The rule is well settled in this state that the Public Service Commission may properly consider rulings made by the Interstate Commerce Commission. *Priesendorf Transp., Inc., v. Herman Bros., Inc.*, 169 Neb. 693, 100 N.W.2d 865 (1960); *Abler v. Herman*

Bros., Inc., 187 Neb. 530, 192 N.W.2d 410 (1971). The Interstate Commerce Commission has recognized that there are no mechanical rules for determining when rights have become dormant, and has applied the "test of substantiality" in resolving issues of dormancy. The test is a flexible one. See *New Dixie Lines, Inc.-Control-Jocie Motor Lines, Inc.*, 75 M.C.C. 659 (1958). Pertinent factors involved include whether the rights involve general or specified commodities, the character of the area served in terms of industry and population, the number of carriers involved in a similar service, whether the rights are radial or nonradial, and whether the financial and material capabilities of the carrier have been utilized as far as practicable. See *Miami Transp. Co., Inc., of Ind.-Pur.-Strothman*, 97 M.C.C. 600, 608 (1964). In *Dahlsten v. Harris*, 191 Neb. 714, 217 N.W.2d 813 (1974), we held that where a carrier, holding a certificate of public convenience and necessity for hauling commodities generally or a generic class of commodities over irregular routes, does not perform a portion of such service through no fault of his own, but is ready, able, and willing to do so, the question of dormancy becomes a question of fact under all the circumstances of the case.

The authority sought to be transferred to Peake authorizes the transportation of bulk cement, limestone, and limestone products over irregular routes in Nebraska. The evidence as presented before the Nebraska Public Service Commission established that since 1977 there has been no traffic in limestone or limestone products. Moreover, the only traffic conducted under the Spector authority has been the transportation of bulk cement originating from Louisville, Nebraska. There has been no traffic in bulk cement from Omaha or Superior, Nebraska, the only other possible points of origin for such traffic. As the traffic conducted from Louisville was conducted under a lease agreement entered into between Ruan and Spector, we must focus on the nature of said lease in order to determine

whether it complied with the requirements for a lease as established by the commission.

In this regard, the rules and regulations of the Nebraska Public Service Commission, Ch. III, art. 7, § (2), provide for the procedure to be followed when motor carriers lease equipment. Those rules provide that a written lease agreement is to be signed between the transferor and the transferee, specifying the period for which the written agreement applies and also specifying the compensation to be paid by the transferee for the rental period. Section (2) (a) (vi) further requires that the lease "[p]rovide for the exclusive possession, control, and use of the equipment, and for the complete assumption of responsibility in respect thereto, by the transferee for the duration of the written agreement." Lastly, the rules provide that the lease must be approved by the Nebraska Public Service Commission.

At the hearing it was established that the transportation of bulk cement requires the use of special equipment and that Spector did not own such equipment in Nebraska. Sam Distefano, the terminal manager for Spector, testified that since 1977 the service performed by Spector was made using leased equipment from Ruan. On cross-examination, Distefano testified that Ruan Transport maintained complete control of the trucks being leased to Spector by controlling the drivers of the vehicles, maintaining insurance on the vehicles, and bearing all expenses incurred in the operation of the vehicles. Distefano stated that he, as the transferee, had no control over the drivers or the equipment leased by Spector, and was unable to testify as to whether Ruan had filed the necessary papers in order to operate under the Spector authority. Finally, Distefano conceded that it was possible that Ruan was developing traffic under the Spector authority.

As demonstrated above, the leases entered into between Ruan and Spector clearly violated § (2) (a) (vi) of the commission's rules. Ralph Saathoff, the director of motor transportation for the commission, testified that

the necessary filings that need to be made in order to lease equipment had not been registered with the Public Service Commission. As to the lease arrangement's compensation, the testimony reveals that Spector was paid only $5 per load rather than the 65-35 percent split which was testified to be the normal lease arrangement between leased operators.

Based upon the testimony presented at the hearing, the Public Service Commission found that the only traffic conducted under the Spector authority had been made pursuant to a lease arrangement which violated the commission's rules and regulations. We conclude that the evidence clearly supports the finding by the commission that the lease was unlawful and was entered into as a sham in order to keep the Spector authority active prior to the application of Peake. This being so, we determine that there was an adequate factual basis on which the commission could determine that the authority held by Spector was dormant, and also that the findings of the commission are supported by evidence in the record.

We therefore determine that the order of the Nebraska Public Service Commission should be, and hereby is, affirmed.

AFFIRMED.

BOSLAUGH, J., concurring.

I concur in the judgment upon the ground that the operations under the certificate issued to Spector Industries, Inc., were in violation of the regulations of the commission. See *Ace Gas, Inc., v. Peake, Inc.*, 184 Neb. 448, 168 N.W.2d 373 (1969).

IN RE APPLICATION OF BEST. DARRELL F. BEST, DOING BUSINESS AS BEST COMMUNICATIONS, APPELLANT, V. LINCOLN TELEPHONE AND TELEGRAPH COMPANY ET AL., APPELLEES.

308 N.W.2d 726

Filed July 24, 1981. No. 43458.

1. **Public Service Commission: Appeal and Error.** An order of the Nebraska Public Service Commission will be affirmed if the commission acted within the scope of its authority and its order is reasonable and not arbitrary. If there is evidence to sustain the findings of the commission, this court cannot intervene.
2. **Public Service Commission: Telecommunications.** Before granting a certificate of convenience and necessity, the commission must find that the portion of the territory of another telephone company in which or into which the applicant proposes to construct new lines or extend its existing lines does not or will not, within a reasonable time, receive reasonably adequate telephone service from the telephone company already serving the territory. Neb. Rev. Stat. § 75-604(2) (Reissue 1976).

Appeal from the Nebraska Public Service Commission. Affirmed.

Jack L. Shultz for appellant.

Paul M. Schudel of Woods, Aitken, Smith, Greer, Overcash & Spangler for appellee Lincoln Telephone.

Scott T. Robertson of Peterson, Bowman & Johanns for appellee Oden.

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

BRODKEY, J.

Darrell F. Best, doing business as Best Communications, the appellant herein, appeals to this court from an order entered by the Nebraska Public Service Commission denying his application for a certificate of public convenience and necessity authorizing the operation of a mobile telephone service to subscribers within a 35-mile radius of 33rd and O Streets in Lincoln, Nebraska. We affirm.

The record in this case reveals that an application requesting the authority to provide the aforementioned service was filed by the appellant with the commission on March 27, 1979. Notice of the application was subsequently published on April 3, 1979. Three formal protests to the granting of the application were filed with the commission on behalf of the Lincoln Telephone and Telegraph Company (LT&T), ATS Mobile Telephone, Inc. (ATS), and Charles P. Oden, doing business as Nebraska Radio Telephone Systems (NRTS). The protestants alleged that they were presently performing adequate service, that the proposed service of the appellant was not required by the public convenience and necessity, and that the granting of the certificate would lead to duplicative service and an inefficient use of the broadcast spectrum.

This matter came on for a public hearing before the commission on July 12, 1979, at which time evidence was presented on behalf of the parties herein. On November 5, 1979, the commission entered its order denying the appellant's application for the certificate of public convenience and necessity. In its order, the commission stated: "We are of the opinion and find that the applicant has failed to show that communications service in the area in question is not and will not within a reasonable time be adequate. Protestant Nebraska Radio Telephone Systems has been authorized to provide service and is proceeding with the installation of its system. There is no evidence in this record that the service to be provided by Nebraska Radio Systems will not be adequate. The application should be denied."

On November 30, 1979, the appellant filed a motion requesting a rehearing on his application. Oral argument on the motion for rehearing was held before the commission on January 3, 1980. The commission entered its order on April 8, 1980, overruling the motion for rehearing, from which order the appellant now appeals to this court. In his brief on appeal, the appellant raises the following assignments of error: (1) That

the Nebraska Public Service Commission acted in an arbitrary and capricious manner in its interpretation of Neb. Rev. Stat. § 75-604 (Reissue 1976); (2) That the commission erred in failing to find that the grant of the application was in the public interest; and (3) That the commission erred in overruling appellant's motion for rehearing.

In *Hartman v. Glenwood Tel. Membership Corp.*, 197 Neb. 359, 372-73, 249 N.W.2d 468, 476 (1977), we stated: "The standard of review in appeals from the Public Service Commission is well established. The order of the Commission will be affirmed if the Commission acted within the scope of its authority and if its order is reasonable and not arbitrary. [Citations omitted.] If there is evidence to sustain the findings of the Commission, this court cannot intervene. [Citation omitted.]"

Section 75-604 provides that no person shall offer telephone service without first making an application to the commission for and receiving from the commission a certificate of public convenience and necessity. In determining whether a certificate should be issued, the statute requires the following: "Before granting a certificate of convenience and necessity, the commission must find that (1) the territory in which the applicant proposes to offer telephone service is not receiving reasonably adequate telephone service, (2) that the portion of the territory of another telephone company in which or into which the applicant proposes to construct new lines or extend its existing lines *is not and will not within a reasonable time* receive reasonably adequate telephone service from the telephone company already serving the territory, or (3) the application is agreeable to the subscriber or subscribers and to both telephone companies involved in the matter, will not create a duplication of facilities, and is in the interest of the public and the party or parties requiring telephone service." (Emphasis supplied.)

The evidence contained in the record of the hearing before the commission convinces us that the order of the

commission was not arbitrary or unreasonable. At the hearing the evidence of public need for the appellant's proposed service consisted of testimony from two public witnesses, both of whom are currently subscribers of mobile telephone service from LT&T. Mr. Daniel Cuda and Mr. Robert Stephens both testified that they had encountered a delay in the installation of their mobile telephone systems by LT&T. Both men testified that it was also difficult to gain access to the LT&T system during certain peak usage hours. It appears, however, that the complaints lodged by Cuda and Stephens were prior to the addition of two UHF channels to the mobile telephone service by LT&T. These channels were expected to increase the capacity of LT&T's system by approximately 40 percent.

Moreover, the appellant argues to this court that NRTS should not be recognized as a telephone company already serving the territory, because at the time of the hearing and at the time of oral argument on the motion for rehearing, NRTS was not providing such a service. The evidence in this regard indicates that at the time of the hearing on the instant application, NRTS had been granted authority by the commission to commence its mobile telephone service at a date not earlier than October of 1979. Charles Oden, owner of NRTS, testified that at the time of the Best hearing, technical and engineering studies of the Lincoln area were nearly completed and that a Washington, D.C., firm had been hired to prepare for the necessary FCC licensing applications. Oden also testified that the FCC has allotted a total of seven VHF channels for utilization by radio common carriers, and of the seven channels six were then assigned. The seventh channel has been assigned to NRTS and is allocated to operations in Fremont and Lincoln. As to UHF channels, Oden indicated that 14 channels are allocated for use by common carriers and that 12 were currently assigned by the FCC to users in the area. Oden stated that he intended to apply to the FCC for use of the two remaining channels. At the time

of oral argument before this court, counsel for NRTS stated that the FCC had assigned the channels to the protestant, and that there were no remaining channels in which the appellant could operate without interfering with the other mobile telephone services.

Under § 75-604 the commission is to consider whether the territory into which the applicant proposes to introduce his service is *or within a reasonable time will be* receiving reasonably adequate telephone service from the companies already serving the territory. We believe that the commission properly considered the additional capacity provided through LT&T's expanded system and the new mobile telephone service provided by NRTS. These systems, along with that of ATS mobile telephone, appear to be able to handle the demands placed on the mobile telephone service within the foreseeable future as indicated.

If, after a reasonable time, on the basis of actual experience, it appears that protestants are not able to provide adequate mobile radio service, there would appear to be nothing to prevent appellant from making further application to the Public Service Commission to provide such service.

The evidence in the record supports the commission's finding that reasonably adequate service will probably be available in the territory within a reasonable time. The decision of the Nebraska Public Service Commission was not arbitrary or unreasonable, and must be affirmed.

AFFIRMED.

IN RE INTEREST OF D.
STATE OF NEBRASKA, APPELLEE, V. D.D.M., APPELLANT.

308 N.W.2d 729

Filed July 24, 1981. No. 43505.

1. **Parental Rights.** Rules governing termination of parental rights are intended to recognize the integrity of the family and to bring about parental termination only when that appears to be required and no other reasonable alternative exists.
2. ——. The rule has been long established in this state that courts may not properly deprive a parent of the custody of a minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship or has forfeited that right.
3. ——. Courts cannot deprive a parent of the custody of a child merely because the parent has limited resources or financial problems, or is not socially acceptable, nor because the parent's lifestyle is different or unusual. Neither can a court deprive the parent of the custody of a child merely because the court reasonably believes that some other person could better provide for the child.

Appeal from the Separate Juvenile Court of Douglas County. Reversed and remanded.

James P. Miller for appellant.

Donald L. Knowles, Douglas County Attorney, and Christopher E. Kelly for appellee.

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

KRIVOSHA, C.J.

This is an appeal from an order entered by the separate juvenile court of Douglas County, Nebraska, on March 21, 1980, terminating the parental rights of a mother to her four minor children. In an effort to minimize the notoriety a case of this type may bring to a family, we shall refer to the mother herein simply as "mother" and to the four minor children collectively as "the children." The trial court's order recites that by clear and convincing evidence the mother has failed to meet the requirements of Neb. Rev. Stat. § 43-209 (6)

(Reissue 1978) in that she has failed to correct the conditions leading to the previous determination that the minor children were homeless or destitute or without proper supervision through no fault of the mother, as defined in Neb. Rev. Stat. § 43-202(1) (Reissue 1978). We have reviewed the record de novo as we are required to do in cases of this nature. See, *State v. Worrell*, 198 Neb. 507, 253 N.W.2d 843 (1977); *State v. Kinkner*, 191 Neb. 367, 216 N.W.2d 165 (1974). Our examination of the record leads us to the conclusion that the evidence is not clear and convincing as found by the separate juvenile court, and the order of the separate juvenile court terminating the parental rights of the mother must be reversed.

The instant case presents the conflict which constantly arises between two competing theories. On the one hand, we are confronted with a desire to recognize and protect the integrity of the family unit. On the other hand, we are required and desire to take such action which will be in the best interests of the children involved. Finding that point at which one of those basic theories outweighs the other is a difficult task and one which the most dedicated of courts is not easily able to do.

Undoubtedly, it would be extremely helpful if this court could articulate specific standards and criteria by which determinations are to be made by the juvenile courts to whom these matters are presented. Unfortunately for all, however, such standards are not easy to articulate and it becomes apparent, after just a little experience with the subject, that indeed each case must be decided upon its own facts viewed in light of its own circumstances. The clear situations are never a serious problem for the court. It is those gray areas which pose the serious problem. As for those, we cannot do more than examine the matters on a case-by-case basis. We must, however, keep in mind our recent pronouncement made in the case of *In re Interest of Hill*, 207 Neb. 233, 239, 298 N.W.2d 143, 146 (1980), wherein

we stated that rules governing termination of parental rights "are intended to recognize the integrity of the family and to bring about parental termination only when that appears to be required and no other reasonable alternative exists." See, also, *In re Interest of Holley, ante* p. 437, 308 N.W.2d 341 (1981).

Further, in *State v. Worrell, supra* at 512, 253 N.W.2d at 847, we said: "[T]he rule has been long established in this state that courts may not properly deprive a parent of the custody of a minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship or has forfeited that right. [Citations omitted.] Courts cannot deprive a parent of the custody of a child merely because the parent has limited resources or financial problems, or is not socially acceptable, nor because the parent's life style is different or unusual. Neither can a court deprive a parent of the custody of a child merely because the court reasonably believes that some other person could better provide for the child."

The record in this case upon which the court determined that the evidence was clear and convincing consists principally of letters written to the court by various welfare agents. While the exhibits were received without objection and therefore are properly before the court, there was no opportunity or effort made to cross-examine the authors of the various reports to determine the basis for their conclusions. In addition to the reports, the balance of the record consists principally of colloquies between the court and various state agents as well as the sworn testimony of only the mother. With regard to the state of the record, the court notes that in cases of this nature where the record must establish the justification for the action by clear and convincing evidence, observance of more formal court procedures is to be encouraged. See Neb. Rev. Stat. § 43-206.03(2) (Reissue 1978). In the instant case this court is called upon to examine the record de novo and to make its own findings of fact; and yet it must, to a

large extent, rely upon statements which, if formally offered in evidence and objected to, may be inadmissible. The terminating of parental rights is far too important a matter to be done by informal procedures.

The record discloses that the mother is a 33-year-old divorcee with four children now ranging in age from 4 to 11 years old. The record discloses that her former husband, a Vietnam veteran, was suffering from psychiatric difficulty and having difficulty adjusting to civilian life after being in Vietnam. Frequently he would become violent and physically abuse her. The record further discloses that she was raised in a rural setting where the showing of affection by members of the family was not only frowned upon but prohibited by her father.

In January of 1978, recognizing that she was in need of psychiatric care, the mother voluntarily placed her children with the State Department of Welfare and admitted herself into the Nebraska Psychiatric Institute in hopes that by doing so she might rearrange her life and be able to handle the needs of her children. The record is clear that had the mother not voluntarily sought psychiatric care and voluntarily brought her children to the state, it is not likely that either the state or the separate juvenile court ever would have been made aware of any difficulty or acquired jurisdiction over the children. In March of 1978 a dependency petition was filed, and the children were legally detained by the Douglas County Juvenile Court on April 5, 1978. Between April 5, 1978, and March 21, 1980, the juvenile court retained jurisdiction of this matter, placing the children for a time in foster care, for a time with the mother, and then back again in foster care.

The record fails to disclose any substantial evidence of any physical or mental abuse by the mother toward her children. As a matter of fact, one of the reports filed by a state welfare agent is clearly to the contrary. A report filed December 13, 1978, recites in part: "[Mother] has

demonstrated an excellent ability in handling all of the children's temper tantrums on different occasions . . . .[Mother] also shows the children affection by hugging and kissing them."

While it is apparent from reading the record that the mother is not likely to ever be selected as "housekeeper of the year," it is likewise clear from the record that her lack of housekeeping ability did not establish by clear and convincing evidence that her parental rights should be terminated. Quite to the contrary, the record indicates that while the mother had poor housekeeping habits, she continued to improve when given direction by the various state agencies. Each report indicates a somewhat improved condition over the previous report. And yet the basis for terminating parental rights is that the mother failed to make reasonable efforts under the direction of the court to correct the conditions leading to the determination.

The record would indicate that the mother made significant efforts to improve. It was suggested by the court that she attend Parent Effectiveness Training, and she attended. It was suggested by the court that she seek psychological counseling, and she sought it. It was suggested by the court that she make efforts to learn to be a better housekeeper, and she made such efforts, although admittedly she did not achieve perfection with regard to housekeeping. An example of that is disclosed in a report filed May 23, 1979, by a service officer to the juvenile court. The report analyzed the court's order dated February 7, 1979, and reads in part as follows:

"1) *That the children's mother is allowed reasonable rights of visitation and she is to exercise such visitation rights on a regular basis.*

"[Mother] has maintained regular visitation with her children. Please see the report from Clare Burton, Douglas County Foster Care worker.

"2) *That [child], child herein, shall continue psychotherapy as arranged by Douglas County Social Services.*

"[Child] sees Dr. Chavez every two weeks. Please see the report from Clare Burton.

"3) *That the childrens' mother shall regularly participate in Parent Effectiveness Training Program.*

"Conversation with Del Roper, Director of the Parent Effectiveness Training Program, on May 1, 1979, revealed that [mother] has been participating in the program on a regular basis. She participates in the program with the Omaha Home for Boys Staff. She participates on Wednesday from 9:00 A.M. until 12:00 P.M. Mr. Roper indicated that [mother] participates in the class discussion and she shares her personal experiences with others in the group. Del indicated that he is pleased with [mother's] participation in that group. He indicated that he will send a report to the court.

"4) *That the childrens' mother shall maintain steady full time employment.*

"[Mother] was employed at Lutheran Old Peoples Home from February, 1979 until May, 1979. Her working hours were from 10:30 P.M. until 7:00 A.M. Conversations with [mother] during April, 1979, revealed that sometimes she worked fourteen days in a row without a day off. They were short of help. During May, 1979, [mother] quit her job there. She quit because they wouldn't give her day hours, but her employer did give a co-worker day hours.

"[Mother] started working for the Tupperware Company on May 18, 1979. Conversation with [mother] on June 7, 1979, revealed that [mother] is participating in Tupperwares' manager training once a week. It appears that [mother] would have to be involved in about twenty parties or two thousand dollars worth of tupperware a month to have an income of five hundred dollars for one month. [Mother] indicated that she will bring a statement from her Tupperware distributor.

"5) *That the childrens' mother shall continue regular basis counseling with Mrs. Berit Yank at the Burt Stree [sic] Mental Health Clinic at 20th and Burt, Omaha, Nebraska.*

"Conversation with Berit Yank on April 12, 1979, and May 30, 1979, revealed that [mother] attends counseling on a regular basis. Berit stated that [mother] has developed a trusting relationship with her. Berit indicated that she will send a report to the Court."

It is difficult to understand how it can be suggested from a reading of that report that the mother was not making reasonable efforts to correct the conditions as directed by the court. It is true that there are items contained in the various reports offered to the court which, if standing alone and unexplained, would tend to place the mother in a bad light. Yet there were explanations. While the explanations may not be sufficient to satisfy a member of this court that the mother was the epitome of a housekeeper, they were sufficient to indicate that the mother was not treating the children in such manner that their best interests required the termination of her parental rights. Each succeeding report indicated that while the house was "messy," it was cleaner than it had been on previous occasions. In a report from Child Protective Service to the court dated May 24, 1979, the state worker reported: "[Mother] has been cooperative with me whenever we have had any contact. She has willingly answered any questions I have asked her. [Mother] has attended all her counseling sessions with Berit Yank at the Burt St. Clinic and will soon be starting a third session of the P.E.T. classes with Del Roper."

On June 6, 1979, Clare Burton, foster care worker for the Douglas County Social Services, wrote to the court and said in part: "Over the past few months I feel that [mother] has gained more sensitivity and awareness in interacting with her children. I feel she is beginning to understand how to take time with them individually and talk with them about their concerns. She has shown interest by frequently initiating contact with me regarding the children's foster home and school progress. I feel that her individual therapy and parenting classes have aided in this awareness but feel it vitally im-

portant that she continue in these programs to help her relate with her children."

In a further report dated July 23, 1979, the county service officer reported to the court in part as follows: "A conversation with Berit Yank, therapist at the Burt Stree [sic] Clinic, on July 12, 1979, indicated that [mother] attends therapy on a regular basis, and is doing very well. She is becoming much more open and is beginning to look more deeply at her behavior and also the childrens'. Ms. Yank is presently working with [mother] in terms of keeping a schedule by which to clean her home. She feels that [mother] is ready to have the children on a full time basis. She indicated that she will send a report to the Court."

On July 25, 1979, the therapist did send a report to the court indicating that the mother was indeed doing extremely well. She concluded her report by saying: "We feel that [mother] should be given the opportunity to have her family back and to use the various agencies and organizations as resources rather than judges of her behavior."

On August 6, 1979, the children's guardian ad litem reported to the court about a visit which he made to the home. He concluded the report by saying, "On the whole, my impression was the house was cluttered not filthy. I would recommend that the children be returned and there be constant supervision until it is shown that [mother] can handle the situation. I based this on the fact that she appears to have made progress on a personal level; she has tried to comply with the Court's order; she is trying to keep the house clean; and the weekend visits will prove its [sic] disruptive [to] the children."

And then in February and March of 1980, while continued progress is reflected (though, to be sure, there are instances which many of us would find objectionable), the court terminates her parental rights.

The separate juvenile court seems to find fault with the fact that the mother, while having a gross income of

perhaps never in excess of $500 per month, has not saved any money. There is no evidence, however, to indicate that the money was foolishly spent or that anyone could save money on $500 a month. The court indicated its disapproval that the mother had failed to comply with the court's order which provided that no one was to be present in the home when the children were visiting except for the mother and social workers. It appears that the mother had married and her husband was present. The court criticizes the mother for having her husband present while the children are visiting. There is some indication in the record, developed by conversation rather than by sworn testimony, that perhaps the marriage may not be legally valid. Nevertheless, the trial court seems to totally disregard the fact that the mother attempted to establish a lawful home in which the children could live. We are completely unable to determine the legality or illegality of the marriage based upon the record in this case. We are able to ascertain, however, that the children are extremely fond of the husband and that there is no evidence that his presence was detrimental to their well-being.

An overall examination of the record leads us to the conclusion that there is not sufficient evidence to establish that the best interests of the children are served by terminating parental rights. Quite to the contrary, the evidence is that the children very much love their mother and love each other, and if they are, indeed, having difficulties, some are due to the fact that they are separated from their mother and from each other. While we are not here condoning filth and the lack of good housekeeping standards, we are not prepared to terminate parental rights solely on that basis. The North Dakota Supreme Court, in the case of *In re Kelber*, 51 N.D. 698, 200 N.W. 786 (1924), perhaps captured the problem as well as it can be captured when it wrote: "The parents may not be blessed with intelligence of the highest order, nor with a high degree of education or culture. The law, however, makes no

distinction between the genius and the common man, the educated and ignorant, the refined and the uncouth, the rich and the poor, insofar as the natural right to the custody of offspring is concerned. Every consideration of justice and humanity requires that family ties shall not be lightly sundered. . . . The home and the family, held together by the ties of natural, rather than adoptive, affection, is the last bulwark of American institutions. Poverty, lack of education, or of culture alone are never sufficient justification for severing the ties that bind families together. In this western country, on these western plains, many a home might have been broken where large families were raised by the pioneers in one room cabins of logs, or sod, had poverty, lack of education, or begrimed faces of children, playing on naked mother earth, been the only showing required."

We are convinced that the best interests of these children are not served by terminating parental rights, but quite to the contrary are best served by reestablishing parental rights. To that end, the order of the separate juvenile court terminating the parental rights is reversed and the rights of the mother to her four children reinstated with physical custody of the children restored to the mother, subject to continuing supervision by the appropriate state agency.

Our action in this case should not, however, be construed by anyone, including the mother, as being approval of her manner of caring for her children, but rather our belief that she should be given further opportunity to correct her ways.

Although the mother made sincere efforts to comply with the requirements established by the juvenile court, her compliance in many respects was not satisfactory. There is evidence of substantial neglect of the children in the past. For that reason, it is essential that her custody of the children be under the supervision of an appropriate agency. In the event the children do not

receive adequate care, further proceedings will be necessary.

REVERSED AND REMANDED.

CLINTON, J., participating on briefs.

RAYMOND J. RIHA, APPELLEE, V.
ST. MARY'S CHURCH AND SCHOOL, INC., ET AL.,
APPELLANTS.

308 N.W.2d 734

Filed July 24, 1981. No. 43717.

1. **Workmen's Compensation: Appeal and Error.** The findings of fact made by the compensation court after rehearing will not be set aside on appeal unless clearly wrong. However, where there is not sufficient competent evidence in the record to warrant the making of the award, or the findings of fact made by the Workmen's Compensation Court do not support the award, this court must modify, reverse, or set aside the award.
2. **Workmen's Compensation: Evidence: Proof.** The plaintiff in a workmen's compensation case must prove by a preponderance of the evidence that his disability is the result of an accident arising out of his employment.
3. ____:____:____. The presence of a preexisting disease or condition enhances the degree of proof required to establish that the injury arose out of the employment.
4. ____:____:____. Where the injury is not of an objective nature, a causal connection between the accident and the disability must be established by expert medical testimony.
5. **Expert Witnesses.** The value of an opinion of an expert is no stronger than the facts upon which it is based.

Appeal from the Nebraska Workmen's Compensation Court. Reversed and remanded with directions.

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

James M. Egr of Egr & Birkel for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN,

BRODKEY, WHITE, and HASTINGS, JJ.

BOSLAUGH, J.

This is an appeal in a proceeding under the Workmen's Compensation Act. The plaintiff was injured on December 31, 1977, while employed as a custodian and maintenance man by the defendant St. Mary's Church and School, Inc., in David City, Nebraska. While spreading ice remover over the church steps in the course of his employment, the plaintiff slipped and fell. Plaintiff received compensation for an injury to his hip and sought additional compensation in this proceeding for an aggravation of a preexisting condition in his low back.

After a hearing before a single judge, the plaintiff received an award for temporary total disability and medical and hospital expenses. On rehearing before a three-judge panel of the Workmen's Compensation Court, with one judge dissenting, the plaintiff again received an award for temporary total disability and medical and hospital expenses. The court found that the temporary total disability would continue for an indefinite period of time, and in the event the temporary disability ceased, the plaintiff would be entitled to compensation for any permanent partial disability due to the accident and injury. The defendants have appealed.

It is undisputed that the plaintiff was in the course of his employment at the time of his injury on December 31, 1977. The issue which must be determined is whether the evidence will sustain the finding of the Workmen's Compensation Court that the injury arose out of the plaintiff's employment. This question must be determined by an analysis of the medical testimony in the record concerning any causal connection between the fall and the disability of the plaintiff.

The findings of fact made by the compensation court after rehearing will not be set aside on appeal unless clearly wrong. *Meyer v. First United Methodist Church,*

206 Neb. 607, 294 N.W.2d 611 (1980). However, where there is not sufficient competent evidence in the record to warrant the making of the award, or the findings of fact made by the Workmen's Compensation Court do not support the award, this court must modify, reverse, or set aside the award. Neb. Rev. Stat. § 48-185 (Reissue 1978).

The plaintiff in this case has a long history of back problems dating back to 1954 when he was injured in a fall from a hayrack. In 1958 that injury was diagnosed as an L5-S1 disc injury and a laminectomy was performed.

On January 15, 1963, the plaintiff again injured his back when he slipped and fell on ice. As a result of the 1963 injury a fusion operation at L3-4, L4-5 was performed to relieve nerve root symptoms and instability in his back. Following this surgery the plaintiff testified that he was unable to bend normally and compensated by using his knees and hips when stooping to pick up objects. Dr. Goetowski, the treating surgeon, estimated the plaintiff had a 5 to 10 percent permanent partial disability to the body as a whole following the second surgery.

The evidence is in conflict as to whether the plaintiff experienced back pain following the second surgery. The plaintiff testified he did not have back pain again until after the December 31, 1977, fall. However, plaintiff's treating physician, Dr. Rudolph, indicated that the plaintiff complained of chronic low back pain in 1975. In July 1975 the plaintiff complained of burning pain in his feet and legs. Dr. Miller, as a consulting physician, was of the opinion that the plaintiff's problem was functional.

Following the December 31, 1977, fall, the plaintiff complained of pain in his left hip. X-ray examination on February 24, 1978, disclosed a chip fracture and degenerative arthritis of traumatic origin.

The plaintiff first complained of back pain following the December 1977 fall on April 21, 1978. Dr. Miller

noted at that time, "He has a myriad of complaints including pain in the bones of his feet, tingling in his hands, back pain, leg pain, etc." Dr. Miller could find no organic explanation for the plaintiff's symptoms, and concluded, "I think maybe the symptoms he has are secondary to drug dependency."

On July 11, 1978, the plaintiff's spine was X-rayed. The radiologist reported bony overgrowth bridging L4-5 and L5-S1, but no sign of recent injury.

In November 1978 a myelogram examination was made. Both Dr. Rudolph, plaintiff's personal physician, and Dr. Miller, plaintiff's orthopedic specialist, believed this test indicated a disc injury at the level of the third lumbar vertebra.

Dr. Miller's preoperative diagnosis of plaintiff's condition and its relation to the December 1977 fall was as follows: "Mr. Riha has a great deal of functional overlay as noted by previous psychological examination but we do feel he has objective evidence of a disc problem which is recurrent at the 3rd lumbar level. He had a previously existing problem requiring a laminectomy 15 years ago but did well until *he was injured in December 1977 and I feel this problem eminates [sic] from that injury.* I therefore feel that he had a previously existing problem which was aggravated by the injury in December 1977." (Emphasis supplied.)

On December 29, 1978, the plaintiff again underwent surgery to relieve his condition. The procedure was a decompression, hemilaminectomy at L3-4 level on plaintiff's left side. The operation disclosed, however, that the plaintiff did not have a disc injury but suffered from spinal stenosis, a narrowing of the nerve root canal in the spine, caused by scarring and bony overgrowth and probably caused by his previous surgery.

In January and March of 1979 the plaintiff's complaints of low back pain were dismissed by Dr. Miller as mostly functional.

The plaintiff in a workmen's compensation case must prove by a preponderance of the evidence that his

disability is the result of an accident arising out of his employment. *Tilghman v. Mills*, 169 Neb. 665, 100 N.W.2d 739 (1960). Moreover, the presence of a preexisting disease or condition enhances the degree of proof required to establish that the injury arose out of the employment. *Sellens v. Allen Products Co., Inc.*, 206 Neb. 506, 293 N.W.2d 415 (1980).

Since the plaintiff's injury was not of an objective nature, expert medical testimony was required to establish a causal connection between the December 1977 fall and the claimed aggravation of a previous injury. *McCann v. Holy Sepulchre Cemetery Assn.*, 205 Neb. 444, 288 N.W.2d 45 (1980); *Mack v. Dale Electronics, Inc.*, *ante* p. 367, 307 N.W.2d 814 (1981). Dr. Rudolph, plaintiff's personal physician, was unable to testify as to a causal connection between the December 1977 fall and plaintiff's recurring back problem. He did testify, however, that spinal stenosis is usually a result of previous surgery.

Although the plaintiff has been examined and treated by many physicians, including neurologists and psychologists, the only medical testimony on causation to support the award to the plaintiff is found in Dr. Miller's December 12, 1978, preoperative diagnosis and a notation Dr. Miller made on January 8, 1980, following a conversation with defendants' attorney. In that notation, Dr. Miller stated: "We were trying to determine whether or not Mr. Riha's problem has eminated [sic] from the injury which he incurred in December 1977 and I do believe in reviewing his records that, although we are referring to 'hip' initially it was the same type pain he has been complaining of all along and is related to the injury of December 1977 although he did have back trouble 15 years prior to that and we would have to say that he had previously existing back problems which was aggravated by his injury. He probably is about 50% disabled now from his back problem."

From this evidence, the single judge determined that the plaintiff had sustained his burden of proof on the

issue of causal connection. On the rehearing, the parties stipulated to the admission into evidence of exhibit 5, an affidavit of Dr. Miller, dated June 3, 1980. The affidavit states in part: "2. On December 29, 1978, I performed surgery on Raymond J. Riha, of David City, Nebraska. A copy of the Surgical Record dated 12-29-78 is attached hereto and made a part hereof. *The postoperative diagnosis contained in that report reflects my present diagnosis of Mr. Riha's problem and supersedes any opinions I have given in reports dated prior to this Affidavit. Said postoperative diagnosis and my present opinion also specifically supersede my notations regarding my conference with Mr. Endacott dated January 8, 1980.*

"3. On the basis of what I discovered at the surgery of 12-29-78, Mr. Riha's back problems were secondary to bony overgrowth and scarring that was the result of previous surgery in the same area of his back rather than the accident involving Mr. Riha which occurred in December of 1977. Said previous surgery occurred about sixteen years prior to December of 1977.

"4. Because of my findings as a result of the surgery performed on 12-29-78, *I cannot now state with a reasonable degree of medical certainty that Mr. Riha's present medical problems with his back are causally related to his accident in December of 1977.*" (Emphasis supplied.)

The three-judge compensation court, in evaluating the weight to be placed on the affidavit, stated: "The evidence is in conflict. We do not regard the later affidavit as binding as a matter of law on the issue of causation. Like other evidence, it may be rejected in favor of contrary evidence. That Dr. Miller's apparent change of opinion is not explained and that the affidavit does not meet head on the doctor's earlier conclusion that plaintiff's complaints are related to and aggravated by the injury of December 1977, are circumstances which detract from the weight to be given the affidavit."

As a general rule, where the record presents nothing

more than conflicting medical testimony, this court will not substitute its judgment for that of the Workmen's Compensation Court. *Keith v. School Dist. No. 1*, 205 Neb. 631, 289 N.W.2d 196 (1980); *Marion v. American Smelting & Refining Co.*, 192 Neb. 457, 222 N.W.2d 366 (1974). In the present case, however, the only evidence on the issue of causation comes from a single expert witness. If his final statement is accepted, all conflict is eliminated, as his June 3, 1980, opinion expressly "superseded" all earlier opinions.

The value of an opinion of an expert is no stronger than the facts upon which it is based. *Anderson v. Cowger*, 158 Neb. 772, 65 N.W.2d 51 (1954). In this respect, it is significant to note that the only opinion to incorporate the postoperative diagnosis as the basis of the opinion was the June 3 affidavit.

The record in this case, when considered as a whole, establishes quite clearly that the cause of the plaintiff's present difficulty is unknown. Dr. Rudolph stated frankly that the cause was unknown. The surgery on December 29, 1978, established that the 1977 fall did not result in a disc injury. The operation which was performed was designed to relieve symptoms caused by the narrowing of the nerve root canal due to scar tissue and bony overgrowth resulting from the previous surgery. Perhaps the operation was not successful. Perhaps the plaintiff's pain has no traumatic origin. The evidence is inconclusive. In the present state of the record the only conclusion that can be drawn is that, as a matter of law, the evidence failed to establish that the plaintiff's disability was caused by the 1977 fall.

The probative value of the 1978 preoperative diagnosis was destroyed by the conditions discovered when the surgery was performed. The affidavit of Dr. Miller effectively destroyed any probative value of his January 8, 1980, statement. See *Thelen v. J. C. Penney Co.*, 186 Neb. 53, 180 N.W.2d 693 (1970). The only other postoperative statements by Dr. Miller were that the plaintiff's pain was functional.

The record does not support the findings of the Workmen's Compensation Court. The judgment must therefore be reversed and the cause remanded with directions to dismiss the petition.

REVERSED AND REMANDED WITH DIRECTIONS.

WHITE, J., dissents.

STATE OF NEBRASKA, APPELLEE, V.
FRANK A. AULRICH, APPELLANT.

308 N.W.2d 739

Filed July 24, 1981. No. 43888.

1. **Wiretaps.** Once it is determined that a wiretap is illegal, any evidence derived from the wiretap must be suppressed.
2. **Wiretaps: Constitutional Law.** Neb. Rev. Stat. §§ 86-701 to 86-712 (Reissue 1976) provide their own exclusionary rule which exists separate and independent of any court-created exclusionary rule involving the fourth amendment.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Reversed and remanded with directions to dismiss.

Kirk E. Naylor, Jr., for appellant.

Paul L. Douglas, Attorney General, and Mark D. Starr for appellee.

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

PER CURIAM.

The appellant, Frank A. Aulrich (Aulrich), appeals from a judgment entered by the District Court for Buffalo County, Nebraska, finding Aulrich guilty of being in possession of a controlled substance in violation of Neb. Rev. Stat. § 28-416(3) (Reissue 1979), and

of being a convicted felon in possession of a handgun in violation of Neb. Rev. Stat. § 28-1206(1) (Reissue 1979), and from the sentences imposed by the court for said convictions. Aulrich maintains that the trial court erred in failing to sustain his motion to suppress certain evidence seized as a result of a search of his residence located in Buffalo County, Nebraska. In the instant case a jury was waived and the case tried to the court on a stipulation of facts. It is clear from the record that if the evidence which Aulrich sought to suppress was in fact suppressed, the convictions could not stand. We have examined the records and files in this case and have concluded that the contention of Aulrich is correct and the judgment must be reversed.

The stipulation of facts entered into between the State and Aulrich at trial discloses in part that on April 2, 1979, Aulrich was serving a term of probation for 2 years pursuant to a sentence by the District Court for Kearney County, Nebraska, for conviction of the offense of felony possession of marijuana. At approximately 9:50 p.m. on April 2, 1979, a member of the Nebraska State Patrol and two officers of the Kearney Police Department entered the trailer where Aulrich was living, and as a result of a search of the trailer they found in the kitchen closet of the residence a Ruger .357-caliber revolver, serial No. 15229515, belonging to Aulrich. It was further stipulated by the parties that the officers found on or in a living room plant table a vial which contained a small amount of white powder. Upon analysis, the powder was confirmed to be cocaine. The parties further stipulated to facts that established that Aulrich had previously been found guilty of a felony offense. Based upon this stipulation, the trial court found Aulrich guilty of both charges.

However, Aulrich entered into the trial stipulation subject to objections which he had earlier raised at a suppression hearing. The record discloses that the parties had likewise entered into an earlier stipulation of facts in connection with a hearing on a motion

to suppress filed by Aulrich. The facts stipulated at the suppression hearing are extremely relevant to the disposition of this matter. The suppression hearing stipulation was to the effect that on April 1, 1979, at 1:19 p.m., officers of the Nebraska State Patrol installed a wiretap on a telephone located at the residence of one David Donathan, a resident of Cass County, Nebraska. As a result of the wiretap, they intercepted a telephone call made by Donathan to Aulrich. The parties further stipulated that the telephone call was intercepted without the knowledge or consent of either Donathan or Aulrich. It was further stipulated by the parties that the contents of the intercepted conversation indicated to the police that there was reason to believe that Aulrich was in possession of marijuana, a controlled substance. According to the stipulation, as a result of the intercepted telephone conversation a member of the Nebraska State Patrol and two officers of the Kearney Police Department undertook to search Aulrich's residence.

The stipulation further provided that the search was carried out without benefit of search or arrest warrant and without any request being made by the officers that Aulrich consent to the search, but based rather upon the provisions of an earlier probation order affecting Aulrich. From the suppression hearing stipulation it is agreed by the parties that on July 27, 1978, Aulrich was placed on probation by the District Court for Kearney County, Nebraska, for a period of 2 years following his conviction for the felony offense possession of marijuana weighing in excess of 1 pound. He agreed in paragraph 11 of the probation order that "as a condition of probation, that said defendant [Aulrich] submit his person and property to search and seizure at any time of the day or night by any law enforcement officer with or without a warrant." The parties further stipulated at the suppression hearing that the search revealed the controlled substance and firearms, more specifically identified by the

parties in the trial stipulation at the time of trial.

The final paragraph of the suppression hearing stipulation provides as follows: "That the interception of the telephone conversation by law enforcement officers, as more specifically referred to within this Stipulation, was unlawful, having been accomplished in violation of the substantive provisions of Sections 86-701 thru 86-707, R.R.S. 1943 (Reissue 1976). More specifically, the wiretap, which was utilized to intercept said conversation, was subsequently found, by District Judge Raymond Case, District Judge of Cass County, Nebraska, and by District Judge William Blue, District Judge of Lancaster County, Nebraska, to have been invalid because said wiretap was conducted without a sufficient prior showing that other investigative procedures had been tried and failed or why said procedures would be unlikely to succeed if tried or would be too dangerous, contrary to the requirements contained in Section 86-705(c), R.R.S. 1943 (Reissue 1976)."

While the State concedes that the wiretap was invalid and unlawful, it nevertheless argues that the invalid wiretap does not affect the subsequent search because the search was made pursuant to the condition of the order of probation. The State's argument is based principally upon a claim that the order of probation is a sufficient attenuating circumstance so as to overcome any violation of the wiretap, and makes the obtaining of the evidence valid and admissible. The State specifically argues in its brief that had there been no wiretap and had no information been obtained from any source which would have led authorities to believe that marijuana was present in the defendant's residence, a warrantless search of the defendant and his property could have been conducted legally pursuant to the probation order. In making such argument the State relies upon our decision in *State v. Morgan*, 206 Neb. 818, 295 N.W.2d 285 (1980).

The difficulty with the State's argument, however, is

that it chooses to disregard all the provisions of Neb. Rev. Stat. § 86-705(11) (Reissue 1976), which, in clear and concise language, provides in part as follows: "*Any* aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of this state, may move to suppress the contents of any intercepted wire or oral communication, *or evidence derived therefrom*, on the grounds that the communication was unlawfully intercepted . . . . If the motion is granted, the contents of the intercepted wire or oral communication, *or evidence derived therefrom*, shall be treated as having been obtained in violation of sections 86-701 to 86-707." (Emphasis supplied.)

While it is true that the order of probation required Aulrich to consent to warrantless searches of his person or property, it did not require him to consent to the unlawful wiretapping of his telephone or to the waiving of his rights under Neb. Rev. Stat. Ch. 86, art. 7.

Our holding in *State v. Morgan, supra*, was not intended to imply that a waiver by a probationer as to certain rights afforded him under the fourth amendment to the U.S. Constitution constitutes a waiver of all his constitutional and statutory rights. Whether a probationer can, under any circumstance, be required to waive his rights under the provisions of Neb. Rev. Stat. §§ 86-701 to 86-712 (Reissue 1976) is not before us and we need not now consider that matter. The parties have in effect agreed that Aulrich *did not* waive his rights under the act nor consent to the interception of his phone conversations. The stipulation makes it clear that the wiretap was unlawful and was the sole basis upon which the ultimate search was conducted. The State agrees it was motivated to conduct the search solely because of the information it had unlawfully obtained through the wiretap.

The condition of the probation order eliminated any need for obtaining a search warrant. The fact, however, that a search warrant was not needed does not abrogate

the clear prohibitions of the wiretap statute, § 86-705(11). In *State v. Kolosseus*, 198 Neb. 404, 408, 253 N.W.2d 157, 160 (1977), we said: "Federal law preempts the field in the area of interception of oral or wire communications and *prohibits* the use of such intercepted communications *or any evidence derived therefrom* . . . ." (Emphasis supplied.) Once it was determined that the wiretap was illegal, any evidence derived from the wiretap must be suppressed. See, *State v. DiMauro and Kessler*, 205 Neb. 275, 287 N.W.2d 74 (1980); *United States v. Spagnuolo*, 549 F.2d 705 (9th Cir. 1977).

The State may not, on the one hand, seek to obtain the benefits of the wiretap statute while at the same time choosing to ignore the penalties which are imposed upon the State in the event that it should violate the provisions of the act. The Nebraska statutes, §§ 86-701 to 86-712, provide their own exclusionary rule which exists separate and independent of any court-created exclusionary rule involving the fourth amendment. See, *United States v. Calandra*, 414 U.S. 338, 94 S. Ct. 613, 38 L. Ed. 2d 561 (1974); *Gelbard v. United States*, 408 U.S. 41, 92 S. Ct. 2357, 33 L. Ed. 2d 179 (1972).

The trial court should have sustained the motion to suppress the evidence obtained during the search. Once that was done, there was no basis for convicting Aulrich, and the conviction must be reversed and the complaint dismissed.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

KRIVOSHA, C.J., concurring in result.

I concur in the result reached by the majority in this case. I believe, however, that this case clearly supports the concerns which I raised in my dissent in *State v. Morgan*, 206 Neb. 818, 295 N.W.2d 285 (1980). The authorities which have held provisions such as the one included in the order of probation in this case to be invalid, either as violating the fourth amendment of the

U.S. Constitution or as being vague and overbroad, have recognized the difficulty of trying to separate out court-made exclusionary rules involving the fourth amendment and the host of statutory exclusions created by both Congress and our Legislature. In this case an additional effort by the law enforcement officers to make an independent investigation would have permitted them to obtain a warrant and secure the evidence necessary for a conviction. By relying upon broad, vague language in an order of probation and thereby being misled into believing that they may disregard other prohibitions contained in other statutes, the police were caught in their own trap. I believe that we would ultimately produce better law enforcement if we made the provision clear by recognizing that one convicted of a crime, but placed on probation, cannot be required to waive any constitutional right as a condition of being placed on probation, including agreeing to submit to any search with or without probable cause and contrary to the constitutional rights he otherwise would have.

STATE OF NEBRASKA, APPELLANT, V. GLEN MUENCHAU AND JOHN D. BROWN, APPELLEES.

308 N.W.2d 824

Filed July 24, 1981. No. 44332.

Confessions. A statement by an interrogating officer that, if the person being questioned would give a statement to the officer, the officer would advise the county attorney that the person being questioned had cooperated by giving a statement is not such an inducement as to render a statement given under such circumstances involuntary and, therefore, subject to being suppressed.

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

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

Roger S. Brink for appellee Brown.

No appearance for appellee Muenchau.

Heard before BOSLAUGH, J.

BOSLAUGH, J.

The State appeals from an order of the District Court of Cass County, Nebraska, suppressing statements made by the appellee Brown to a Lancaster County sheriff's deputy.

An information was filed in the District Court of Cass County alleging the appellee and Glen Muenchau had committed arson by burning a vacant farmhouse near Alvo, Nebraska. Appellee then moved to suppress the statements he had given to the deputy sheriff. After an evidentiary hearing, the trial court granted the suppression motion.

The record of the suppression hearing shows that during late 1980, the Lancaster County sheriff's office and the State Fire Marshal's office were investigating fires of suspicious origin in Lancaster and Cass Counties. Their investigation prompted Lancaster County Deputy Sheriff Robert Marker to contact the appellee and request that he come to the sheriff's office on November 29, 1980, for questioning about a haystack fire near Waverly. When the appellee arrived at the sheriff's office, Deputy Marker advised him of the nature of the questioning, and then informed him of his rights with regard to custodial interrogation as set out in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Appellee indicated that he understood these rights and agreed to make a statement. After some discussion with Deputy Marker, appellee gave an oral statement, later transcribed, in which he admitted involvement in the Waverly haystack fire, but denied any knowledge of the fire near Alvo. Appellee at that time agreed to submit to a polygraph examination.

On December 1, 1980, appellee took the polygraph

examination. After Deputy Marker advised appellee that the results of the examination showed that his statement had not been truthful, appellee made a second statement to Deputy Marker in which he admitted involvement in the Alvo fire.

Before the appellee gave these statements, Deputy Marker had advised the appellee that if he gave a statement Deputy Marker would inform the county attorney's office that appellee had cooperated by giving a statement. At the suppression hearing, Marker testified that "John was told the same thing that we tell anyone else that comes in. We cannot promise him that he will have a lighter sentence, that anything will happen, that normally when a person cooperates with the court, that the court takes that into consideration." The appellee contends that Marker's references to advising the county attorney's office that appellee cooperated was a direct or implied promise and such an inducement as to make appellee's confession involuntary and therefore inadmissible.

In *Brady v. United States*, 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970), the U.S. Supreme Court held that, to be admissible, a statement or confession must be free and voluntary. It must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. See, also, *State v. McDonald*, 195 Neb. 625, 240 N.W.2d 8 (1976).

We have held that a confession must be suppressed where a tangible benefit was offered to the defendant in return for an inculpatory statement. For example, in *State v. Smith*, 203 Neb. 64, 277 N.W.2d 441 (1979), a police officer advised the 15-year-old defendant "that if the defendant cooperated with the police he would attempt to have the matter transferred to juvenile court." 203 Neb. at 66, 277 N.W.2d at 443. This court held that such a promise "was an inducement which under the circumstances of this case rendered the statement involuntary. . . .

. . . .

"The offer to try to have the case transferred to juvenile court was an inducement to confess in exchange for leniency. . . . [T]he defendant's statement to the Omaha police was given in the hope of receiving some benefit in return and was inadmissible." 203 Neb. at 66-67, 277 N.W.2d at 443.

Here no such benefit was offered to the appellee in return for making a statement. The fact that the defendant had "cooperated" by giving a statement to the deputy sheriff would be readily apparent to the county attorney. In fact, Deputy Marker affirmatively stated that he could not promise the appellee anything. Deputy Marker's remarks were similar to those made by a police detective in *People v. Higgins*, 50 Ill. 2d 221, 278 N.E.2d 68 (1972), *cert. denied* 409 U.S. 855, 93 S. Ct. 195, 34 L. Ed. 2d 100. In *Higgins*, the defendant and several other persons, including his sister, were arrested as suspects in the shooting death of a woman. In the course of a conversation with a police detective, defendant, in response to a question from the detective, asked: "'If I tell the truth would you let the other people go?' Detective Davis answered that he had no authority to release anyone who was arrested and charged and that only the State's Attorney or judge could do so, but that, if defendant told the truth, the State's Attorney would take this into consideration." 50 Ill. 2d at 223, 278 N.E.2d at 70. The Illinois Supreme Court found that these remarks did not render defendant's subsequent inculpatory statement involuntary.

The remarks of Deputy Marker in the present case require the same result. Marker made no promises, direct or implied, of any tangible benefit to the appellee. His remarks contained no element of impermissible inducement on the part of the State which would render appellee's confession involuntary and therefore inadmissible.

The order of the District Court sustaining the motion

to suppress is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

DENNIS D. BEAVERS ET AL., APPELLEES, V.
DONALD D. GRAHAM, APPELLANT,
PHILLIP R. REIFF ET AL., APPELLEES.

308 N.W.2d 826

Filed July 31, 1981. No. 43229.

Appeal and Error: Courts: Jurisdiction. The trial court has no jurisdiction to enter an order after the defendant has perfected his appeal to the Supreme Court.

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

Monte Taylor of Taylor, Hornstein & Peters for appellant.

Lawrence I. Batt of Garber & Batt for appellees.

Heard before BOSLAUGH, MCCOWN, and CLINTON, JJ., and VAN PELT and MARTIN, District Judges.

MARTIN, District Judge.

The plaintiffs, an investment group, brought an action in equity against defendant Donald D. Graham, an investment agent, who held and voted the stock owned by the group, alleging Graham used their funds without authorization, mismanaged the investment, and breached his fiduciary capacity. The trial court entered an order appointing a referee to hold hearings and submit a report on the accounting issue and the question of whether or not a receiver should be appointed. In the report subsequently filed by the referee, Graham was found to owe certain sums on the accounting issue, and the referee recommended no receiver should be appointed. Plaintiffs filed a motion

to adopt the report in part, and excepted to it in part. Defendant Graham filed exceptions to the report as a whole.

A hearing was held on the referee's report on July 12, 1979, and the matter was taken under advisement by the District Court. On September 24, 1979, the referee filed a supplementary report which recommended that Graham be removed as agent for plaintiffs' investment group, reversed his recommendation as to the appointment of a receiver, and made adjustments in the accounting matters.

Defendant Graham excepted to the supplementary report. Plaintiffs again moved to adopt the supplementary report in part, and excepted to it in part.

On November 19, 1979, the District Court held a hearing on the referee's supplementary report and ruled at that time that both the original and the supplementary reports would be adopted in toto. It issued its order on January 22, 1980, removing Graham as agent, appointing a receiver, directing Graham to deliver the assets of plaintiffs to the receiver, and entered judgment against Graham in favor of the individual plaintiffs, as determined by the referee.

Graham moved for a new trial, which was overruled, and on January 31, 1980, filed a notice of appeal to this court.

On February 1, 1980, the District Court held a hearing on plaintiffs' motion for partial summary judgment and judgment on the referee's report as supplemented, which motion was filed January 10, 1980. The motion of the plaintiffs was granted, and on February 8, 1980, an order was entered for partial summary judgment. Defendant Graham then moved for a new trial. The motion was overruled and the defendant filed a supplementary notice of appeal on February 27, 1980.

The assignments of error raised here which require consideration are: (1) Whether or not the District Court erred in adopting the referee's supplementary report; and (2) Was the court without jurisdiction to enter its

order of partial summary judgment after the defendant filed his notice of appeal from the order of January 22, 1980.

The court order appointing a referee was well within the purview of Neb. Rev. Stat. §§ 25-1129 et seq. (Reissue 1979). Defendant Graham argues that the supplementary report of the referee went beyond the original order of appointment. The argument is that the referee was to initiate hearings with regard to the issue of receivership and the issue of accounting, and that because, in his supplementary report, the referee recommended removal of the defendant as agent and the appointment of a receiver, which he had not recommended in the original report, the referee exceeded his authority.

The question of Graham's agency is part and parcel of plaintiffs' case and, we feel, falls within the issue of receivership and was well within the authority originally granted the referee. The argument that his authority was terminated at the time the original report was filed is inconsequential. The report and the supplementary report were not adopted until November 19, 1979, and only after hearings had been held on both reports. The reports when filed had no effect until confirmed by the court. *Citizens Bank of Humphrey v. Stockslager*, 1 Neb. (Unoff.) 799, 96 N.W. 591 (1901).

In this instance the referee's filing of a supplementary report was well within the discretion of the District Court.

A careful reading of the court order of January 22, 1980, and the one signed February 8, 1980, shows very little material differences except that the latter corrects the number of shares involved from 12,000 to 12,900, denies any future compensation for services on behalf of the investment group to defendant Graham, and in slightly different language implements the order of January 22. The legal question involved here concerning the order after appeal has been ruled upon by this court on many occasions and needs no further

clarification in our opinion. The judgment on plaintiffs' motion for summary judgment entered February 8, 1980, was in error and should not have been entered. Neb. Rev. Stat. § 25-1912 (Reissue 1979); *State v. Allen*, 195 Neb. 560, 239 N.W.2d 272 (1976). However, since this is an appeal in an equity action, our duty is to try the issues of fact de novo upon the record. *Schupack v. McDonald's System, Inc.*, 200 Neb. 485, 264 N.W.2d 827 (1978). Our independent review of the record leads us to the conclusion that judgment should be entered for the plaintiffs and against the defendant Donald D. Graham in accordance with the order of the District Court of January 22, 1980, as supplemented by its order of February 8, 1980.

AFFIRMED.

MCCOWN, J., concurs in result.

ALLEN BEEBE, SPECIAL ADMINISTRATOR OF THE ESTATE OF LINDA BEEBE, APPELLANT, V. SORENSEN SAND AND GRAVEL COMPANY, CITY OF OMAHA, AND JOSEPH MCGUIRE, APPELLEES.

308 N.W.2d 829

Filed July 31, 1981. No. 43307.

1. **Negligence: Evidence: Proof.** In an action for wrongful death, the plaintiff may establish by a preponderance of the evidence that the wrongful act or omission of the defendant was the proximate cause of death and such connection may be shown by circumstantial evidence.
2. **Motions to Dismiss.** A party against whom a motion to dismiss is made is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be drawn from the evidence, and if there is any evidence which will sustain a finding for the plaintiff, it may not be disregarded and the case decided as a matter of law.
3. **Negligence: Jury Trials.** What amounts to gross negligence in any given case must depend upon the facts and circumstances. What would amount to gross negligence under certain circumstances might, under different

circumstances, be even slight negligence. Ordinarily, the question of negligence, whether slight or gross, is one of fact. If the evidence respecting it is in conflict and is such that ordinary minds might draw different conclusions therefrom, then a question of fact is presented for the jury to determine.

4. **Motor Vehicles: Highways.** Unless specifically made applicable, the provisions of Neb. Rev. Stat. §§ 39-601 to 39-6,122 (Reissue 1978), except those provisions relative to careless driving and to reckless driving, shall not apply to: (1) Persons, teams of draft animals, motor vehicles, and other equipment while actually engaged in work upon the surface of a highway but shall apply to such persons and vehicles when traveling to or from such work. Neb. Rev. Stat. § 39-606 (Reissue 1978).
5. **Highways: Words and Phrases.** Whether or not a person is "actually engaged in work upon the surface of a highway" at the time of an alleged occurrence, so as to come under the provisions of Neb. Rev. Stat. § 39-606 (Reissue 1978), may be a question of fact, depending on the circumstances.

Appeal from the District Court for Douglas County: THEODORE L. RICHLING, Judge. Affirmed in part, and in part reversed and remanded for a new trial.

Mary Cannon Veed of Matthews & Cannon, P.C., for appellant.

Patrick B. Donahue of Cassem, Tierney, Adams, Gotch & Douglas for appellee Sorensen.

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

Wayne J. Mark of Fraser, Stryker, Veach, Vaughn, Muesey, Olson & Boyer, P.C., for appellee McGuire.

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

BRODKEY, J.

Allen Beebe, special administrator of the estate of Linda Beebe, the plaintiff and appellant herein, appeals to this court on behalf of his daughter, Dana Beebe, a minor, from an order entered by the District Court of Douglas County, Nebraska, sustaining the separate motions made at the end of the plaintiff's case by the defendants, Sorensen Sand and Gravel Company (Sorensen), the City of Omaha, and Joseph McGuire, to

dismiss plaintiff's petition against them, or in the alternative to direct a verdict against the plaintiff. On February 6, 1980, the trial judge sustained the defendants' motions and dismissed the petition of the plaintiff against each of them, and thereafter dismissed the jury, which, to that point, had been hearing the case. We reverse and remand for a new trial as to all the defendants except the City of Omaha, and we sustain the action of the trial court in dismissing the City of Omaha, which ruling in favor of the City is not contested by the appellant in this appeal. See *Lynde v. Wurtz*, 147 Neb. 454, 23 N.W.2d 703 (1946).

It appears from the record in this case that on January 15, 1975, at approximately 1 a.m., the decedent, Linda Beebe, was riding as a passenger in an automobile operated by the defendant Joseph McGuire. During the previous evening, January 14, 1975, the couple had dined at a restaurant in Omaha, and later stopped at a lounge where they met some friends and had drinks. At the time of the accident they were proceeding in a southerly direction on the Radial Highway in the vicinity of Seward Street on the way to Linda's home.

It appears from the record that some days prior to the accident in question, Omaha had received a heavy snowfall, and the streets in question were still covered with snow in spots. Defendant McGuire testified at the trial that the Radial Highway was "icy," and also "sloppy" and "wet." McGuire was driving his automobile in the southbound curb lane; and when in the vicinity of Seward, he collided with a snowplow or grader owned and operated by the defendant Sorensen under a contract with the City of Omaha to remove the snow from the streets. At the time of the accident, the snowplow, being described as "Cat 12," was traveling in a northerly direction on the Radial Highway in the southbound curb lane of traffic, the same lane in which McGuire's vehicle was traveling in a southerly direction.

McGuire testified that the collision had affected his memory of what actually happened, and that he had little

recollection of the details of the accident until after the collision occurred. He did remember, however, and testified that he had stopped for a red light before proceeding along the Radial Highway, and definitely stated that he did not see the snowplow at all prior to the accident. Evidence in the record clearly establishes that his automobile struck the grader head on in the southbound curb lane of traffic. McGuire also testified that prior to the accident he was traveling at a speed of approximately 25 m.p.h., and also that he did not recall seeing any flashing lights or other warning signs prior to the accident. His windshield was clean and there was no frost upon it. Although there is no direct evidence in the record that Linda died as the proximate result of the accident, or, for that matter, that she was even dead, the fact remains that her death can hardly be disputed, especially in view of the fact that this action was brought by her special administrator. With reference to the cause of her death, we set out, verbatim, McGuire's testimony as to what happened at that time, and we set out the questions and answers in that interrogation on direct examination: "Q. After you got out of the car did you speak to any of the other people at the scene? A. The first ones that I have — Again, really concrete that I can say that I talked to were the officers, police officers that first arrived and I indicated to them that Linda was in the car; that she was hurt worse than I and they left to deal with her, and other than that I don't really remember speaking to anyone. Q. What had become of Linda? A. She was sitting in the car, head back. As I recall, there was some blood on her forehead, apparently unconscious. Q. Were you then taken to a hospital or — A. Yes. It was, again, right after the blizzard and they were using the big, I believe it's the National Guard's ambulances, things that — two piece units with great big tires and I recall the officers, you know, telling me to get in. Then she was brought on in on the stretcher and the officer had me sit on one seat and brace this stretcher with my feet to keep it from bouncing around in the back of the trailer-

type thing they were using. Yes, we were taken to the hospital at that time. Q. What hospital was that? A. University. Q. Were you injured in this accident? A. Yes. Q. What were your injuries? A. Two or three deep lacerations up here (indicating), and apparently my jaw hit the steering wheel, broke the jaw, broke the bone completely off."

In addition, the evidence also reveals that the windshield of McGuire's automobile was severely cracked and damaged in front of both the driver's seat and the passenger's seat. Linda was taken to the hospital in an ambulance, but the record does not reveal when she died. It is, of course, the general rule in an action to recover for wrongful death that the plaintiff establish by a preponderance of the evidence that the wrongful act or omission of the defendant was the proximate cause of the death. However, it is the general rule that such connection may be shown by circumstantial evidence. See, 25A C.J.S. *Death* § 87 (1966); 22 Am. Jur. 2d *Death* § 222 (1965). Also, the law does not require every fact and circumstance going to make up a case of negligence, or to identify the proximate cause of the injury and death, to be proved by eyewitnesses or positive, direct testimony. 22 Am. Jur. 2d *Death* § 243 (1965). There is sufficient evidence in the record from which a jury could find that the cause of Linda's death was the accident in question.

The snowplow in question was operated at the time of the accident by the witness Stanley Olsen, an employee of the defendant Sorensen. The snowplow in question was 24 feet long, 11 feet high, and 8 feet wide, with a 12-foot blade. It was painted yellow and had, according to pictures received in evidence of the actual plow itself, at least 4 headlights or spotlights upon it, plus a revolving or flashing light on the top of the cab. The type and location of the lights in question were somewhat disputed in the record. However, the evidence establishes that at or near the scene of the accident there were street lights on the Radial Highway, as well as lights from a nearby shopping center. Olsen testified that on that morning he

was operating the snowplow for the City, and that a city inspector was in charge of the snow-cleaning operation and directed the drivers as to which streets should be plowed. Olsen stated that the city inspector told him that he had missed plowing Decatur Street, which was several blocks north of Hamilton Street where he was located at the time he first turned onto the Radial Highway and drove north in the southbound curb lane. Olsen testified that he first observed the car driven by McGuire when it was approximately 200 yards north of him, and that it was coming directly toward his snowplow; that the lights of the car were on; and that the car did not appear to slow down, swerve, or move out of the lane of traffic in which they both were. He testified that at the time of the accident he was going approximately 3 miles per hour. Olsen also testified that the city inspector had told him that he could drive in the southbound lane of traffic in a northerly direction in order to get to the street that he had failed to clean. There is a conflict in the testimony as to whether Olsen had stopped his snowplow prior to the accident. At one point in his testimony he testified that he had stopped, but at another point he testified that he could not recall if he had stopped before the accident.

Larry Erickson, the inspector for the City of Omaha, testified that it was his responsibility to supervise the private contractors who did road work for the City of Omaha. He stated, however, that it was not his function to tell the operators of the snowplows what route they should take. He saw the snowplow shortly before the accident, and testified that it was still moving at that time. He denied in his testimony that he had instructed Olsen to drive northbound in the southbound traffic lane on his way to Decatur Street.

The matter was set for trial by jury in the District Court on February 4, 1980, upon the amended petition of the plaintiff alleging gross negligence under the guest statute against the defendant McGuire, and also alleging various acts of ordinary negligence against the other

defendants. The City of Omaha filed an answer to the amended petition of the plaintiff, and also filed amended cross-claims against the defendants Sorensen and McGuire. The defendant Sorensen filed an amended answer to the amended petition of the plaintiff, and also a cross-claim against McGuire. In the answer filed by the City of Omaha, it alleged that the proximate cause of the collision and injuries to Linda Beebe was the negligence of the defendant Joseph McGuire in failing to keep a proper lookout, in failing to have his vehicle under reasonable control, in failing to yield the right-of-way, in driving his automobile at an excessive rate of speed under the conditions then and there existing, in failing to observe another vehicle clearly within his range of vision, and in driving while under the influence of intoxicating alcohol. In the answer filed by Sorensen, it was alleged that the sole and proximate cause of the accident and decedent's injuries was the negligence of Joseph McGuire in failing to keep a proper lookout, in failing to have his vehicle under reasonable control, in operating his vehicle at an excessive rate of speed under the conditions then and there existing, and in operating his vehicle while under the influence of alcohol. However, in the answer of defendant Joseph McGuire, he alleges that the direct and proximate result of the accident and injuries was the negligence of Stanley Olsen, as imputed to defendant Sorensen, alleging failure to have his vehicle under reasonable control, in failing to yield the right-of-way, in failing to swerve or divert his course of travel so as to avoid the accident, and in failing to have his vehicle equipped with sufficient warning devices as specifically set out in subsequent paragraphs of the answer.

As previously stated, at the close of plaintiff's case, each defendant made a motion for dismissal of plaintiff's petition, or in the alternative for a directed verdict, which motions the trial court thereafter sustained and dismissed the petition against all the defendants.

On appeal, the appellant assigns as error: (1) The trial

court erred in ruling in favor of defendant Sorensen on its motion for a directed verdict on the issue of proximate cause; (2) The trial court erred in finding that no jury question was presented by plaintiff's evidence as to the causal connection between Sorensen's negligence and the plaintiff's injury; (3) The trial court erred in holding that defendant McGuire was not guilty of gross negligence; (4) The trial court erred in holding there was insufficient evidence to create a jury question as to defendant McGuire's negligence; (5) The guest statute is unconstitutional; and (6) The trial court erred in finding that no damages accrued to Dana Beebe as a result of her mother's death.

At this point it will be helpful to review some well-established principles of law applicable to situations such as those present in the instant case: "[A] party against whom a motion to dismiss is made is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be drawn from the evidence, and if there is any evidence which will sustain a finding for the plaintiff, it may not be disregarded and the case decided as a matter of law." *Omaha Nat. Bank v. Omaha P. P. Dist.*, 186 Neb. 6, 9, 180 N.W.2d 229,232 (1970); *Reed v. Reed*, 182 Neb. 136, 153 N.W.2d 356 (1967). "For the purpose of evaluating a motion for a directed verdict or a dismissal of a cause of action, all doubt must be resolved in favor of the party against whom the verdict or dismissal is urged. The truth of all evidence he has submitted must be assumed and he must be given the benefit of all inferences therefrom. The question must be whether, in view of these assumptions, the jury could properly bring in a verdict in his favor." *Jones v. Foutch*, 203 Neb. 246, 252, 278 N.W.2d 572, 576 (1979). See, also, *Bohling v. Farm Bureau Ins. Co.*, 191 Neb. 141, 214 N.W.2d 381 (1974). In *Jones v. Foutch, supra* at 254, 278 N.W.2d at 577, the court also quoted from *Demont v. Mattson*, 188 Neb. 277, 196 N.W.2d 190 (1972), as follows: "'This court has frequently reiterated in slightly varying language that whether

gross negligence exists must be ascertained from the facts and circumstances of each particular case and not from any fixed definition or rule. [Citation omitted.] In case of doubt or where reasonable minds might differ the evidence must be resolved in favor of the existence of gross negligence, in which case it is a question for the jury.'"

The above case also cited from our opinion in *Carley v. Meinke*, 181 Neb. 648, 652, 150 N.W.2d 256, 259-60 (1967), in which case the trial court directed a verdict for the defendant and on appeal this court reversed and remanded for a new trial, stating: "It is also true that any one of the foregoing acts of negligence might not, standing alone, constitute gross negligence. . . . 'It is apparent that no one act of the defendant can be separated from the whole of these acts and held to be the independent cause of this accident. Under these circumstances, each act is not to be segregated and weighed separately to determine whether or not it constituted gross negligence. The several acts are to be considered as a whole. While each of several acts, standing alone, may not exceed the bounds of ordinary negligence, yet, taken together, they may establish gross negligence.'"

In *Komma v. Kreifels*, 144 Neb. 745, 750, 14 N.W.2d 591, 595 (1944), this court stated: "'What amounts to gross negligence in any given case must depend upon the facts and circumstances. What would amount to gross negligence under certain circumstances might, under different circumstances, be even slight negligence. Ordinarily, the question of negligence, whether slight or gross, is one of fact. If the evidence respecting it is in conflict and is such that ordinary minds might draw different conclusions therefrom, then a question of fact is presented for the jury to determine.'" The rule is also well established that no decision on gross negligence can constitute an absolute precedent in any other case. Each case necessarily differs somewhat in its particular facts and circumstances, and in the composite which results from them. *Liston v. Bradshaw*, 202 Neb. 272, 275

N.W.2d 59 (1979). In the foregoing case, quoting from *Thompson v. Edler*, 138 Neb. 179, 292 N.W. 236 (1940), we also stated at 279, 275 N.W.2d at 63: "'While it may be regrettable that no perfect yardstick for measuring gross negligence has ever been devised, the numerous decisions, which the guest statutes have produced, seem rather clearly to demonstrate that this is as close as it is possible to come to a judicial solution. If the tapeline of past decisions seems at times to be somewhat inaccurately applied, and the processes of logic to be a bit variable in their result, this may be largely because the observer is looking at the facts in isolation and not in context.'" Likewise, in *Olson v. Shellington*, 167 Neb. 564, 571, 94 N.W.2d 20, 25 (1959), we stated: "An issue of gross negligence must be decided from the facts of each case. Such an issue is for the jury if the evidence relating thereto is conflicting and from it reasonable minds might arrive at conflicting conclusions."

We first consider the question of whether the trial court should have dismissed plaintiff's petition against defendant McGuire pursuant to his motion at the end of plaintiff's case. In so doing, the court determined that the evidence against McGuire was insufficient to constitute gross negligence. We believe the trial court erred in this regard, and that there was sufficient evidence in the record to warrant the submission of the question to a jury. Under the rules of law set out above, we believe there is ample evidence in the record to allow reasonable minds to conclude that McGuire was guilty of gross negligence, particularly if the evidence is viewed in the light most favorable to plaintiff's claim against him. We think there is clearly a question as to the sufficiency of McGuire's lookout and observations in view of the size and dimensions of the snowplow in question, which was, according to the evidence, equipped with both stationary and flashing lights, and was painted a yellow color. This is particularly true in view of the fact that the driver of the snowplow had no trouble at all seeing McGuire's approaching automobile when it was approximately 200

yards from where he was stationed. McGuire also testified that his windshield was clean and there was no frost covering it. He merely testified that he did not see the snowplow at all before the collision occurred.

A similar situation was involved in *Boepple v. Mohalt*, 101 Mont. 417, 54 P.2d 857 (1936), where the Supreme Court of that state held that the sole and proximate cause of a collision between an automobile and a road grader was the automobile driver's failure to maintain a proper lookout, and not the alleged failure of the operator of the grader to operate it on the right side of the road or his failure to use adequate warning signs, and that the injured occupant of the automobile was precluded from recovering damages against the operator of the grader. In that case the court stated at 433, 54 P.2d at 861: "The physical facts, as shown by the photographs, together with the evidence, contradict the claims of plaintiff and disclose that there was unquestionably ample room for Boepple to have passed around the grader. This circumstance, together with Boepple's own statement that his eyesight was good, and the evidence showing conclusively that he could have easily stopped or avoided the grader if he had seen it at a distance of 239 feet, lead to the inevitable conclusion that the sole, direct and proximate cause of the accident was Boepple's failure to keep a proper lookout ahead."

We next consider whether there was evidence of unlawful speed to submit to the jury, in addition to the other evidence of negligence, in order to determine whether the individual acts of negligence amounted to gross negligence. While McGuire testified that he was traveling at a speed of approximately 25 m.p.h. prior to the accident, we believe it was properly a matter for the jury to determine from all the facts and circumstances whether that speed, under the conditions then existing, was unreasonable, considering the fact that the highway was snowpacked and icy; that the accident occurred at 1 a.m. in the morning; that there were street lights and other lights in the vicinity; that, as previously stated, the

snowplow was equipped with flashing and stationary lights; and also the evidence that the operator of the snowplow was able to see McGuire over 200 yards away. There would seem to be at least a fact question presented as to whether McGuire could have or should have seen the snowplow approaching him on the wrong side of the road, and whether or not under the circumstances McGuire should not have reduced his speed to accommodate for the surrounding conditions.

Finally, we believe that the jury should have had the additional opportunity to consider the fact that McGuire had been imbibing in intoxicating liquors earlier that evening. While there is no evidence in the record that McGuire was actually intoxicated or that his drinking of beer and wine earlier in the evening affected his driving ability, yet, under our recent case of *Fortin v. Hike*, 205 Neb. 344, 287 N.W.2d 681 (1980), we think it is clear that the jury was entitled to *consider* the fact that McGuire drank the liquor, along with the other evidence in the case. In *Fortin* we pointed out three situations involving the consumption of alcoholic liquor, the first being a situation where there is evidence of consumption of liquor by the operator of a motor vehicle, but an absence of evidence from which the trier of fact might conclude that the drinking affected the safe operation of the vehicle, and no other evidence of any other negligent act. In that situation we laid down the rule that the consumption of alcohol as a negligent act should not be submitted. The second type of situation, pointed out in that opinion, which we believe is applicable to the facts of the instant case, is that: "(2) There is evidence of consumption of alcoholic liquors, accompanied by other evidence of a negligent act or acts which may have proximately caused the accident." *Id.* at 349, 287 N.W.2d at 684-85. In that situation we held at 349-50, 287 N.W.2d at 685: "In the second situation, the consumption of alcohol alone is not evidence of negligence, but may be considered by the trier of fact together with evidence of the other acts

or omissions from which negligence may be inferred....

"Where the evidence is conflicting, of course, the determination of the issue is one for the trier of fact."

The evidence in the record with respect to the lack of lookout on the part of McGuire and the visibility of the snowplow in front of him, as well as the question presented as to the possible excessiveness of his speed under the circumstances, in addition the evidence of his prior consumption of alcoholic liquor, we believe would clearly justify, and in fact require, the submission of the issue of "gross negligence" to the jury before whom the trial was already proceeding.

We now consider whether there is evidence in the record to justify the submission of negligence on the part of Sorensen, or his driver Olsen, to the jury. Admittedly there is a conflict in the evidence in the record as to whether Olsen was directed to drive in a northerly direction in the southbound curb lane to reach Decatur Street, which his supervisor had informed him he had neglected to plow. Olsen stated that he was so directed. His supervisor testified that Olsen was not so directed. In view of the conflicting testimony on this important question of whether he was negligent in driving the snowplow in the wrong direction on the Radial Highway, it was for the jury to determine the issue. It must also be remembered that Olsen testified he first saw the McGuire vehicle coming toward him when he was over 200 yards distant, and that the vehicle came straight at him and did not in any manner attempt to swerve or drive onto the adjacent lane to pass him. There was no evidence that Olsen made any effort whatsoever to avoid the collision.

Sorensen seeks shelter and justification for its actions under the provisions of Neb. Rev. Stat. § 39-606 (Reissue 1978), which provides exceptions to the application of the traffic rules of this state as set out in the statutes. Section 39-606 provides in part: "Unless specifically made applicable, the provisions of sections 39-601 to 39-6,122, except those provisions relative to careless

driving and to reckless driving, shall not apply to: (1) *Persons, teams of draft animals, motor vehicles, and other equipment while actually engaged in work upon the surface of a highway but shall apply to such persons and vehicles when traveling to or from such work . . . .*" (Emphasis supplied.)

The evidence is clear, notwithstanding the argument by Sorensen to the contrary, that Olsen was changing the location of the operation of the snowplow to a different location than that at which he had previously been working, at the express direction of his supervisor. Sorensen argues that Olsen was still actually engaged in work upon the surface of the highway while so doing. This same issue was presented in the case of *Gonsalves v. Petaluma Bldg. Materials Co.*, 181 Cal. App. 2d 320, 5 Cal. Rptr. 332 (1960), in which case the court held that even though a water truck was merely making a loop to resume work on southbound lanes of a divided highway, the water truck ceased to be "actually engaged in work upon the surface of the road" and commenced "traveling to such work" when it entered a crossover to northbound lanes, and it was not exempted, while in crossovers in northbound lanes, from traffic rules. The court held that the exemptions from traffic rules afforded by statute should not exceed the purpose for which it was enacted, to wit, the release of vehicles "actually engaged" in construction work from traffic laws designed for regulation for normal highway traffic. Likewise, in *Doerle v. State*, 147 So. 2d 776 (La. App. 1962), the Louisiana court held that where a highway crew had completed work on the surface of the highway and was making necessary preparations to move to some other location, a state employee attempting to make a sharp left turn upon the highway was not exempt from traffic regulations under the statute providing that the regulatory provisions do not apply to persons or vehicles actually engaged in work upon the surface of the highway. In *Creamer v. Rude*, 37 Ill. App. 2d 148, 155-56, 185 N.E.2d 345, 348 (1962), the court stated: "We now

turn to defendant's 2d point. A statute of this state provides that the provisions of the Motor Vehicle Act shall not apply to persons operating motor vehicles and other equipment while such persons and/or equipment are actually engaged in work upon the surface of the highway. . . .

"Whether or not a State highway employee is 'actually engaged in work upon the surface of the highway' at the time of an alleged occurrence, so as to come under the provisions of this statute may, or may not, according to the circumstances, *be a question of fact.*" (Emphasis supplied.) See, also, *Cose v. Towner County*, 102 N.W.2d 538 (N.D. 1959); 60A C.J.S *Motor Vehicles* § 371 (1969).

Sorensen relies on the case of *Most v. Cedar County*, 126 Neb. 54, 252 N.W. 465 (1934), as authority for his contention that it was proper for Olsen to operate road maintenance equipment on the left-hand side of the road in the face of traffic, when necessary. We believe *Most* is factually dissimilar to the instant case, as in *Most* the tractor was actually being used for road repair at the time of the collision. The court stated in its opinion at 56-57, 252 N.W. at 466: "Evidence that it was necessary to operate the maintainer on the left-hand side of the road in the face of traffic is uncontradicted. . . . The maintainer was in operation where the county had a right to use it." Under the facts in the instant case, and the authorities above cited, we believe that a fact question existed as to whether at the time of the accident Olsen was "actually engaged in work upon the surface of the highway."

Appellant in his appeal has also questioned the constitutionality of the guest statute. We have previously declared the guest statute in this state to be constitutional. See *Botsch v. Reisdorff*, 193 Neb. 165, 226 N.W.2d 121 (1975). We have recently reached the same conclusion in *Kreifels v. Wurtele*, 206 Neb. 491, 293 N.W.2d 407 (1980). We do not believe it is necessary to consider the issue again. We point out, however, that the guest statute in effect at the time of this collision was re-

pealed by the Nebraska Legislature on March 11, 1981, and a new guest statute was enacted at that time, limiting the application of such statute to parents, grandparents, children, grandchildren, and brothers and sisters.

In view of our conclusion that the trial court erred in sustaining the motions of the defendants to dismiss plaintiff's petition against them, and also our conclusion that the matter must be remanded to the District Court for a new trial as to all defendants except the City of Omaha, we do not at this time discuss the remaining assignments of error.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR A NEW TRIAL.

BOSLAUGH, J., dissenting in part.

Although it is not clear from the record whether the motor grader was stopped at the time of the collision, the undisputed evidence is that it was traveling at only 3 miles per hour as the McGuire automobile approached it.

Under these circumstances, the fact that the motor grader was traveling in the wrong direction was not a substantial factor in causing the collision and was not a proximate cause of the accident. As this court stated in *Most v. Cedar County*, 126 Neb. 54, 57, 252 N.W. 465, 466 (1934), the motor grader "occupied the same space in the road" whether it was going toward the west or the east.

I would affirm the judgment as to the defendant Sorensen Sand and Gravel Company.

CLINTON and HASTINGS, JJ., join in this dissent.

IN RE INTEREST OF QUENTIN BIRD HEAD, A MINOR CHILD UNDER THE AGE OF 18 YEARS. STATE OF NEBRASKA, APPELLEE, V. FREDERICK TAIL, NATURAL FATHER, APPELLANT.

308 N.W.2d 837

Filed July 31, 1981. No. 43743.

1. **Juvenile Courts: Indian Child Welfare Act.** Continued hearings in a proceeding are not subsequent proceedings within the meaning of the Indian Child Welfare Act. 25 U.S.C.A. § 1923 (Supp. 1963 to 1980).
2. **Child Custody: Words and Phrases: Indian Child Welfare Act.** A child custody proceeding includes "any action which results in the termination of the parent-child relationship." 25 U.S.C.A. § 1903 (Supp. 1963 to 1980).
3. **Parental Rights: Notice.** Appellant, who was served with a summons and petition which notified him of the nature and purpose of the proceeding, its possible consequence, and the specific factual allegations on which termination of his parental rights might be based, received adequate notice.
4. **Parental Rights.** An order of the juvenile court terminating parental rights under Neb. Rev. Stat. § 43-209 (Reissue 1978) must be based on clear and convincing evidence.
5. **Parental Rights: Appeal and Error.** An action for termination of parental rights is reviewed by this court de novo upon the record.

Appeal from the District Court for Sheridan County: JOHN D. KNAPP, Judge. Affirmed.

Charles Plantz and David J. Clegg for appellant.

Dennis D. King and Terrance O. Waite of the Office of Sheridan County Attorney for appellee.

Michael T. Varn, guardian ad litem.

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

CLINTON, J.

Frederick (Freddie) Tail appeals from a judgment by the county court of Sheridan County, sitting as a juvenile court, which terminated his parental rights to his son, Quentin Bird Head. The parental rights of

Martha Bird Head Tail, Quentin's mother, were also terminated by this judgment; she does not appeal.

The petition to terminate parental rights was filed on June 8, 1977, at which time Quentin was approximately 1 year old. It alleged, among other things, that Quentin was a neglected and dependent child within the meaning of Neb. Rev. Stat. § 43-202(2) (Reissue 1978) because: (1) His natural parents did not make adequate provisions for his care throughout the numerous periods during which they were incarcerated for various offenses; and (2) While Quentin was in the custody of his natural parents they repeatedly jeopardized his health and well-being, both through their own use of alcohol and by leaving him in the care of intoxicated persons.

Following adjudication and disposition hearings, the county court found that Quentin was neglected and dependent under § 43-202(2) and terminated the parental rights of his natural parents on July 29, 1977. Both parents appealed to the District Court for Sheridan County, which, on December 22, 1977, upheld the finding that Quentin was neglected and dependent but vacated the termination order, saying that there was insufficient evidence introduced to support it. The matter of disposition was continued in the District Court under Neb. Rev. Stat. § 24-541 (Reissue 1979) pending hearings on the treatment of Martha Bird Head Tail, hereinafter referred to as Martha, and appellant for alcoholism and further evidence by the State. Following two additional hearings, the District Court terminated the parental rights of Martha and appellant.

Appellant contends that the District Court erred in finding: (1) The Indian Child Welfare Act did not apply to this case, hence, the State did not have to meet its procedural and substantive requirements; (2) The notice given appellant on June 10, 1977, was adequate and satisfied his right to procedural due process; and (3) There was clear and convincing evidence introduced to support the termination of appellant's parental rights. We will deal with each assignment of error separately.

The first error raised by the appellant is that the State should have complied with the substantive and procedural requirements of the Indian Child Welfare Act because Quentin is an Indian child eligible for membership in the Pine Ridge Oglala Sioux Indian Reservation. The Indian Child Welfare Act provides: "None of the provisions of this subchapter, except sections 1911(a), 1918, and 1919 of this title, shall affect a proceeding under State law for foster care placement, termination of parental rights, preadoptive placement, or adoptive placement which was initiated or completed prior to one hundred and eighty days after November 8, 1978, but shall apply to any subsequent proceeding in the same matter or subsequent proceedings affecting the custody or placement of the same child." 25 U.S.C.A. § 1923 (Supp. 1963 to 1980).

The petition to terminate the appellant's parental rights was filed on June 8, 1977, nearly 2 years prior to May 7, 1979, the effective date of the Indian Child Welfare Act. Likewise, the judgment of the District Court vacating the county court's termination order and continuing the issue of disposition, filed on January 4, 1978, predated the effective date of the Indian Child Welfare Act by more than a year. The District Court also held a disposition hearing on October 30, 1978, 6 months prior to the effective date of the act, which was continued until February 12, 1980.

Appellant argues that the dispositional hearing held on February 12, 1980, was a subsequent proceeding in the matter of termination as provided by 25 U.S.C.A. § 1923. We do not agree. The hearing of February 12, 1980, was a continuation of the one held October 30, 1978, which was itself continued from the hearing held December 22, 1977, following the appeal to the District Court. Continuations of a proceeding are not subsequent proceedings under 25 U.S.C.A. § 1923. *Matter of T. J. D.*, __Mont.__, 615 P.2d 212 (1980).

The following analysis will illustrate how this proceeding was continued from June 8, 1977, to February

12, 1980. Neb. Rev. Stat. § 43-206.03(3) and (4) (Reissue 1978) provides: "(3) At the hearing the court shall first consider only the question of whether the minor is a person described by section 43-202. This shall be known as the adjudication. After hearing the evidence on such question, the court shall make a finding and adjudication entered in the minutes based on proof . . . by a preponderance of the evidence whether or not the child is a person described by subdivision (1) or (2) of section 43-202.

"(4) If the court shall find that the child named in the petition is not within the provisions of section 43-202 it shall dismiss the case. If the court finds that the child named in the petition is such a child, it shall make and enter its finding and adjudication accordingly, designating which subdivision or subdivisions of section 43-202 such child is within; the court shall then proceed to an inquiry into the proper disposition to be made of such child. Strict rules of evidence shall not be applied at any dispositional hearing."

Under these provisions, juvenile proceedings are bifurcated into adjudication and disposition hearings. These hearings may be initiated pursuant to separate pleadings, e.g., a petition praying for adjudication which, if granted, may be followed by a motion for disposition. In such a case the juvenile court will first hear the petition for adjudication and base its findings on the allegations therein. Later, if the petition is granted, the juvenile court will hold a subsequent proceeding on the motion for disposition, basing its determination on the allegations pled in the motion. In the case now before us, however, the petition filed on June 8, 1977, prayed for both adjudication and disposition. The county court conducted an adjudication hearing on the allegations made in the petition. After finding that Quentin was a neglected and dependent child within the meaning of § 43-202(2), the county court continued its proceeding on the petition, held a disposition hearing on the allegations therein, and terminated the parent-child relation-

ship between Quentin and his natural parents.

The natural parents appealed to the District Court under § 24-541. Section 24-541 authorizes District Courts to receive additional evidence necessary for the determination of factual issues. In the instant case the District Court invoked this power, continued the disposition proceeding to February 12, 1980, and rendered a decision, dated June 16, 1980, on the original petition filed June 8, 1977.

Each of the hearings before the county and District Courts was conducted on the allegations pled in the original petition. The Indian Child Welfare Act defines a "child custody proceeding" to include "termination of parental rights" which shall mean "any action resulting in the termination of the parent-child relationship." 25 U.S.C.A. § 1903 (Supp. 1963 to 1980). Construing this definition together with the language concerning "subsequent proceedings" in 25 U.S.C.A. § 1923, we conclude that the case before us constituted a single action initiated by the June 8, 1977, petition. This action or proceeding resulted in termination of the parent-child relationship on June 16, 1980.

The second error assigned by appellant is that he was denied procedural due process because he received insufficient notice concerning the nature and purpose of the proceeding, its possible consequence, the factual basis underlying the allegations made in the petition, and the legal standard governing termination of parental rights.

The record shows that appellant was served with a summons and the petition before the commencement of this proceeding. These documents notified him as to the nature and purpose of the proceeding, its possible consequence, and the specific factual allegations on which termination might be based. He was present at the proceeding in county court and was represented by counsel at all stages of the proceeding.

Furthermore, appellant did not challenge the sufficiency of the notice he received in any manner prior to

this appeal. We have held that failure to challenge the sufficiency of either notice or the pleadings at trial where the defendant participates on the merits of the cause of action waives any defect in the notice or pleadings. *State v. Best*, 173 Neb. 483, 113 N.W.2d 650 (1962); 72 C.J.S. *Process* § 113 b. (1951).

Finally, appellant contends that the evidence presented to support the termination of his parental rights did not meet the standard of being clear and convincing. *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). A summary of the evidence in the record is necessary for an analysis of this contention.

During their marriage, Martha, Quentin, and appellant had no permanent residence. Between April 1977 and April 1978 they lived for lengthy periods in Gordon, Nebraska, with Tom Plenty Wounds, Martha's uncle. Several other individuals, who are also related to Martha, resided at the Plenty Wounds home on a regular basis during the same period that Martha, Quentin, and appellant did. These individuals, Martha, and appellant were often intoxicated and frequently incarcerated for alcohol-related offenses, according to the testimony of Jim Talbot, sheriff of Sheridan County, and Ernest Justesen, a Gordon police officer. Martha testified that appellant was and remains an alcoholic.

There is evidence in the record to indicate that Tom Plenty Wounds was the major source of support for Martha, appellant, Quentin, and the other relatives who lived in the Plenty Wounds home. Tom Plenty Wounds, rather than Martha or appellant, purchased the basic items which Quentin required during the time that Quentin and his natural parents lived in the Plenty Wounds home.

Justesen testified that Quentin was left by his parents in the custody of intoxicated persons who endangered his safety more than once. Justesen related two such instances. On May 19, 1977, at about 10 p.m., Justesen arrested appellant and Martha, who were both inebri-

ated, near the Gordon city park. Later that night, Justesen located Quentin on the chest of Albert Bird Head, his uncle, who was passed out in a roadside ditch as a result of intoxication. On another occasion, appellant and Martha, who were both intoxicated, took Quentin with them to a local rendering plant where they became involved in an altercation. Gunshots were fired during the course of this conflict.

Both appellant and Martha were convicted of and incarcerated for numerous alcohol-related offenses. For example, appellant was sentenced to 60 days for assault on September 30, 1977; a fine for intoxication on December 1, 1977; 90 days for assault on January 9, 1978; and 5-7 years for assault with intent to do great bodily harm, to run consecutively with 1 year for assaulting or resisting a law enforcement officer, on March 10, 1978. Martha spent 171 days in jail between July 1976 and June 1977 for various alcohol-related offenses. During these periods until June 15, 1977, Quentin was left in the care of Martha's relatives. On that date the county court held its first hearing concerning the petition filed on June 8, 1977. Following this hearing the court ordered that Quentin be placed in a foster home pending further hearings. Quentin was placed with a foster family on September 16, 1977.

Visitations between appellant, Martha, and Quentin were first scheduled on February 18, 1978. On one occasion, Martha took Quentin to visit appellant, who was in jail. During May 1978 appellant began serving a sentence in the Nebraska penitentiary. On September 7, 1978, appellant wrote to Michael T. Varn, guardian ad litem for Quentin, from prison. Appellant inquired about Quentin's status in this letter and suggested that his oldest brother, Cleve Tail, be given custody of Quentin. Near Christmas 1979, appellant wrote to Mary York, a maintenance worker for the Sheridan County welfare office, and asked her if she would deliver a Christmas gift to Quentin from him. During January 1980 she delivered another gift, some beadwork

appellant made for Quentin.

Other than the above-mentioned visit, two letters, and the two gifts, appellant has had no contact with or concerning Quentin since January 1978.

Neb. Rev. Stat. § 43-209(4) (Reissue 1978) provides that parental rights may be terminated when "[t]he parents are unfit by reason of debauchery, habitual use of intoxicating liquor or narcotic drugs . . . which conduct is found by the court to be seriously detrimental to the health, morals, or well-being of the child."

An appeal from an order terminating parental rights is heard 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 both the parties and witnesses. The findings of fact made by the trial court will not be set aside on appeal unless they are clearly against the weight of the evidence or there was a clear abuse of discretion. *State v. Jenkins*, 198 Neb. 311, 252 N.W.2d 280 (1977); *In re Interest of Morford*, 207 Neb. 627, 300 N.W.2d 795 (1981).

In the case now before us, the District Court found that Quentin was a neglected, dependent child because of the habit, i.e., alcoholism, of his natural parents. The evidence contained in the record was sufficient to establish clearly and convincingly that appellant was unfit by reason of habitual use of intoxicating liquor to discharge his parental responsibilities and that his failure to do so was seriously detrimental to Quentin's health and well-being. The record reveals no attempt by appellant prior to his incarceration in the Nebraska Penal and Correctional Complex to alter his habitual abuse of liquor. Given appellant's habit and the lack of evidence that he has conquered it, the best interests of Quentin were served by terminating the parental relationship.

AFFIRMED.

KRIVOSHA, C.J., concurs in result.

STATE OF NEBRASKA, APPELLEE, V. STEVEN M. LOVELESS, APPELLANT.

308 N.W.2d 842

Filed July 31, 1981. No. 43852.

1. **Tape Recordings.** Tape recordings of relevant and material conversations are admissible as evidence of such conversations and in corroboration of oral testimony of the conversations, provided proper foundation is laid.
2. ——. Unless the unintelligible portions of a tape recording are so substantial as to render the recording as a whole untrustworthy, the recording is admissible and the decision whether to admit it should be left to the sound discretion of the trial judge.
3. **Rules of Evidence: Expert Witnesses.** If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise. Neb. Rev. Stat. § 27-702 (Reissue 1979).
4. **Aiding and Abetting.** Aiding and abetting involves some participation in the criminal act and must be evidenced by some word, act, or deed. No particular acts are necessary; nor is it necessary that any physical part in the commission of the crime is taken or that there was an express agreement therefor. Mere encouragement or assistance is sufficient.

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

Joseph L. Vacca, Esquire, for appellant.

Paul L. Douglas, Attorney General, and Sharon M. Lindgren for appellee.

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

PER CURIAM.

Steven M. Loveless, the defendant and appellant herein, appeals to this court from his conviction in the District Court of Washington County, Nebraska, of the crime of possession of burglary tools in violation of Neb. Rev. Stat. § 28-508 (Reissue 1979). The case was tried before a jury commencing on September 15, 1980. The

jury found the defendant guilty of the charge. On October 20, 1980, Loveless appeared before the District Court for trial on count II of the information, which charged him with being a habitual criminal. The defendant was found not guilty on that charge, and the habitual criminal charge was dismissed. On November 3, 1980, the trial court sentenced Loveless to a term of imprisonment for 1 year in the Nebraska Penal and Correctional Complex, less credit for 9 days spent in the Washington County jail while awaiting disposition of this case. We affirm.

The background against which this case arises involves two incidents and trips made by the defendant Loveless and two acquaintances of his, Herschell Gitchell and Martin Kulakofsky, who allegedly drove to Blair, Nebraska, from Missouri Valley, Iowa. The first visit occurred during the evening hours of Saturday, January 12, and the early morning hours of Sunday, January 13, 1980; and the second visit occurred during the evening hours of Sunday, January 13, 1980, and the early morning hours of Monday, January 14, 1980. This appeal involves only the defendant, Steven Loveless, who was charged and convicted of the offense of possession of burglary tools, as stated above. Although, in his brief on appeal, the defendant makes four separate assignments of error, the principal contentions involved herein are that the court erred in allowing, over defendant's objections, a certain tape recording to be played to the jury when the recording was inaudible in portions and difficult to understand, and also that the court erred in allowing a witness, Officer Warden, to testify as to his interpretation of certain portions of the tape in question. The record reveals that during the trial of the defendant, the jury was allowed to hear the aforesaid tape recording of an alleged conversation between Kulakofsky and Gitchell, which was introduced by the State apparently for the purpose of establishing the presence of Loveless in Blair, Nebraska, during the evening of January 12, 1980, and the early morning

hours of January 13, 1980. In addition to the tape recording itself, a typed transcript of the tape was received in evidence for the jury's consideration.

Without setting out in detail at this point the facts leading up to the visit of the three men to Blair on the evening of January 12, 1980, it appears that at approximately 3 a.m. on the morning of January 13, 1980, Kulakofsky and Gitchell were detained by members of the Blair Police Department at a location outside of Blair, Nebraska, on Highway 30. They were suspected by the police of possible criminal activity, and were placed in the back seat of a police cruiser and left alone, during which time the police conducted an on-the-site investigation. At the time Officer Warden of the Blair Police Department left Kulakofsky and Gitchell alone in the police cruiser, he had left a microcassette tape recorder operating on the front seat of the cruiser. It was this cassette which recorded the conversation between Kulakofsky and Gitchell, and which was offered and received in evidence at the trial. Later that morning, Kulakofsky and Gitchell were released by the police and left Blair to return to Iowa where they allegedly found Loveless walking on the Iowa side of the Missouri River bridge. The record further reveals that in the evening of that same day, January 13, 1980, Gitchell went to the defendant's home in Missouri Valley, Iowa, and requested a ride to Blair for the purpose of retrieving a screwdriver and crowbar which he had abandoned in a ditch along Highway 30 at the time he was originally detained by the police. Loveless then drove Gitchell to the spot along Highway 30, and they retrieved the tools from the ditch. Gitchell placed the tools on the floorboard in front of the passenger seat in Loveless' car and commenced to leave, but they were stopped by the Blair police and subsequently arrested for possession of burglary tools.

The testimony given by the three men at the trial was widely divergent and, in spots, very contradictory. Loveless testified at the trial that he had accompanied

Kulakofsky and Gitchell to Blair on the first night; that they had gone to a bar outside of Blair; and that a disagreement arose, following which he left the bar and commenced walking back to Missouri Valley, Iowa. He stated he did not see Kulakofsky or Gitchell again until several hours later, when they picked him up in Iowa.

Kulakofsky testified, however, that during the evening of January 12, 1980, he and Gitchell had driven from Council Bluffs to Loveless' home in Missouri Valley, Iowa, and that while at the Loveless home the three men discussed plans to go to Blair that evening and bulgarize either the Pizza Hut or a bowling alley. For the purpose of effecting an entry to the place of business, they took with them a crowbar and a screwdriver, which were later identified by a witness as falling within the category of "burglary tools." They also took with them two walkie-talkies to use for communication purposes during the commission of the burglary. The three men drove to Blair in Gitchell's car, and had the burglary tools and walkie-talkies with them inside the car. According to Kulakofsky, when they arrived in Blair they drove past the bowling alley and Pizza Hut and went to the Plum Tree Lounge. The three men later left the lounge, and Kulakofsky drove the car to a dirt road and let Gitchell and Loveless out of the car with the crowbar and screwdriver and one of the walkie-talkies. According to the plan formulated earlier that evening in Loveless' home in Missouri Valley, Kulakofsky was to act as the "look-out" man and was to remain in the car until the others communicated with him on the walkie-talkie with directions to pick them up. Kulakofsky testified that he became concerned when his walkie-talkie did not work, and after a period of time he began driving up and down the highway looking for his companions. He was stopped by Officer Warden and ticketed for failure to have a registration for the car. He subsequently located Gitchell who had also been stopped by the police; and, as previously stated, they were both placed in the police cruiser where

their conversation was recorded. They were later released and were driving back to Iowa when they allegedly located the defendant on the Iowa side of the bridge. Subsequent to picking up the defendant, there was conversation in the automobile about Gitchell and Loveless returning to Blair the next evening to retrieve the crowbar and screwdriver which had been deposited in the ditch. Kulakofsky denied there was any argument between the men while they were at the Plum Tree Lounge.

Gitchell testified at the trial that he had deposited the crowbar and screwdriver in the ditch when he saw the police; that he had intended to burglarize the Pizza Hut on either night if the conditions were favorable; and that he intended to use the crowbar and screwdriver for that purpose. Police Officer Hale of the Blair Police Department identified an exhibit as being part of a "lockhouse" which he removed from the Pizza Hut door on January 14, 1980, after the defendant had been arrested. Esley Kotschwar, firearms and tool mark examiner of the Nebraska State Patrol, testified he had examined the crowbar and the lockhouse from the Pizza Hut and expressed the opinion that the crowbar admitted into evidence was used to make the tool marks on the door latch plate.

The State offered into evidence at the trial a tape recording of the conversation between Gitchell and Kulakofsky in the rear seat of the police cruiser, for the apparent purpose of rebutting defendant Loveless' testimony that he had been walking home to Iowa at the time his companions were detained and had no intention of burglarizing businesses in Blair. The trial court held hearings on two motions to suppress the tape, which motions were overruled. At the trial the tape was admitted into evidence as exhibit 14 and played to the jury, and a transcript of the tape, prepared by Officer Warden who had listened to the tape over 50 times, was also received into evidence and submitted to the jury. Although certain portions of the tape were inaudible, as

evidenced by the notations of the court reporter, it appears that other portions of the tape were audible, and were even transcribed by the court reporter who heard them played in the courtroom. Of particular importance is the conversation between Kulakofsky and Gitchell while talking in the back seat of the police cruiser, with the tape recorder sitting on the front seat. Both the tape and the written transcript prepared by Officer Warden reveal that Kulakofsky asked Gitchell, "Where'd Steve go?" and Gitchell replied, "Down in the hole down there," to which response Kulakofsky stated, "Okay that's cool." Also, according to Officer Warden's transcript, at that time Kulakofsky asked Gitchell, "Where's the bars?" and Gitchell replied, "Steve's got 'em." The tape and transcript would seem to indicate, as reflected above, that Loveless may not have been walking home to Iowa as he claimed in his testimony.

Officer Warden testified that exhibit 15 was a transcript he made of the tape in question on January 14, and also testified: "I've used this type of tape recording for the past two years and I've transcribed a number of tapes that I've recorded in certain cases, including this tape here, particular tape, I've transcribed, written it out. I have listened to this tape probably 50 times." The court then stated, "Well, with that basis, I'll let you proceed and you'll have the right to bring in anything else that you want to."

The defendant contends on appeal that Officer Warden was not an expert in the field of making or transcribing sound recordings and, therefore, his testimony, particularly with regard to the interpretation of certain portions of the tape in question, should have been excluded. We point out, however, notwithstanding the lack of formal training in connection with the preparation and interpretation of sound recordings, that to be considered an expert it is not necessary that one have such formal training; actual practical experience in the field can also qualify one as an expert in that field. This fact is recognized by the new evidence

rules adopted in this state. Neb. Rev. Stat. § 27-702 (Reissue 1979) provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, *a witness qualified as an expert by knowledge, skill, experience, training, or education,* may testify thereto in the form of an opinion or otherwise." (Emphasis supplied.)

It is a well-established rule of law that tape recordings of relevant and material conversations are admissible as evidence of such conversations and in corroboration of oral testimony of the conversations, provided proper foundation is laid. *State v. Myers,* 190 Neb. 146, 206 N.W.2d 851 (1973); *State v. Lynch,* 196 Neb. 372, 243 N.W.2d 62 (1976). In 29 Am. Jur. 2d *Evidence* § 436 (1967), it is stated: "The fact that a recording may not reproduce an entire conversation, or may be indistinct or inaudible in part, has usually been held not to require its exclusion; however, the recording may be rejected if it is so inaudible and indistinct that the jury must speculate as to what was said. It has been held that unless the unintelligible portions of a tape recording are so substantial as to render the recording as a whole untrustworthy, the recording is admissible and the decision whether to admit it should be left to the sound discretion of the trial judge." We are unable to determine from the record in this case exactly how much of the tape recording in question was inaudible, but it is clear that certain material parts were audible and were recorded by the court reporter on the playback of the tapes in the courtroom, both at the hearings on the motions to quash and during the trial itself. There is nothing in the record to indicate that the trial court in any way abused its discretion in refusing to suppress the evidence in question and in admitting the tape into evidence at the trial, particularly in view of the testimony of Officer Warden that he had had considerable experience in tape recording conversations and had, in fact, studied and replayed this particular tape at least

50 times.

Defendant contends, however, that it was not proper for Warden to testify and explain his interpretation and conclusions as to certain portions of the tape in which the words were, at least to a certain extent, inaudible and unclear. There is no question, and there are a legion of cases so holding, that one who was present and who heard the conversation in question at the time the recording was made may testify for the purpose of clarifying inaudible or unintelligible portions of the tape. However, as the defendant in this case points out, Officer Warden was not present at the time the conversation between Gitchell and Kulakofsky occurred in the rear seat of the police cruiser, and hence defendant contends Warden should not be permitted to testify as to the contents of the tape recording in question. This same question was addressed in the case of *United States v. Onori*, 535 F.2d 938 (5th Cir. 1976). In that case the court permitted the testimony of an expert in tape identification to point out alleged errors in the government's transcript of the conversation in question. The court also in its opinion pointed out the reasons for the necessity of the use of a transcript of a tape recording, stating: "The need or desire for transcripts arises generally from two circumstances. First, portions of a tape may be relatively inaudible. Second, without the aid of a transcript, it may be difficult to identify the speakers. In either of these cases, it has been said that it is within the discretion of the trial court to allow a transcript to be used by the jury '*to assist the jury as it listens to the tape.*' . . .

. . . .

"It is therefore incorrect to think of the transcripts as simply an 'aid' — as better lighting fixtures in the courtroom would be an 'aid' to the jury's vision of witnesses — and not as evidence of any kind. They are evidence and, like other evidence, may be admitted for a limited purpose only. That purpose here, as the court outlined in its special instruction, was primarily to establish the

identity of the speakers at any particular time." *Id.* at 947.

Since it is permissible for experts to testify with regard to the contents of sound recordings, and since we have concluded that, notwithstanding his lack of formal training in the field, Officer Warden, by virtue of his experience, was in fact an expert, we conclude that the trial court, in the exercise of its judicial discretion, did not err in admitting into evidence the tape and the transcript thereof in question, and the same was properly heard and considered by the jury in its deliberations. The weight to be given to the evidence contained in the tape recording and transcript was, we believe, properly a matter for the jury's determination.

We have dealt at some length in this opinion with the question raised by the defendant with reference to the admissibility of the tape recording and the transcript thereof, and of the evidence of Officer Warden at the trial with reference thereto. We are convinced, however, even apart from the question of the admissibility of the tape recording in question, that there is sufficient other evidence in the record to affirm the conviction and sentence of the defendant on the charge of possession of burglar's tools. Section 28-508 defines that crime as follows: "(1) A person commits the offense of possession of burglar's tools if: (a) He knowingly possesses any explosive, tool, instrument, or other article adapted, designed, or commonly used for committing or facilitating the commission of an offense involving forcible entry into premises or theft by a physical taking; and (b) He intends to use the explosive, tool, instrument, or article, *or knows some person intends ultimately to use it,* in the commission of an offense of the nature described in subdivision (1)(a) of this section." (Emphasis supplied.) It is clear that to commit an offense under the above statute it is not required that the burglary or similar offense actually take place.

When instructing the jury in this case, the court in-

cluded in its instructions one on "aiding and abetting." Neb. Rev. Stat. § 28-206 (Reissue 1979) provides: "A person who aids, abets, procures, or causes another to commit any offense may be prosecuted and punished as if he were the principal offender." This provision contained in the new Criminal Code is substantially similar to Neb. Rev. Stat. § 28-201 (Reissue 1975), upon which instruction NJI 14.12 is based. That instruction was approved by this court at the time of the adoption of the Nebraska Jury Instructions in 1969. The instruction given by the court substantially followed the language of NJI 14.12 and provided, among other things: "Aiding and abetting involves some participation in the criminal act and must be evidenced by some word, act, or deed. No particular acts are necessary; nor is it necessary that any physical part in the commission of the crime is taken or that there was an express agreement therefor. *Mere encouragement or assistance is sufficient.*" (Emphasis supplied.) There is strong evidence in the record from which the jury could conclude that on the evening of January 12, 1980, the defendant and his companions met at the defendant's home in Missouri Valley, Iowa, and at that time agreed to go to Blair, Nebraska, to burglarize the Pizza Hut or a bowling alley; that pursuant to such agreement all three individuals drove to Blair in Gitchell's automobile; that at the time they were driving to Blair for the aforesaid purpose and with the aforesaid intent, they had in the car and in their possession a crowbar and a screwdriver, later established by testimony to be burglar's tools, and also two walkie-talkies; that notwithstanding the conflicting evidence as to who actually owned the tools in question or under whose control the tools were while being transported in the automobile, it is clear that such tools were, during that trip, in the actual or constructive possession of at least one or more of the occupants of the automobile, or in the joint possession of all of them. There is also evidence from which the jury could find that the defendant went to Blair with knowledge of the purpose of the

trip and aided, abetted, assisted, and encouraged the commission of the crime, which, in this case, was charged to be the unlawful possession of burglar's tools. Loveless accompanied Gitchell and Kulakofsky on the trip with obvious knowledge, in view of their previous conversation, that one of them intended to use the tools in question to burglarize a business establishment. It would seem clear that during the trip from Iowa to Nebraska Loveless was in either actual, constructive, or joint possession of the burglary tools with knowledge of their intended use. See, *Phillips v. State*, 154 Neb. 790, 49 N.W.2d 698 (1951); *Kennedy v. State*, 171 Neb. 160, 105 N.W.2d 710 (1960). In *State v. Woodruff*, 205 Neb. 638, 288 N.W.2d 754 (1980), we held that constructive possession may be proved by direct or circumstantial evidence, and may be shown by the accused's proximity to the controlled substance at the time of the arrest or by the showing of ownership, dominion, and right of control of an automobile in which the contraband was found. There is little question but that burglary tools would also fall within the definition of "contraband." See, also, *State v. Matthews*, 205 Neb. 709, 289 N.W.2d 542 (1980). The evidence reveals Gitchell and Kulakofsky drove from Council Bluffs, Iowa, to Missouri Valley, Iowa, in Kulakofsky's automobile; however, in making the trip from Missouri Valley to Blair, Nebraska, they drove over in Gitchell's automobile. The second night the trip was made in Loveless' car. However, in view of the fact that Gitchell was the owner of, and had dominion and control over, his automobile on the way to Blair, Nebraska, on the first night and would therefore, under the circumstances, be guilty of possession of burglar's tools, we believe that Loveless would also be guilty as a principal under the aiding and abetting statute above quoted. In *State v. Walker*, 187 Neb. 482, 191 N.W.2d 817 (1971), we stated that a common purpose among two or more persons to commit a crime need not be shown by positive evidence but may be inferred from the circumstances

surrounding the act and from the defendant's conduct subsequent thereto, and that participation in the criminal intent may be inferred from presence, companionship, and conduct before and after the offense is committed. We are of the opinion, therefore, that even considering only the events of the first night in which the defendant and his companions planned the commission of the burglary in Blair and made the trip to Blair in the automobile containing the burglary tools, there was sufficient evidence to sustain the verdict of the jury in convicting the defendant of the crime with which he was charged, even disregarding the issue raised as to the admissibility of the tape recording.

We conclude, therefore, that the judgment and sentence of the trial court were correct and must be affirmed.

AFFIRMED.

WHITE and HASTINGS, JJ., concur in result.

KRIVOSHA, C.J., dissenting.

I must respectfully dissent from the majority in this case. In the first instance, I have some difficulty concluding that the evidence was sufficient to submit the case to the jury on a charge of aiding and abetting the possession of burglar's tools. In my view, the evidence falls short of being sufficient to show the necessary knowledge on the part of the defendant to convict him of aiding and abetting the possession of burglar's tools.

But that is not the basis upon which I find the greatest conflict between myself and the majority in this case. I believe that the tape offered in evidence purporting to consist of a conversation between Kulakofsky and Gitchell was not only inaudible in places but, where audible, was unintelligible insofar as it could in any way be interpreted to concern a conversation about the defendant. The difficulty with the majority's position, as I view it, is twofold. I know of no basis upon which one may be an expert in the unintelligible. To be sure, there are experts with regard to the inaudible. The police

officer in this case did not possess the necessary criteria to be considered an expert in discerning and sifting out inaudible sounds on a tape recording. Rather, he simply supplied the missing terms in order to make understandable what was otherwise an unintelligible sentence.

In *Northern Nat. Gas Co. v. Beech Aircraft Corp.*, 202 Neb. 300, 305-07, 275 N.W.2d 77, 81 (1979), we said: "That rule [§ 27-705], however, does not in and of itself permit anyone to qualify as an expert upon his own declaration or to render any opinion he desires.

"Before an expert opinion can be rendered, it must be shown that such opinion is of a scientific, technical, or other specialized knowledge which will assist the trier of fact to understand the evidence or to determine a fact in issue, and that the witness qualifies as such expert by knowledge, skill, experience, training, or education. § 27-702, R.R.S. 1943. There is no exact standard for fixing the qualifications of an expert or skilled witness. Mathine v. Kansas-Nebraska Nat. Gas Co., Inc., 189 Neb. 247, 202 N.W.2d 191. Such a witness will be deemed qualified if and only if he possesses special skill or knowledge respecting the subject matter involved so superior to that of men in general as to make his formation of a judgment a fact of probative value. Kohler v. Ford Motor Co., 187 Neb. 428, 191 N.W.2d 601.

. . . .

"The record is this case is totally devoid of any evidence that an expert in weather would attempt to render an opinion such as that sought to be tendered by appellant's expert herein; or that the information relied upon by the expert was of such type that an expert on weather would rely upon such information in rendering an opinion. In the absence of such evidence we agree with the trial court that any opinion tendered by the expert in this case would be based on pure speculation and be solely without any basis or foundation."

To the same effect, it would appear from the record herein that one does not become an expert on the unin-

telligible simply by having listened to a particular tape over 50 times. The evidence, as I view it, fails to establish that the officer in question had any more ability to understand the tapes than any other lay person. The simple fact of the matter is that the tape was clearly inadmissible and should have been excluded, based upon lack of foundation in addition to the fact that it was plain error to permit its introduction on the basis of hearsay.

The majority has in part resolved this problem by suggesting that the introduction of the tape, even if inadmissible, was harmless error due to the fact that there was sufficient other evidence to convict the accused. I do not believe we can say that the introduction of a tape which is apparently relied upon by the State for the purpose of establishing the credibility of a State's witness where there is a conflict in the evidence can be considered as harmless error. We have no way of looking into the minds of the jury to determine what bit of evidence may have been the deciding factor. Certainly a tape purporting to be a discussion by the witnesses whose testimonies are in conflict is significant.

Though the accused may be guilty, he is nevertheless entitled to a fair trial. I am unable to say that the introduction of the tapes was harmless beyond a reasonable doubt. Being unable to say that, I would have granted a new trial.

I am authorized to state that McCOWN, J., joins in this dissent.

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

309 N.W.2d 65

Filed August 7, 1981. No. 43141.

SUPPLEMENTAL OPINION

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, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

KRIVOSHA, C.J.

In argument on the motion for rehearing, appellee maintains that the language of our opinion previously adopted and appearing at 208 Neb. 511, 304 N.W.2d 368 (1981), with regard to the obligation of the public employer to the public employee over subsequent years' raises, is ambiguous. In an effort to clarify our position, we substitute the following language to our opinion, in lieu of that language which now appears as the last full paragraph of the opinion:

It is the holding of this court that once a public employer has established a rate of pay for the performance of a particular job in a specific year by granting an across-the-board, cost-of-living wage increase to a group of employees, it may not withhold paying that salary to an employee of the classification granted the raise and performing that work, who would otherwise be entitled to payment at the increased rate of pay, solely on the basis that at the time the payment should otherwise be made the public employer and the bargaining representative of the employee

are then engaged in a labor dispute. By so declaring, we intend that the wage which should be paid to a public employee by a public employer during a dispute is that wage which the public employer has declared as the appropriate wage to be paid and which it would otherwise agree to pay the public employee if no dispute then existed. As an example, if in the instant case all county welfare employees were granted an increase of 7 percent across the board as a cost-of-living wage increase, the county may not pay the increase to nondisputing employees while escrowing the funds belonging to disputing employees until the dispute is terminated. 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 order of the CIR in the instant case is reversed and the cause remanded for further proceedings in accordance with this opinion, if necessary.

REVERSED AND REMANDED WITH DIRECTIONS.

CLINTON, J., dissenting.

I respectfully dissent from the original as well as the supplemental opinion issued after we heard arguments on the motion for rehearing. The issue of whether or not granting a raise to certain county employees not members of the union involved in the current controversy was not raised by either party in the case, nor was it considered by the Commission of Industrial Relations, and the evidence with respect to it was extremely limited, to say the least. The opinion, with respect to that issue, begins by saying: "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."

The response of the union to the motion for rehearing sets out what apparently is the entire record on the subject of the evidence on the issue. See p. 4, union's response. It will be noted that the employees referred to in the testimony are employees who are *not* in the bargaining unit involved in the current litigation, and the answer of the county's witness indicated that all employees of the county, whether in or out of any particular bargaining unit, apparently received a 7 percent wage increase where there was no labor dispute in progress or wage issues being negotiated.

What we have done in effect is to hold that whenever any group of employees of the governmental unit receives a wage increase, union employees in any bargaining unit involved in a wage dispute must receive the same increase as the nondisputing employees, and receive it in the same amounts and in the same across-the-board fashion.

The court's opinion also does not contemplate that there may be different bargaining years for labor contracts and that different and multiple bargaining units may be involved. As the motion for rehearing points out, our opinion uses the terms "members of AFSCME," "employees," and "disputing employees" almost interchangeably. The opinion also refers to wages in dispute "in a given year" and disputes "over a previous year's wages." It is obvious that there may be multiple bargaining units represented by unions in some cases, no unions in others, and, in many cases, where the bargaining unit may contain a mixture of union and nonunion employees.

It seems to me a more critical factor involved here may be that in selecting an issue that was not raised by the parties nor considered by the Commission of Industrial Relations, and doing so under our plain error rule, we pass on an issue which is, initially at least, an issue for the Commission of Industrial Relations. Neb. Rev. Stat. § 48-819.01 (Cum. Supp.

1980). The question of what is an unfair labor practice is a question which should be first raised in the Commission of Industrial Relations, and generally the Commission of Industrial Relations ought to have an opportunity to pass on the issue before this court reviews it. Such an issue ought to be fully covered by the evidence and argued by counsel before we undertake to get into it. Section 48-819.01 was enacted as a consequence of our holding in *University Police Officers Union v. University of Nebraska*, 203 Neb. 4, 277 N.W.2d 529 (1979). In that case we held that the Commission of Industrial Relations had no authority "to make findings with regard to unfair labor practices or direct a public employer to take any more action than is necessary to preserve and protect the status of the parties' property and public interest involved pending final determination of the issues." (Syllabus of the court.)

If every across-the-board raise granted by a governmental employer to employees in one bargaining unit not then involved in wage negotiations must be immediately passed on to every employee of every bargaining unit in across-the-board fashion, the governmental employer has lost virtually all its bargaining power. Every union or employee representative will feel entirely free to proceed with labor controversies and wage negotiations on every occasion because they have absolutely nothing to lose.

Such a broad holding is contrary to the provisions of the act which requires the Commission of Industrial Relations to determine and fix *comparable* wages.

We have consistently held that the determination of the terms and conditions of employment is a legislative function. *Orleans Education Assn. v. School Dist. of Orleans*, 193 Neb. 675, 229 N.W.2d 172 (1975). We have on our own initiative taken steps to confine the commission to its proper role under the Constitution and statutes. *Transport Workers of America v. Transit Auth. of City of Omaha*, 205 Neb. 26, 286 N.W.2d 102

(1979); *Saltz v. School Dist. of Norfolk*, 208 Neb. 740, 305 N.W.2d 635 (1981). It is inconsistent and illegal for us to usurp the function of the Commission of Industrial Relations on review by injecting a matter not an issue and on which, in any event, the commission has jurisdiction to pass on initially. Indeed, what the court has done is, if we may borrow a phrase from Mr. Justice Byron White, "a raw exercise of judicial power," i.e., without authority in law.

Even if this were an appeal from a court and involved a matter strictly judicial, there is no precedent which supports what we do here. We are not in this case merely saying a wrong principle of law has been relied upon, but say to the parties, in effect: This was not an issue made by the pleading or the evidence, nonetheless, we make it an issue.

CLAIRE SCHEIDELER, APPELLANT, V. H. F. ELIAS AND THE LUTHERAN HOSPITAL SOCIETY, INC., OF BEATRICE, NEBRASKA, APPELLEES.

309 N.W.2d 67

Filed August 7, 1981. No. 43316.

1. **Summary Judgment.** The issue on a motion for summary judgment is whether or not there is a genuine issue as to any material fact, and not how that issue should be determined. In considering such a motion, the trial court must take 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 be reasonably drawn from the evidence. Summary judgment is an extreme remedy and should be awarded only when the issue is clear beyond all doubt.
2. **Releases: Tort-feasors.** A release by an injured party of the tort-feasor responsible for the original injury does not, in the absence of language indicative of such an intention on the part of the parties, preclude an action by the injured party against a physician or hospital for negligent treatment of the original injury.
3. ____:____. Two factors are controlling in determining the effect of an agreement purporting to operate as a release: (1) Whether the injured party has received full satisfaction; and (2) Whether the parties intended

that the release be in full satisfaction of the injured party's claim, thus releasing all successive tort-feasors from liability. Such questions are for the trier of fact to decide.

Appeal from the District Court for Gage County: WILLIAM F. COLWELL, Judge. Reversed and remanded.

Galloway, Wiegers, Sprouse & Heeney and K. E. Mahlin for appellant.

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

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

BRODKEY, J.

Claire Scheideler, the plaintiff and appellant herein, appeals to this court from a judgment entered by the District Court of Gage County, Nebraska, sustaining the joint motion of the defendants, H. F. Elias, M.D., and The Lutheran Hospital Society, Inc., of Beatrice, Nebraska, for summary judgment. We reverse and remand.

The factual background of this appeal is as follows. On June 17, 1974, the appellant was injured when the motorcycle he was riding collided with an automobile driven by Mrs. Lois Saathoff. The appellant received numerous lacerations and abrasions to his body and suffered a severe compound fracture of the right fibula. Scheideler was subsequently transported by ambulance to the Lutheran Hospital in Beatrice, Nebraska. Upon admission to the hospital, the appellant was treated by Dr. H. F. Elias.

Scheideler was hospitalized at Beatrice from June 17, 1974, through July 26, 1974, when he was dismissed to go home for a 2-day weekend. The appellant returned to the hospital on July 29, 1974, and remained under the care of Dr. Elias until he was finally discharged on August 26, 1974. Thereafter, the appellant was referred to a physical therapist for outpatient treat-

ment. According to Scheideler, the physical therapist discovered that the appellant's right leg was an inch shorter than his left leg, and referred him back to Dr. Elias. On September 23, 1974, it was discovered that the appellant's right hip was dislocated. Dr. Elias referred Scheideler to an orthopedic surgeon in Lincoln, Nebraska, Dr. Gene Lewallen.

Scheideler was hospitalized at Bryan Memorial Hospital in Lincoln on October 4, 1974, where he was put into traction prior to surgery on his hip. On October 9, 1974, the appellant underwent a Charnley-Mueller total hip replacement in which his hip was reduced and replaced by a prosthesis. Scheideler was discharged from the hospital on October 21, 1974, and subsequently released by his surgeon, Dr. Lewallen, on September 9, 1975.

During the first week of his hospitalization at Lutheran Hospital in Beatrice following the June 17, 1974, accident, Scheideler was contacted by Rodney Arnett, a representative of the liability insurance carrier which insured Lois Saathoff, the driver of the vehicle which collided with the appellant's motorcycle. From that date until June 24, 1975, Scheideler and Arnett had continuing negotiations regarding the appellant's personal injury claim against the Saathoffs. On June 24, 1975, Scheideler signed a release in settlement of his claim against the Saathoffs and all others who "are or might be liable," for a consideration of $46,600.

This action commenced on June 11, 1976, when the appellant filed his petition alleging negligence on the part of the appellees in treating his injuries and in failing to diagnose the dislocated hip. Also named as a defendant to this action was Dr. Patrick Gillespie, a radiologist in Beatrice. Dr. Gillespie was subsequently dismissed as a party defendant upon oral application of the appellant. In their amended answer, Dr. Elias and the Lutheran Hospital alleged that the settlement and release executed by the appellant constituted a re-

lease of all claims asserted by Scheideler, thereby barring his claims against them as a matter of law.

Dr. Elias and the Lutheran Hospital filed a joint motion for summary judgment with the trial court; and on December 7, 1979, at the hearing on the motion, the court file containing all pleadings and discovery documents, the deposition of Claire Scheideler taken on August 2, 1977, and an affidavit of Claire Scheideler was received into evidence by the District Court. At the conclusion of the hearing, all parties stipulated on the record that judgment could be entered at chambers without further notification to the parties. On December 13, 1979, the District Court entered judgment granting the motion for summary judgment and dismissing the petition against both defendants. A subsequent motion for new trial was overruled by the trial court, and the appellant now appeals to this court.

In his brief on appeal, the appellant makes the following assignments of error: (1) The court erred in adopting as a rule of law that the defendant health care providers were not liable to the appellant because of his release of the original tort-feasor; (2) The court erred in not finding that the acts or failure to act on the part of the defendants represented a separate cause of action from any which the appellant had against the Saathoffs; (3) The court erred in finding that the release acknowledged full payment of all special and general damages sustained by the appellant; (4) The court erred in finding that there was no issue of material fact as to the release signed by appellant; (5) The court erred in finding there was no failure of meeting of the minds as to the nature and purpose of the release; (6) The court erred in applying the theory of law that contribution between joint tort-feasors should release all wrongdoers; and (7) The court erred in granting summary judgment in favor of the defendants as a matter of law.

The well-established rule governing the scope of

review by this court of a summary judgment has been stated as follows: "'The issue on a motion for summary judgment is whether or not there is a genuine issue as to any material fact, and not how that issue should be determined. In considering such a motion, the trial court must take 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 be reasonably drawn from the evidence.'" *McDowell v. Rural Water Dist. No. 2*, 204 Neb. 401, 410, 282 N.W.2d 594, 599 (1979). This court has also held that summary judgment is not appropriate, even where there are no conflicting evidentiary facts, if the ultimate inferences to be drawn from those facts are not clear. *Metro. Tech. Community College v. South Omaha Industrial Park*, 207 Neb. 472, 299 N.W.2d 535 (1980). Summary judgment is an extreme remedy and should be awarded only when the issue is clear beyond all doubt. *Barnes v. Milligan*, 196 Neb. 50, 241 N.W.2d 508 (1976); *Farro v. Rubottom*, 202 Neb. 120, 274 N.W.2d 149 (1979).

The primary issue raised on appeal is whether the complete release of an original tort-feasor bars an injured person from subsequently recovering from a treating physician for alleged acts of malpractice or negligent hospital treatment. The general release signed by Scheideler was a preprinted form containing blank spaces only for the amount of the consideration paid for the settlement, the names of the parties, the dates of the accident or occurrence for which the release was given, the location of the accident in question, and the date of the release, in addition to blank spaces for the signatures of the parties executing the release. The release in question, signed on June 24, 1975, by Scheideler, provided in pertinent part as follows: "RELEASE IN FULL FOR THE SOLE AND ONLY CONSIDERATION OF FORTY SIX THOUSAND SIX HUNDRED and no/100----(Dollars) ($46,600.00) to me/us paid, receipt of which is hereby

acknowledged, I/we hereby release and discharge William A. Saathoff and Lois Saathoff his successors and assigns, *and all other persons, firms or corporations who are or might be liable,* from all claims of any kind or character which I/we have or might have against him or them, and especially because of all damages, losses or injuries to person or property, or both, whether developed or undeveloped, known or unknown, resulting or to result from accident on or about the 17th day of June, 1974, at 1 mile west Highway 77 on State Line County road, Kansas-Nebraska line. and I/we *hereby acknowledge full settlement and satisfaction of all claims of whatever kind or character which I/we may have against him or them* by reason of the above mentioned damages, losses or injuries." (Emphasis supplied.)

In its judgment entered in this matter, the trial court, citing an annotation in 39 A.L.R.3d 26 (actually 39 A.L.R.3d 260, 263 (1971)), adopted and quoted the following: "As a general rule, it has been recognized that a tortfeasor is liable for the consequences of the negligence, mistake, or lack of skill of a physician or surgeon attending the injured person, if the injured person exercised reasonable care in securing the services of a competent physician or surgeon, the reasoning being that the additional harm is either (1) a part of the original injury, (2) the natural and probable consequence of the tort-feasor's original negligence, or (3) the normal incidence of medical care necessitated by the tortfeasor's original negligence."

The trial court, in affirming the motion for summary judgment, found: "3. Prior to June 24, 1975, the plaintiff had possible claims against Saathoff, defendants and all other persons or institutions involved in his treatment and care that he may have claimed to be wrongdoers. 4. Plaintiff during all of the negotiations for settlement and at the time the Release was executed was represented by counsel. Plaintiff was not overreached

or mislead [sic] in any way to the end that there was a mistake or failure of meeting of the minds as to the nature and purpose of the Release. The evidence shows without contradiction that plaintiff by his release acknowledges that it was in payment in full of the charges made by both defendants, and that the sum of $30,673.79 included in the settlement claim was for general damages suffered by plaintiff, but was not itemized. 5. There is no issue of material fact as to the Release dated June 24, 1975, being a full release of any claim that plaintiff had against Saathoff by reason of the collision between the vehicles, and, further, that it was a full release of any claim plaintiff had against defendants, or either of them, for care and treatment during 1974. To hold otherwise would destroy the procedure of negotiation and settlement of similar claims, overlapping of claims and damages, and leave open the possible liability of third persons who render treatment in circumstances similar to this case, but were not named in the Release. Plaintiff had an option to negotiate the Release on a limited liability basis, but he elected otherwise."

As is apparent from analysis of the cases by the editor of the annotation entitled Release of One Responsible for Injury as Affecting Liability of Physician or Surgeon for Negligent Treatment of Injury, found at 39 A.L.R.3d 260 (1971), there are two separate and distinct, and in some respects conflicting, rules of law which have been followed by various jurisdictions with reference to the legal issues presented in this case. The first rule of law, which was based upon the common law, is that a general release executed in favor of one responsible for plaintiff's original injury, at least in the absence of a different intention positively revealed by the language or circumstances of the release, or of a finding that negligence by the physician or surgeon produced an entirely new injury, precludes an ordinary negligence action against the physician or surgeon for damages incurred by his negligent treatment of the

injury. This rule has been generally referred to as the traditional rule. The traditional rule is subject to an exception that a release does not bar the injured party from recovery where a new injury has been produced through the physician's or surgeon's negligence. The second rule, followed by a substantial and increasing number of jurisdictions, is that the release by an injured party of the one responsible for the injury does not, of itself, in the absence of language indicative of such an intention on the part of the parties, preclude an action by the injured party against the physician or surgeon for negligent treatment of the injury, at least unless there has been full compensation in fact for the injured party's total injury. We do not believe that this court has heretofore passed upon or adopted one of the foregoing rules as applicable in this state. Both of these rules are set out, analyzed, and evaluated at some length in the A.L.R.3d annotation previously referred to. In *Thornton v. Charleston Area Medical Ctr.*, 213 S.E.2d 102, 107-08 (W. Va. 1975), that court reviewed the annotation and stated as follows:

"The rule as reconstructed by the writer from an annotation found at 39 A.L.R.3d 260 (1971), is characterized as the 'traditional' resolution and is summarized as follows:

"'A general release executed in favor of the one responsible for a plaintiff's original injury, in the absence of a different intention positively revealed by the language or circumstances of the release, precludes an ordinary negligence action against a physician or hospital for damages incurred by their negligent treatment or medical care of the original injury.'

"In this composite form the rule is substantially followed in the following jurisdictions: Poltera v. Garlington, 489 P.2d 334 (Colo. App. 1971); Feinstone v. Allison Hospital, Inc., 106 Fla. 302, 143 So. 251 (1932); Tidwell v. Smith, 27 Ill. App. 2d 63, 169 N.E.2d 157 (1960); Staehlin v. Hochdoerfer, 235 S.W. 1060

(Mo. 1921); Mainfort v. Giannestras, 49 Ohio Ops. 440, 111 N.E.2d 692 (Ohio Com. Pl. 1951); Farrar v. Wolfe, 357 P.2d 1005 (Okl. 1960); Williams v. Dale, 139 Or. 105, 8 P.2d 578 (1932); Thompson v. Fox, 326 Pa. 209, 192 A. 107, 112 A.L.R. 550 (1937); and Corbett v. Clarke, 187 Va. 222, 46 S.E.2d 327 (1948).

"On the other hand, the result reached by this Court in the recent Cox v. Turner case [207 S.E.2d 152 (W. Va. 1974)] is very similar to that which is indicated if we should choose to follow the so-called 'modern' rule that a release of the original tort-feasor may not *necessarily* bar a further recovery against a successive and independent tort-feasor who negligently or unskillfully renders hospital or medical care in the treatment of the injury caused by the original tort-feasor. Presently, some fourteen jurisdictions have adopted a modification of the traditional rule which provides that:

"'A release by an injured party of the tort-feasor responsible for the original injury does not *per se*, in the absence of language indicative of such an intention on the part of the parties, preclude a second action by the injured party against a physician or hospital for negligent treatment or medical care of the original injury, if there has been less than full compensation recovered for the injured party's total injuries.'

"In substance, this rule has been adopted in the following jurisdictions: Cimino v. Alway, 18 Ariz. App. 271, 501 P.2d 447 (1972); Ash v. Mortensen, 24 Cal. 2d 654, 150 P.2d 876 (1944); Knight v. Lowery, 228 Ga. 452, 185 S.E.2d 915 (1971); Smith v. Conn, 163 N.W.2d 407, 39 A.L.R.3d 251 (Iowa 1968); Fieser v. St. Francis Hospital and School of Nursing, Inc., 212 Kan. 35, 510 P.2d 145 (1973); Selby v. Kuhns, 345 Mass. 600, 188 N.E.2d 861 (1963); Couillard v. Charles T. Miller Hospital, Inc., 253 Minn. 418, 92 N.W.2d 96 (1958); Hansen v. Collett, 79 Nev. 159, 380 P.2d 301 (1963); Wheat v. Carter, 79 N.H. 150, 106 A. 602 (1919); Daily v. Somberg, 28 N.J. 372, 146 A.2d 676, 69

A.L.R.2d 1024 (1958); Derby v. Prewitt, 12 N.Y.2d 100, 236 N.Y.S.2d 953, 187 N.E.2d 556 (1962); Galloway v. Lawrence, 263 N.C. 433, 139 S.E.2d 761 (1965); McMillen v. Klingensmith, 467 S.W.2d 193 (Tex. 1971); DeNike v. Mowery, 69 Wash.2d 357, 418 P.2d 1010 (1966).

"In jurisdictions following the modern rule, execution of the release in favor of the original tort-feasor does not furnish an irrebuttable presumption that the injured party also contemplated that he had recovered a complete satisfaction for his injuries, including those suffered at the hands of a negligent physician or hospital treating his original injuries. To the contrary, in the 'modern' rule jurisdictions, parol evidence is admissible to explain the intention of the parties at the time the release of the original tort-feasor was executed. Dickow v. Cookinham, 123 Cal. App. 2d 81, 266 P.2d 63 (1954); Knight v. Lowery, *supra;* Community School District v. Gordon N. Peterson, Inc., 176 N.W.2d 169 (Iowa 1970); Couillard v. Charles T. Miller Hospital, Inc., *supra;* Krenz v. Medical Protective Company, etc., 57 Wis.2d 387, 204 N.W.2d 663 (1973) . . . . [W]e are led to the conclusion that there is an aspect of inherent unfairness in the ineluctable application of an irrebuttable presumption which holds that a release of an original tort-feasor executed after treatment of injuries operates as an absolute bar to a second action by the injured party against a physician or hospital for negligent treatment or care of the original injury. Such a rule may operate unjustly for the benefit of negligent parties who have caused great injury to a person by unskillful medical treatment or negligent hospital care in that it absolutely frees them from liability or obligation to contribute to the recovery which the law has characterized as total. Such a rule does not provide for the contingency of latent and unpredictable manifestations of known injuries which may result in a greater and more permanent harm in the future, in a manner entirely unanticipated

when the original tort-feasor was released. And, although the law would have it otherwise, the rule that the release constitutes an absolute bar may, in fact, prove to be a trap for the unwary layman who is ignorant of the law. To particularize, is it reasonable and fair to conclude that an injured party also excuses his physician or hospital from negligence when he releases a motorist who struck his motorcycle on the highway and injured him? The question answers itself. Legal fiction should serve justice, not strangle it."

In *Wecker v. Kilmer*, 260 Ind. 198, 202-03, 294 N.E.2d 132, 134-35 (1973), the court, in discussing the traditional rule, stated:

"This allegedly prevailing view is also illogical because the alleged original tortfeasor has *disclaimed any liability* in the release. If one were injured in an accident where no one was at fault and one's injuries were subsequently aggravated by the negligent acts of a physician, one would not be without a cause of action against the physician. We have no proof that the *alleged* original tortfeasor was in fact a tortfeasor. It should only be to avoid unjust enrichment and prevent double recovery that any monies received from other sources would be credited against a recovery from the negligent physician.

"We note that this so-called prevailing view has received intensive criticism from modern commentators.

"'Dean Wigmore has denounced the doctrine as a "surviving relic of the Cokian period of metaphysics" (17 Ill. L. Rev. 563), Dean Prosser has criticized it as "at best an antiquated survival of an arbitrary common law procedural concept" (Torts, p.244) and Mr. Justice Rutledge, speaking for the Court of Appeals for the District Of Columbia, observed that "The rule's results are incongruous. More often than otherwise they are unjust and unintended. Wrongdoers who do not make or share in making reparation

are discharged, while one willing to right the wrong and no more guilty bears the whole loss. * * * Many, not knowing this, accept less only to find later they have walked into a trap. The rule shortchanges the claimant or overcharges the person who settles, as the recurring volume and pattern of litigation show. Finally, it is anomalous in legal theory, giving tortfeasors an advantage wholly inconsistent with the nature of their liability."' *Derby v. Prewitt* (1962), 12 N.Y.2d 100, 104, 187 N.E.2d 556, 558.

"We also note that the 'prevailing view' has become continually less acceptable to courts over the past two decades. See Anno. 39 A.L.R.3d 260.

"Two factors should be controlling in determining the effect of an agreement purporting to operate as a release: (1) Whether the injured party has received full satisfaction; and (2) Whether the parties *intended* that the release be in full satisfaction of the injured party's claim, thus releasing all successive tortfeasors from liability. See *Harper & James, Torts* (1956), § 10.1, *Prosser on Torts* (4th ed. 1971) at 304. Both are questions of fact and normally to be determined by the jury. The actual form or title of the release is immaterial and parol evidence should be permitted to determine the intent of the parties."

In this regard, we also note that the modern rule has apparently been incorporated in the Restatement (Second) of Torts § 885 (1979). That section provides:

"(1) A valid release of one tortfeasor from liability for a harm, given by the injured person, does not discharge others liable for the same harm, unless it is agreed that it will discharge them.

"(2) A covenant not to sue one tortfeasor or not to proceed further against him does not discharge any other tortfeasor liable for the same harm.

"(3) A payment by any person made in compensation of a claim for a harm for which others are liable as tortfeasors diminishes the claim against the tortfeasors, at least to the extent of the payment made,

whether or not the person making the payment is liable to the injured person and whether or not it is so agreed at the time of payment or the payment is made before or after judgment."

After considering the advantages and disadvantages of both of the rules discussed above, as well as the authorities and writings of legal experts with respect to same, this court has concluded that the "modern rule" is the better and more equitable rule, and we hereby adopt it for application in this state in the instant case and henceforth.

In their brief on appeal, the appellees cite *Fitzgerald v. Union Stock Yards Co.*, 89 Neb. 393, 131 N.W. 612 (1911), in support of the proposition that if one of several joint tort-feasors makes settlement with the injured party and pays him damages which he agrees to receive and does receive as full compensation for all damages sustained, it will release all of the joint tort-feasors. Primarily, the appellees contend that if Scheideler is allowed to pursue his suit in negligence against them, he may be allowed a double recovery for the same injury. We do not agree with the appellees' contention for several reasons which distinguish the facts in *Fitzgerald* from those in the instant case.

First, many of the cases cited as authority for the modern rule deal with the situation where the defendant is charged with a subsequent or successive wrong which contributed to the damage for which the original tort-feasor was liable. The distinction made between joint tort-feasors and successive tort-feasors as it relates to the modern rule of release is well set out by the Iowa Supreme Court in *Smith v. Conn*, 163 N.W.2d 407 (Iowa 1968). In that case the court states at 410-11:

"The cases have generally recognized a distinction between the rule of unity of discharge by release as applied to joint or concurrent tort-feasors on the one hand and successive tort-feasors on the other. In New York Court of Appeals in Derby v. Prewitt, 12 N.Y.2d

100, 236 N.Y.S.2d 953, 958, 187 N.E.2d 556, 559, Fuld, J.: 'As to the first asserted basis for the rule, it is obvious that the taxicab driver and the doctor, having neither acted in concert nor contributed concurrently to the same wrong, are not joint tort-feasors. (See Matter of Parchefsky v. Kroll Bros., 267 N.Y. 410, 413-414, 196 N.E. 308, 310-311, 98 A.L.R. 1387.) Their wrongs were independent and successive, rather than joint, and this being so, the plaintiff had not one but two separate and distinct causes of action, one against the cab driver for the negligent operation of his vehicle and the other against the doctor for his alleged malpractice in treating the fracture which the plaintiff sustained in the automobile accident. It is true that the driver could have been held liable for the aggravation of the injury caused by the doctor's negligence but, as pointed out above, that liability is not the result of any concept of joint wrongs but is rather the product of the familiar rule that a wrongdoer is responsible for the reasonably foreseeable consequences of his tortious act, including the negligent conduct of others. Conversely, it would defy reason to hold the physician liable for injuries caused by the original wrongdoer which were not the consequences of his own carelessness, and no one suggests that a release of the doctor would completely discharge the original wrongdoer.

. . . .

"'Since, therefore, neither the joint tort-feasor doctrine nor the reasons underlying it are here applicable, we may not say, as a matter of law, that the release executed by the plaintiff bars the present action. In the light of our analysis, the question for resolution, and it is to be decided as an issue of fact upon a trial, is whether the plaintiff's settlement with the taxicab driver did actually constitute satisfaction of all damages caused by his wrong or was intended as such. If it did, or was so intended, no claim remained against the doctor. But, if it did not reflect full satisfaction, and

was not so regarded — and the burden of proving this essential fact rests upon the plaintiff — the release will not prevent recovery against the doctor.'"

We are also persuaded by the line of authority under the modern rule which holds that two essential questions of fact are raised in the instant case. These questions pertain to whether the release given to the original tort-feasor is intended to release subsequent tort-feasors, and whether the tort victim has been fully compensated for his injuries. Such questions are for the trier of fact to decide. *DeNike v. Mowery*, 69 Wash. 2d 357, 418 P.2d 1010 (1966); *Fieser v. St. Francis Hospital & School of Nursing, Inc.*, 212 Kan. 35, 510 P.2d 145 (1973); *Harris v. Grizzle*, 599 P.2d 580 (Wyo. 1979). We also note the case of *Couillard v. Charles T. Miller Hospital, Inc.*, 253 Minn. 418, 92 N.W.2d 96 (1958), in which the Supreme Court of Minnesota overruled two prior decisions based on the traditional rule. In *Couillard*, the court held that the general release constituted prima facie evidence that the plaintiff had received full compensation for his injuries; that the plaintiff had the burden of proof to establish the contrary; and that where the physician is neither a party nor mentioned in the release, an ambiguity exists as to whether he was intended to be released.

In the present case, neither of the appellees was named in the release executed by the appellant nor did they make payment toward satisfaction of any liability. Furthermore, appellant alleges that since he executed the release prior to his discharge by Dr. Lewallen, he has not received full satisfaction for his injuries. Since we determine that the release in this case does not have the conclusive effect upon the liability as attributed to it by the trial court, there exist material issues of fact which preclude summary judgment. These issues of fact include, at least, whether or not the appellant intended to release Dr. Elias and the hospital (in his affidavit filed in connection with the motion for summary

judgment and in his deposition admitted into evidence, Scheideler alleged he had not so intended), and also whether he had received full payment and satisfaction for all his damages.

We conclude the summary judgment entered in favor of the appellees must be reversed and the cause remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

BOSLAUGH, J., dissents.

LOUISE T. HAMMOND, APPELLANT AND CROSS-APPELLEE, V. NEBRASKA NATURAL GAS COMPANY, ET AL., WALSH, WALENTINE & MILES, APPELLEE AND CROSS-APPELLANT.

309 N.W.2d 75

Filed August 7, 1981. No. 43408.

1. **Insurance: Loans.** An arrangement between an insurer and an insured, whereby the former loans to the latter the amount of a loss under the terms of a policy of insurance, to be repaid only if the insured made a recovery from a third person, is a lawful agreement, and the loan thus made is not such a payment of insurance as to make the insurer the real party in interest.
2. **Insurance: Actions: Costs.** Where the loan receipt under which the insurer advances money to an insured obligates the insurer to bear the expense of all legal proceedings pursued in prosecuting the claims of the insured which the insured has pledged to the insurance company, it is improper to charge the insured with any of the expenses of litigation.
3. **Insurance: Actions: Interest.** An insurer which recovers, on behalf of its insured in a negligence action brought against a third person, the amount which the insurer has paid the insured is entitled to the judgment interest awarded on that amount, even though the loan receipt under which the insurer advanced funds to the insured provides that the loan is without interest, as such interest is not paid directly or indirectly by the insured but is paid by the third party with whom the insured has ceased to have concern and privity.
4. **Attorneys' Liens.** To be entitled to an attorney's lien under Neb. Rev. Stat. § 7-108 (Reissue 1977), it is first necessary that an attorney-client relationship, either express or implied, exists.

5. **Subrogation: Attorney Fees.** Under the "common fund" doctrine, where the holder of subrogation rights does not come into the action, whether he refuses to do so or acquiesces the action brought by the plaintiff, but accepts the avails of the litigation, he is subjected to his proportionate share of the expenses thereof, including attorney fees. However, this rule is not applicable where the party sought to be charged has employed his or its own attorney and has actively participated in the litigation, and such counsel has not terminated, abandoned, or acquiesced in the representation of his client by other counsel.

Appeal from the District Court for Dodge County: FRANCIS J. KNEIFL, Judge. Affirmed as modified.

William G. Line and John F. Kerrigan of Kerrigan, Line & Martin for appellant.

Richard E. O'Toole and Thomas J. Walsh of Walsh, Walentine, Miles, Fullenkamp & O'Toole for appellees Cornhusker, New Hampshire Ins. Co., and Walsh, Walentine.

Ronald H. Stave and Thomas J. Shomaker of Sodoro, Johnson, Daly, Stave, Cavel & Coffey for appellee St. Paul Fire.

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

PER CURIAM.

This action is the second appeal of the above-captioned case to this court. The general background of the litigation is set out in our opinion in *Hammond v. The Nebraska Nat. Gas Co.*, 204 Neb. 80, 281 N.W.2d 520 (1979), and will not be repeated here, except as is pertinent in part with the issues in this appeal.

It appears from the record that after the entry of the judgment in the original action, the law firm of Walsh, Walentine & Miles of Omaha, Nebraska, filed attorney liens pursuant to the provisions of Neb. Rev. Stat. § 7-108 (Reissue 1977) against the proceeds of the judgment recovered by Louise Hammond, the plaintiff in the original case, in the amount of $427,500 and, in addition, interest thereon. Thereafter, on August 21,

1979, Walsh, Walentine & Miles filed in the original action what they captioned "Motion for Determination of Validity and Amount of Attorneys' Liens and Distribution of Judgment as Interests Appear."

On the following day, August 22, 1979, the law firm filed an "application," asking the court for a determination of the respective amounts of the various interests in the judgment and for an allocation of attorney fees from the amount of the personal interest of Louise T. Hammond and the amounts of the subrogated interest of Fireman's Fund Insurance Company and St. Paul Fire & Marine Insurance Company, plus a proration of reasonable sums expended for discovery, trial, and appeal of the captioned suit. On August 27, 1979, the plaintiff filed what it titled "Response Of Plaintiff To Motion With Respect To Attorneys' Liens And Distribution Of Judgment, And Application Supplementary Thereto." In that response plaintiff denied that the Walsh law firm had been employed to represent her; prayed that all the claims of Walsh be dismissed, or, in the alternative, that out of the proceeds of the judgment in the hands of the court, the court authorize the payment of court costs to the parties who had paid those costs and who were entitled to reimbursement; prayed for the repayment to the Cornhusker Casualty Insurance Company, the New Hampshire Insurance Company, the Fireman's Fund Insurance Company, and the St. Paul Fire & Marine Insurance Company of monies paid to her after the entry of the judgment under the terms of their respective insurance policies in amounts totaling $307,400, which sums had been paid to her under loan receipts from each of said companies, about which more will be said later in this opinion; and also prayed that all the balance of the avails of the judgment, including interest accrued and accruing, be paid to her.

This matter came on for hearing before the District Court of Dodge County on September 13, 1979, for a determination of the respective amounts and various

interests in the judgment rendered; the allocation of attorney fees; the allocation of all postjudgment interest; the division of the amount of postjudgment interest owing Louise T. Hammond; and the right, if any, of Walsh, Walentine & Miles to an attorney fee from Louise T. Hammond, the Fireman's Fund Insurance Company, and the St. Paul Fire & Marine Insurance Company.

In its order entered on April 9, 1980, the District Court found as follows:

"That on or about January the 10th, 1976, the Plaintiff, Louise T. Hammond, was the owner in fee of the Pathfinder Hotel in Fremont, Nebraska. That on January 10th, 1976, there were four insurance policies in full force and effect by four different insurance companies as hereinbefore set forth.

"That on or about February 4th, 1976, the New Hampshire Insurance Company paid Mrs. Hammond the face amount of its policy in the sum of $125,000.00, taking a loan receipt from the Plaintiff. That on or about the 4th day of February, 1976, the Cornhusker Casualty Insurance Company paid the Plaintiff the sum of $125,000.00, taking a like loan receipt from the Plaintiff. That on or about March 30, 1976, the Fireman's Fund Insurance Co. paid the Plaintiff the sum of $50,000.00, procuring a loan receipt from the Plaintiff. That the St. Paul Fire & Marine Insurance Company paid the Plaintiff the sum of $7,400.00, taking a like loan receipt from the Plaintiff.

"That immediately subsequent to January 10th, 1976, and at all times material to this matter, the Cornhusker Insurance Company and the New Hampshire Insurance Company were represented by the law firm of Walsh, Walentine and Miles. That the Fireman's Fund Insurance Co. was represented by the Law firm of Niewald, Risjord & Waldeck and the St. Paul Fire & Marine Insurance Company was represented by the law offices of Emil F. Sodoro, P.C.; and that the Plaintiff

was represented by the law firm of Kerrigan and Line.

. . . .

"There was no attorney-client relationship at any time existing between the law firm of Walsh, Walentine, and Miles with the Plaintiff, Louise T. Hammond, the Fireman's Fund Insurance Co. or the St. Paul Fire and Marine Insurance Company. Those respective parties had, at all times material, retained and were represented by counsel of their choice.

"That the Plaintiff, Louise T. Hammond, by the insurance contract and execution of the loan receipts was contractually obligated to cooperate with the four insurance carriers and their retained counsel and the Plaintiff's counsel was also obligated to cooperate as per the provisions of the loan receipts.

"The law firm of Walsh, Walentine & Miles represented their companies['] interest totaling $250,000.00 of the total $307,400.00 insurance proceeds and in the main they proceeded to prepare and present the case, be the chief counsel in the trial court, and in the main handle the subsequent appeal to the Supreme Court. As to the Plaintiff, Louise T. Hammond, they acted by reason of a contractual right with the Plaintiff under her insurance policy and by mutual agreement between the attorneys for the other two insurance carriers.

"The record is bare of any indication of non-cooperation by any of the other parties before the Court and received into evidence are numerous affidavits of attorneys of record and other persons involved directly or indirectly in the preparation and trial of the lawsuit. Giving equal credence to all the affidavits, they are hopelessly impossible of resolve. The law firm of Walsh, Walentine, & Miles prosecuted their claim upon attorney liens against the various interests of the other parties and in support thereof advanced an equitable theory of Common Fund or Quantum Meruit.

"The Court, addressing itself to the matter of the attorney liens filed by the law firm of Walsh, Walentine, & Miles, finds that no valid liens exist. Section 7-108,

R.R.S. Neb., 1943, authorizes attorney liens and the basis for the same i.e. an attorney-client relationship must exist, either express or implied. No such relationship existed, either express or implied, in the above entitled cause and therefore, there is no basis to give rise to a statutory attorney lien as authorized by Section 7-108.

"The Court, addressing itself to the applicants' theory of Common Fund or Quantum Meruit, the law firm of Walsh, Walentine, & Miles performed pursuant to a contract of employment with their employers, the Cornhusker Casualty Insurance Company and the New Hampchire [sic] Insurance Company. Professionally, they were obligated to do so. The Plaintiff, Louise T. Hammond, was contractually obligated to cooperate and so her attorneys were also obligated for they stood in no different stead than the Plaintiff. As between the counsel for the other insurance carriers, since the firm of Walsh, Walentine, & Miles had by far the greatest financial interest in the outcome of the law suit; the evidence establishes it is customary in the trade for the firm with the greatest interest to be the lead counsel. In this case, the record is repleat [sic] that is the position the Walsh Firm not only chose, but insisted upon assuming. This case is simply not a Common Fund proposition and the facts clearly distinquish the case before the bar from United Service[s] Automobile Association v. Hills, 172 Neb. 128, and other Nebraska cases which are addressed to the Common Fund doctrine."

The District Court also determined that the costs of the original litigation, as exhibited by exhibit C, amounted to $23,513.19. This court awarded costs in the amount of $2,932.22, leaving a net cost remaining of $20,580.97. The District Court allocated costs of the litigation in the percentage the various interests bore to the whole as follows: Cornhusker Casualty, .2924; New Hampshire Insurance, .2924; Fireman's Fund Insurance, .1170; St. Paul Fire & Marine, .0173; and Louise T. Hammond, .2809. The court also allocated the

interest, both awarded and accrued, in the same percentages. The costs of the action were taxed to the Walsh law firm and subsequent motions for new trial filed by both the plaintiff and the applicant were subsequently overruled.

In her brief on appeal, the plaintiff assigns as error that the trial court erred in failing to award her all postjudgment interest, and in charging her with a share of the litigation expenses. The law firm of Walsh, Walentine & Miles has cross-appealed to this court, assigning as error the failure of the trial court to allocate an attorney fee from a common fund produced for the benefit of Louise T. Hammond, Fireman's Fund Insurance Company, and St. Paul Fire & Marine Insurance Company. The appellee law firm also alleges error on the part of the trial court in declaring the attorney liens invalid.

The loan receipts supplied by the New Hampshire Insurance Company and the Cornhusker Casualty Insurance Company for the advancement of the funds to the plaintiff are almost identical, and provide in pertinent part: "Received from the New Hampshire Insurance Company (hereinafter referred to as 'Company') the sum of One Hundred Twenty-Five Thousand and no/100- - -Dollars ($---125,000.00---) as a loan, *without interest*, repayable only in the event and to the extent of any net recovery the undersigned may make from any person, persons, corporation or corporations, or other parties, causing or liable for the loss or damage to the property described below, or from any insurance effected on such property, *and as security for such repayment the undersigned hereby pledges to the said 'Company' all his, its or their claim or claims against said person, persons, corporation or corporations or other parties*, or from any insurance carrier or carriers, and any recovery thereon, and hereby delivers to said 'Company' all documents necessary to show his, its or their interest in said property.

"The undersigned covenants that no settlement has

been made by the undersigned with any person, persons, corporation or corporations, or other parties against whom a claim may lie, and no release has been given to anyone responsible for such loss and that no such settlement will be made, nor release given without the written consent of the said Company; and *the undersigned covenants and agrees to cooperate fully with the said Company, to promptly present claim and, if necessary, to commence, enter into and prosecute suit against such person or persons*, corporation or corporations, or other parties, through whose negligence or other fault the aforesaid loss was caused, or who may otherwise be responsible therefor, with all due diligence, in his, its or their own name.

"In further consideration of said advance the undersigned hereby guarantee(s) that he, it or they are the owner(s) of said property and entitled to recover upon said claim for loss or damage thereto, and hereby appoint(s) the managers and/or agents of the said 'Company' and their successors severally, his, its or their agent(s) and attorney(s)-in-fact, with irrevocable power, to collect any such claim or claims, and to begin, prosecute, compromise or withdraw in his, its or their name, *but at the expense of the said 'Company,' any and all legal proceedings that the said 'Company' may deem necessary to enforce such claim or claims*, and to execute in the name of the undersigned, any documents that may be necessary to carry the same into effect for the purposes of this agreement.

"Any legal proceedings are to be under the exclusive direction and control of said 'Company.'" (Emphasis supplied.)

A loan receipt provided by Fireman's Fund Insurance Company was signed by the plaintiff on March 30, 1976. The loan agreement form provided by St. Paul Fire & Marine Insurance Company does not appear in the record, but apparently was similar in its terms. We note that the validity of loan receipt agreements between an insured party and his insurer has been approved by this

court. *Shiman Bros. & Co. v. Nebraska National Hotel Co.*, 143 Neb. 404, 9 N.W.2d 807 (1943); *Bozell & Jacobs, Inc. v. Blackstone Terminal Garage, Inc.*, 162 Neb. 47, 75 N.W.2d 366 (1956). In *Shiman Bros.*, this court stated: "An arrangement between an insurer and an insured, whereby the former loaned to the latter the amount of a loss under the terms of a policy of insurance, to be repaid only if the insured made a recovery from a third person, is a lawful agreement and the loan thus made is not such a payment of insurance as to make the *insurer the real party in interest.*" (Emphasis supplied.) (Syllabus of the court.)

In the instant case, the plaintiff entered into loan agreements whereby she pledged any and all claims she had against Nebraska Natural Gas Company to her insurers as security for the repayment of the "loans" in accordance with the terms of the loan agreement, in the total amount of $307,400. The loan receipts expressly provided that the plaintiff would not enter into any settlement with anyone responsible for her loss; that she would cooperate fully with her insurers in prosecuting the claim; that all legal proceedings were to be under the exclusive direction and control of her insurers; and that said legal proceedings would be at the expense of the insurers.

In disposing of this case, it is obviously necessary to interpret the language contained in the loan agreements executed by the plaintiff. In *Wyatt v. Woodmen Acc. & Life Co.*, 194 Neb. 614, 616-18, 234 N.W.2d 217, 219-20 (1975), this court stated as follows: "A policy of insurance will be given effect according to the ordinary sense of the terms used, and if they are clear they will be applied according to their plain and ordinary meaning. . . .

. . . .

"An insurance policy should be construed as any other contract to give effect to the intent of the parties at the time it was made. The language should be considered not in accordance with what the insurer intended it to

mean but what a reasonable person in the position of the insured would have understood it to mean. In giving effect to this principle of law, it is imperative that the contract made by the parties shall be respected and that a new contract is not interpolated by construction." See, also, *Steinheider & Sons, Inc. v. Iowa Kemper Ins. Co.*, 204 Neb. 156, 281 N.W.2d 539 (1979).

It appears to us that the language of the loan receipts is clear and unambiguous. By the terms of the loan receipts the insurers obligated themselves to bear the expense of all legal proceedings pursued in prosecuting the claims of the plaintiff, which she pledged to the insurance companies. We determine that the order of the District Court must be modified in part as to that portion of the order charging her with a percentage of the litigation expenses, as set out above in the order of the court.

We do not agree, however, with the plaintiff's contention that she is entitled to all postjudgment interest in the judgment recovered by her in the amount of $427,500, which amount is approximately $120,000 more than the amount loaned to her by the insurance companies. For clarification, we note that the insurance companies do not claim interest on the money they loaned to plaintiff in March of 1976 under the loan receipts; rather, the companies claim the right to postjudgment interest on the sum of $307,400 included in the original judgment.

While Nebraska apparently has not ever specifically passed upon this question, we are persuaded by the opinion of the court in *Herbert Rosenthal J. Corp. v. St. Paul F. & M. Ins. Co.*, 21 App. Div. 2d 160, 249 N.Y.S.2d 208 (1964), in which case the Supreme Court, Appellate Division, held that an insurer which recovered, on insured's behalf in a negligence action against a third person, the amount the insurer had paid the insured plus loss of profit was entitled to interest awarded on the amount paid to insured, even though the loan receipt stated that the loan was without interest,

where the receipt was the means of making absolute payment of the loss and of permitting the insurer to sue in insured's name. With respect to the question of who was entitled to the interest on the judgment, the court stated: "On this analysis there is no valid ground, other than a forced application of what are at best ambiguous words, why the insurer should not receive the interest accrued on the money of which it had been deprived, and not the insured which has had its money all this time. . . . This is not interest paid directly or indirectly by the insured ('the borrower') which is all that is forbidden by the loan receipt, but it is paid by the third party with which, as to this portion of the recovery, the insured has long ago ceased to have concern and privity." *Id.* at 166, 249 N.Y.S.2d at 214.

In the instant case, the plaintiff has had the benefit of the $307,400 since the date it was paid to her by the respective insurance companies in 1976. We determine that the trial court properly divided the interest, both awarded and accrued, in proportionate shares according to the percentage the parties' interest bears to the whole.

We now turn to the assignments of error raised by the law firm of Walsh, Walentine & Miles on cross-appeal. We determine, initially, that the trial court was correct in ruling that no proper attorney lien existed under § 7-108. That section specifically provides: "An attorney has a lien for a general balance of compensation upon any papers *of his client* which have come into his possession *in the course of his professional employment*; and upon money in his hands *belonging to his client*, and in the hands of the adverse party in an action or proceeding in which the attorney was employed from the time of giving notice of the lien to that party." (Emphasis supplied.)

At no time in the instant case did an attorney-client relationship exist between the law firm of Walsh, Walentine & Miles and the plaintiff, the Fireman's Fund Insurance Company, or the St. Paul Fire &

Marine Insurance Company. Those parties were, at all times pertinent to the litigation, represented by the counsel of their choice. Therefore, the attorney liens filed by the applicant under § 7-108 are invalid, and the trial court properly ruled as such.

We now consider what is probably the principal issue involved in the cross-appeal of Walsh, Walentine & Miles. The firm contends that the trial court erred in failing to allocate a fee to the Walsh firm from a "common fund" produced for the benefit of Louise T. Hammond, Fireman's Fund Insurance Company, and St. Paul Fire & Marine Insurance Company. Walsh contends that he is entitled to such fee because of the fact that he and his firm did most of the work, trial and preparatory, with reference to the original litigation, as a result of which a judgment was recovered greatly in excess of that which was actually anticipated, and which enured to the benefit of both the plaintiff and the insurance companies covering losses resulting from the fire. It is true that the Walsh firm, by virtue of the size of its claim, acted as "lead counsel" in the litigation, and also represented its own clients, New Hampshire Insurance Company and Cornhusker Casualty Insurance Company. Walsh describes the contributions of counsel for the other insurance companies and parties to the litigation as being minimal or nonexistent. However, the record reveals that he assumed his position as "lead counsel" at his insistence; and it is not true, as revealed by the record, that the other counsel made minimal or no contributions. In fact, it appears that part of the reason for the failure of the other counsel to partake more actively in the preparation and trial of the lawsuit was due to Walsh's request and insistence. At the hearing with regard to attorney fees, John Risjord, counsel for Fireman's Fund Insurance Company, testified, and was examined by a member of his own firm. His testimony is enlightening, and we set it out in some detail:

"Q- Did you, in any of your telephone conversations

with Mr. Walsh, have occasion to discuss with him how attorney fees would be paid if settlement or judgment were obtained against any of the Defendants? A- Yes, sir. Q- Do you know when that conversation took place? A- Yes, sir. Q- When was that? A- March 9, 1976. Q- And how are you so sure of that date, sir? A- I have a telephone record of it. As a matter of fact, I have our original telephone office record here. Q- Those records reveal that you talked with the number which corresponds with the telephone number of the Walsh Firm in Omaha on March 9, 1976? A- Correct. I had previously taked [sic] with him on the telephone on the subject of the March 9th, conversation and Mr. Kerrigan had written a letter a little earlier, a few days earlier anyway, suggesting a proration of the recovery. Which Mr. Walsh was not very happy with because the net effect of it might be to diminish Mr. Walsh's fees. I advised Mr. Walsh early in the game that I didn't know how much gas explosion experience he had, and I still don't know, and I advised him that I had tried 12 or 14 of these cases, including plastice [sic] pipe and coupling cases, to whatever benefit that could be to him. That I would be glad to help out and try to guide the litigation and he thanked me for that and indicated that he was perfectly capable of handling it himself. I'm sure he was. So, we didn't undertake to further advise him much as to how to handle the case. He advised me, in a letter I think, that he would also send me copies of letters to Kerrigan and rather insisted upon taking the lead in the case. He felt he had his client's lion share of the money involved in the case, to some extent a quarter of a million dollars on the building and we only had $50,000.00 on the contents. Q- What previoulsy [sic] was the nature of the conversation on March 19th, with relation to attorney fees? A- Mr. Walsh expressed concern that the filing of the suit was emminent [sic]. He had not yet paid the Hammonds' apparently, but he had the check ready to pay them. We had paid the Hammonds' their total policy. He prepared a preliminary

petition and sent me a copy of it for critique. I critiqued it and suggested some things that he might change and alter in it, including the fact he didn't have the coupler manufacturer properly identified or pleaded and I found out who that was from Mr. White and furnished the name and this sort of thing. Following that he redrafted it and sent it to me and we discussed it before it was filed and discussed it with Mr. Kerrigan. That was one of the things I called about and he raised the issue of attorney fees. In view of Mr. Kerrigan's letter, in which it was at least implied, that Mr. Walsh or I might not enjoy the attorney fee arrangement we had with our clients, *it was Mr. Walsh's suggestion, in fact he insisted, that each of us should look to our own clients for our fees.* He was particularly adamant about that and Mr. Kerrigan was not going to share his fee. I agreed that would be agreeable with me. He advised me in that conversation that he had discussed it with Mr. Kerrigan and he thought Mr. Kerrigan would go along with that. So, we entered into the three way situation somewhat awkwardly, but on the basis each of the three firms would undertake to collect whatever fee arrangement they had with their own clients and no attorney involved would share in anybody elses' [sic] fee. Q- Did Mr. Walsh express to you concern that the ultimate judgment which might be obtained might be less than the total insurance on the building? A- Yes. Q- Did he indicate that was his concern about it that the fees than a whole pie a whole pie there to be divided up? A- That's correct. He was particularly concerned about that with respect to the value of the building. The building had been purchased for substantially less than a quarter of million. However, I felt the liability of the gas company being evidence that the jury would undoubtedly award whatever, substantially whatever, value was proved on the building. I didn't have the concern he did. I wasn't representing the building carrier and I felt we had a pretty solid contents cliam [sic] for the furnishings and equipment for $50,000.00. Q- After the review of the

petition, and the amendments made pursuant to your suggests [sic] and the case was filed, did you, thereafter, offer the services of Mr. White and the services of your law firm to Mr. Walsh to pursue this litigation? A- On a number of occasions. Q- What response, if any, did you get to these offers? A- Well, he made it clear it was his parade and I truly didn't want to rain on it either. It is traditional in insurance subrogation where you have two companies on the same risk that the one that has the lion's share, that company and their lawyer run the show. I was perfectly willing that be so. As we went along, there was very little discovery for a number of months. The parties were filing motions and the gas company was filing motions and parties being added and subtracted and primarily consolidated for discovery with other cases and this sort of thing. Both Mr. Kerrigan and Mr. Walsh were primarily on top of it. Q- Did your firm take part in the actual trial which commenced in January of 1978? A- Well, yes and no. We got news, I think through Mr. Kerrigan, that the Walsh Firm was trying to get one of their smaller cases they were involved in to trial as a test case. I was concerned about that because I didn't think the case they chose had too much impact. It was property damage and subrogation without much appeal. I felt one of the stronger cases might be better litigated. I hadn't been consulted in the matter so I volunteered to Mr. Walsh's Firm. I first talked to Mr. O'Toole and told him we would be of whatever assistance we could be in that case. Q- Was that the Opera Company case? . . . Q- Have you reviewed the time record of the firm to determine the total number of days or percentage actual trial days which our firm was represented here in the courthouse? A- Not percentage wise. I know that you attended the trial on reportedly at least all but, I think, on parts of one or two days. I was rather distressed when you reported to me after you arrived here that Mr. Walsh had had you excluded from the counsel table in view of the fact we were representing an inter-

est in the subrogation in the action with a substantial financial interest. Q- In your years of practice, have you ever seen that type of procedure invoked before? A- Never." (Emphasis supplied.)

The record also reveals that the other firms involved in said litigation contributed in varying amounts and degrees to the preparation and trial of the lawsuit. The attorneys for the plaintiff herein, Kerrigan and Line, were, as revealed by the record, responsible in no small part for obtaining the evidence with reference to the damages involved in the fire of the Pathfinder Hotel and were able to do so after the Walsh firm was unable to obtain evidence justifying an increase in the verdict, redounding to the benefit of the plaintiff. Also the Sodoro firm, attorneys for St. Paul Fire & Marine Insurance Company, attended 29 depositions in preparation for the trial. We also point out that while there is not in evidence records of the time spent by the other firms for their own clients in connection with the case, as was true in the case of the Walsh firm, we believe that the value of the respective contributions of counsel in a multicounsel case cannot be determined solely on the basis of the time devoted to the case. The skill, advice, and experience of other counsel who may assist or advise, and participate to some degree, in recovering a favorable verdict in a complex suit must also be considered. We believe it would be an almost impossible task for this court to review, evaluate, and apportion the contributions of the respective counsel in situations such as this and attempt to award to the various counsel participating in a lawsuit part of the fees individually contracted for by them with their own clients. Had there been a specific agreement between said counsel at the inception of the litigation, and their respective contributions and duties delineated, it probably would have diminished or eliminated the possibility of situations occurring such as the one with which we are confronted. We might also add that if any or all of the other interested counsel were not carrying out their appointed

tasks during the course of the litigation, complaint to that effect could and should have been made before judgment was obtained, and not after the recovery of judgment in an effort to augment the attorney fees for counsel under the claim that it had made the greatest contribution to the success of the litigation.

In support of its position that it is entitled to part of the fee of other counsel in the litigation, the Walsh firm relies strongly upon two prior Nebraska cases, to wit, *United Services Automobile Assn. v. Hills*, 172 Neb. 128, 109 N.W.2d 174 (1961), and *Krause v. State Farm Mut. Auto. Ins. Co.*, 184 Neb. 588, 169 N.W.2d 601 (1969), which cases establish the "common fund" rule in this jurisdiction. In *United Services Automobile Assn. v. Hills, supra*, the court stated at 133, 109 N.W.2d at 177: "The applicable rule is that where the holder of the subrogation right does not come into the action, whether he refuses to do so or acquiesces in the plaintiff's action, but accepts the avails of the litigation, he should be subjected to his proportionate share of the expenses thereof, including attorney's fees." In the *Hills* case, the attorney was awarded an attorney fee from a recovery made as the result of his efforts, where the insurance company, although originally a party to the action, withdrew from the suit and refused to participate in the recovery. The court, under those circumstances, refused to permit the unjust enrichment of the insurance carrier and awarded Hills an attorney fee for representing the interest of United Services Automobile Association in recovering the "common fund." In the opinion the court states at 134, 109 N.W.2d at 178:

"United contends, however, that the foregoing rule does not apply where the insured is informed that its subrogation claim is not to be included in the litigation and it indicates an intention to pursue the enforcement of its right of subrogation in some other manner. It seems clear to us, however, that whatever intentions United may have had prior to the commencement of the present action, they were abandoned when it elected

to pursue its general equitable right of subrogation against the avails of the settlement established by the efforts of the Dawsons and Hills. In other words, when United abandoned its previous hostile position and elected to seek the collection of its claim from the avails of the litigation and settlement secured solely by the efforts of the Dawsons and Hills, it brought itself squarely within the cited authorities. Under such situation, justice and equity require that United pay its proportionate share of the expenses, including attorney's fees, incurred by the Dawsons and Hills in establishing the fund from which United seeks to benefit."

We believe that the *Hills* case is factually distinguishable from the instant case in several respects. In *Hills*, the insurance company was not a party to the litigation nor was it represented by counsel. In the instant case the plaintiff and the four insurance companies, two not being represented by the Walsh firm, were actual parties to the litigation and were each represented by attorneys employed by them. While it is true, as discussed above, that the amounts of the respective contributions of the attorneys varied greatly, the fact remains that they were still representing their clients in the litigation and participated, to some extent at least, in the conduct of the case. We are impressed by the language of the court in *Wash. Fire & Marine Ins. Co. v. Hammett*, 237 Ark. 954, 377 S.W.2d 811 (1964), where the court stated at 956, 377 S.W.2d at 813: "The appellant's real grievance lies in having to pay a fee to an attorney not of its own choice. Subrogation however, is governed by equitable principles. *Webster v. Horton*, 188 Ark. 610, 67 S.W.2d 200. *If the appellant had employed its own attorney and had actively participated in the action against Purcell it could not fairly have been compelled to contribute to Howard's fee. Pontiac Mutual County, Etc. Co. v. Sheibley, 279 Ill. 118, 116 N.E. 644. But when the insurance company has benefited from the work done by the insured's attorney there is no inequity in*

requiring it to bear its fair share of the collection expense." (Emphasis supplied.)

Likewise, in *Travelers Ins. Co. v. Williams*, 541 S.W.2d 587, 589-90 (Tenn. 1976), the court was confronted with a similar situation and stated: "There are, of course, many situations in which the work of an attorney proves useful to persons other than his own client. The normal rule in such cases is that he must look only to his client, with whom he has contracted, for his compensation, notwithstanding the acceptance of benefits by others. [Citations omitted.] But, an exception to this rule is made whenever one person, having assumed the risks and expense of litigation, has succeeded in securing, augmenting, or preserving property or a fund of money in which other people are entitled to share in common. In that event, the expenses of the action are borne by each participant according to his interest. [Citations omitted.] The fairest and most efficient means of distributing these costs is thought to be to make them a charge upon the fund itself. This device, known as the 'fund doctrine,' was invented by courts of equity to prevent passive beneficiaries of the fund from being unjustly enriched. It is, therefore, never applied against persons who have employed counsel on their own account to represent their interests. [Citations omitted.] Thus, the right to employ counsel of one's own choosing is preserved." In its opinion the court also stated: "Neither do we find evidence of unjust enrichment of the insurer from the services of the insured's attorney upon which a quasi or constructive contractual duty could be based. In our view, one is not unjustly enriched by a benefit 'forced upon' him as the result of services voluntarily and officiously performed by another who has been expressly informed by the alleged promisor that his services are not desired.

"We conclude that the facts of this case do not entitle the insured's attorney to receive any fee from the insurer with respect to the subrogation claim; he acted as

a volunteer." *Id.* at 590-91. In this connection see, also, *Pontiac Fire Ins. Co. v. Sheibley*, 279 Ill. 118, 116 N.E. 644 (1917).

The Walsh firm also cites and relies upon the cases of *Gillotte v. Omaha Public Power Dist.*, 189 Neb. 444, 203 N.W.2d 163 (1973), and *Schulz v. General Wholesale Coop. Co., Inc.*, 195 Neb. 410, 238 N.W.2d 463 (1976), in support of its contention that it is entitled to share in the attorney fees of the other attorneys in the cause because of work performed. We point out, however, that both of the above-cited cases were workmen's compensation cases and involved an interpretation of Neb. Rev. Stat. § 48-118 (Reissue 1978), which specifically provides that where an employer and employee join in a suit against a third person, the District Court has jurisdiction to determine all disputes between the employer and employee, including the setting and allocation of attorney fees and expenses. There is no similar specific provision applicable to the facts of the situation involved in this case. Moreover, we point out that even in *Schulz, supra*, the court went on to state at 416-17, 238 N.W.2d at 467-68: "At no time did St. Paul's counsel terminate or abandon its representation or rely on or acquiesce in representation of their client by Cobb. Their representation of St. Paul remained active and viable throughout, culminating in their participation in the District Court hearing to approve the final lump sum settlement.

"Under these circumstances, we conclude that St. Paul had full and adequate representation from its own counsel and we affirm the District Court's denial of plaintiff's application for attorney's fees."

Our conclusion is that the "common fund" doctrine is not applicable under the facts of the instant case, and that the Walsh firm is not entitled to augment its contracted fees entered into with its clients, but that the respective counsel in the instant case, with respect to attorney fees for their participation in the litigation, are relegated to their contracts with their respective clients.

In view of what we have stated above, the order entered by the District Court, as modified, must be and hereby is affirmed.

AFFIRMED AS MODIFIED.

EUGENE STOCK, APPELLANT, V.
LOUIS A. MEISSNER AND WESTERN SURETY COMPANY, A CORPORATION, APPELLEES.

309 N.W.2d 86

Filed August 7, 1981. No. 43412.

1. **Limitations of Actions.** The statute of limitations begins to run when a cause of action accrues.
2. **Contracts: Limitations of Actions.** By failing to make demand, a party to a contract to whom payment is due on demand cannot do away with the statute of limitations.
3. **Bonds: Principal and Surety.** A bond does not cover defaults of the principal occurring prior to the effective date of the bond, unless the bond expressly provides otherwise, for it cannot be assumed that the surety intended to be bound by the past delinquencies of the principal.
4. **Summary Judgment.** Where there are no genuine issues as to any material fact and a party is entitled to judgment as a matter of law, summary judgment may be properly granted.

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

R. Steven Geshell of Robak & Geshell for appellant.

Patrick A. Brock for appellees.

Heard before BOSLAUGH, CLINTON, and BRODKEY, JJ., and WOLF and BURKHARD, District Judges.

BURKHARD, District Judge.

This is an action by the seller of grain against a grain dealer and his bonding company for damages for the alleged failure of the grain dealer to pay the fair market value for grain delivered to the dealer.

From February 13 through February 20, 1974, the

plaintiff-appellant, Eugene Stock (hereinafter called Stock), and his assignors delivered to defendant-appellee Louis A. Meissner (hereinafter called Meissner), a licensed grain dealer buyer, 4,072.32 bushels of corn pursuant to an oral contract. The grain was to be paid for by Meissner on demand. During the period February 13 to 20, 1974, Meissner was bonded by Universal Surety Company (hereinafter called Universal), which bond was canceled on September 21, 1975. Meissner then became bonded by defendant-appellee Western Surety Company (hereinafter called Western), effective September 18, 1975.

On December 28, 1978, Stock made his first demand on Meissner for the payment of the corn delivered in February of 1974. Meissner stated that Stock had not only been paid, but he was overpaid, because not all of the corn delivered was of the quality contracted for. Stock then filed suit against Meissner and Western on February 12, 1979, for $8,144.64, plus interest, attorney fees, and court costs. The defendants, by their answers, alleged the affirmative defenses of the statute of limitations and the statute of frauds. Western further alleged in its answer that it was not a surety on Meissner's transactions at the time of the deliveries involved herein, i.e., February of 1974.

Defendants filed a motion for summary judgment. The trial court, on March 24, 1980, sustained the motion as to Meissner on the ground that the claim of Stock was barred by the 4-year statute of limitations on oral contracts, Neb. Rev. Stat § 25-206 (Reissue 1979), and sustained the motion as to Western on the ground that it was not the surety for Meissner at the time of the transactions in February of 1974. On April 18, 1980, Stock's motion for a new trial was overruled, and this appeal was then taken. We affirm the ruling of the trial court.

Stock sets forth several assignments of error, but the basic contention is that the court erred in finding that there were no genuine issues of material fact and in

finding that the defendants were entitled to a judgment of dismissal as a matter of law.

The issue as regards Meissner is when Stock's cause of action against Meissner accrued so as to start the running of the 4-year statute of limitations.

In *Luikart v. Hoganson*, 135 Neb. 280, 281 N.W. 27 (1938), action was commenced on December 26, 1936, on a promissory note dated May 26, 1931, which note was payable "on demand after date." Hoganson, the maker, permitted judgment by default to be entered against him. The endorsers demurred to plaintiff's petition on the ground that as to them the action was barred by the 5-year statute of limitations. The demurrer was sustained, and plaintiff appealed to this court. Plaintiff argued that the statute of limitations did not begin to run from the date of the original note but only from the date of actual demand, since payment was to be made "on demand after date." This court, in ruling that the demurrer was properly sustained and that the statute of limitations had run, stated that plaintiff-payee could have brought an action on the demand note the day after it was executed and delivered, but the action was brought more than 5 years thereafter. The cause of action thus accrued on May 27, 1931. The court stated as follows: "It is well settled law here and elsewhere that the statute of limitations begins to run when a cause of action accrues. . . . By failing to make a demand, payee in a note payable on demand cannot do away with the statute of limitations." *Id.* at 283, 281 N.W. at 28. See, also, *Melville Lumber Co. v. Scott*, 135 Neb. 379, 281 N.W. 803 (1938); *Grant v. Williams*, 158 Neb. 107, 62 N.W.2d 532 (1954); *Alexanderson v. Wessmann*, 158 Neb. 614, 64 N.W.2d 306 (1954); 54 C.J.S. *Limitations of Actions* § 201 (1948).

It is clear from this court's prior holdings that Stock's cause of action accrued on February 21, 1974, the day demand *could* have been made. Suit was not filed by Stock until February 12, 1979, and thus his claim against Meissner is outlawed by the applicable 4-year

statute of limitations. The trial court was correct in sustaining Meissner's motion for summary judgment against Stock.

The issue as regards Western is whether or not it could be liable for Meissner's alleged nonpayment for the grain delivered in February 1974, when the effective date of its bond is September 18, 1975. Stock contends that there is such liability and that the statute of limitations as regards Western is 10 years under Neb. Rev. Stat. § 25-209 (Reissue 1979). The pertinent part of Western's bond is as follows: "'NOW THEREFORE, this obligation is such that if . . . the said Principal(s) [Meissner] . . . his agents and employees will pay the purchase price of such grain *upon demand of the owner or seller* . . . then this obligation to be void, otherwise, to remain in full force and effect.'" (Emphasis supplied.)

Stock argues that the bond was breached, and the cause of action against Western accrued, when he made demand on Meissner for payment on December 28, 1978, and Meissner allegedly failed to make payment.

It is true that Western was the bonding company on December 28, 1978. However, it is only logical and practical to construe the language "upon demand of the owner or seller" in the bond to mean when the owner or seller had the *right* to make demand for payment. This *right*, as we have stated, accrued on February 21, 1974, when Stock's cause of action against Meissner accrued. It is not logical that the cause of action against Meissner would accrue on February 21, 1974, but not against his bonding company until December 28, 1978. Under Stock's theory, assuming the 10-year statute of limitations would be applicable, Stock would have until December 28, 1988, to file suit against Western on transactions that occurred almost 15 years before.

"A bond does not cover defaults of the principal occurring prior to the effective date of the bond, unless the bond expressly provides otherwise . . . for it cannot be assumed that the surety intended to be bound by the

past delinquencies of the principal." *Department of Agriculture v. Ackerman*, 34 Ill. App. 3d 796, 797, 341 N.E.2d 48, 49-50 (1975), *rehearing denied* January 2, 1976. See, also, 74 Am. Jur. 2d *Suretyship* § 29 (1974).

We therefore conclude that Western is not liable for any nonpayment by Meissner arising out of the grain transactions in February 1974, and the trial court acted correctly in sustaining Western's motion for summary judgment against Stock.

Where, as in this case, there are no genuine issues as to any material fact and defendants are entitled to judgment as a matter of law, summary judgment may be properly granted. Neb. Rev. Stat § 25-1332 (Reissue 1979).

Appellant Stock's assignments of error are without merit. The judgment of the trial court is affirmed.

AFFIRMED.

CLINTON, J., concurs in result.

STATE OF NEBRASKA, APPELLEE, V. JOSEPH H. NOWICKI, APPELLANT.

309 N.W.2d 89

Filed August 7, 1981. No. 43764.

1. **Investigative Stops.** Police officers may stop any person in a public place whom they reasonably suspect of committing, who has committed, or who is about to commit a crime, and may demand of that person his name, address, and an explanation of his actions.
2. ——. Police officers must have a particularized and objective basis for suspecting the person stopped of criminal activity. The assessment of the totality of circumstances includes all of the objective observations and considerations, as well as the suspicion drawn by a trained and experienced police officer by inference and deduction that the individual stopped is or has been or is about to be engaged in criminal behavior.
3. **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 in-

formation were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense.

4. ——: ——. Probable cause is to be evaluated by the collective information of the police engaged in a common investigation.

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 G. Roderic Anderson for appellee.

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

BRODKEY, J.

Joseph H. Nowicki, the defendant and appellant herein, was charged in the District Court of Douglas County, Nebraska, with possessing a controlled substance, to wit, cocaine, with the intent to distribute, deliver, or dispense in violation of Neb. Rev. Stat. § 28-416 (Reissue 1979). The case was tried before the court on July 22, 1980, and the defendant was convicted of the lesser-included offense of possession of a controlled substance as charged. Nowicki was subsequently sentenced to a term of probation for a period of 2 years, the first 60 days to be spent in the custody of the Douglas County Department of Corrections. He has now appealed to this court, and his sole assignment of error is that the District Court erred in overruling his motion to suppress the cocaine seized as being the fruit of an unlawful arrest. We affirm.

The record on appeal discloses that on May 23, 1980, at approximately 4 p.m., Officer Thomas Gorgen of the Omaha Police Department was informed that one William Yoder had been arrested, and a quantity of suspected cocaine had been seized pursuant to a search warrant issued to Officer Jack Caniglia. At the time of the arrest, Yoder was driving a vehicle owned by

Hezekiah Pittman, who was suspected of distributing controlled substances in Omaha.

In an effort to locate Pittman, the police obtained information which led them to believe that Pittman was staying at the address of 13164 Grover Plaza in Omaha, and that he possibly had in his possession a quantity of cocaine. A search warrant for the address was obtained by Officer Caniglia, which was served upon the lessee of the premises, one Barney L. Boyd. Boyd informed the police that Pittman had spent the previous night at the apartment with another individual known to Boyd only as "Bill." Boyd told the police that Pittman had remained at the apartment until 3 p.m. that afternoon, when Pittman received a telephone call from an anonymous caller informing him that "Bill" had been arrested. The physical description given by Boyd of the person known as "Bill" was similar to the description of William "Bill" Yoder who had been arrested driving Pittman's car. Boyd stated to the police that Pittman had requested a ride to the area of 24th and L Streets in Omaha, and that Pittman was carrying a brown cardboard box when he left the Boyd vehicle.

Upon their return to the Central Police Station, Officers Caniglia and Gorgen were advised by their supervisor, Lt. Robert Olson, that further information as to the whereabouts of Pittman had been obtained from two informants who had provided reliable information in the past. The first informant stated that Pittman was involved in drug activities with Joseph H. Nowicki, who resided at 2312½ L Street with a Caucasian female named Denise Sedan, and that Nowicki was distributing cocaine from that address. The informant also stated that Nowicki was supplied with his cocaine by a black male known as Hezekiah Pittman and that it was probable that Pittman would go to the Nowicki residence if he needed a place to "hide out."

The second informant stated to the police that he had observed Pittman in possession of a quantity of suspected cocaine within the previous 72 hours and that in

all likelihood Pittman would go to the residence of Nowicki to "hide out." In addition, the second informant stated that Pittman owned a blue, two-door Dodge automobile that was parked in that vicinity, in which Pittman might hide suspected cocaine.

Based upon the information stated above, officers were assigned to prepare an affidavit and application for issuance of a search warrant for the apartment at 2312½ L Street, and also for the persons of Hezekiah Pittman, Joseph H. Nowicki, Denise Sedan, and their automobiles. Officers Caniglia and Gorgen were assigned to commence surveillance of the defendant's apartment to determine if Hezekiah Pittman was at that location. It appears that the police were directed to remain in position until the search warrant was completed and brought to the residence. During the surveillance, officers conducting the surveillance observed a blue 1967 Dodge two-door van parked in the Payless Shoe Store parking lot at 24th and L Streets. A check of the vehicle's license indicated that the van was registered to Hezekiah Pittman. Also parked in the lot was a red pickup truck which Officer Caniglia was advised belonged to the defendant, Joseph Nowicki.

At approximately 9:30 p.m. that evening, a Caucasian male and female left the apartment and entered the blue van. The automobile was driven to the front of the building, at which time a black male left the building and entered the vehicle. At this time, Officers Caniglia and Gorgen were directed to follow the parties, and they began to follow the red pickup truck owned by the defendant. While the officers were following the truck, they were advised by Lt. Olson over their radio that they should stop and detain the driver of the truck if they thought he spotted them following the vehicle. The truck proceeded 3 blocks north on 24th Street where it turned into a McDonald's restaurant.

Suspecting that the driver had spotted them, the officers stopped the vehicle in question and had the driver pull it to the side of 24th Street. At this time the

officers obtained the driver's license and registration of the driver of the truck, which identified him as Joseph Nowicki. The defendant was told that the police were conducting an investigation, and Nowicki returned to the driver's seat of his truck. After Nowicki returned to his vehicle, the officers were directed by Lt. Olson by radio to have the party transported to Central Police Station. As the defendant was leaving his truck at the request of the police, Officer Caniglia observed a plastic bag, with a white substance enclosed, protruding from the driver's seat. It appears that there was a tear or slit in the seat, and Officer Caniglia testified that he could observe the plastic bag from where he was standing outside the truck. Officer Caniglia took the plastic bag into his possession. The contents were later identified as cocaine, and the defendant was subsequently arrested for possession of a controlled substance. It appears that while the police were detaining Nowicki prior to his arrest, Officer Gorgen returned to the surveillance area and obtained a police cruiser, which was used to transfer the defendant back to his residence at 2312½ L Street. The warrant for the search of defendant's residence, vehicle, and person arrived approximately 45 minutes later. The police subsequently found on the person of the defendant a small piece of folded magazine paper containing a white substance which was later identified as cocaine.

In his brief on appeal the defendant assigns as error that the District Court erred in failing to sustain defendant's motion to suppress the cocaine seized as being the "fruit" of an unlawful arrest. Defendant's primary contention is that the police did not have probable cause to arrest him as there was no evidence that the vehicle was violating any traffic regulations, or that the defendant was engaged in any other criminal activities. It would appear from the record that the defendant is challenging the investigative stop of his vehicle, rather than the subsequent search of his person.

By virtue of the authority contained in Neb. Rev.

Stat. § 29-829 (Reissue 1979), police officers may stop any person in a public place whom they reasonably suspect of committing, who has committed, or who is about to commit a crime, and may demand of that person his name, address, and an explanation of his actions. In the recent case of *State v. Ebberson, ante* p. 41, 305 N.W.2d 904 (1981), this court considered the standards required for making an investigative stop in connection with the recent opinion of the U.S. Supreme Court in *United States v. Cortez*, __U.S.__, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981). In *Ebberson*, we stated at 44-45, 305 N.W.2d at 907:

"The U.S. Supreme Court has addressed the standards that must be met in an investigatory stop to satisfy the requirements of the fourth amendment in *United States v. Cortez*, __U.S.__, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981). The Court held that an investigatory stop must be justified by objective manifestation that the person stopped is, has been, or is about to be engaged in criminal activity. In determining what cause is sufficient to authorize police to stop a person, the totality of the circumstances — the whole picture — must be taken into account.

"Police officers must have a particularized and objective basis for suspecting the person stopped of criminal activity. The assessment of the totality of circumstances includes all of the objective observations and considerations, *as well as the suspicion drawn by a trained and experienced police officer by inference and deduction that the individual stopped is or has been or is about to be engaged in criminal behavior*. See, *Brown v. Texas*, 443 U.S. 47, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979); *Delaware v. Prouse*, 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed 2d 660 (1979)." (Emphasis supplied.)

This court has held that a police officer is authorized to arrest a person without a warrant if he has reasonable cause to believe that such person has committed a crime. In *State v. Jones*, 208 Neb. 641, 645, 305 N.W.2d 355, 358 (1981), we stated: "'[T]he 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.' " In this regard, we have also held that probable cause is to be evaluated by the collective information of the police engaged in a common investigation. *State v. Stickelman*, 207 Neb. 429, 299 N.W.2d 520 (1980).

In assessing the totality of the circumstances presented by the facts in the instant case, we determine that probable cause existed for the police to arrest the defendant on the evening of May 23, 1980. The police were informed that the defendant resided at 2312½ L Street and that Pittman would probably be at this address. They were also provided a description of the Pittman vehicle and advised that cocaine was sometimes kept in the car. This information was all verified by the police in their surveillance of the Nowicki address, and the fact that William Yoder was arrested while driving a vehicle owned by Pittman, which was found to have a controlled substance hidden inside. The information strongly indicated that Pittman and his acquaintances possessed and dealt in drugs, and the information obtained by the police provided probable cause to believe that the defendant was committing and had committed a crime prior to his arrest.

We also note that once the police had detained the defendant, their observation of the bag of cocaine inside his vehicle was proper, as the bag was in the plain view of the police when the door was opened. See, *State v. Brown*, 195 Neb. 321, 237 N.W.2d 861 (1976); *State v. Sotelo*, 197 Neb. 334, 248 N.W.2d 767 (1977). The evidence was properly seized and received into evidence at trial. Defendant's sole assignment of error is without merit.

The judgment of the District Court must be affirmed.

AFFIRMED.

KRIVOSHA, C.J., dissenting.

I regret that I must respectfully dissent from the majority in this case. While I would generally concur with the principles of law set out by the majority, I believe the facts in this case do not justify the application of those rules. The record discloses that as the officers followed the truck, it pulled into a McDonald's parking lot and the driver ordered food. There was nothing suspicious about the driver or his driving other than it was believed that these individuals had, on other occasions, been involved in drug dealing at 2312½ L Street. There was no evidence that the occupants were at the moment engaged in any illegal activity.

While the defendant was waiting for his food, the officers were advised by Lt. Olson that if the officers thought the driver "had spotted their tail" they should stop him, as a search warrant was being prepared for the residence at 2312½ L Street. The officers then blocked the vehicle's path and stopped it as it was leaving the McDonald's parking lot. The officers advised the occupants that they were conducting an investigation and asked for the defendant's driver's license and registration. The defendant complied with the request. The officers then ran a vehicle check on the registration and were advised by Lt. Olson to arrest the party and transport him to Central Police Station. No reason for the arrest was given. At that point in time the officers had no evidence that any crime had been committed, was being committed, or was about to be committed. All they knew was that the individuals or some of them had been involved in drug dealing and the home at 2312½ L Street was to be searched pursuant to a search warrant, which was then being obtained. It was not until *after* they had arrested the defendant pursuant to instructions by Lt. Olson that they sought to secure the vehicle and for the first time observed the plastic bag protruding from a slit in the seat.

Officer Caniglia, one of the arresting officers, testified that he was ordered to arrest the defendant, take

him to police headquarters, and tow his vehicle before any weapon or cocaine was found. The arrest was in fact then accomplished and the defendant handcuffed before anything was found in the truck.

While the need to combat crime is ever present, we must not disregard the clear mandates of the Constitution. This case now stands for the proposition that if one has a prior criminal record and is known to deal in illegal activity, he or she may be arrested and their persons or properties searched without warrant on the basis of their prior association with crime. Such a conclusion totally annihilates the protections sought to be provided citizens by the fourth amendment to the Constitution of the United States and Neb. Const. art. I, § 7. There is simply no evidence in this record to indicate that prior to the arrest being made anyone associated with law enforcement believed that there were drugs present in the vehicle, or that at the time of the defendant's arrest he was then actually engaged in a drug transaction. Probable cause has been defined as existing if the facts and circumstances known to the officer warrant a prudent and reasonable man in believing that in the case of an arrest the arrestee has committed the offense. See, *Henry v. United States*, 361 U.S. 98, 80 S. Ct. 168, 4 L. Ed. 2d 134 (1959); *Ker v. California*, 374 U.S. 23, 83 S. Ct. 1623, 10 L. Ed. 2d 726 (1963). Mere good faith on the part of arresting officers cannot justify a warrantless arrest. I believe that the motion to suppress should have been sustained.

STATE OF NEBRASKA, APPELLEE, V. RICHARD L. TWEEDY, APPELLANT.

309 N.W.2d 94

Filed August 7, 1981. No. 43876.

1. **Pleas.** Although the preferred procedure for ascertaining whether or not a factual basis exists to support a guilty plea is to inquire directly of the defendant, an examination before sentencing of a presentence report containing such facts is an acceptable alternative.
2. **Sentences: Plea Bargains.** A defendant has no legal basis to rely on a sentence recommended as part of a plea bargain where the trial court has made it clear that it was not in any way bound by such agreement.
3. **Pleas.** A plea of guilty must not only be intelligent and voluntary to be valid but the record must affirmatively disclose that the defendant entered his plea understandingly and voluntarily.
4. **Pleas: Misdemeanors: Constitutional Rights: Waiver.** A defendant who pleads guilty to a misdemeanor in which a sentence of imprisonment is legally permissible is entitled to be informed of the nature of the charges against him, the right to assistance of counsel, the right to confront witnesses against him, the right to a jury trial, and the privilege against self-incrimination, and the record must affirmatively show a voluntary and intelligent waiver of these rights.

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

Robert G. Krafka of Krafka & Sixta, P.C., for appellant.

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

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

HASTINGS, J.

The defendant, Richard L. Tweedy, has appealed from the District Court for Dodge County which affirmed a county court conviction of Tweedy for second offense driving while under the influence of alcoholic liquor. Defendant received a sentence of 90 days in the Dodge County jail and suspension of his driver's license for 1 year. The defendant as-

signs as error the court's refusal to allow the defendant to withdraw his plea because the court had not established a voluntary and intelligent waiver of his constitutional rights when the court accepted defendant's guilty plea; the failure to find a factual basis for the plea; and the failure to follow the sentencing recommendations of the prosecuting attorney. We reverse.

The defendant had initially been charged on August 1, 1979, with third offense driving while under the influence of alcohol. Pursuant to a plea bargain, on September 27, 1979, the complaint was amended to second offense driving while under the influence of alcohol, and the defendant pleaded guilty to the amended charge. The Dodge County attorney's office recommended a 2-year probation to include a $200 fine, loss of driving privileges during probation except for work and probationary purposes, and antibuse and inpatient treatment if deemed necessary by the Dodge County Chemical Abuse Program staff. The court pointed out to the defendant that such recommendation was only that of the county attorney's office and that the court was not obligated to "follow any plea agreement." After hearing from the defendant that he was pleading guilty because he did in fact commit the crime, the county court accepted the plea and ordered the defendant to report to the chief probation officer for a presentence investigation and to the Dodge County Chemical Abuse Program office for evaluation and testing. A presentence report was furnished to the court on October 25, 1979, which contained overwhelming evidence in the section containing the police report to support a finding of driving while intoxicated, including a gas chromatograph test of twenty-hundredths of one percent.

The matter came on for sentencing on December 3, 1979. On that date the court continued the matter until January 3, 1980, and deferred sentencing pending the defendant's successful completion of inpatient treatment at an approved treatment facility of his

choice. The matter again came on for sentencing on May 15, 1980. By that time, the court had learned that the defendant had been terminated from the treatment program because of two unexcused absences. The court ordered the defendant to serve 90 days in the Dodge County jail, and a 1-year suspension of his driver's license. The sentence and conviction were appealed to the District Court for Dodge County and there affirmed.

Defendant's second and third assignments of error may be disposed of rather quickly. The preferred procedure for ascertaining whether or not a factual basis exists to support a guilty plea is to inquire directly of the defendant. However, an examination of a presentence report containing such facts made before sentencing is an acceptable alternative. *State v. Daniels* 190 Neb. 602, 211 N.W.2d 127 (1973); *State v. Leger*, 190 Neb. 352, 208 N.W.2d 276 (1973). We have also suggested that by a defendant admitting that he is in fact guilty of the crime charged, he has furnished a factual basis for accepting the plea. *State v. Hyslop*, 189 Neb. 331, 202 N.W.2d 595 (1972).

There are two answers to the defendant's contention that the trial court failed to follow the recommendations of the county attorney. A defendant has no legal basis to rely on a sentence recommended as part of a plea bargain where the trial court has made it clear that it was not in any way bound by such agreement. *State v. Ristau*, 201 Neb. 784, 272 N.W.2d 274 (1978). Furthermore, the court made it abundantly clear to the defendant that before it would consider probation for the defendant it would be necessary for him to complete a program of inpatient treatment for alcohol. He failed to do so.

There is no merit to either of these two assignments of error.

A more difficult problem is presented by defendant's claim that there was no voluntary and intelligent waiver of his constitutional rights prior to the accept-

ance of his guilty plea. In other words, we are faced with the general question of the applicability of the principles of *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), to misdemeanors. *Boykin* identified the three main constitutional rights waived when a plea of guilty is accepted, i.e., the privilege against self-incrimination, the right to trial by jury, and the right to confront one's accusers. "We cannot presume a waiver of these three important federal rights from a silent record." *Boykin* at 243.

This court has been reluctant to embrace unequivocally the specific holdings of *Boykin*. "This requirement of an item-by-item review of constitutional rights on a guilty plea is a strained and a too extreme construction of those cases." *State v. Turner*, 186 Neb. 424, 425, 183 N.W.2d 763, 765 (1971). However, we did adopt the holding of *Boykin* in principle. "What Boykin says is that the court cannot presume a waiver of federal constitutional rights from a silent record. That case requires that a plea of guilty must not only be intelligent and voluntary to be valid but the record must affirmatively disclose that the defendant entered his plea understandingly and voluntarily." *Turner* at 425, 183 N.W.2d at 765. If we concede that the record must affirmatively show an intelligent plea, understandingly entered, it is difficult to imagine how this can be demonstrated unless that same record discloses knowledge on the part of a defendant as to what rights he is waiving when entering such plea.

In any event, does the *Boykin-Turner* rule apply to misdemeanor proceedings? The courts of several of our sister states have encountered the same problem. In an exhaustive opinion by Tobriner, J., the California Supreme Court in *Mills v. Municipal Court*, 10 Cal. 3d 288, 515 P.2d 273, 110 Cal. Rptr. 329 (1973), held that *Boykin* was applicable to all misdemeanors regardless of penalty. "A misdemeanor defendant no less than a felony defendant relinquishes various constitutional rights by entering a plea of guilty. There is no question,

of course, that in misdemeanor proceedings a defendant retains fully both his right to confront his accusers and his privilege against self-incrimination [citations omitted]; moreover, in this state, every misdemeanor defendant has a right to a trial by jury." *Mills* at 298, 515 P.2d at 280, 110 Cal. Rptr. at 336. "The People have suggested no logical basis for confining the rulings of *Boykin* and *Tahl* to the felony context in which they were enunciated, and we can discern no rational ground for such a distinction." *Id.* at 299, 515 P.2d at 281, 110 Cal. Rptr. at 337. "Under these circumstances, we believe that it would be more expedient simply to provide for an adequate record of a defendant's waivers in all felony and misdemeanor cases, rather than to require the trial court first to make a pre-arraignment determination of the potential sentence a misdemeanor defendant might receive, and then to obtain explicit waivers from those who face imprisonment." *Id.* at 301, 515 P.2d at 282, 110 Cal. Rptr. at 338.

In *Cleveland v. Whipkey*, 29 Ohio App. 2d 79, 278 N.E.2d 374 (1972), the Supreme Court of Ohio reached a similar conclusion. "The Supreme Court, however, did not limit its decisions to felonies nor did it include or exclude misdemeanors. The court only made flat assertions that these rights and privileges applied to criminal cases.

"Academically, and based on sound legal reasoning, these same rules should apply to misdemeanors as well as felonies. Valid reasons have not been presented why the Supreme Court rules regarding waivers of constitutional rights should not apply to misdemeanors as well as to felonies. The labels of 'misdemeanor' and 'felony' should not control whether a defendant is entitled to all of his constitutional rights." *Cleveland* at 84, 278 N.E.2d at 378.

The Michigan Court of Appeals in *People v. Tomlinson*, 50 Mich. App. 655, 213 N.W.2d 803 (1973), apparently following general court rules promulgated

by the Supreme Court, refused to apply the requirements of *Boykin* to "simple misdemeanors," i.e., those where the penalty is less than 6 months' imprisonment. Its reason for such decision was that "less solicitude is required than reciting the litany of constitutional rights which the defendant is waiving" in a case involving a 10-day jail sentence and a $50 fine. *Tomlinson* at 659, 213 N.W.2d at 805.

Although holding that the record did show that defendant was made aware of the constitutional rights which would be waived by a guilty plea, the court in *Crew v. Nelson*, 88 S.D. 162, 216 N.W.2d 565 (1974), held that *Boykin* was applicable to misdemeanor cases. "We first conclude that the Boykin standards of arraignment apply generally to misdemeanor cases. A misdemeanor defendant has the same rights to trial, to confronting his accusers, and to his privilege against self-incrimination. Thus we see no rational basis for making a distinction between a felony and a misdemeanor case." *Crew* at 164-65, 216 N.W.2d at 566.

We do recognize, however, that there is a vast difference between the impact of a waiver of constitutional rights when one's liberty is involved as opposed to his pocketbook. In *Argersinger v. Hamlin*, 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972), the Court held that no person may be imprisoned for any offense absent a knowing and intelligent waiver of counsel. In arriving at that decision, the Court reviewed the authorities providing for specified standards required under the sixth amendment for all criminal prosecutions. These included the requirement of a public trial, the right to be informed of the nature and cause of the accusation, the right of confrontation, and compulsory process for obtaining the attendance of witnesses. "We have never limited these rights to felonies or to lesser but serious offenses." *Argersinger* at 28.

We therefore hold that no defendant may be imprisoned for any offense, whether a traffic infraction, misdemeanor, or felony, absent a knowing and intelli-

gent waiver of his rights as provided for by the *Boykin-Turner* rule. That means that such defendants are entitled to be informed of the nature of the charges against them, the right to assistance of counsel, the right to confront witnesses against them, the right to a jury trial where otherwise authorized, and the privilege against self-incrimination. A voluntary and intelligent waiver of these rights must affirmatively appear from the record.

We realize that this holding may place some additional burdens on some of the municipal and county courts which have not heretofore followed this procedure. Therefore, the rule announced today is to be applied prospectively only, i.e., to guilty pleas taken after the date of the issuance of the mandate in this case.

It remains only for us to apply these principles to the instant case. The defendant was represented by counsel at all stages of the proceedings. (We should mention, however, that counsel was not the same as the one representing the defendant on this appeal.) The defendant was advised that the charges against him had been reduced from third offense to second offense driving while intoxicated. The defendant declared that no threats or promises had been made to him. He was advised that the recommendations of the county attorney as to probation were not binding on the court. The trial court then stated "[t]hat the Court isn't obligated to follow any plea agreement. Do you understand what your rights are in this Court?" to which the defendant replied "Uh—yes"; following which the trial court stated, "Do you have any question about any of those rights at this time that you wish to have explained?" and the defendant said "No." He was told of the possible penalties. The defendant was then asked by the court if he entered "this plea of guilty voluntarily, knowingly, intelligently and with understanding of the consequences of your plea," and he replied "Yes."

It is readily apparent that the *record* fails to disclose

that defendant knew of his right to a jury trial, of the right to confront witnesses against him, or of the privilege against self-incrimination. It is therefore impossible to conclude from a record entirely barren of any facts demonstrating that defendant understood his various rights that the defendant voluntarily and intelligently gave them up by pleading guilty. The case is reversed, defendant's conviction is vacated, and the cause is remanded to the District Court for further proceedings.

Before concluding, however, we cannot urge strongly enough that *all* courts should devise and implement a standard procedure for explaining the various rights to defendants entering pleas of guilty. If this is done, there should be no reason in the future for a court to fail to properly advise defendants of their constitutional rights when offering pleas of guilty. However, we should hasten to add that defense counsel are not immune from their share of criticism in cases of this kind. The fact that we employ the adversary system in the administration of justice does not mean that defense counsel have no responsibility to the court. It is incumbent upon counsel to take the necessary precautions to ensure that the record made adequately demonstrates for the benefit of the court that the defendant has knowledge of his rights and freely and voluntarily waives them before allowing him to plead guilty.

REVERSED AND REMANDED.

COLWELL, Retired District Judge, dissenting.

I must respectfully dissent from the opinion of the majority of the court in this case which reverses the judgment entered by the District Court of Dodge County affirming defendant's conviction in the county court for second offense driving while under the influence of alcoholic liquor and vacating such conviction, which conviction was based upon defendant's plea of guilty to said charge. In his appeal to this court, the

defendant *inter alia* assigns as error the refusal of the court to allow the defendant to withdraw his plea of guilty, contending that there was no voluntary and intelligent waiver of his constitutional rights at the time the court accepted his guilty plea.

The majority of the court in today's action again relies on the case of *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), which case in its opinion pointed out three constitutional rights which are waived upon the acceptance of a guilty plea, to wit, (1) the privilege against self-incrimination, (2) the right to trial by jury, and (3) the right to confront one's accusers. The Court in that opinion stated at 239: "*So far as the record shows, the [trial] judge asked no questions of [defendant] concerning his plea, and [defendant] did not address the court.*" (Emphasis supplied.) The Court further stated at 243: "We cannot presume a waiver of these three important federal rights from a silent record."

In today's opinion, the majority states: "We therefore hold that no defendant may be imprisoned for any offense, whether a traffic infraction, misdemeanor, or felony, absent a knowing and intelligent waiver of his rights as provided for by the *Boykin-Turner* rule." The *Turner* referred to in the above quotation refers to the case of *State v. Turner*, 186 Neb. 424, 183 N.W.2d 763 (1971), which sets forth the rule for accepting pleas of guilty that has been in effect in this state for over 10 years, and which has been consistently followed by other Nebraska decisions since that time. That rule states that a plea of guilty must not only be intelligent and voluntary to be valid but the record must affirmatively disclose that the defendant entered his plea understandingly and voluntarily. In *Turner*, and subsequent cases, the same argument was made, relying specifically upon *Boykin v. Alabama, supra*, that *Boykin* requires an affirmative showing in the record that the trial court advised the defendant of his privilege against compulsory self-incrimination

as well as his right to confront his accusers before a determination of his waiver of these constitutional guarantees. In *Turner*, this court stated at 425, 183 N.W.2d at 765: "We do not interpret Boykin so strictly. What Boykin says is that the court cannot presume a waiver of federal constitutional rights from a silent record. That case requires that a plea of guilty must not only be intelligent and voluntary to be valid but the record must affirmatively disclose that the defendant entered his plea understandingly and voluntarily."

As pointed out by the majority in its opinion, the defendant was represented by counsel at all stages of the proceedings; he was advised that the charges against him had been reduced from third offense to second offense driving while intoxicated; he declared that no threats or promises had been made to him; and he was advised that the recommendations of the county attorney as to probation were not binding on the court. The trial court then inquired of the defendant if he understood "what your rights are in this Court," to which the defendant replied "Uh—yes"; following which the trial court asked if he had "any question about any of those rights at this time that you wish to have explained," to which the defendant responded "No." He was told of the possible penalties for the offense. The court then asked him if he entered his plea of guilty "voluntarily, knowingly, intelligently and with understanding of the consequences of your plea," and he replied "Yes." The court then proceeds to point out in the majority opinion that the record does not disclose that the defendant knew of his right to a jury trial, or of his right to confront witnesses against him, or of the privilege against self-incrimination, and therefore that defendant's plea of guilty to the charge was not a voluntary and intelligent plea. The meaning and extent of the court's language in *Boykin v. Alabama, supra,* have been the subject of discussion and rulings by the courts of

innumerable jurisdictions in this country since the case was decided in 1969, and the majority of the cases decided since that time which have considered the question have held that the express enumeration of the three rights referred to and the express waiver of the accused prior to the acceptance of the guilty plea are not a matter of constitutional due process. The following cases are enlightening as to the status of the rule announced in the *Boykin* case since it was released.

In *Wilkins v. Erickson*, 505 F.2d 761 (9th Cir. 1974), the court discussed the issue in some detail, stating at 763:

"Boykin Does Not Require
Articulation of the Three Rights

"Wilkins relies upon Boykin v. Alabama, *supra*. He contends that since he was not personally advised by the trial judge on entry of his plea that by pleading guilty he was waiving (1) his privilege against self-incrimination, (2) his right to trial by jury, and (3) his right to confront his accusers; that he was unaware of the consequences, and that his plea, therefore, was not voluntarily and intelligently made. Wilkins further argues that the failure of the trial judge to articulate these three rights on the record resulted in a 'silent' record which cannot be supplemented by a post-conviction evidentiary hearing. Accordingly, he wants the opportunity to replead.

"Wilkins relies on the following language from *Boykin:*

'We cannot presume a waiver of these three important federal rights from a silent record.

'What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what a plea connotes and of its consequence. When the judge discharges that function, he leaves a record adequate for any review that may be later sought.'

395 U.S. at 243-244, 89 S. Ct. at 1712. [Footnote reference omitted]

"The district court's decision, however, is supported by Supreme Court decisions subsequent to *Boykin* and several circuits. The rigid interpretation of *Boykin* urged by Wilkins has not been adopted by the Supreme Court in subsequent decisions on voluntariness of guilty pleas. In Brady v. United States, 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970), the Court citing *Boykin*, upheld a guilty plea as voluntary and intelligent even though defendant had not been specifically advised of the three rights discussed in *Boykin*. The *Brady* Court clarified *Boykin* by stating, '[t]he new element added in *Boykin* was the requirement that the record must affirmatively disclose that a defendant who pleaded guilty entered his plea understandingly and voluntarily.' 397 U.S. at 747-748 fn. 4, 90 S. Ct. at 1468. In North Carolina v. Alford, 400 U.S. 25, 31, 91 S. Ct. 160, 164, 27 L. Ed. 2d 162 (1970), the Court stated that in determining the validity of guilty pleas the 'standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.' Specific articulation of the *Boykin* rights is not the sine qua non of a valid guilty plea.

"Other circuits have considered the application of *Boykin* to state prisoner petitions and have held in accordance with Brady v. United States, *supra.* McChesney v. Henderson, 482 F.2d 1101, 1106 (5 Cir. 1973) (The court alternately held that a subsequent state evidentiary hearing could be considered); Wade v. Coiner, 468 F.2d 1059, 1060 (4 Cir. 1972). *Cf.* Todd v. Lockhart, 490 F.2d 626, 627 (8 Cir. 1974) (A subsequent state evidentiary hearing failed to decide the question of voluntariness. On appeal from denial of a writ of habeas corpus by the district court, its judgment was reversed).

"The Ninth Circuit has apparently not passed on the

question. Accordingly, we hold that *Boykin* does not require specific articulation of the above mentioned three rights in a state proceeding. Brady v. United States, 397 U.S. at 747-748, 90 S. Ct. 1463 and cases *supra.*"

Likewise, in *Wood v. Morris*, 87 Wash. 2d 501, 554 P.2d 1032 (1976), the court discussed *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), at great length, and concluded by stating at 507-08, 554 P.2d at 1036-37:

"[W]hile it has been held that a defendant's constitutional rights to a jury trial, confrontation and protection against self-incrimination must be specifically and expressly enumerated by the trial judge and expressly waived by the accused prior to acceptance of a guilty plea, *see In re Tahl, supra* at 131-33 [1 Cal. 3d 122, 460 P.2d 449, 81 Cal. Rptr. 577 (1969)]; *Higby v. Sheriff of Clark County, supra* at 781 [86 Nev. 774, 476 P.2d 959 (1970)], we adopt an interpretation of *Boykin* which does not impose this requirement as a matter of constitutional due process. This is the view of the majority of courts which have considered the question. *See, e.g., McChesney v. Henderson, supra* at 1106-10; *United States v. Sherman, supra* at 305; *Stinson v. Turner*, 473 F.2d 913, 915-16 (10th Cir. 1973); *Wade v. Coiner, supra* at 1061; *State v. Turner*, 186 Neb. 424, 425, 183 N.W.2d 763 (1971); *People v. Kuchulan*, 390 Mich. 701, 704, 213 N.W.2d 95 (1973); *Commonwealth v. Morrow*, 363 Mass. 601, 296 N.E.2d 468, 472-73 (1973); *Merrill v. State*, 87 S.D. 285, 290, 206 N.W.2d 828 (1973). Supreme Court decisions subsequent to *Boykin* make this clear. In *Brady v. United States*, 397 U.S. 742, 25 L. Ed. 2d 747, 90 S. Ct. 1463 (1970), and *North Carolina v. Alford*, 400 U.S. 25, 27 L. Ed. 2d 162, 91 S. Ct. 160 (1970), the court, citing *Boykin*, upheld guilty pleas without any indication that specification of the three constitutional rights enumerated in *Boykin* was required to be made at the time of the acceptance of the pleas. We also note

that in both cases the court relied upon evidence received at post-conviction hearings. We hold, therefore, that there is no constitutional requirement that there be express articulation and waiver of the three rights referred to in *Boykin* by the defendant at the time of acceptance of his guilty plea if it appears from the record, and the clear and convincing weight of extrinsic evidence if the record is unclear on the matter, that the accused's plea was intelligently and voluntarily made, with knowledge of its consequences."

It should be noted that the court includes among the cases in support of its finding that the requirement of *Boykin* is not a matter of constitutional due process the Nebraska case of *State v. Turner*, *supra*. Nebraska has followed the rule set down in *Turner* in at least a dozen cases since *Turner* was decided, including the following cases: *State v. Lewis*, 192 Neb. 518, 222 N.W.2d 815 (1974); *State v. Fowler*, 201 Neb. 647, 271 N.W.2d 341 (1978); *State v. Curnyn*, 202 Neb. 135, 274 N.W.2d 157 (1979); *State v. Hill*, 204 Neb. 743, 285 N.W.2d 229 (1979); *State v. Rouse*, 206 Neb. 371, 293 N.W.2d 83 (1980). I believe it is clear in the instant case that defendant's guilty plea to the charge against him was voluntarily and intelligently entered, notwithstanding the apparent failure of the court to inquire with reference to the three matters set out in *Boykin*. In addition to the verbatim record as set forth in the record, there were other records, facts, and circumstances before the court at that time, including (1) the affidavit for arrest warrant by the arresting officer describing the defendant's erratic driving and the results of his breath test which showed the alcohol content in his blood at the time to be twenty-hundredths of one percent; (2) the journal entry of the arraignment stating that the defendant was advised of the nature of the charge, which was for driving while intoxicated (DWI), third offense; (3) the journal entry of his conviction on September 27, 1979, which recited in part: "[T]he Defendant advised

the Court that he understood his rights, waived his right to jury . . . ." Also, "It was determined that the plea was entered voluntarily, knowingly, and intelligently and with the understanding of the consequences of the plea"; (4) the defendant was represented by retained counsel; and (5) the defendant was familiar with the nature of the proceedings, having twice previously been convicted of DWI. After the plea bargained guilty plea, the sentence was not imposed until almost 8 months had lapsed, during which time the defendant was attempting alcohol rehabilitation. I believe that the facts in this case clearly indicate that the defendant's guilty plea fully complied with the standards set out in *State v. Turner*, 186 Neb. 424, 427, 183 N.W.2d 763, 766 (1971), that: "'The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant'"; and, as further stated in *Turner* at 425, 183 N.W.2d at 765: "This requirement of an item-by-item review of constitutional rights on a guilty plea is a strained and a too extreme construction of those cases." The majority opinion states the rule that the defendant is entitled to be informed of certain enumerated rights, including those that are a basis for his appeal, is to apply only *if imprisonment is imposed.* Such a rule would automatically narrow the holding of *Turner* and our subsequent cases to require an item-by-item dialogue, which is contrary to our established law.

Further, I disagree with the holding of the majority that the *Boykin-Turner* waiver rule applies to all misdemeanors and requires that a voluntary and intelligent waiver of those rights must affirmatively appear from the record. The courts are divided as to whether the *Boykin* rule applies to misdemeanors. In support of its conclusion that it does, the majority opinion cites as its principal authority the case of *Mills v. Municipal Court*, 10 Cal. 3d 288, 515 P.2d 273, 110 Cal. Rptr. 329 (1973), where the court held that

Boykin was applicable to all misdemeanors. However, in that same opinion the court pointed out at 303, 515 P.2d at 284, 110 Cal. Rptr. at 340: "[I]n evaluating the procedures utilized in inferior courts for advising defendants of their rights and obtaining 'on the record' waivers, the realities of the typical municipal and justice court environment cannot be ignored, and that, *so long as the spirit of the constitutional principles are respected*, 'the convenience of the parties and the court should be given considerable weight.'" (Emphasis supplied.) On the contrary, the court in *People v. Tomlinson*, 50 Mich. App. 655, 213 N.W.2d 803 (1973), held that the *Boykin* rule did not apply to simple misdemeanors where the penalty is less than 6 months' imprisonment. The problem of applying the strict requirements set out in *Boykin* to minor criminal matters was early recognized by the advisory committee of the American Bar Association in preparing their tentative draft of "Standards Relating to Pleas of Guilty" in 1967. In their introduction to those standards, it is stated as follows: "The Advisory Committee proposes these standards for application to all serious criminal cases. More simplified procedures, not dealt with in this report, could properly be used for minor traffic offenses and other lesser offenses, such as those typically proceeded against in court without counsel for the prosecution. The category of cases not covered by these standards may well vary from state to state, and will depend upon such matters as the allocation of jurisdiction between courts, the availability of facilities, and the understanding of the general public of the penalties for certain crimes."

It should be remembered that in Nebraska county and municipal courts have jurisdiction of misdemeanor offenses and traffic offenses, and daily handle a very large volume of such cases, generally under adverse circumstances and with limited supportive personnel. It is not unusual for some of those courts to handle in excess of 50 criminal cases during the course

of a single court day. During the calendar year 1980, the county courts in Nebraska processed approximately 190,000 traffic cases and 50,000 misdemeanor and ordinance cases; and during the same period, the municipal courts processed 118,000 traffic, ordinance, and misdemeanor cases. These courts are courts of record and generally utilize tape recording equipment to record the proceedings in such courts. As a general rule, the tapes are destroyed in approximately 60 days. The verbatim records of cases similar to that involved in this appeal are usually brief and are often supplemented by the judges' handwritten notes, findings, and orders, necessitated by the large volume of cases handled and the urgency to make a record of the case and then to proceed with the next case. The majority, in its opinion, recognizes these problems and the necessity of coordinating them with the public's interest in prompt, efficient administration of the judicial system. To require the same degree of care and exactitude in the processing of such cases as is required for the arraignments of defendants charged with felonies and more serious offenses can only result in impeding the efficiency of the judicial system. All that should be required in such cases is that the rule as announced in *State v. Turner*, that the plea of the defendant be voluntary and understandingly made, should suffice. To require a reversal of a conviction based upon a guilty plea made by the defendant because an item-by-item interrogation is not conducted by the trial judge would, in my opinion, be unnecessarily burdensome and would have a crippling effect upon those engaged in enforcing the laws of this state, and upon the judicial system itself. This, I believe, is totally unnecessary and should not be done. In the few and rare instances where injustice is done under the existing system, there is ample opportunity for relief by a defendant through post conviction procedures, as is done in other states, or by further dialogue between the court and the defendant to es-

tablish the existence of other required elements for a guilty plea which were previously not inquired into at the original arraignment. Guilty pleas should not be routinely set aside where it is clear that such pleas were voluntarily, understandingly, and intelligently made, as I believe was clearly true in this case.

For all the reasons stated above, I must respectfully dissent from the opinion of the majority of the court in this case.

I am authorized to state that BRODKEY, J., joins in this dissent.

BOSLAUGH, J., joins in this dissent.

KIRSCH FABRIC CORP., A CORPORATION, APPELLEE, V. BROOKSTEIN ENTERPRISES, INC., A CORPORATION, DOING BUSINESS AS UPHOLSTERY UNLIMITED, APPELLANT.

309 N.W.2d 328

Filed August 14, 1981. No. 43331.

1. **Deceptive Trade Practices.** Comparative advertising which is untrue, misleading, or deceptive is unlawful.
2. **Deceptive Trade Practices: Injunction.** Deceptive trade practices and unfair competition may be enjoined under Nebraska law.
3. **Judgments.** A judgment which is unduly broad and makes prospective findings is erroneous.

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

Irving B. Epstein of Viren, Epstein, Leahy & Coren and Miller & Rowen for appellant.

Thomas E. Johnson and Jonathan R. Breuning of Baird, Holm, McEachen, Pedersen, Hamann & Haggart for appellee.

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

MARTIN, District Judge.

This is an appeal from a decree of the District Court of Douglas County, Nebraska, enjoining the defendant-appellant from specific advertising practices, i.e., using plaintiff-appellee's name and sample books in appellant's radio and television ads.

The facts are as follows. Appellee Kirsch is in the business of selling upholstery fabrics wholesale. Appellant Brookstein Enterprises is in the business of selling upholstery fabrics retail. Both Kirsch and Brookstein sell a striped velvet upholstery fabric manufactured by Baxter, Kelly & Faust, Inc., referred to as "Miami" pattern. Appellant, in February 1978, engaged in radio and television advertising campaigns making comparisons between the appellee's and appellant's goods. The ad objected to is as follows: "This book of Kirsch upholstery samples is used by a number of our competitors. You order from it and wait. Upholstery Unlimited carries a number of similar fabrics on hand. This striped velvet from the book has a suggested retail of $18.60. Our everyday low price is only $6.99 on a similar fabric. On the average chair that's a savings of $70, and on the average sofa that's a savings of $150. Compare for yourself our large on-hand selection at Upholstery Unlimited in the Woolco Center on South 84th Street."

The issues involved here are: (1) Was appellant's advertising misleading, deceptive, or untrue? (2) Does appellant have to "palm off" its goods as the same as another to fall within the purview of the Nebraska Uniform Deceptive Trade Practices Act? (3) Was the injunction too broad?

The contention that those ordering upholstery material from Kirsch had to wait for delivery, the purported savings on upholstering chairs and sofas if material was purchased from appellant, and the use of Kirsch's sample book for comparisons was determined by the district judge to be either misleading or deceptive, and from our review of the evidence de novo, we agree.

Perhaps the main point of contention concerned the following: "Upholstery Unlimited carries a number of similar fabrics on hand. This striped velvet from the book has a suggested retail of $18.60. Our everyday low price is only $6.99 on a similar fabric."

Both Kirsch and Brookstein purchased the "Miami" pattern from the same supplier. Testimony at the trial indicated that in the manufacture of upholstery fabrics "first quality" is fabric with less than seven defects per 35 yards or one per 5 yards, not to exceed seven. Testimony of an employee of the manufacturer supplying both appellee and appellant was to the effect that appellee Kirsch only bought first quality goods, while appellant Brookstein purchased seconds.

Appellant contends that by judicious cutting, etc., second quality goods could be made "similar" to appellee's first quality goods.

The dispute revolves around the definition of "similar." Appellant argues its "Miami" pattern is nearly corresponding or resembles appellee's "Miami" pattern in many respects, even though originally it was second quality goods; that this is not deceptive since it is not "palming off" goods as identical.

Is the word "similar" used in its ordinary sense or is it used in its more restrictive sense, as the appellee contends, so that the consumer is misled and believes he is buying "identical" material at a cheaper price? That is, is appellant "palming off" its goods as being the same as another's?

We believe that the purchaser of upholstery goods would not be deceived regarding the term "similar" as used in this ad; that there is no likelihood of confusion here. The ordinary consumer would know that he is buying something almost the same but not identical when using the ordinary meaning of the word "similar." The price differential is such that no prudent individual would believe he was getting the same goods.

However, if we view the advertising package as a whole, taking into account the misrepresentation as to

having to wait for material ordered, the unauthorized use of Kirsch's sample book, and unsubstantiated comparison as to savings per unit upholstered, there was deception under the common law of unfair competition and the Nebraska Uniform Deceptive Trade Practices Act, Neb. Rev. Stat. §§ 87-301 et seq. (Reissue 1976).

The lower court, therefore, rightly enjoined appellant from the dissemination of false and misleading advertising, except it went too far in specifically enjoining appellant from ever disseminating advertising which utilized appellee Kirsch's name or trade name. In effect, the court enjoined the appellant from prospective acts for which injunction is unfounded and which would be a deprivation of due process.

Judgment of the trial court is reversed with respect to the order enjoining appellant from ever using appellee's name in its advertising. In all other respects it is affirmed.

AFFIRMED IN PART, AND IN PART REVERSED.

McCOWN, J., concurs in result.

HARVEY R. WOOLEY, PERSONAL REPRESENTATIVE OF THE ESTATE OF TY MARTIN WOOLEY, APPELLANT, V. JANET KITTLE, APPELLEE.

309 N.W.2d 805

Filed August 21, 1981. No. 43448.

1. **Jury Instructions: Appeal and Error.** A party may not tender an instruction to the court and then, after an adverse verdict, object to its submission to the jury.
2. ____:____ Failure to object to instructions after they are submitted to counsel for review precludes raising objections to said instructions on appeal.

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

Schneider & Nisley, P.C., for appellant.

Kay & Kay for appellee.

Heard before BOSLAUGH, CLINTON, and BRODKEY, JJ., and REAGAN and NORTON, District Judges.

NORTON, District Judge.

This is an appeal from a jury verdict and the overruling of appellant's motion for judgment notwithstanding verdict or in the alternative for a new trial. We affirm.

The original action was for wrongful death, brought by Harvey R. Wooley, personal representative of the estate of Ty Martin Wooley, deceased, hereinafter referred to as Wooley, against one Janet Kittle, hereinafter referred to as Kittle. The jury returned a general verdict in favor of Kittle. In his appeal Wooley assigns seven errors. For the purposes of this decision we will consider only whether the trial court erred in giving certain instructions to the jury.

Ty Martin Wooley, six-year-old child of Harvey R. and Coralotta Wooley, died as the result of injuries received on October 15, 1978. There is no question that the injuries were the result of an accident involving a 1972 Caprice automobile, owned and operated by Kittle at that time.

Wooley, his wife, a daughter, and the decedent lived in a residence located in Key Estates Mobile Home Park at North Platte, Nebraska, at the time of the accident. The park consisted of 235 lots with approximately 600 people living therein, about half of whom were children. There were no sidewalks adjacent to the lots, nor were there any hard-surfaced play areas or playground equipment. There were two dirt play areas. Evidence indicated that children played in the streets, which were hard-surfaced, and that pedestrians used the streets to move from one area to another.

The Wooley home was located on a cul-de-sac to-

gether with other homes, including that of Kittle and her family. There were four lots on each side of the cul-de-sac. The cul-de-sac was a dead-end street, running south from an east-west street. The Wooley home was located on the east side of the cul-de-sac, and the Kittle home on the west side. Immediately adjacent to the street in front of the Kittle home was a hard-surfaced parking slab 20 feet in depth and 17 feet 9½ inches in width, with space sufficient to park three automobiles. This parking slab was located approximately 13 feet directly east of the Kittle home. Running generally northwest from the northwest corner of the parking slab was a sidewalk approximately 38 feet in length, ending at the front porch of the Kittle home, which porch was located on the northeast corner of the house. The house itself generally ran from north to south, with the front facing to the east.

On the day of the accident Kittle and her husband left their home shortly after lunch to attend a Girl Scout pinning ceremony. They took with them their three children and two other girls. At that time they were riding in the 1972 Caprice automobile, which had been purchased the day before the accident. Kittle's husband was driving. The ceremony lasted about 1½ hours, after which they returned to their home. The Caprice automobile was at that time parked in the middle of the parking slab facing west. Parked immediately north of the Caprice and on the north part of the slab was a Datsun station wagon belonging to Kittle's husband. The Kittle family went into their home. Shortly thereafter, Kittle realized that she had to purchase a present for her older son to take to a birthday party. Together with that son she left the home and walked to the Caprice. She noted a child by the name of John Mashek standing in the front yard of his home, which was located directly across the street from her home. She saw no other children either in the street or near to it. She entered the Caprice

from the left side and her son entered from the right side. After adjusting the seat to compensate for the size difference between her husband and herself she started the engine of the automobile. At that time her daughter came out of the house and stood in front of the Caprice. A conversation ensued, and Kittle stuck her head out of the left side window to talk with her daughter. She then looked in the outside rearview mirror and did not see anything. She stated that she looked both to the north and south. She then adjusted the inside rearview mirror and could still see John Mashek standing in his yard. Kittle then turned to her son and said, "Well, how many bicycles or something do we have to move now?" The question was based on the fact that bicycles and other items would be left upon occasion in the street. Kittle and her son both turned and looked out of the rear window of the Caprice. The only thing visible was John Mashek, who was standing in his yard and looking at Kittle. Kittle remained in a turned around position and proceeded to back the automobile. After going a short distance into the street she felt a bump, caused by something under the car. There was no apparent audible sound. She stopped the automobile, changed gears, and then pulled forward. She could not recall a bump when she drove forward. She thought she had run over a toy.

Kittle then exited the automobile and walked to the rear, at which time she discovered Ty Martin Wooley lying in the street with his feet toward the north and his head toward the south. He had obvious injuries. Beneath him was a skateboard. Evidence in the record indicates that children had been observed riding skateboards on their stomachs prior to the day of the accident. The child never recovered consciousness, and died shortly thereafter.

Two of the assignments of error deal with instruction Nos. 9 and 15 which were given by the trial court. Instruction No. 9 was an instruction requested by

Wooley and appears in the following language: "One of the issues in this case is whether the accident was caused by the conduct of Ty Martin Wooley. If you find the sole proximate cause of the accident was the conduct of Ty M. Wooley, then your verdict should be for the defendant. However, if the plaintiff has proved by a preponderance of the evidence, that some negligence of the defendant as set forth in Instruction No. 2 was the proximate cause or a proximately contributing cause of the accident, then the conduct of Ty M. Wooley could not have been the sole proximate cause thereof, then your verdict on the issue of negligence should be for the plaintiff." Instruction No. 15 was an instruction running to the question of contributory negligence on the part of the decedent's mother, in the following language: "If a mother fails to exercise reasonable care over her child to prevent him from getting out onto a roadway and, as a consequence of the failure, the child did get on the roadway and is killed, the mother's failure to exercise due care constitutes contributory negligence." Both of these instructions were included in the set of proposed instructions given to counsel for the parties prior to submission of the case, and were approved without exception by counsel for Wooley.

Wooley's argument in support of his contention that the giving of instruction No. 9 was error on the part of the trial court actually becomes twofold in its thrust. In essence, he says that this instruction should not have been given in view of the fact that the amended answer of Kittle alleges that the death of the decedent was "proximately caused and contributed to by the negligence of the plaintiff's decedent . . . ." Thus, says Wooley, the manner in which Kittle has framed this defense becomes in actuality a judicial admission by Kittle that the actions of the decedent were not the sole proximate cause of the accident but, if anything, were only contributing; that inasmuch as a child of tender years, such as the decedent, is incapable of

contributory negligence as a matter of law, the giving of instruction No. 9 permitted the jury to speculate on the issue of sole proximate cause, which issue had been removed by Kittle's admission; and that this error resulted in an unconscionable verdict.

This argument is not well taken. The language used in the amended answer by Kittle, while not stated in the words "sole proximate cause," does not say what Wooley claims. To imply that the phrase "proximately caused" should be so narrowly construed within the context in which it is used would simply frustrate the purpose of the law. Of greater importance, however, is the fact that instruction No. 9 was initially requested by Wooley. It is to be presumed that he was as familiar with the pleadings when the instruction was tendered as he is in this appeal. A party may not tender an instruction to the court and then, after an adverse verdict, object to its submission to the jury. *Kaufman v. Tripple*, 180 Neb. 593, 144 N.W.2d 201 (1966).

The other part of the problem with instruction No. 9 is, in reality, an implication which arises when it is read in connection with other instructions submitted to the jury. Is there a possibility that the giving of this instruction, coupled with certain others, might have tended to raise in the minds of the jury a right to speculate on the contributory negligence of the decedent and his mother acting together, leading to a conclusion that this total negligence was sufficient to defeat Wooley's claim? However, it is noted that prior to trial Wooley moved in limine to restrict evidence of contributory negligence on the part of the decedent, which motion was sustained by the trial court. Also, a reading of the instructions in total, and particularly No. 8, indicates that the trial court sufficiently cautioned the jury on the fact that a child of tender years is incapable of contributory negligence. It is fundamental that in the absence of any evidence of misconduct by counsel in arguing the case, or a showing to the contrary, it is to be presumed that the jury

followed the instructions given by the court. There is no evidence of either in this case.

On the basis of the foregoing, one is led to the inescapable conclusion that there is no merit to Wooley's argument that the giving of instruction No. 9 was error on the part of the trial court.

Wooley also objects to the giving of instruction No. 15, arguing that there was insufficient evidence to support this instruction. Once again, it is to be noted that his counsel did not object to this instruction at the conference on instructions held after the reception of evidence and when the parties had rested. Failure to object to instructions after they are submitted to counsel for review precludes raising objections to said instructions on appeal. *Flinn Paving Co., Inc. v. Sanitary & Improvement Dist. No. 227*, 198 Neb. 542, 254 N.W.2d 78 (1977).

A review of the evidence received at the time of trial discloses that the mother of the child had lived in the Key Estates Mobile Home Park, at the same location, for approximately 4 months preceding the accident of October 15, 1978. There is nothing to indicate that she was confined to the limits of her home, and in fact there is evidence that she participated in family activities which took her out and about the park. One could therefore logically assume that she was familiar with the general physical nature and construction of the area and the lack of playground facilities for the use of children. On the day in question, and at the time of the accident, she was inside her home "working around the house." She acknowledged that she was responsible for two children at that time. She knew her son was outside "at the Mashek place playing with John." She stated that she "could see him from the window." However, she did not see the accident. It would appear that there was sufficient evidence presented to justify the giving of instruction No. 15.

There being no error on the part of the trial court in the giving of these two instructions, the verdict

of the jury and the judgment of the trial court in overruling the motion for judgment notwithstanding verdict or a new trial are affirmed.

AFFIRMED.

IN RE INTEREST OF MARGARET BURBANKS, MARY RIMA, AND MELODY RIMA, CHILDREN UNDER THE AGE OF 18 YEARS. STATE OF NEBRASKA ET AL., APPELLEES, V. WAYNE RIMA AND SHIELA RIMA, APPELLANTS.

310 N.W.2d 138

Filed September 11, 1981. No. 43592.

1. **Appeal and Error.** Under Neb. Ct. R. 8.a.2.(3) (Rev. 1977), we may, on appeal, notice plain errors not assigned.
2. **Parental Rights.** Parental rights may not be terminated except by clear and convincing evidence.
3. **Guardians Ad Litem: Waiver.** A guardian ad litem may not waive the substantive rights of the ward, but must require proper legal proof.
4. **Parental Rights.** Parental rights may not be terminated under the following provision of Neb. Rev. Stat. § 43-209(6) (Reissue 1978): "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," except where the correctional efforts have been directed to the conditions upon which the adjudication was based.

Appeal from the District Court for Red Willow County: JACK H. HENDRIX, Judge. Reversed and remanded with directions.

Terry Malcom of Colfer, Lyons, Wood, Malcom & Goodwin for appellants.

Arlan G. Wine, Special County Attorney, for appellees.

Bert E. Blackwell, guardian ad litem, for minor children.

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

CLINTON, J.

This appeal involves three separate actions for the termination of the parental rights of Wayne and Shiela Rima to three children, Margaret Burbanks, Mary Rima, and Melody Rima. The county court of Red Willow County, after hearing, granted the prayer for termination and, on appeal to the District Court, the judgment was affirmed. The three cases were consolidated for trial in the county and District Courts and for argument and briefing in this court.

The parents appeal to this court and make and argue the following assignments of error: (1) The evidence does not sustain the finding of the court that their parental rights should be terminated on the ground stated in Neb. Rev. Stat. § 43-209(6) (Reissue 1978), to wit, "reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the determination," made at the adjudication hearing, namely, that the parents have failed and neglected to provide "special care made necessary by the mental condition of the [children]," Neb. Rev. Stat. § 43-202(2)(d) (Reissue 1978); (2) It is not proper to terminate parental rights except for intentional conduct detrimental to or wanton disregard for the welfare of the children; and (3) It is improper and unlawful to terminate parental rights for the principal purpose of facilitating adoption when the record establishes that this is the purpose of the proceedings.

The joint brief of the county attorney and the guardian ad litem for the children does not directly join issue with the position taken by the parents in their brief. Rather, the appellees argue that proof of the Rimas' poor financial condition and lack of ability to provide adequate nutritional and basic child care justifies the termination. They also take the position that remedial measures taken under the court's supervision under the provisions of § 43-209(6) need not be directly related to remedying the conditions or situation upon which the adjudication was based: in this instance, the

alleged mental condition of the children and neglect of the parents to provide special care directed to that condition.

A proper perspective for determining the issues raised on this appeal can be set only by summarizing the statutory framework governing the proceedings and the actual proceedings as they occurred in this case.

The original jurisdiction of courts in juvenile matters is defined by § 43-202. Six areas or grounds of jurisdiction are defined. The particular section of that statute under which the court found it had jurisdiction, as alleged in the supplemental petition on which the case was tried, was that subsection which provides: "(2) Exclusive original jurisdiction as to any child under the age of eighteen years . . . (d) whose parent, guardian, or custodian neglects or refuses to provide special care made necessary by the mental condition of the child." Section 43-209 lists six grounds upon which parental rights may be terminated. The ground upon which the court terminated the parental rights was the following: "(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.) § 43-209.

Neb. Rev. Stat. § 43-206.03 (Reissue 1978) prescribes the rules of procedure applicable to juvenile cases. The portion of the proceeding applicable in this case may be summarized as follows. Subsections (3) and (4) of the statute separate the proceedings into two parts. First, the court must determine whether or not the child comes within one of the categories described in § 43-202. This is referred to as the adjudication portion of the hearing, and in cases where subsections (1) and (2) of that statute are applicable, the finding must be supported by a preponderance of the evidence and the court must designate which subdivision or

subdivisions the child is within. The statute then provides that the court shall proceed to an inquiry into the proper disposition to be made of such child.

This court has held that parental rights may not be terminated except by clear and convincing evidence. *State v. Jenkins*, 198 Neb. 311, 252 N.W.2d 280 (1977). Review by this court is de novo on the record. *State v. Jenkins, supra.* We also may, of course, notice plain error not assigned. Neb. Ct. R. 8.a.2.(3) (Rev. 1977). We reverse the cause and remand to the District Court for further proceedings.

We, therefore, first examine the evidence to determine whether the adjudication finding that the parents neglected or refused to provide special care made necessary by the mental condition of each child is supported by a preponderance of the evidence and whether the determination made by the court that reasonable efforts by the parents under the direction of the court have failed to correct the condition is proved by clear and convincing evidence.

Before entering upon that inquiry, a brief reference as to what occurred procedurally is appropriate.

The original petition filed in the county court on May 25, 1976, alleged that the children were neglected because of the mental retardation of the parents and prayed for an award of temporary custody of the children to the Department of Public Welfare of Red Willow County. The parents, on June 4, 1976, signed a stipulation agreeing to the placement of temporary custody of the children in the Red Willow County Department of Public Welfare. A guardian ad litem was apparently appointed for the parents on the same day. The children had been removed from the home about the time of the filing of the petition in the latter part of May. Journal entries dated June 4, 1976, and November 10, 1976, recite that the Rimas were questioned by the guardian ad litem and that they understood the nature of the stipulation they had signed. There is in the record another order dated July 23,

1976, appointing a guardian ad litem. The reason for the multiplicity of these orders does not appear and the bill of exceptions contains no evidence with reference to the testimony.

After this, the guardian ad litem resigned because he had been elected or appointed county attorney and would have had a conflict of interest, and a special prosecutor was appointed.

On March 16, 1977, supplemental petitions were filed in the county court reciting that on *June 4, 1976*, each child was a neglected child and, without specificity, alleging that the parents "have repeatedly neglected the child and refused to give the child necessary parental care and protection." The supplemental petitions repeated the allegations that the parents were, because of mental deficiency, unable to discharge parental responsibilities and that the condition would continue for an indeterminate period. They further alleged that the child "suffers from certain mental and physical deficiencies and needs special parental care and it would be in the best interests of said child to terminate all parental rights."

A guardian ad litem for the parents was appointed on March 16, 1977, and a guardian ad litem for the children was appointed on June 17, 1977. The first hearing at which any evidence was adduced was on June 17, 1977. It is to be noted that this was more than 1 year after the proceedings were first begun. That hearing was the first of a series, continuing at intervals during the summer of 1977. At these hearings, the testimony covered the period beginning sometime in 1974, when, apparently, the Department of Public Welfare first began working with the Rimas, until the summer of 1977. At that time the children had been in foster care for more than a year.

At the conclusion of these hearings, on September 22, 1977, the two guardians ad litem and the special county attorney entered into stipulations as follows: "1. That the said [name of child] is a dependent and

neglected child within the meaning of Nebraska R.R.S., Section 43-206.03 and Nebraska R.R.S., Section 43-202 (2) (D), in that the parents, Wayne Rima and Sheila [sic] Rima, have neglected or refused to provide special care made necessary by the mental condition of the child.

"2. That the parties hereto jointly Stipulate that the Court may enter an Order granting the care, custody and control of said minor child to the Department of Public Welfare for placement in a Foster Home. That the Court shall further Order that the placement of said child in the custody and control of the Department of Public Welfare shall continue until such time as it is shown to the Court that Wayne Rima and Sheila [sic] Rima are able to provide the special care made necessary by the mental condition of the children or until further order of the Court.

"3. That Thomas Blount, Special County Attorney, in and for Red Willow County, Nebraska, Stipulates that the Court may enter an Order dismissing that portion of the proceedings pertaining to and praying for the termination of the parental rights of Wayne Rima and Sheila [sic] Rima." Pursuant to those stipulations, the court entered orders finding that: "IT IS THEREFORE, ORDERED, that the care, custody and control of the said [name of child], a child under the age of Eighteen (18) years, is granted to the Department of Public Welfare for placement in a Foster Home until such time as it is shown to the Court that Wayne Rima and Sheila [sic] Rima are able to provide the Special Care made necessary by the mental condition of the children or until further order of the Court.

"IT IS FURTHER ORDERED, that Wayne Rima and Sheila [sic] Rima, the parents of the minor child, shall work with and cooperate with the Department of Public Welfare and the Multi-County Social Service Unit in an effort to be able to provide for the Special Care made necessary by the mental condition of the

child and they shall make all reasonable efforts to correct the conditions leading to the determination herein."

In November 1978, the county attorney filed motions in each of the cases to terminate the parental rights. The motions recited that on June 4, 1976, the child was found to be dependent and neglected; that Multi-County Social Service Unit 122 (hereinafter M-CSSU) has made reasonable efforts to correct the conditions necessitating the removal of the child from the home, but the efforts have been unsuccessful in correcting said conditions; that the child has been living in a foster home since before June 4, 1976; and that the foster parents would make suitable adoptive parents and are willing to adopt if the parental rights are terminated.

On December 22, 1978, the county attorney filed a motion applicable to all three children to terminate parental rights. It, too, recited that the children had been neglected and dependent as defined by § 43-202(2); that on September 22, 1977, the three children had been found by the court to be dependent and neglected as defined by § 43-202(2)(d) for the reason that the parents, Wayne and Shiela Rima, neglected or refused to provide special care made necessary by the mental conditions of the children; that from October 3, 1977, to November 30, 1978, M-CSSU made reasonable efforts under the direction of the court to help correct the conditions leading to the determination stated in paragraphs 2 and 3, but these have been unsuccessful in correcting the conditions; and that it would be in the best interests of the children that parental rights be terminated.

In April of 1979, the disposition hearing was held, evidence was adduced, and on May 1, 1979, the court entered an order terminating the parental rights and awarding custody and control of the children to the Department of Public Welfare of the State of Nebraska. The findings upon which the order was based were

the following:

"1. Above said minor children have previously been found by this Court to be children as described in Subdivision (1) and (2) of Section 43-202[(2)] R.R.S. 1978 Cumulative Supplement.

"2. Reasonable efforts, under the direction of the Court, have failed to correct the conditions leading to the determination as hereinabove set forth in paragraph #1.

"3. It is in the best interest of said minor children to terminate the parental rights of natural parents, Wayne and Shiela Rima to said children.

"4. Care, custody and control of said minor children should be awarded to the State of Nebraska, Department of Public Welfare."

We will now summarize separately the evidence adduced at the two hearings. The period covered by the evidence at the adjudication hearing related to a period beginning sometime in 1974, when the Department of Public Welfare apparently began working with the Rima family, through the summer of 1977. At the time the children were removed from the home of their parents in the latter part of May 1976, their approximate ages were: Melody, 3 months; Mary, 19 months; and Margaret, 3 years 4 months.

Prior to their removal, Margaret was attending a school apparently operated by M-CSSU, called the Child Development Center (hereafter CDC). The function of this school was to enhance the social development of children having handicaps.

The evidence presented tended to support the conclusion that the Rima children were lagging in physical development and did not appear well nourished; that a sufficient quantity and variety of foods were not always on hand in the home; and that Shiela, the mother, lacked adequate knowledge in the matters of balanced nutrition and meal preparation. This evidence was based upon the testimony of a health department nurse who visited the home at

2-month intervals for a period of about a year and a half and a staff homemaker who visited the home about 80 times from July 1974 until September 1976. These two witnesses regarded their efforts to teach and motivate Shiela as unsuccessful.

A particular complaint made with reference to Melody was that the mother was feeding her whole cow's milk to which Karo syrup was added, instead of the formula which the doctor recommended. Shiela testified that she had used the whole milk and Karo syrup combination for 3 weeks before the child was removed from the home and that the prior use of the formula suggested by the doctor did not agree with the baby. She made the change on the recommendation of her mother. At birth, Melody weighed 6 pounds 4 ounces. At age 3 months she weighed 8 pounds 6 ounces, and at that time, a few days before removal, she was hospitalized for examination. After 6 months of foster care, Melody weighed 15 pounds 5 ounces, which was light for her age, approximately the fifth percentile.

No medical or other expert evidence was introduced to support the allegation of mental retardation of the parents. The head of the M-CSSU testified that, in her opinion, the Rimas did not have the mental capability to educate their children and did not have the mental ability to discharge parental responsibilities. The parents were called by the State as witnesses. The father testified that he had been an inmate of the Beatrice home for 10 years, ending in 1968. According to his testimony he was confined for a sexual crime that he was alleged to have committed. No records from the Beatrice home were admitted in evidence. He acknowledged that he is illiterate. His answers, however, were responsive to the questions asked. However, it may be inferred that he did not understand some of the questions. He was asked if he ever communicated with the children and whether his wife ever communicated with the children. As to himself,

he said, "No, not really." As to Shiela he said he did not know. However, later, when the questions were phrased differently, he indicated that both he and his wife talked to the children. He testified to the part he played in the care of the children, such as feeding one while Shiela fed the other, helping "potty-train" Margaret by putting her on the stool, giving "horseback" rides, and putting the children to bed at night. He stated that he loved his children and did not want them taken from him. He further testified as to the kind of meals prepared by his wife, which testimony contradicted that of the previous witnesses. Wayne's testimony was that Shiela prepared suppers which consisted of meat, potatoes, vegetables, and canned fruit.

He further stated that he had been trained at Milford as a short-order cook; however, the evidence does not indicate that he ever worked at that employment. His employment during his marriage had been for a roofing company as an operator of the hot pot; for a doctor (apparently a podiatrist) making, in Wayne's words, "patterns . . . for correcting the feet"; and as a dishwasher. He stated that he had worked for about a year in each of the jobs. All the jobs were at or near minimum wages, ranging from $2.30 to $3.25 per hour. He acknowledged that at times he had not worked and that this was because his stomach bothered him and he was sick on those occasions. He apparently did not understand arithmetic, as the total wages he said he earned during a 2-week period when he worked fulltime did not seem to correspond to the wage rate.

Shiela's answers were also responsive to the questions asked. Her testimony as to meal preparation contradicted that of the social workers. It is apparent that she is not a very intelligent woman. She testified that she asked that the "agreements" (to which we will make later references) be read and explained to her because she did not understand the big words. One of the social workers testified that when written

messages were sent to Shiela from the school, she always asked the social worker what they said. Shiela testified that she loved her children and did not want the children taken from her and that she would have liked to visit them more often than was permitted after they were taken away.

At the time in 1976 when the Rimas signed the consent to have the children placed in temporary care of the Department of Public Welfare, Shiela testified they were having financial difficulties, Wayne being unemployed at that time.

The evidence indicates that the family income consisted of Wayne's earnings, a disability check received by Shiela, and aid to dependent children. Shiela's disability check was $167.80 and was Supplemental Security Income. Her disability apparently made the family eligible for the ADC payments; the amount of the latter payment varied, depending upon Wayne's income, and, during the 2 years before the children were removed, it varied from the maximum of $294 when Wayne was unemployed, down to $122.46.

Shiela testified that her disability was because of difficulty with her eyes and with her hands. One of the social workers testified, apparently on a hearsay basis, that the disability was based upon her mental incapacity. Shiela had been receiving these payments since she was 17 years of age. At the time of the hearing she was 26.

The evidence as to the mental condition of the children consisted of the testimony of the director of the CDC and four short letter reports from physicians. A good deal of this evidence relates to a time after the children were taken from the home.

The director of the CDC made a first acquaintance with the two older children, Margaret and Mary, at the CDC in September of 1975. At that time Margaret would have been about 2 years 7 months of age and Mary about 11 months of age. She saw Melody at her home shortly after her birth. Margaret had been

attending the CDC from sometime prior to September 1975 and was still there at the time of the director's testimony on June 22, 1977, more than a year after being placed in foster care. Mary did not begin attending the center until January 1977, roughly 7 months after being placed in foster care.

The director of the school testified that Margaret was tested and then certain "goals" were established for her and the teaching was directed to accomplish those goals. These goals were established on October 13, 1975, when Margaret was 2 years 8 months of age and were, according to the witness' testimony, as follows: "Margaret will eat with a spoon without spilling it's [sic] baby's food; Margaret will pull her pants up after toileting without prompting; Margaret will put on an outside garment such as a coat; Margaret will spontaneously name 25 noun pictures; Margaret will point to familiar objects — this was once worked on in previous goals — in a book on request, objects that we knew she knew; Margaret will demonstrate an unspoken awareness of mind by not allowing personal objects to be shared; she will greet peers when reminded by saying 'hi'; she will match primary colors; she will obey commands of stop and go when on a walk; she will identify by pointing five body parts on command: ear, nose, mouth, eyes and hair."

As time went on, new "goals" were established. After 6 months Margaret did not speak in sentences, but had a vocabulary of about 60 words. The testing referred to in the paragraph above was referred to as the "Portage" test. It tested the child in five separate areas. The test was not designed to determine whether the child's environment was at fault or whether deficiencies were due to innate intelligence. The areas of testing were self-help, where a "normal" 3-year-old would have 47 specific skills; cognition, where the child should have 52; motor skills, where the child should have 74; language, where the child should have 53; and socialization, where the child

should have 49. Margaret, when tested, had 36 of the self-help skills, 40 of the cognition skills, 57 of the motor skills, 33 of the language skills, and 14 of the skills in socialization.

The testimony indicated that all children did not develop at the same speed, and the witness stated she did not know whether the tests took that into account or not. The only foundation laid for the validity of the Portage test was that it was used in other like schools in the State of Nebraska and had been developed by six people in the State of Wisconsin. By June of 1976 Margaret had achieved most of the goals. The witness rendered her opinion that Margaret was a mentally retarded child and recommended to the parents that when Margaret entered school she be placed in special education.

The witness further recommended that Margaret, whether she remained in foster care or returned to her parents, continue in the CDC. She also testified that a learning disability does not necessarily assume or show that there are environmental problems, and that learning disabilities can exist without environmental problems.

Melody was enrolled in the school in February 1977, that is, at the age of 1 year, and after she had been in foster care for about 9 months.

Mary entered the CDC in March of 1976 at about 18 months of age and about 2 or 3 months before she was removed from the home. Mary was not given the Portage test until January of 1977, after having lived in foster care for 7 or 8 months. She scored 34 out of 52 in cognition; 35 out of 47 in self-help; 51 out of 74 in motor development; 23 out of 53 in language; and 29 out of 49 in socialization. In the witness' opinion Mary was mentally retarded.

As previously mentioned, the sole medical evidence adduced was received in the form of letter reports from physicians. Two of these are extremely brief. The first was dated July 26, 1974. It recited that because of

the "mental limitations" of the parents and "the limited social and economic environment of the Rima child . . . she would benefit from the Child Development Center." Although no child was identified in the report, the date of the letter, taken together with the evidence we have already recited, would indicate that the child referred to was Margaret. A foundation for the various conclusions in the letter was not laid.

The second letter pertained to Mary and was dated March 19, 1976. It was addressed to the Red Willow County Welfare Department and stated: "In pursuant [sic] to our conversation I just want to affirm that Mary Alice Rima is physically fit for school. She needs more attention with regard to her social development, and also has a need for evaluation for her diet."

The third letter was dated May 24, 1976. It referred to "screening" examinations of the Rima children and stated that Melody had serious growth retardation, weighing only 8 pounds 6 ounces at 3 months, and that she had lost weight in the last month. It also stated that the child was anemic and needed better nutrition. As to Mary, it stated that she was a very little girl, in the tenth percentile for weight, and that she was very docile, which was unusual for her age. It suggested that she needed more adult attention and nutrition. As to Margaret, the report recited that she was 3 years of age, somewhat small for her age, and docile. It suggested that she needed more nutrition and perhaps more adult attention. The letter recommended that the infant, Melody, be admitted to the hospital.

The fourth letter related to Melody and was dated January 11, 1977. It referred to a medical history given by the director of the welfare department. It recited the birth weight was 6 pounds 4 ounces and that prenatal care was not given until 1 month prior to birth. It noted that there were no neonatal problems. At the time of examination she was in the fiftieth percentile for height and in the fifth percentile for weight, 15 pounds 5 ounces. Problems noted at that

time were: (1) Otitis for the past month for which she was being treated; and (2) Microcephaly (small skull), otherwise the skull was normal; the doctor "imagine[d]" the small skull was inherited, but would need skull measurements of the parents to determine whether their skulls were within normal limits; and (3) Developmental delays "most likely the result of the microcephaly, which again may well be hereditary in origin." He recommended that she be followed as to her weight as well as head circumference and that, depending on what the parents' head circumferences were and how Melody developed, perhaps future testing would be needed. He recommended she be entered in the CDC at McCook. It is to be noted that at this time Melody had been in foster care for 7½ months.

The foster father of Margaret was called, as was the first foster mother of Mary and Melody. Their testimony was limited to the period of the first 30 days that the children were in their care. The substance of the testimony of Margaret's foster father was that Margaret was very quiet, very obedient, and ate well; she did not sleep well at night; she played best with children about a year younger than herself; she had to be urged to get out of bed by herself; she was slow in speech and could not count; and she was thin compared with other 3-year-olds. She laughed when her foster parents played with her. He stated that he (and apparently his wife) wanted to adopt Margaret. He and his wife were the parents of a 9½-year-old daughter afflicted with cerebral palsy. When Margaret was first in the home, the following incident occurred. They placed their child in a wheelchair and put a pillow or other padding under her feet. Margaret, unknown to them, observed this and the next time the child was placed in the wheelchair by her father, Margaret, on her own initiative, obtained a pillow and put it in place for the child's feet.

The temporary foster parent of Mary and Melody

had these children in her care from May 1976 to the first of December 1976, and again had Melody in temporary care from January 1, 1977, to April 1, 1977. The foster mother had picked up Melody at the hospital in May 1976 after the child had been there for 3 days. At that time, the child weighed less than 10 pounds and was pale and limp. Mary had been picked up at the social service office within about 10 minutes of the time she was removed from her grandmother's home. Mary did not talk; she did not walk well, having a rather peculiar gait; she ate "voraciously"; and she ate with her fingers. Some time elapsed before she played with the other children. When she was received she had a distended stomach. A cleft lip was partially repaired surgically while the child was in her custody. It took about a month before Mary began to respond and want to play with her foster father.

Following removal of the children from the Rima home, the Rimas and the M-CSSU entered into two "agreements" prepared by the M-CSSU. The first covered the period from October 3, 1977, through January 11, 1978, and was signed by the Rimas; the second covered the period from January 12, 1978, through June 30, 1978, and was executed by the guardian ad litem for the parents but not by the parents. These agreements recited what was expected of the Rimas by the agency and what the agency would do. The first agreement required: (1) Wayne to maintain steady and full-time employment; (2) Wayne and Shiela to pay their bills on time; (3) Wayne and Shiela to live within their means and meet with the social worker once a week to work on budgeting, and Shiela to furnish receipts for all expenditures; and (4) Wayne and Shiela to keep the appointments made by the worker for visitations with the children. Visitations were one per month for 1 hour. Because the foster home was not in McCook, the visitations alternated between McCook and some other city, such as Lexing-

ton. The worker's responsibilities under the agreement were to help Shiela with budgeting; arrange for the monthly visitations; and evaluate the Rimas' progress in budgeting, stability of the home, and dependability in keeping scheduled appointments.

The second agreement made the same requirements of the Rimas but in much more detail. It, for example, gave priority to the payment of certain bills: rent, gas, and electricity, and required detailed record-keeping in the matter of the budget. It added these requirements: The Rimas purchase food stamps each month, visits by a staff homemaker to assist in planning nutritious meals, and attendance by the Rimas at parenting classes. It increased visitations by bringing all the children to the Rima home once a month for a 4-hour visitation and gave the Rimas the opportunity to visit Melody and Mary once a month in Lexington and Margaret in Culbertson.

On April 4, 5, and 6, 1979, trial on the issue of termination of parental rights was held. The guardians ad litem served as attorneys for their wards as they had from the time of their appointment. The county attorney had, prior to trial, filed a motion to permit psychological evaluation of the parents. On January 25, 1979, the court had ruled that the mental condition of the parents was not an issue and overruled the motion. The evidence adduced at the termination hearing was directed primarily to (1) whether or not the Rimas had fulfilled their "agreements," and (2) the results of psychological tests of the children, all of which took place while the children were in foster care.

The children were examined by Jack Dodge, a school psychologist. He tested Margaret on September 29, 1976, about 4 months after her removal from the home of her parents. This test was made in McCook when Margaret was 3 years 8 months old. He used the Stanford-Binet test and the result indicated to him an IQ of 70, which he described as "borderline mental retardation." He also gave her a Vineland "develop-

mental" test, the results of which he did not remember. He recommended that Margaret continue at the CDC where, as we have noted, she had been in attendance previous to the time she was taken from her home.

Mr. Dodge saw Mary on two occasions. The first was when she was about 1½ years of age, which was 2 months before her removal from the home, and again when she was 2 years of age. Part of this second examination was an interview of the persons who were at that time the foster parents. The first test which he administered indicated an IQ of 83. The second test indicated an IQ of 90, which was about 1 month behind her chronological age. These tests were designed to indicate the child's social age as compared with chronological age.

He examined Melody at 11 months of age. This would be about 8 months after her removal. Earlier he had testified that children under 1 year of age are very difficult to evaluate. He gave her a score of 73, indicating that she was 2 or 3 months delayed.

He stated that he could not express any opinion as to the cause of the "lags" in the children and could not express any opinion as to whether the "lags" were innate or the result of environmental factors.

The children were examined by Jerry Mandel, Ph.D., a psychologist, on December 17, 27, and 29, 1978, and he gave his opinion on the social and intellectual functioning of the children at that time. The bases of the opinion were histories given him by the then foster parents (which histories included what the foster parents had been told by the social agencies); reports of earlier examinations made at the Meyer Children's Rehabilitation Institute at the University of Nebraska Medical Center, which latter tests were not admitted into evidence but which are in the record; tests which he administered to Margaret and Mary; and observations he had made of Melody, as he considered her too young for testing.

The children's ages at the time of testing by Dr.

Mandel were, respectively, 5 years 11 months; 4 years 3 months; and 2 years 10 months. He gave the two older children three tests: the WISC, a standard IQ test for children; the Bender-Gestalt visual motor test; and the Draw-a-Person test. He stated that Margaret's IQ was on the borderline of normal and dull-normal, i.e., 90. In his written report, which is also in evidence, he stated that she was functioning at the low end of her intellectual ability. He indicated that he considered her visual motor skills to be at about the level of 3 years 4 months. He considered her vocabulary adequate for her age. He considered that she had the potential for normal development.

Mary scored 104 in her IQ test, a score of 100 being considered average. She was functioning at the level of a 5½-year-old in cognitive skills. Her articulation was unclear, she had a vocabulary of 2,000 words, and she spoke in sentences. This latter information was not based on testing, but on history received from the foster parents.

Melody was functioning at a developmental level considered on a par with her chronological age. The substance of Mandel's conclusions was that the children had not, between birth and 3 years of age, received the stimulation necessary for the social growth at normal rates.

In addition to the two psychologists, the State called three social workers, three of Wayne's former employers, two representatives of creditors of the Rimas, and the present foster mothers of the three girls. We will attempt to summarize their testimony in an organized fashion, although it is somewhat difficult because it was, for the most part, presented in an unorganized way.

During the years 1977 and 1978 and previously, Wayne worked for two roofing contractors. This work was seasonal, covering about 5 or 6 months of the year with interruptions because of inclement weather. From one employer, Wayne earned $562.65 in 1977 and

$356.75 in 1978. In 1978 he also worked for another roofer, being employed from April 5 through August 16. The work was 5 days per week. He originally worked for $3 an hour but later the pay was raised to $3.25. Except for a period in April or May when Wayne was injured, he worked regularly except in July and August when the regularity tapered off. Wayne was not fired. This employer believed he, at that time, went to work for the Cornbelt Chemical Company. He considered Wayne an average worker, although during the last part of his employment he missed more work than the other employees. Wayne's employment with Cornbelt Chemical was, according to his supervisor, only a temporary job when help was needed. He worked there from August 14 to August 19, 1978.

Other evidence of family income came through the testimony of a social worker in connection with the matter of whether the Rimas were living within their income and accounting by receipts for all expenditures. This testimony covered the period beginning October 1977 through November 1978. The source of the witness' information was the accountings rendered by the Rimas. This indicated a family income for the period (excluding September 1978 for which the witness had mislaid the information) of $5,618.20. The Rimas could furnish receipts for only $4,129.93. One of the social workers testified that in the wintertime Wayne was unable to obtain employment.

The testimony with reference to the matter of visitations with the children showed that the Rimas kept all of their scheduled visitations for McCook. However, all except one of nine appointments scheduled for Lexington were canceled. Some of these, the number not specified, were canceled by the M-CSSU. A social worker testified that some of the cancellations by the Rimas were because they did not have a car or did not have money for gasoline. Related to this evidence is the testimony of one of the social workers. When asked if the Rimas spent money for luxuries or un-

necessary things, she replied that they had purchased a washing machine, a television set, a coffeemaker, and "I believe" two vehicles. So, on the one hand, it appears that the M-CSSU was complaining that appointments in Lexington were not kept, yet, on the other, it considered the purchase of an auto, which in light of the Rimas' income must have been a clunker, as a luxury. The witness also testified that Shiela had requested that more of the visits be scheduled in McCook. The worker also testified that the Rimas took two automobile trips, one of which, at least, was at a time when a visitation could have taken place.

The evidence indicates that the Rimas attended only one of nine "parenting" sessions.

Relative to the matter of paying bills on time, the evidence was as follows. The Rimas paid $100 for rent. It apparently was never delinquent and was the first thing paid. Two kinds of bills were not paid regularly and on time. These were the gas bill and the telephone bill. The Rimas had telephone service only during the period June 15 to September 11, 1978. On the latter date, $33.77 was unpaid and telephone service was disconnected by the company. The evidence with reference to the gas bill covers the period June 10, 1976, to April 5, 1979. The Rimas did not pay their gas bills dated 3-15-77, 4-11-77, 5-10-77, and 6-10-77, totaling $112.17, and service was disconnected. They apparently went without gas service thereafter until on October 11, 1977, when the Crisis Intervention Program paid the bill and service was reconnected on November 1, 1977. Thereafter, the Rimas made periodic payments on the gas bill, totaling $125.14, and by June there was a delinquency, including penalties for late payment, in the amount of $122.20. This was paid by the Emergency Energy Program on June 8, 1978. On July 10, 1978, the Rimas had paid their bill in advance and had a $23.95 credit. Thereafter, they made periodic payments, and on April 5, 1979, there was a delinquency of $64.02. There is no other

evidence of failure to pay bills on time. This was the situation at the time of trial.

The second agreement required the Rimas to purchase food stamps monthly. The evidence indicated that during 1977 and 1978 they purchased food stamps on only one occasion.

The substance of the evidence with reference to meal planning and preparation and housekeeping was this. Shiela demonstrated to the social worker that she was able to plan a meal properly. The worker, however, never saw her prepare a nutritious meal and concluded that she did not because the necessary supplies were not in the house on the occasions of her visits. The evidence was that the home was clean 9 out of 10 times. However, the children's room was empty and dirty as the Rimas had disposed of the bed and other furnishings, apparently to get funds to aid their existence.

Margaret's foster mother testified that she received Margaret in her home on May 24, 1976. It may be noted that this was the day before the original petition was filed in the county court. Margaret was 3 years 3 months of age at that time. She was a thin child and did not appear healthy. Margaret was acquainted with the foster parents' only daughter, who was afflicted with cerebral palsy, because both were enrolled in the CDC at McCook. Margaret treated the daughter kindly. Margaret continued in the CDC program until the January preceding the witness' testimony, at which time the foster parents were advised that she needed to be with more normal children. Thereafter, Margaret went to CDC 3 days a week and preschool 2 days a week. The foster parents wish to adopt Margaret.

The foster mother of Mary, the assistant director of the CDC program at Cozad, received the child on January 4, 1977, when she was 2 years 3 months old (after having been in other foster care for 7 months); she was not toilet trained. She was always loving and

never shy. She understood language and what was asked of her, but did not put words together until 1978. She was being continued in the CDC program in McCook as she still needed speech therapy. The foster parents want to adopt Mary but would accept long-term foster care.

Melody's foster mother, a social worker, received the child on April 4, 1977, about 10 months after Melody was taken from her parents. At that time she was very small, just able to sit up. In the witness' opinion, the child had poor muscle tone from the hips down. She did not crawl. The special care being given her by the foster parents was to work along with the professionals. The foster mother considered that she had speech problems. She was unable to crawl on all fours, but pulled herself along with her arms and legs. The foster parents want very much to adopt Melody but would accept long-term foster care, and they are willing to accept almost anything rather than give her up. The witness was also permitted to testify without objection to certain hearsay testimony about the child's alleged small head size. She testified that the doctors "theorized" that it had been the consequence of malnutrition and that she had outgrown it. She had been tested and was "genetically normal."

There are a large number of irregularities, and procedural and substantive errors, appearing in the record which, if tolerated or approved by this court, would tend, if followed in every case, to make a petition for termination of parental rights a self-fulfilling prophecy.

We list these in somewhat chronological order and in an abbreviated form before we discuss such of them as we find necessary. (1) The evidence indicates that the children were removed from the home before the petition was filed, and the record, which apparently is supposed to be complete, does not indicate that the procedures for emergency removal provided by Neb. Rev. Stat. § 43-206(5) (Reissue

1978) were followed; (2) The execution of a stipulation by the allegedly mentally retarded parents placing the custody of the children in the Department of Public Welfare; (3) The affidavit of the director of the M-CSSU attached to the original petition, which, it is to be inferred, was the foundation for the removal, states at least one important alleged fact which the later record establishes is false, i.e., that Melody's weight at 3 months was less than her birth weight; (4) The delay of more than 1 year in holding the adjudication hearing, during a substantial portion of which time both the allegedly retarded parents and the children were without representation by guardian ad litem or counsel; (5) A substantial portion of the important and relevant evidence adduced and admitted at the adjudication hearing was either hearsay or admitted without appropriate foundation, contrary to the statutory requirement that the usual rules of evidence apply, Neb. Rev. Stat. § 43-206.03 (Reissue 1978); (6) The fact that the adjudication order and finding were based upon a stipulation between the State and the guardians ad litem rather than evidence, contrary to legal precedents which provide that, although such guardians may enter into stipulations which merely facilitate the procedure, they have no right to waive or stipulate away the substantive rights of their wards (see authorities later cited in the discussion); and (7) The legal and evidentiary disparity which exists between the basis of the adjudication and the requirement of subsection (6) of § 43-209 which provides that termination must be based upon failure to correct conditions leading to the determination of neglect at the adjudication.

Mental deficiency is not a legal term but, rather, a fact question. It includes those situations where there is a substantial impairment of the will. 44 C.J.S. *Insane Persons* § 2 (1945). Section 43-209 requires that where termination of parental rights is sought because of mental deficiency of the parents, a

guardian ad litem be appointed. The delay in the appointment of a guardian ad litem for the parents and the children and the long delay in holding the adjudication hearing do, in our judgment, constitute a lack of due process in that it deprived the parents of their parental rights under the "liberty" provision of Neb. Const. art. 1, § 3. It also may have constituted a lack of due process as far as the children are concerned, for they are entitled to the care of their natural parents and association with their siblings.

The statutes do contemplate that children may be removed from parental care immediately on the filing of the petition where the welfare of the child requires immediate action. Neb. Rev. Stat. §§ 43-206(5) and 43-205.01(3) (Reissue 1978). The record does not establish that these statutes were complied with.

Nonetheless, these procedural and substantive errors cannot be remedied by mere reversal and dismissal, for we must, of course, consider the welfare of the children. The allegations and indications in the record indicate they may have been neglected in ways other than that on which the adjudication was based, and further remedial measures or even termination of parental rights may be necessary.

As we have noted, the adjudication, based upon the proposition that the children needed special care because of their mental condition, was entered pursuant to a stipulation by the guardians ad litem and the State. The mental condition referred to in § 43-202(2)(d), read in the context of the various other grounds for invoking the jurisdiction of the court, we believe, refers to some inherent mental condition. It cannot be said that there is any competent evidence to support the finding that the children suffered from any special mental condition or that the parents refused or neglected to provide that special care. Margaret, at the time of her removal from the home, was then in attendance at the CDC. The evidence was that, even if foster care was to be

continued, Margaret's participation in the CDC program should continue. The sole evidence with reference to Margaret's mental condition was the hearsay statement of one physician that there was some indication that she was mentally retarded, but that it was hard to say at her age. There is not one scintilla of evidence that either Mary or Melody suffered from such a mental condition. Later evidence adduced at the termination hearing tends to completely rebut the proposition that they suffered from some mental condition which required special care. Rather, it tended to show that they were normal children.

A guardian ad litem may not waive the substantive rights of the ward, but must require proper legal proof. *First Trust Co. v. Hammond*, 139 Neb. 546, 298 N.W. 144 (1941); *In re Estate of Manning*, 85 Neb. 60, 122 N.W. 711 (1909); *Wirth v. Weigand*, 85 Neb. 115, 122 N.W. 714 (1909); *Mattson v. Mattson*, 29 Wash. 417, 69 P. 1087 (1902); *Knight v. Waggoner*, 214 S.W. 690 (Tex. Civ. App. 1919); *Cochran v. Cochran*, 277 Ill. 244, 115 N.E. 142 (1917); *Peterson v. Hague*, 51 Idaho 175, 4 P.2d 350 (1931); *In re Houts*, 7 Wash. App. 476, 499 P.2d 1276 (1972). It should be apparent that adjudications cannot be effectively reviewed if based upon stipulations rather than upon evidence. This, based upon the reasoning of the cited authorities, is at least part of the reason why a guardian ad litem may not waive substantive rights in the cases of incompetent or mentally deficient persons, for to do so would prevent effective judicial review. We hold that the finding based upon the stipulation was void.

As we have earlier noted, these proceedings were initiated upon the ground that the parents, because of their mental deficiencies, were unable to discharge their parental responsibilities and that such condition, in reasonable likelihood, would continue for a long and indefinite period of time. That ground was abandoned and the stipulation was entered into. The record supports the inference that there existed a desire to

avoid making a finding that the parents were incompetent or mentally deficient, for this, especially in the case of Shiela, might indicate that she is incapable of exercising her will in defense of her own right of privacy. The record shows without contradiction that, sometime, apparently between the time the petition was filed and before the adjudication hearing, the director of the M-CSSU assisted in the processing of legal instruments executed by the allegedly mentally deficient parents to authorize Shiela to have an abortion and for Shiela to be sterilized. The abortion did take place. The director testified that the sterilization did not. However, there is other evidence in the record that it may have taken place. At what time and on whose initiative does not appear. The director testified that Shiela understood what she was signing.

We have searched the statutes to determine whether any welfare agency in Nebraska is authorized to engage in such activities. We find none. The Supreme Court of the United States has held that a woman does have a constitutional right to an abortion. It would seem to follow that a woman also has a concomitant right not to have the above-described procedures performed. See the opinion of Mr. Justice Douglas in *Skinner v. Oklahoma*, 316 U.S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942), and the several concurring opinions in that case.

It is plain from the wording of the statute that if parental rights are terminated under subsection (6) of § 43-209 because reasonable efforts have failed to correct the condition, the efforts, or in this case the implementation of the "agreements," must be directed to correcting the condition leading to adjudication in the first place, i.e., in this instance, a finding that the children suffered from a mental condition which required parental care which the parents refused or neglected to give.

The record, however, does tend to support two con-

clusions: (1) That the children may have been malnourished; and (2) That their slow development in other areas was because the parents may not have provided the necessary environment to develop them at a normal rate in the intellectual and social areas. The adjudication was not based on those grounds, as would be required by statute. The plans were not designed to remedy the conditions determined by the adjudication. Two of the social workers testified that little instruction or encouragement could be given to the parents to provide the necessary stimulation when the children were not present in the home. We hold that the trial court erred in determining that the mental deficiency of the parents was not relative to the court's determination of whether to terminate parental rights.

We reverse the judgment and remand the cause to the county court with directions to receive evidence to determine whether there should be an adjudication of neglect and whether parental rights should be terminated under subsection (5) of § 43-209, and receive such other evidence as it may determine is necessary and relevant, especially as to conditions as they exist at the present time. Leave is granted to amend pleadings as may be required in the judgment of the county court. The court should also determine whether, pending final determination of the cause, greater visitation rights under conditions more convenient to the parents should be granted.

We urge the county court to give reasonable priority to this matter.

REVERSED AND REMANDED WITH DIRECTIONS.

BRODKEY, J., concurs in result.

JEFFREY A. OGLE AND JOAN KAY OGLE, HUSBAND AND WIFE, APPELLEES, V. LINCOLN REAL ESTATE, INC., A NEBRASKA CORPORATION, DOING BUSINESS AS CENTURY 21-LINCOLN REAL ESTATE, INC., ET AL., APPELLANTS.

310 N.W.2d 513

Filed September 18, 1981. No. 43379.

Equity: Jurisdiction. Where a court of equity has properly acquired jurisdiction in a suit for equitable relief, it will make a complete adjudication of all matters properly presented and involved in the case and ordinarily will grant such relief, legal or equitable, as may be required, and thus avoid unnecessary litigation.

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

Watkins, Osborne, Scott & Keist for appellant Lincoln Real Estate, Inc.

Terry K. Barber of Johnston, Grossman, Johnston, Barber & Wherry for appellants Schwaninger.

C. Russell Mattson of Mattson, Ricketts, Davies, Stewart, Calkins & Buxbury for appellees.

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

RICHLING, District Judge.

This is a suit in equity by Jeffrey A. Ogle and Joan Kay Ogle, husband and wife, against Lincoln Real Estate, Inc., a Nebraska corporation, a licensed real estate broker with its principal place of business in Lincoln, Nebraska; Henry W. Hart, a salesman employee of said company; and Edgar L. Schwaninger and Marilyn M. Schwaninger, husband and wife, owners of certain real estate which had been platted and divided into lots for the purpose of sale.

The action sought to cancel the conveyance of real estate and prayed for judgment against the defendants,

and each of them, for the amount of the purchase price paid by the Ogles for a certain lot, and for damages sustained through conduct of the defendants, together with interest and costs.

Trial was had. The trial court found that it had jurisdiction of the subject matter and the parties, and retained jurisdiction and entered judgment for the plaintiffs and against all of the defendants.

The defendants Schwaninger appealed and the defendants Lincoln Real Estate, Inc., and Henry W. Hart filed a separate appeal. We affirm the judgment of the District Court.

The Schwaningers laid out a development of certain real estate they owned in Lancaster County, Nebraska. They engaged the defendant Lincoln Real Estate, Inc., to sell lots in the development. The defendant Hart was employed as a salesman for Lincoln Real Estate, Inc.

The Ogles, in response to advertising done by the defendants, contacted Lincoln Real Estate, Inc., and Hart for the purpose of purchasing a lot on which they could erect a dwelling. Hart, with Edgar Schwaninger present, showed the Ogles the development and pointed out certain lots. Relying upon the representations made by the defendants, the Ogles purchased a lot. They paid the defendants the purchase price and received a deed. They then proceeded with their plans to erect a dwelling thereon. This included the drilling for a well, starting to construct an individual sewer system, obtaining a building permit, and applying for electric power and telephone service.

After some work had been accomplished, but before the dwelling was placed on the land, the Ogles were advised that they were proceeding on a lot other than the one which had been conveyed to them by the Schwaningers. The Ogles contend that the lot for which they received a deed was not the real estate which was represented to them as the real estate which they were purchasing, and that the lot which

was actually conveyed was not fit for erecting a dwelling thereon; that the Ogles had advised the defendants that their purpose in purchasing a lot was to build a dwelling thereon. The Ogles contend that the representations were falsely and recklessly made and that the Ogles relied on the truth of said representations, to their damage.

The trial court found "by clear and convincing evidence the plaintiffs have proved that they were sold by defendants what in reality was Lot 6 . . . but they were given a Deed by defendants to Lot 5 . . . ." The trial court further found that the defendants had recklessly misrepresented to the plaintiffs the location of the real estate in question, resulting in fraudulent conduct by the defendants, and that the plaintiffs relied on the misrepresentation. It was the further finding of the trial court that consequential expenses were incurred by the plaintiffs as a result of the conduct of the defendants.

The trial court granted judgment against the defendants, and each of them, for the amount of the purchase price paid by the plaintiffs to the defendants, and for such consequential expenses as the court found were incurred as a result of the conduct of the defendants, together with interest and costs. The judgment further provided that the plaintiffs should execute and deliver to the clerk of the court a quitclaim deed conveying Lot 5 to Edgar L. Schwaninger and Marilyn M. Schwaninger, husband and wife, as joint tenants with rights of survivorship, the same to be delivered by such clerk to the grantees therein upon payment of the judgment, costs, and interest as provided in said judgment.

The defendants contend that the trial court erred in finding reckless misrepresentation and fraud when the same was not sustained by sufficient evidence.

This was brought as a suit in equity. A money judgment was rendered therein. An appeal was taken to this court. This court retries the issues presented

to the court below upon the evidence presented in the bill of exceptions. Neb. Rev. Stat. § 25-1925 (Reissue 1979) provides: "In all appeals from the district court to the Supreme Court in suits in equity, wherein review of some or all of the findings of fact of the district court is asked by the appellant, it shall be the duty of the Supreme Court to retry the issue or issues of fact involved in the finding or findings of fact complained of upon the evidence preserved in the bill of exceptions, and upon trial de novo of such question or questions of fact, reach an independent conclusion as to what finding or findings are required under the pleadings and all the evidence, without reference to the conclusion reached in the district court or the fact that there may be some evidence in support thereof."

This court has held in *Russo v. Williams*, 160 Neb. 564, 567-68, 71 N.W.2d 131, 136 (1955): "That rule is, however, subject: '* * * to the condition that when the evidence on material questions of fact is in irreconcilable conflict this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite.'" See, also, *O'Brien v. Fricke*, 148 Neb. 369, 27 N.W.2d 403 (1947); *Krelle v. Bowen*, 128 Neb. 418, 259 N.W. 48 (1935); *Chitwood Packing Co. v. Warner*, 138 Neb. 800, 295 N.W. 882 (1941); *Donahoo v. Home of the Good Shepherd of Omaha, Inc.*, 193 Neb. 586, 228 N.W.2d 287 (1975). In the case at bar, the court not only had the opportunity to observe the witnesses and their manner of testifying but also, upon the stipulation of the parties, the trial court made a personal inspection of the subject premises.

Further, in *Sechovec v. Harms*, 187 Neb. 70, 72, 187 N.W.2d 296, 297 (1971), this court held: "[W]here a court of equity has properly acquired jurisdiction in a suit for equitable relief, it will make a complete adjudication of all matters properly presented and

involved in the case and ordinarily will grant such relief, legal or equitable, as may be required and thus avoid unnecessary litigation." See, also, *Muff v. Mahloch Farms Co., Inc.*, 184 Neb. 286, 167 N.W.2d 73 (1969); *Ready Sand & Gravel Co. v. Cornett*, 184 Neb. 726, 171 N.W.2d 775 (1969).

The judgment of the District Court should be, and hereby is, affirmed.

AFFIRMED.

DONNA M. WIBLE, APPELLEE, V.
JERRY C. WIBLE, APPELLANT.

310 N.W.2d 515

Filed September 18, 1981. No. 43780.

1. **Child Custody.** The test for determining custody, which has been reiterated by this court many times, is the best interests of the child.
2. ——. In determining the question of who should have the care and custody of children upon the dissolution of a marriage, the paramount consideration is the best interests and welfare of the children.
3. ——. 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.

Appeal from the District Court for Sarpy County: GEORGE H. STANLEY, Judge. Reversed and remanded.

Michael N. Schirber of Schirber Law Office, P.C., for appellant.

Robert A. Skochdopole and Daniel P. Chesire of Kennedy, Holland, DeLacy & Svoboda for appellee.

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

RICHLING, District Judge.

This is an action for dissolution of marriage. The parties were married on December 28, 1970. One child,

Brandt Cameron, was born to this union on June 23, 1972. The parties were divorced in Johnson County, Kansas, on March 29, 1976. They were remarried on June 12, 1976. Later, the husband was assigned military duty as an Air Force physician at Offutt Air Force Base in Sarpy County, Nebraska. The parties took up residence in Sarpy County, Nebraska. Another child, Brandi Elise, was born to this union on August 15, 1977. The parties and the two children lived together until their separation in late 1979.

On November 16, 1979, Donna Marie Wible, the petitioner and appellee herein, filed her petition for dissolution of the marriage in the District Court of Sarpy County, Nebraska. On November 16, 1979, the district judge signed a temporary restraining order and an ex parte order granting temporary custody of the two minor children to the appellee. On November 26, 1979, Jerry Craig Wible, the respondent and appellant herein, filed his motion, with supporting affidavit, moving the court for an order awarding him the temporary care, custody, and control of the minor children. The record reflects that on November 30, 1979, the parties appeared by counsel, but not personally. The judge's docket entry recites: "Counsel stated that matters have been settled, all but custody issue, which is set for hearing January 8, 1980, at 1:30 p.m. Counsel to prepare Order and submit it to the Court." On December 6, 1979, a temporary order was signed and entered which provided that the temporary restraining order and temporary custody order entered on November 16, 1979, shall remain in full force and effect and that hearing as to the temporary custody was set for January 8, 1980. It made provision for temporary support and maintenance to be paid by the appellant to the appellee. The docket entry of January 2, 1980, showed that the trial was reset to February 6, 1980.

The docket entry of February 6, 1980, shows as follows: "This cause came on and the parties appeared

with counsel. Trial was had. The Court finds that the marriage is irretrievably broken and is hereby dissolved. The parties have entered into a Property, Temporary child custody, child support, alimony and division of property agreement. The matter as to the permanent custody is set on or before August 4, 1980. Counsel to submit a proper decree incorporating the agreement reached between the parties."

The bill of exceptions discloses that the matter came on for hearing on February 6, 1980, at 4:40 p.m. The parties appeared personally and with counsel. The only evidence offered or received was the testimony of the appellee. She recited a barebones testimony combining fact and opinion sufficient to permit the court's dissolution of the marriage. The appellee was asked by counsel if the parties had reached an agreement as to the distribution of the assets. She replied, "I believe so." No inquiry was ever made of appellant concerning any proposed settlement. Counsel then proceeded to advise the court as to the terms and conditions of the agreement of the parties. Appellant's counsel stated: "Parties agree that the Court will enter an order with Court approval placing custody of the two children with the Court, possession in the petitioner, subject to a reasonable visitation rights of the respondent, and will take the issue of permanent custody and possession under advisement until August 4, 1980. Petitioner agrees to immediately make arrangements to seek alcohol counselling from a psychiatrist . . . . And the Court will direct a home study . . . ." No evidence was offered as to the fitness or unfitness of either party to have the care and custody of the children. No evidence was offered as to the needs of the parties or the children or of the appellant's ability to pay.

A "Decree of Dissolution of Marriage" was signed and entered on February 22, 1980. The decree dissolved the marriage, approved the property settlement of the parties, and awarded the appellee alimony in the

amount of $200 per month for a period of 36 months, said payments to terminate upon the death of either party or the remarriage of the appellee. The decree further provided: "Temporary custody of BRANDI ELISE WIBLE and BRANDT CAMERON WIBLE is hereby placed with the District Court of Sarpy County, Nebraska, and possession of said minor children is placed with the Petitioner subject to reasonable and liberal visitation rights on behalf of the Respondent at all reasonable times and places. It is further ordered that the Court will take under advisement the issue of permanent custody and possession which matter is hereby set for hearing on August 4, 1980, at 9:00 a.m., at which time both Petitioner and Respondent shall have the privilege to present evidence on the issue of permanent custody and possession of said minor children."

The decree further ordered a home study conducted by the Sarpy County Child Protective Services, with its report being made to the court and available to counsel.

The decree further ordered the appellee to immediately make arrangements for and seek alcoholic abuse counseling from a medically certified psychiatrist, said psychiatrist to submit a report to the court which would be made available for examination by counsel.

Although the decree provided for custody of the children in the court and that hearing would be had on permanent custody on August 4, 1980, the decree made provision for the payment of child support in the amount of $300 per month per child, and stated: "Said payments are to continue until said minor children respectfully [sic] attain their age of majority, marry, die, enter the armed services of the United States, or otherwise are emancipated or subject to further Order of the Court."

On July 24, 1980, the following docket entry was made by the court: "This cause came on and further

hearing set August 26, 1980, at 9:30 A.M. Entry to counsel."

The record discloses that on August 26, 1980, counsel for both parties met with the court in chambers. The court advised counsel for appellant that counsel for appellee wished to make a motion in limine. Whereupon, counsel for the appellee stated: "[T]he petitioner moving the Court in limine to make a pre-hearing ruling limiting the evidence to be heard on the question of fitness of either party for custody of children from the date of February 6, 1980, the date of the decree of dissolution of marriage, to present date. And in support thereof shows to the Court on February 6, 1980, all parties appeared for trial. That at that time there was an agreement made between the parties and accomodation [sic], if you will, concerning custody of children; the whole matter before the Court, that is it involved the child support, property settlement and the alimony. All of those were agreed upon by the parties.

"The Court was fully informed of the issues before the parties, and both parties knew the circumstances of the marriage at the time of the decree. . . ."

The court then inquired of counsel for the appellant if he had any objection to the motion. In response, counsel for the appellant stated: "Yes, the respondent does oppose that motion. Rather than sit here and give the distorted, self-serving rendition of what happened on February 6th, I have asked the court reporter to just mark the Transcript of Proceedings from that date; would certainly speak for itself. . . ." Whereupon, the court sustained appellee's motion in limine.

The matter proceeded to hearing. However, rather than the appellee proceeding with her evidence, the court required the appellant to proceed, thus placing on him the burden of proof. The appellant had subpoenaed and available nine witnesses. The first witness was called. Because of objections and the court's ruling, not only was little evidence elicited but the appellant

was prevented from making an offer of proof because of the sustained motion in limine.

Even though the appellant was limited because of the court's ruling on the motion in limine, the record discloses as follows. Not long after the parties had separated, the appellee met one Captain Richard Marmon in "about the middle of November." On November 16, 1979, the appellee filed her petition for dissolution of the marriage, together with other matters hereinbefore set forth. Hearing was had and a decree of dissolution signed on February 6, 1980. The appellee was granted the right of possession of the family residence so as to provide a home for herself and the two minor children until the house was sold as provided for in the decree. However, the appellee withdrew the minor 7-year-old son from the Bellevue school system, and on March 5 she and the two minor children moved in with Captain Marmon in a house newly purchased by him in Papillion, Nebraska.

The appellee testified, upon questioning, "We had a relationship just as we have now. . . . Just as if we were married." The appellee and the two minor children continued to live with Captain Marmon in his house in Papillion until the appellee and Captain Marmon were married 2 days after the divorce became final, to wit, on August 8, 1980.

At neither hearing was any evidence offered as to the needs of appellee and the minor children, and very minimal evidence of the appellant's ability to pay. The only evidence of the appellant's ability to pay was that at the time the order for child support was entered he had left the military service and had just started a medical practice in a small town; that he had to borrow a large sum of money to get started and had nothing but conjecture as to what his earning capacity would be in the future. The record contains not one iota of evidence as to the appellant's fitness or unfitness to have custody of the minor children. Because of the court's sustaining of the motion in limine,

very limited evidence was offered as to the appellee's fitness or unfitness. Upon trial de novo review by this court, the evidence offered as to the appellee's fitness and the best interests of the minor children is less than minimal.

On September 26, 1980, an order was signed and entered which provided that "custody of the minor children BRANDI ELISE WIBLE, born August 15, 1977 and BRANDT CAMERON WIBLE, born June 23, 1972, is hereby permanently awarded to the Petitioner, Donna Marie Marmon, formerly known as Donna Marie Wible . . . ." The order further required the appellant to pay to the appellee child support in the sum of $250 per month per child for 12 months, beginning September 1, 1980; thereafter the child support was increased to $300 per month per child for 12 months and thereafter to $400 per month per child.

Motion for new trial was overruled and appeal taken to this court.

"An appeal in a dissolution of marriage action is reviewed de novo by this court.

"Where the issue of child custody is involved, both the mother and father have an equal right to the custody of their children. The test for determining custody is the best interests of the child.

"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*, 208 Neb. 498, 304 N.W.2d 58 (1981) (syllabi of the court).

"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).

There was no evidentiary hearing at the time of the entry of the decree. The only evidence offered was the bare showing in support of the request for dissolution of the marriage. There was no evidence as to the best interests of the children. Custody of the

children was taken in the court upon the recommendation of both parties through their counsel. The custody issue was set for hearing at a later date. Both parties recognized that the appellee had such an alcohol abuse problem that she should be required to seek alcohol abuse counseling from a licensed physician, a psychiatrist, who would submit a report to the court setting forth his diagnosis and the course of counseling prescribed for the appellee, as well as the appellee's response to said counseling. At the hearing as to custody, however, this psychiatrist did not appear. Rather, a psychiatrist hired by the appellee qualified himself to testify and expressed an opinion as to custody.

When one reads the entire record in this case, one must conclude that this court, in attempting to give paramount consideration to the best interests and welfare of the children, is foreclosed from so doing because of the lack of evidence in the record. This lack of evidence in large measure is due to the ruling of the trial court in sustaining the motion in limine and in otherwise excluding proffered evidence.

This court further stated in *Moninger v. Moninger*, 202 Neb. 494, 497-98, 276 N.W.2d 100, 103 (1979): "The criteria the trial court should use in determining the custody of the minor children has been stated so often that it barely needs repeating; however, one of the best statements, which is well recognized by our courts, is found in the case of Christensen v. Christensen, 191 Neb. 355, 215 N.W.2d 111: 'In determining the question of who should have the care and custody of children upon the dissolution of a marriage, "the paramount consideration is the best interests and welfare of the children." Broadstone v. Broadstone, 190 Neb. 299, 207 N.W.2d 682. See, also, Lanz v. Lanz, 189 Neb. 578, 203 N.W.2d 761; Section 42-364, R.S. Supp., 1972. The judgment concerning the custody of children is necessarily quite subjective in nature. Many factors may be considered in light of the par-

ticular circumstances of each individual case. The general considerations of the moral fitness of the parents, of respective environments offered by each parent, the emotional relationship between the children and their parents, their age, sex, and health, the effect on the children of continuing or disrupting an existing relationship, the attitude and the stability of character of each parent, and the capacity to furnish the physical care and education and needs of the children are some of many factors for the court to consider. In evaluating the general concept of the best interests and welfare of the children it is settled and fundamental law that this court will give weight to the fact that the trial judge saw and observed the witnesses and the attitude of the parents at the trial.'"

Even taking into consideration the fact that the trial judge saw and observed the witnesses, a review of the entire record in this case compels one to conclude that the trial court was guilty of a clear abuse of discretion. Also, the order of the trial court was clearly against the weight of what evidence there is in the record.

"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*, 208 Neb. 456, 457, 303 N.W.2d 783, 784 (1981).

This court has also held on many occasions that the 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. Again, in this case, there is no evidence as to the needs of the children and only conjecture, rather than facts, as to the appellant's ability to pay at the time of the entry of the order and in the future.

A review de novo of the record compels one to conclude that the court was in error in sustaining the motion in limine. A motion in limine is not a proper

procedure in a dissolution proceeding. However, in view of the ruling of this court, time and space shall not be taken for a full discussion of that matter. The court was in error in limiting the evidence as to the fitness of the parties and the best interests of the minor children.

From a review of the record, we conclude that the court abused its discretion and that a proper determination cannot be made for the best interests of the children. The trial court's abuse of discretion and error deprived the appellant of a fair trial.

The judgment of the trial court should be, and hereby is, reversed and the case is remanded for a full evidentiary hearing on the questions of custody and support of the minor children.

REVERSED AND REMANDED.

STATE OF NEBRASKA EX REL.
NEBRASKA STATE BAR ASSOCIATION, RELATOR, V.
PAUL M. CONLEY, RESPONDENT.

310 N.W.2d 520

Filed September 18, 1981. No. 44436.

Original action.

Judgment of reprimand.

On motion for the court.

PER CURIAM.

The respondent, Paul M. Conley, has filed with this court a conditional admission of guilt of the formal charges filed against him by the Counsel for Discipline of the Nebraska State Bar Association.

Respondent is charged with the violation of Canon 6, DR 6-101(A)(3), and Canon 9, DR 9-102(A)(1) and (2) and DR 9-102(B)(4), and with a violation of his license to practice law as provided in Neb. Rev. Stat. § 7-104 (Reissue 1977).

While representing a claimant in a personal injury action, the respondent recovered an award in the amount of $3,500 from the State Farm Mutual Automobile Insurance Company. Respondent was issued a check draft for $3,500 on September 24, 1980. On September 29, 1980, respondent deposited the check draft in his business account. Early in October respondent notified claimant that he had received the settlement funds and would deposit them into his trust account with final dispersal to be made on October 20, 1980. Arrangements were also made for the purchase of a Certificate of Deposit in the amount of $850 for placement in a conservatorship. On October 20, 1980, respondent failed to disperse the assets of the settlement. On November 16, 1980, respondent issued checks on his business account to claimant, claimant's wife, and claimant's daughter as a final disbursement of the settlement funds. The check which was payable to claimant was returned unpaid by reason of insufficient funds on November 21, 1980. The check cleared respondent's account on November 24, 1980. On January 2, 1981, the Certificate of Deposit was finally purchased for the conservatorship.

The respondent, having failed to use a trust account for client's funds and having failed to properly transmit client's funds to the client, is guilty of unprofessional conduct and is hereby publicly reprimanded for conduct violative of the Canons of Ethics and of his oath as a member of the bar of this court.

JUDGMENT OF REPRIMAND.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1981

STATE OF NEBRASKA, APPELLEE, V.
MICHAEL M. STEWART, APPELLANT.

310 N.W.2d 706

Filed October 9, 1981. No. 43802.

Witnesses. When a witness is cross-examined on a matter collateral to the issue, he cannot, as to his answer, be subsequently contradicted by the party putting the question.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Reversed and remanded.

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

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

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

PER CURIAM.

The defendant appeals from a sentence of 4 to 6 years' imprisonment for assault in the first degree.

The record shows that on February 23, 1980, the defendant and a female companion were waiting for the elevator in the Howard Johnson Motel in Omaha, Nebraska. Stewart Peters, the victim, and a group of his acquaintances were in the elevator when it reached the first floor where the defendant and his companion were waiting. The defendant testified that, when the

elevator door opened and Peters and his party began getting off, one of the men in the party made an obscene remark to the defendant's companion. No one in the victim's party could recall hearing the remark, and the man whom the defendant identified as the speaker, Tom Dolton, denied making an obscene remark but testified that he simply asked the defendant's companion if she needed some assistance with packages she was carrying.

Following whatever remark was made, the defendant, with rough language, told Mr. Dolton and the rest of the party to get off the elevator. There was testimony that some words were exchanged between Dolton and the defendant. The defendant and Royce Gustafson, a member of the Dolton-Peters party, testified that they heard Dolton threaten the defendant with a bottle, and that the defendant threatened to cut Dolton's heart out. At this point, the victim, Stewart Peters, became involved as he got off the elevator.

Peters testified that when he came off the elevator the defendant was standing in the hallway with his hands raised in a sort of martial arts stance, and Peters said, "'What are we having, a hung-kung-fuey show,' or something to that nature." The defendant then lunged at Peters and Peters struck the defendant with his right fist and may have pushed him back with his left hand. The defendant then stabbed Peters in the left forearm, inflicting a serious injury. Peters and the rest of his party then went to the lobby for assistance. Later the police arrested the defendant at the motel.

At the trial, the prosecuting attorney, over objection, was allowed to ask the defendant on cross-examination whether the defendant had had a fistfight with his girl friend earlier on the day of the assault. When the defendant denied this, the State on rebuttal was allowed, over objection, to present testimony that the defendant had struck a woman companion on two occasions on the same day as the assault. The principal

assignment of error relates to the admission in evidence of this testimony.

Neb. Rev. Stat. § 27-404(2) (Reissue 1979) provides: "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."

At the trial, the evidence that the defendant had struck his girl friend was offered to rebut the defendant's denial that he had been in a fistfight. On appeal, the State argues that the testimony was admissible to prove intent.

The evidence that the defendant had struck his girl friend earlier that day was not admissible for impeachment purposes. It related to a collateral issue and was not proper rebuttal evidence. In *Latham v. State*, 152 Neb. 113, 117, 40 N.W.2d 522, 525 (1949), we said: "When a witness is cross-examined on a matter collateral to the issue, he cannot as to his answer be subsequently contradicted by the party putting the question." See, also, *Griffith v. State*, 157 Neb. 448, 59 N.W.2d 701 (1953); *Swogger v. State*, 116 Neb. 563, 218 N.W. 416 (1928); *Vanderpool v. State*, 115 Neb. 94, 211 N.W. 605 (1926).

The evidence was not admissible as proof of intent because the act in question, the stabbing of Peters, was not equivocal in nature and criminal or honest according to the intent with which it was done. The evidence was not admissible to "disclose the mastering purpose of the alleged criminal act." See *State v. Ray*, 191 Neb. 702, 217 N.W.2d 176 (1974). The evidence of the earlier assault did not involve or explain the circumstances of the crime charged and was not an integral part of an overall occurrence or transaction.

The admission of the testimony concerning the earlier assault was erroneous and prejudicial and requires that the judgment be reversed.

The judgment of the District Court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. RODNEY D. PORTER, APPELLANT.

310 N.W.2d 926

Filed October 9, 1981. No. 43906.

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

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

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

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

HASTINGS, J.

Defendant was sentenced to a term of probation for a November 5, 1978, burglary. The statute covering this crime in effect at the time was Neb. Rev. Stat. § 28-532 (Reissue 1975), which provided for a possible sentence of from 1 to 10 years' imprisonment in the Nebraska Penal and Correctional Complex. Following an appropriate hearing his probation was revoked and he was thereafter sentenced to a term of not less than 3 nor more than 10 years' incarceration in the penal complex. He has appealed from that sentence, assigning as errors that the trial court considered certain confidential letters addressed to the trial judge, contrary to Neb. Rev. Stat. § 29-2261(3) (Reissue 1979); that the sentence was excessive; and that the court failed to give defendant credit for 34 days in jail served prior to the sentencing. The maximum sentence

imposed upon the defendant was the maximum permitted by statute, and under the rule in *State v. Rathbun*, 205 Neb. 329, 287 N.W.2d 445 (1980), credit for jail time must be given. The State concedes this point. The defendant agrees that the evidence was sufficient to revoke his probation and he does not contest this finding by the trial court, and we agree that the record supports such conclusion.

The letters complained of were from the mother and grandmother of the defendant's girl friend, reciting several incidents of cruel, vicious, and perverted acts of violence directed against the latter by the defendant. At the time of sentencing the district judge stated that he would consider those letters only as an indication that the defendant had not done much to correct the situation that was "evaluated as existing" at the time of the original sentence of probation. The defendant's counsel was allowed to examine and read these letters prior to the final sentencing and, although he had every opportunity to do so, neither he nor the defendant made any effort to refute the facts alleged in those letters. The only objection made was that the letters were hearsay and that they were not authorized by statute as a type of information proper for a presentence investigation.

By the very nature of a presentence investigation report, it is necessary to rely to a great extent upon hearsay information. Furthermore, § 29-2261(3) provides in part that a presentence investigation and report shall include "any other matters that the probation officer deems relevant or the court directs to be included." We have held on numerous occasions that before pronouncing sentence a trial judge has broad discretion in the source and type of evidence he may use to assist him in determining the kind and extent of punishment to be imposed within the limits fixed by statute. We have gone so far as to say that the latitude allowed a sentencing judge in such instances is almost without limitation as long as it is

relevant to the issue. *State v. Stranghoener*, 208 Neb. 598, 304 N.W.2d 679 (1981); *State v. Rose*, 183 Neb. 809, 164 N.W.2d 646 (1969). There is no merit to this assignment of error.

As to the claimed excessiveness of sentence imposed, it is axiomatic that absent an abuse of discretion we will not disturb the action of the trial court in imposing a sentence within the statutory limits. *State v. Bosak*, 207 Neb. 693, 300 N.W.2d 201 (1981).

Defendant's record commenced in 1973, at which time he was 13 years of age. He was sent to Boys Town for mail theft, from which institution he ran away on four different occasions. He was also committed to the Youth Development Center from which he escaped, stole an automobile, and was convicted and sentenced to 4 months in jail. He was convicted of burglary and served 3 weeks in jail. He was again committed to the Youth Development Center and was eventually discharged. In 1977 he was convicted of auto theft and sentenced to 1 year in the Nebraska Penal and Correctional Complex. There was no abuse of discretion by the trial court in the imposition of the sentence in this case.

The judgment and sentence of the District Court is affirmed, except that defendant shall be given credit for 34 days' jail time previously served.

AFFIRMED AS MODIFIED.

EDWARD DEAN BETZER, APPELLEE, V. SUSAN GAIL BETZER, APPELLANT.

310 N.W.2d 707

Filed October 9, 1981. No. 44010.

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

Thomas J. Young for appellant.

Whitmore, Gilroy & Stortz, P.C., for appellee.

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

HASTINGS, J.

The respondent, Susan Betzer Catania, has appealed from an order of the District Court modifying a marriage dissolution decree of March 29, 1979. The modified decree took the custody of the parties' 9-year-old daughter Jennifer from the mother and placed it in Edward Betzer, the father and petitioner. The respondent contends that there were insufficient circumstances to warrant a change of custody, that the father was not a fit person to have the custody and control of the child, and that the change of custody was not in the best interests of Jennifer. We affirm.

From the date of the original decree until the hearing on the modification in August and October of 1980, Jennifer spent the summers with her father and the rest of the time with her mother. During that period of time, Susan lived with three different men, becoming romantically involved with two of them, and moved from Omaha to Lisle, Illinois, to Statesboro, Georgia, to Omaha, and finally to Nederland, Colorado. In the meantime, Edward remained in Omaha where he continued to work for Western Electric in a position which he had held for 11 years. During a portion of that time up to the time of the last hearing, his fiancee resided with him in the family home.

As the trial judge observed, neither parent "would

win a moral prize." However, he also pointed out that Susan had moved to six different places in a little over a year and a half, and he obviously concluded that the father offered a more stable environment, suitable to the best interests of the child. We agree. The determination of the trial judge with respect to changing custody of a child ordinarily will not be disturbed unless there has been a clear abuse of discretion or the decision is against the weight of the evidence. *Soukup v. Soukup*, 208 Neb. 672, 305 N.W.2d 372 (1981).

The judgment of the District Court is affirmed.

AFFIRMED.

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

311 N.W.2d 7

Filed October 9, 1981. No. 44064.

Criminal Defendants: Appearance Bonds. A defendant who is released following imposition of sentence to reappear upon further order of the court has been "released from custody under . . . a conditioned release" within the meaning of Neb. Rev. Stat. § 29-908 (Reissue 1979).

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

James T. Hansen and Jonathan Pratter for appellant.

Paul L. Douglas, Attorney General, and Dale D. Brodkey for appellee.

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

HASTINGS, J.

Defendant was prosecuted and convicted of a violation of Neb. Rev. Stat. § 29-908 (Reissue 1979), failing to appear before the court after having been "released from custody under bail, recognizance, or a conditioned

release." He was sentenced to a term of imprisonment of 18 months to 2 years. Defendant has appealed, contending in substance that the State failed to establish an essential element of the crime, viz, that there was a valid recognizance in effect at the time of his failure to appear. We determine that defendant's appeal is wholly without merit.

The defendant was charged with unlawfully disposing of a dead body and, on July 20, 1977, was released under a properly executed $5,000 recognizance. Following his conviction and sentence for a term of 18 months to 2 years, a 30-day stay of execution was granted to permit the defendant to perfect his appeal to the Supreme Court. In addition, the trial court continued the original $5,000 recognizance. On October 15, 1979, a mandate from this court affirmed the judgment and sentence, and the defendant was ordered to surrender himself on November 2, 1979, which he failed to do. His bond was ordered forfeited and he was finally arrested and returned to the Scotts Bluff District Court on September 2, 1980.

By some sort of convoluted reasoning, the defendant claims that the 30-day stay of execution of the sentence had expired long before his ordered appearance date and the $5,000 recognizance executed before trial was no longer in effect; therefore, there was no binding bail agreement in force which he violated.

The recognizance executed by the defendant before trial was not limited to appearing for trial. It required the defendant to appear on August 12, 1977, and from time to time thereafter as ordered by the court. The district judge, following sentencing on the original felony, not only suspended execution of the sentence for 30 days as requested by the defendant but also released the defendant on the "present filed bond." At the time of his release, the defendant was also told by the court that "if this matter were to be affirmed by the Nebraska Supreme Court on appeal and you did fail to appear for execution of this sentence, it would create a separate

crime . . . ."

No question remains but that the defendant was "released from custody under bail, recognizance, or a conditioned release" and failed to appear and surrender himself as required by § 29-908.

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

AFFIRMED.

DAWN K. NOVAK, PERSONAL REPRESENTATIVE OF THE ESTATE OF STEVEN M. NOVAK, DECEASED, APPELLANT, V. GORDON L. NELSEN ET AL., APPELLEES.

311 N.W.2d 8

Filed October 9, 1981. No. 44398.

1. **Jury Verdicts: Motions for New Trial: Time.** After a verdict by a jury a motion for new trial must be made within 10 days after the verdict was rendered and accepted by the court, not from the date judgment was entered on the verdict.
2. **Motions for New Trial: Appeal and Error: Time.** In the absence of a timely motion for new trial, a notice of appeal must be filed within 1 month after the rendition of the judgment or decree or the making of the final order.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Appeal dismissed.

Gast & Kielty for appellant.

Alan L. Plessman for appellees.

On motion for the court.

PER CURIAM.

The defendant Byington has filed a motion to dismiss the appeal in this automobile accident negligence case. The only issue is when the time for filing a motion for new trial begins to run following the rendition and acceptance of a jury verdict. Because the court has not

directly ruled on the specific issue here, an opinion is deemed appropriate.

At the conclusion of the evidence the trial court sustained a motion for directed verdict as to defendant Nelsen, and on April 16, 1981, the jury returned its verdict in favor of the defendant Byington. On the same date the trial judge noted on the trial docket that the verdict was accepted. The proceedings had on April 16, 1981, were spread upon the journal of the court on the following day. On April 20, 1981, the District Court entered judgment on the jury verdict and dismissed the plaintiff's petition. On April 30, 1981, motion for new trial was filed by the plaintiff, which was overruled by the District Court on May 22, 1981. On June 16, 1981, notice of appeal was filed.

Neb. Rev. Stat. § 25-1142 (Reissue 1979) provides in part: "A new trial is a reexamination in the same court of an issue of fact after a verdict by a jury, report of a referee, or a decision by the court."

Neb. Rev. Stat. § 25-1143 (Reissue 1979) provides in relevant part: "The application for a new trial must be made, within ten days, either within or without the term, after the verdict, report or decision was rendered . . . ." The stated exceptions are not involved here.

We have consistently held that a motion for a new trial filed more than 10 days after a verdict, report, or decision is rendered is a nullity, and that the overruling of such a late motion does not extend the time for filing a notice of appeal. *Pallas v. Dailey*, 169 Neb. 277, 99 N.W. 2d 6 (1959).

After a verdict by a jury a motion for new trial must be made within 10 days after the verdict was rendered and accepted by the court, not from the date judgment was entered on the verdict. See § 25-1143. To the extent *Community Credit Co. v. Gillham*, 191 Neb. 198 at 206, 214 N.W.2d 384 at 390 (1974), is in conflict, it is overruled.

In the absence of a timely motion for new trial, a notice of appeal must be filed within 1 month after the

rendition of the judgment or decree or the making of the final order. See Neb. Rev. Stat. § 25-1912 (Reissue 1979).

In this case the motion for new trial was filed more than 10 days after the verdict of the jury was rendered, accepted, and filed and it was, therefore, a nullity. Judgment on the verdict was entered on April 20, 1981, and notice of appeal was filed on June 16, 1981, more than 30 days thereafter. This court is therefore without jurisdiction. The appeal is dismissed.

APPEAL DISMISSED.

IN RE ESTATE OF GALEN L. NELSEN, DECEASED. DELMER GROETEKE, APPELLANT, V. BEVERLY A. NELSEN, PERSONAL REPRESENTATIVE, APPELLEE.

311 N.W.2d 508

Filed October 23, 1981. No. 43492.

1. **Uniform Commerical Code: Contracts.** Performance of an oral contract for the sale of goods that is capable of apportionment is enforceable only as to that portion that has been either fully or partially performed.
2. **Statute of Frauds: Contracts.** A delivery alone by the seller is insufficient to take an oral contract for the sale of goods of the price of $500 or more out of the statute of frauds. The goods must have been received and accepted before avoidance of the statute of frauds is recognized.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Affirmed.

H. E. Hurt, Jr., and James A. Gallant for appellant.

Nicholas J. Lamme of Yost, Schafersman, Yost, Lamme & Hillis for appellee.

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

WHITE, J.

This is an appeal from a District Court judgment en-

tered on a jury verdict in favor of the estate of Galen L. Nelsen. The claimant, Delmer Groeteke, farms near Hooper, Nebraska. The deceased, Galen L. Nelsen, owned and operated Anderson Feed & Seed Co. in Fremont, Nebraska.

Early in the spring of 1977 Delmer Groeteke contacted Galen L. Nelsen about the possibility of Anderson Feed & Seed Co. purchasing Groeteke's 1976 soybean crop. After performing germination tests on the beans, Groeteke and Nelsen entered into an oral agreement for the purchase of the soybeans. The exact quantity of soybeans purchased was disputed. Delmer Groeteke claims the oral contract was for his entire crop, approximately 2,500 bushels. The estate claims the oral contract was for 1,762.68 bushels of soybeans, the amount which was actually delivered and received. The price, which was $10.40 per bushel, is not in dispute.

On April 12, 1977, Delmer Groeteke delivered the first load of soybeans, 212 bushels, to Anderson Feed & Seed Co. Since he was busy with his farming operations, Groeteke left his truck with Nelsen so that Nelsen could haul the remaining beans. Between April 15, 1977, and May 18, 1977, Nelsen and his son hauled eight loads of soybeans from the Groeteke farm. This brought the total amount of soybeans actually received by Anderson Feed & Seed Co. to 1,762.68 bushels. Groeteke was paid for the nine loads of soybeans in three checks dated May 9, 1977, May 24, 1977, and June 4, 1977, totaling $18,331.77. No beans were hauled after May 18, 1977.

The price of soybeans dropped during the summer, and on August 1, 1977, Groeteke sold 260.67 bushels of the remaining beans to the Hooper co-op for $5.74 per bushel. On March 17, 1978, Groeteke sold the remaining 500 bushels to the Hooper co-op for $6.31 per bushel. Action was commenced on August 9, 1978, to recover the difference between the price received for the remaining bushels and the contract price. On August

11, 1978, Galen Nelsen was killed in an automobile accident. Groeteke filed a claim against Nelsen's estate in the county court of Dodge County, Nebraska, on June 4, 1979. The claim was disallowed by the personal representative. Groeteke's petition for allowance of the claim in the county court was also disallowed. An appeal was taken to the District Court for Dodge County, Nebraska. The issue was tried to a jury and a verdict was rendered in favor of the estate, from which the claimant appealed. We affirm the trial court's judgment on other grounds.

The trial court should have sustained the estate's motion for a directed verdict. The statute of frauds was properly raised as a defense to the present action by a general denial. *Benes v. Reed*, 158 Neb. 128, 62 N.W.2d 320 (1954); *Ord v. Benson*, 163 Neb. 367, 79 N.W.2d 713 (1956). The record shows that the statute of frauds was specifically raised in the estate's motion for a directed verdict at the close of the claimant's case. The statute of frauds states: "Except as otherwise provided in this section a contract for the sale of goods for the price of five hundred dollars or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing." Neb. U.C.C. § 2-201(1) (Reissue 1980). The oral contract was for personal property in excess of $500.

The claimant argued that the contract was without the statute of frauds because it falls within Neb. U.C.C. § 2-201(3)(c) (Reissue 1980), which reads: "A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable . . . with respect to goods for which payment has been

made and accepted or which have been received and accepted . . . ."

The contract in question clearly falls within § 2-201(3)(c). The evidence indicates that Galen Nelsen received, accepted, and paid for 1,762.68 bushels of soybeans. However, at no time were the remaining 750 bushels received or accepted by Nelsen. "The language of the statute, and of the official comment, makes it clear that part performance of an oral contract for the sale of goods that is capable of apportionment is enforceable only as to that portion that has been either fully or partially performed." *In re Augustin Bros. Co.*, 460 F. 2d 376, 380 (8th Cir. 1972); *Wilke v. Holdrege Coop. Equity Exchange*, 200 Neb. 803, 265 N.W.2d 672 (1978). To the extent the contract covers goods in excess of 1,762.68 bushels of soybeans, it is unenforceable. A directed verdict was proper under these circumstances since, under the facts, the claimant was not entitled to any relief.

In his assignments of error, Groeteke claims the trial court erred in not giving his jury instruction Nos. 1, 2, and 3, dealing with acceptance and delivery. The statute of frauds is clear on this issue. A delivery alone by the seller is insufficient to take an oral contract for the sale of goods of the price of $500 or more out of the statute. The statute makes it necessary that the goods "have been received and accepted" before avoidance of the statute of frauds is recognized. See, *Del Hayes & Sons, Inc. v. Mitchell*, 304 Minn. 275, 230 N.W.2d 588 (1975). *Benes v. Reed, supra.* The assignment is without merit.

The remaining assignments of error will not be discussed, as they are not determinative of this appeal.

AFFIRMED.

RICHARD P. STRAYER AND ROBERT L. PETTEGREW, APPELLANTS, V.
CITY OF OMAHA, A MUNICIPAL CORPORATION, ET AL., APPELLEES.

311 N.W.2d 510

Filed October 23, 1981. No. 43500.

Contracts: The interpretation given a contract by the parties themselves while engaged in the performance of it is one of the best indications of the true intent of their contract, and should be given great, if not controlling, influence.

Appeal from the District Court for Douglas County: D. NICK CAPORALE, Judge. Affirmed.

Thomas F. Dowd of Dowd & Fahey Law Offices and Jerome A. Merwald for appellants.

Herbert M. Fitle, City Attorney, and Kent N. Whinnery for appellees.

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

BOSLAUGH, J.

The plaintiffs, Richard P. Strayer and Robert L. Pettegrew, are park caretakers employed by the City of Omaha, Nebraska. They brought this action against the City, the mayor, the Finance Department director, and the Parks and Recreation Department director on behalf of themselves and all other similarly situated current and former employees who had been employed by the City within the preceding 5 years. The plaintiffs alleged they were hourly employees but had not been paid for hours worked in excess of 40 hours per week. The plaintiffs prayed for an accounting of the wages due them, together with interest, costs, and attorney fees.

The answer of the City alleged that the plaintiffs were entitled to wages at the hourly rate for only 40 hours per week and that there was no identity of interest be-

tween the plaintiffs and other members of the class.

The trial court found that the action was not properly brought as a class action and that the plaintiffs were entitled to be paid at the hourly rate on the basis of only 40 hours per week without regard to the hours actually worked. The plaintiffs have appealed.

The plaintiffs are employed as either Park Caretaker I or Park Caretaker II by the defendant City. The collective bargaining agreement provides an "hourly rate" of pay for the classifications which include Park Caretakers I and II. The testimony shows that the hourly rate was determined by multiplying the monthly rate by 12, and then dividing that figure by 2,080 hours. The number of hours, 2,080, was arrived at by multiplying 52 weeks by 40 hours. The plaintiffs contend the formula for determining the hourly rate assumes a 40-hour week.

The caretakers are on call 24 hours a day, but their "workweek" is a 6-day 48-hour week. Twice a month they are paid one half of what is defined in the collective bargaining agreement as their monthly rate of pay.

The plaintiffs contend that caretakers are hourly employees and their basic weekly salary should be the stated hourly rate times 48 hours. They emphasize that vacation, sick, and overtime pay for the caretakers is figured on the basis of the "hourly rate."

Park caretakers who work on their regularly scheduled day off are paid one and one-half times the hourly rate stated in the collective bargaining agreement. Witnesses for the City testified that, as to park caretakers, the stated hourly rate is merely a control number to facilitate figuring overtime, vacation pay, and sick-leave pay. They also testified that the 48-hour "workweek" assigned to park caretakers serves the same type of control function for determining time and attendance records. There was also testimony that, during negotiations in the early 1970s, demands were made by representatives of the park caretakers with regard to paying park caretakers by an hourly, rather than monthly,

rate, but that this demand was rejected.

Park caretakers for the City of Omaha are furnished living quarters by the City in the park where they work. Utilities and telephone service are paid for by the City.

The sections of the current collective bargaining agreement dealing with hours of work (Article XII), overtime (Article XIII), meal periods (Article XIV), and show-up and call-in time (Article XV) all specifically exempt employees who are furnished living quarters on city property from the operation of those articles.

While the labor agreement does provide that "Eight hours of work shall constitute a regular daily work shift. A regular work week consists of five consecutive eight-hour days," it further provides that "The provisions of this Article [XII] shall not apply to employees furnished living quarters on CITY property." We think that these provisions demonstrate that considerations applied to city employees based on a 40-hour workweek do not apply to the plaintiffs.

It is clear from the record that the park caretakers have always been paid on a monthly basis. With one exception the job "postings" since 1969, which appear in the record and are announcements of examinations for persons seeking employment as park caretakers, quote a monthly salary.

"'The interpretation given a contract by the parties themselves while engaged in the performance of it is one of the best indications of the true intent of their contract, and should be given great if not controlling influence, * * *.'" *Stover v. Ed Miller & Sons, Inc.*, 194 Neb. 422, 426-27, 231 N.W.2d 700, 703 (1975).

We think the record as a whole shows that the plaintiffs, as park caretakers, are entitled to be paid only on a monthly basis, and the finding of the trial court was correct.

It is unnecessary to consider the assignments of error concerning whether a class action was appropriate.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. BILLY R. BILLUPS, APPELLANT.

311 N.W.2d 512

Filed October 23, 1981. No. 43693.

1. **Warrantless Searches: Search and Seizure.** The voluntariness of the consent to search should be determined from the totality of all the circumstances surrounding it.
2. ——:——. The question of whether a consent to search is voluntarily given is a question of fact.
3. ——:——. When the prosecution seeks to justify a warrantless search by proof of voluntary consent it is not limited to proof that the consent was given by the defendant, but may show that the permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.

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 Dale D. Brodkey for appellee.

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

KRIVOSHA, C.J.

The appellant, Billy R. Billups (Billups), appeals from a conviction based upon a jury verdict which had found Billups guilty of committing a violation of Neb. Rev. Stat. § 28-324(1) (Reissue 1979), robbery, a Class II felony; a violation of Neb. Rev. Stat. § 28-1205(1) (Reissue 1979), using a firearm to commit a felony, a Class III felony; and a violation of Neb. Rev. Stat. § 28-308(1) (Reissue 1979), assault in the first degree, a Class III felony. Billups was sentenced to a term of 15 to 20 years on the robbery charge; 5 to 20 years on the use of a firearm charge, to be served consecutively to the robbery sentence; and 5 to 20 years on the

first degree assault charge, to be served concurrently with the robbery sentence and use of a firearm sentence.

Billups assigns two errors. The first error assigned by Billups is that the trial court erred in refusing to suppress evidence seized at appellant's home while making an alleged unlawful arrest. The second assignment of error claimed by Billups is that the trial court erred in failing to instruct the jury on a lesser-included offense of second degree assault, as requested by Billups. We believe that appellant's claim of error in both instances must be denied and the judgment and sentences affirmed in all respects.

We shall discuss the assignments of error in the order presented by appellant. Before doing so, however, a brief summary of the facts is necessary.

On the morning of March 27, 1980, Gary Cady was working at the Imperial Oil Company gas station in Omaha, Nebraska. At about 8:15 a.m. he noticed two males sitting in a car near the air pump. One of the men, whom Cady later identified as Billups, came into the station and asked for change. Cady indicated to Billups that he did not have any money with him. Billups then began to talk about the old manager who used to help him out. The conversation lasted about 3 or 4 minutes and Billups departed the station. After Cady had pumped gas for a number of cars he went back inside the station to put the money into the safe. At that point Billups entered the station again and headed toward the men's room. He was wearing a "long gray coat with checks on it." He suddenly jumped back and displayed a revolver which he pointed at Cady and ordered him to "step on back here." Cady went into the backroom of the station and was ordered to lie down on the floor and not move. While Cady was lying on his stomach Billups took Cady's billfold and the coin changer and asked him for the keys to the safe. Cady told Billups that he did not have the keys for the bottom safe but did for the top

safe. While Cady was getting up to get the keys out of his coat pocket, Billups proceeded to shoot Cady, once in the shoulder or arm, which knocked him back, and a second time in the chest, right above the heart. Cady fell to the floor, at which time Billups shot him again. At that point Billups fled the station, taking with him $75.10.

Shortly thereafter help arrived and the police were summoned. Before Cady was taken to the hospital he gave a description of Billups to the police. Cady also described the coat which Billups was wearing. It was a long gray coat with checks of black or gray.

At the hospital Cady had one bullet surgically removed from his right shoulder, the other bullets having glanced off of him. The hospital personnel had to dig the bullet out and then sew up the wound. At the hospital Cady identified Billups as the robber from numerous photographs shown him by a police officer. With this information the police went to where Billups lived with his brother, Bernard, and Bernard's wife, Edith.

One of the police officers present at Billups' residence testified at a suppression hearing requested by Billups that when the police arrived at Billups' house they observed two women in front of the house getting into a car. One of the women was Edith Billups, Bernard Billups' wife. She was asked if Billups was at home and she replied that she believed he was. Testimony discloses that at that point Edith Billups turned from the car and proceeded to walk back to the house with the police officers following her. She knocked on the front door and it was opened by Bernard Billups. The officers asked if appellant was home and were told by Bernard Billups that his brother was upstairs sleeping.

The officers then went upstairs and placed Billups under arrest. As the officers were leaving the residence with Billups they noticed a black-and-white tweed-type coat hanging in a hallway just inside the front door.

The police took the coat with them when they took Billups to police headquarters. Cady later identified the coat as that worn by Billups during the robbery and assault.

Bernard Billups denied having given consent but conceded that when he answered the front door his wife, Edith, walked in with the officers right behind her. No one advised the officers to remain out of the house. Based upon the testimony the trial court specifically found that the evidence established that the officers had received consent to enter the house from Mrs. Billups, one of the residents of the house.

With this background we turn now to the assignments of error raised by appellant, the first one being that the trial court erred in refusing to suppress the evidence of the overcoat obtained during the arrest of Billy Billups. Billups' argument is framed in the traditional fourth amendment form. Billups argues that the arrest, having been nonconsensual and without warrant, violated the standards established by the U.S. Supreme Court in *Payton v. New York*, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980). Appellant then argues that because the arrest was illegal and in violation of Billups' fourth amendment rights, all evidence obtained as a result of the illegal arrest are "the fruits of a poisonous tree" and likewise inadmissible. See *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). Appellant's position is correct unless the trial court properly found that the entry into the Billups home was consensual. While it is true that mere submission to authority is insufficient to establish consent, see, *Amos v. United States*, 255 U.S. 313, 41 S. Ct. 266, 65 L. Ed. 654 (1921), and *Bumper v. North Carolina*, 391 U.S. 543, 88 S. Ct. 1788, 20 L. Ed. 2d 797 (1968), consent must in each instance be determined from the totality of the circumstances.

While greater expectations of privacy may exist with regard to one's home as opposed to other property, the

issue concerning consent appears to be the same. In *State v. Rathburn*, 195 Neb. 485, 239 N.W.2d 253 (1976), we examined the matter of consent in the context of the fourth amendment to the U.S. Constitution, and said at 489, 239 N.W.2d at 256: "The voluntariness of the consent to search should be determined from the totality of all the circumstances surrounding it. [Citations omitted.] A question of whether a consent to search is voluntarily given is a question of fact."

Likewise, in *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973), the U.S. Supreme Court said in part: "[T]he question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances. While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the *sine qua non* of an effective consent. As with police questioning, two competing concerns must be accommodated in determining the meaning of a 'voluntary' consent—the legitimate need for such searches and the equally important requirement of assuring the absence of coercion."

And in *United States v. Watson*, 423 U.S. 411, 424, 96 S. Ct. 820, 46 L. Ed. 2d 598 (1976), the U.S. Supreme Court said: "We are satisfied in addition that the remaining factors relied upon by the Court of Appeals to invalidate Watson's consent are inadequate to demonstrate that, in the totality of the circumstances, Watson's consent was not his own 'essentially free and unconstrained choice' because his 'will ha[d] been overborne and his capacity for self-determination critically impaired.' [Citation omitted.] There was no overt act or threat of force against Watson proved or claimed. There were no promises made to him and no indication of more subtle forms of coercion that might flaw his judgment. He had been arrested and was in custody, but his consent was given while on

a public street, not in the confines of the police station. Moreover, the fact of custody alone has never been enough in itself to demonstrate a coerced confession or consent to search. Similarly, under *Schneckloth*, the absence of proof that Watson knew he could withhold his consent, though it may be a factor in the overall judgment, is not to be given controlling significance."

And, further, in the recent case of *United States v. Mendenhall*, 446 U.S. 544, 555-58, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980), the U.S. Supreme Court said: "We also reject the argument that the only inference to be drawn from the fact that the respondent acted in a manner so contrary to her self-interest is that she was compelled to answer the agents' questions. It may happen that a person makes statements to law enforcement officials that he later regrets, but the issue in such cases is not whether the statement was self-protective, but rather whether it was made voluntarily.

. . . .

"The question whether the respondent's consent to accompany the agents was in fact voluntary or was the product of duress or coercion, express or implied, is to be determined by the totality of all the circumstances . . . . The Government's evidence showed that the respondent was not told that she had to go to the office, but was simply asked if she would accompany the officers. There were neither threats nor any show of force. The respondent had been questioned only briefly, and her ticket and identification were returned to her before she was asked to accompany the officers."

The question, therefore, that we must answer in the instant case is whether there was consent given to the officers to enter the Billups home and make the search. In doing so we must keep in mind the standard of review to be applied in such a case, which is, "The applicable standard of review by this court . . . should be the same as applied in other similar types of cases. The

findings of fact by the District Court will not be set aside on appeal to this court unless they are clearly erroneous. In determining whether the District Court's findings are clearly erroneous, this court takes into consideration the advantage of the District Court in having heard the oral evidence." *State v. Van Ackeren*, 194 Neb. 650, 657, 235 N.W.2d 210, 215 (1975). Furthermore, in *State v. Van Ackeren* at 657-58, 235 N.W.2d at 215, we noted: "When the prosecution seeks to justify a warrantless search by proof of voluntary consent it is not limited to proof that the consent was given by the defendant, but may show that the permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected. United States v. Matlock, 415 U.S. 164, 94 S. Ct. 988, 39 L. Ed. 2d 242 . . . ."

We believe an examination of the record supports the trial court's finding that Edith Billups, a co-occupant of the premises, did in fact consent to the officers entering the home. The evidence clearly establishes that at the time the officers arrived Edith Billups was departing the premises and about to enter into her car and drive away. She voluntarily, without threat or coercion, changed her direction and walked back to the house with the officers knowingly following behind her. She knew the officers were looking for Billups and her action in leading the officers back to the house is completely consistent with the officers' testimony that she was taking them back to the house. Upon arriving at the porch she knocked on the door and, when the door was opened, walked into the house with the officers behind her. She made no effort to indicate to the officers that they were not at liberty to continue following her through the door as they had previously followed her from the sidewalk to the door. Moreover, Edith Billups never appeared and testified to the contrary. We are unable to say that the finding of fact by the trial court to the effect that Edith Billups

gave consent was clearly erroneous and must be disregarded. We therefore must conclude that the trial court's finding of consent was correct, and the first assignment of error must be overruled.

We turn then to the second assignment of error raised by appellant to the effect that the trial court erred in not giving a requested instruction on second degree assault as being a lesser-included offense. We believe that the flaw in this argument is due to the fact that appellant is wrong in maintaining that second degree assault is a lesser-included offense of first degree assault. They are two distinct offenses. Section 28-308(1) provides: "A person commits the offense of assault in the first degree if he intentionally or knowingly causes *serious bodily injury* to another person." (Emphasis supplied.) On the other hand, Neb. Rev. Stat. § 28-309(1) (Reissue 1979) defines assault in the second degree: "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." (Emphasis supplied.) First degree assault occurs whenever "serious bodily injury" is present, while second degree assault only involves "bodily injury" if with a dangerous weapon, and "serious bodily injury" if done recklessly with a dangerous weapon. Certainly there is no evidence in this case to support a claim that the shooting by Billups was done recklessly and was anything but intentional. See Neb. Rev. Stat. § 28-109(19) (Reissue 1979). Therefore, unless we are prepared to say that shooting one in the chest above the heart is not the inflicting of a serious bodily injury and that a jury could lawfully find that shooting one in the chest above the heart is only a bodily injury, there was no evidence upon which assault in the second degree could have properly been submitted to the jury. We have frequently held that it is only when a higher crime fully embraces

all of the ingredients of a lesser offense and when the evidence requires it that an instruction on a lesser-included offense must be given on request. See *State v. McClarity*, 180 Neb. 246, 142 N.W.2d 152 (1966). Neb. Rev. Stat. § 28-109(20) (Reissue 1979) defines serious bodily injury to mean "bodily injury which involves a substantial risk of death, or which involves substantial risk of serious permanent disfigurement, or protracted loss or impairment of the function of any part or organ of the body." The evidence in this case correctly reflected that if the appellant was guilty of anything, he was guilty of intentionally or knowingly causing serious bodily injury to another. While we are not prepared to say, and do not by this decision hold, that every shooting of another is automatically a serious bodily injury, we do believe that shooting one in the chest above the heart in such a manner that the bullet must be dug out and the wound sutured, as disclosed by the evidence, indeed satisfied the statutory definition of "serious bodily injury." To hold anything else would be to totally ignore the obvious. We believe the trial court was correct in only submitting to the jury the issue of first degree assault and refusing to submit to the jury the issue of second degree assault. Having so concluded, the judgment and sentences must be affirmed.

AFFIRMED.

LOUISE E. REDMOND, APPELLANT AND CROSS-APPELLEE, V. JAMES L. REDMOND, APPELLEE AND CROSS-APPELLANT.

311 N.W.2d 517

Filed October 23, 1981. No. 43742.

Property Division: Appeal and Error. This court is not inclined to disturb the division of property made by the trial court in an action for dissolution of marriage unless it is patently unfair on the record.

Appeal from the District Court for Dakota County: BRYCE BARTU, Judge. Affirmed as modified.

Kurt T. Rager and Leamer Law Office for appellant.

Maurice S. Redmond for appellee.

Heard before BOSLAUGH, CLINTON, BRODKEY, and WHITE, JJ., and HOWARD, District Judge.

HOWARD, District Judge.

Petitioner appeals from that portion of a decree in dissolution of her marriage appointing a referee to sell all the personal property and granting her 60 percent of the net proceeds, assigning as error that the requirement of a sale rather than a division in kind is unfair and abusive of discretion, and that she should be awarded a greater proportion of the personal property. Respondent cross-appeals, contending that he is entitled to 50 percent, rather than 40 percent, of the personal property.

The record insufficiently details the personal property and fails to show values. It apparently consists of household furniture, some of which is encumbered, appliances and utensils, a 1978 Ford automobile purchased on an installment sale contract, a promissory note of $5,300 given by respondent to petitioner before the marriage, life insurance policies, and other miscellaneous items.

The trial court also awarded the family home to the petitioner, subject to the mortgage which she was directed to pay, and clothing and personal effects to the parties in possession. The fairness of these awards is not questioned by either party. At the time of the marriage in 1974 the petitioner owned the house, full of furniture, a supermarket, where respondent worked on a salary until he suffered a stroke in 1975, and an automobile which was traded in for the 1978 Ford in question. Since being disabled, respondent has received Social Security and insurance payments, and $18 per week painting signs for a local grocery store. During

the marriage, before his stroke, respondent made payments of $300 per month for child support and alimony from a previous marriage. It appears that respondent has made some payments on the furniture, the automobile, and insurance policies, as well as house payments for "quite a few years." Precision is lacking throughout the evidence. Petitioner acknowledges that respondent is entitled to "something," and respondent argues that he should receive 50 percent, not 40 percent, of the personal property. This court is not inclined to disturb the division of property made by the trial court unless it is patently unfair on the record. *Tavlin v. Tavlin*, 194 Neb. 98, 230 N.W.2d 108 (1975). We cannot say, on this record, that the division was patently unfair.

The record discloses that very little assistance was given to the trial court by counsel in the task of evaluating the marital estate. The trial court's decision requiring a sale of all personal property can be understood, but we are of the view that, given the nature of the personal property and the encumbrances, the portion of the decree appointing a referee to sell the personal property should be modified to require the referee to itemize the values and determine the encumbrances and report them to the court for further order.

Accordingly, the decree is affirmed in all respects, except that the portion thereof appointing the referee is modified to provide that the referee shall inquire into the nature and values of the various items of personal property and the encumbrances thereon and report the same to the court for further order, which, so far as is practicable, shall divide the property in kind.

AFFIRMED AS MODIFIED.

JESSIE L. AKINS, APPELLANT, V.
HAPPY HOUR, INC., ET AL., APPELLEES.

311 N.W.2d 518

Filed October 23, 1981. No. 43765.

SUPPLEMENTAL OPINION

Appeal from the Nebraska Workmen's Compensation Court. On motion for rehearing. See *ante* p. 236, 306 N.W.2d 914 (1981), for original opinion. Motion for rehearing overruled.

Robert C. Wester of Schirber Law Offices, P.C., for appellant.

Hansen & Engles, P.C., for appellees Happy Hour and Aetna Ins. Co.

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

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

PER CURIAM.

The present statutes and decisions of this court do not authorize an allowance of attorney's fees in this court under the circumstances present in this case. See *Rexroat v. State*, 143 Neb. 333, 9 N.W.2d 305 (1943).

That portion of the judgment allowing an attorney's fee of $1,000 for services of the employee's attorney in this court is withdrawn.

MCCOWN, J., dissenting.

Neb. Rev. Stat. § 48-125 (Reissue 1978) provides for the allowance of attorney's fees to an employee in workmen's compensation cases. The relevant portion of that statute provides: "In the event the employer files an application for a rehearing before the compensation court en banc from an award of a judge of the compensation court and fails to obtain any reduction in the amount of such award, the compensation court sitting en banc may

allow the employee a reasonable attorney's fee to be taxed as costs against the employer for such rehearing, and the Supreme Court shall in like manner allow the employee a reasonable sum as attorney's fees for the proceedings in that court."

The supplemental opinion of the majority in this case holds that where an employer initiated the appeal from an award of a judge of the compensation court and the final judgment of the Supreme Court on appeal reversed the judgment of the three-judge compensation court and affirmed the amount of the original award, the employee is not entitled to an attorney's fee in either the Workmen's Compensation Court or in this court because the employer was not the appellant in the Supreme Court. That holding fragments the appellate process in workmen's compensation cases and misinterprets the legislative intent.

No one would dispute the fact that the Legislature intended that whenever an employer initiated an appeal, either in the Workmen's Compensation Court or in the Supreme Court, and failed to obtain a reduction in the award appealed from in that court, the employee is entitled to an attorney's fee. There is no reason whatever to divide the appeal process in a workmen's compensation case and treat it as though it involved two separate cases in two different courts, each final and independent of the other. The case at bar is a graphic example of the result of such an interpretation.

In this case the Supreme Court held that the three-judge compensation court erroneously reduced the original award in a case in which the employer initiated the appellate process in the compensation court. On the continuation of the appellate process by the employee the Supreme Court has now affirmed the original award of a judge of the compensation court and that award has become the final judgment in the compensation court as well as in this court. If that final judgment had been originally entered by the three-judge compensation court and the employer had appealed that

decision to this court and our decision had been exactly as it is, the employee would have been entitled to attorney's fees in both the compensation court and in this court. Under the supplemental opinion a majority of this court has now held that the employee is entitled to no attorney's fee at all in either court. That result, in the name of stare decisis, exalts form over substance at the expense of justice.

The supplemental opinion rests on the case of *Rexroat v. State*, 143 Neb. 333, 9 N.W.2d 305 (1943). That case has been cited with approval on one or two later occasions and is now reaffirmed by the majority in the supplemental opinion. The *Rexroat* case represents an erroneous and technical misinterpretation of the legislative intent in contradiction of the requirement that the Workmen's Compensation Act must be liberally construed so that its beneficent purposes may not be thwarted by technical refinements of interpretation. The fact that almost 40 years have passed since *Rexroat* does not constitute any reasonable justification for perpetuating an unjust result. *Rexroat v. State*, and its progeny, should be overruled.

KRIVOSHA, C.J., and WHITE, J., join in this dissent.

IN RE INTEREST OF CHADD CHIRNSIDE AND ROBIN CHIRNSIDE, CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. MARLENE CHIRNSIDE, APPELLANT.

311 N.W.2d 876

Filed October 23, 1981. No. 43821.

1. **Parental Rights.** The right of a parent to maintain the custody of his or her children is a natural but not inalienable right, and the public has a paramount interest in the protection of the rights of a child.
2. ——. The court may terminate all parental rights between the parents and such child when the court finds such action to be in the best interests of the child and it appears by the evidence that 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.

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

Dennis R. Keefe, Lancaster County Public Defender, and Don C. Bauermeister for appellant.

Ron Lahners, Lancaster County Attorney, and Richard J. Hautzinger for appellee.

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

PER CURIAM.

The appellant, Marlene Chirnside (mother), appeals from an order entered by the separate juvenile court of Lancaster County, Nebraska, terminating her parental rights to her two minor children, Chadd Chirnside, born March 18, 1973, and Robin Chirnside, born March 5, 1974. Mother maintains that the State has failed to introduce clear and convincing evidence to establish that the best interests of the children require termination of her parental rights. We have examined the entire record in this case and conclude that the action of the separate juvenile court in terminating mother's parental rights is in fact supported by clear and convincing evidence and is in the best interests of the minor children. The judgment of the separate juvenile court must, therefore, be affirmed.

The parents of the minor children involved in this action were divorced on May 19, 1975. The custody of the children was placed with mother. On April 14, 1976, a petition was filed in the separate juvenile court of Lancaster County, Nebraska, alleging that the children were neglected children as defined by Neb. Rev. Stat. § 43-202(2) (Reissue 1978). The petition alleged that the children were without proper parental care in that their parents failed to provide them with proper care

necessary for their health and well-being, including failure to provide a clean and safe home, failure to provide adequate supervision, and refusal on mother's part to accept services offered by the Lancaster County Department of Public Welfare to correct the conditions of neglect. On April 28, 1976, the separate juvenile court found in fact that mother did not provide a home for her children which was clean and safe, and further found that the children were not given adequate supervision. Specifically, the court found that the environment provided by mother was unsafe and, unless immediately corrected, would be harmful to said children and that the children were without proper parental care as defined by § 43-202(2).

Notwithstanding the court's findings, the court delayed final disposition of the matter and gave mother 3 days to correct the situation. The court ordered that if mother made the home clean and safe within the 3-day period the children were to remain in her custody under caseworker supervision. If she failed to make the home clean and safe, the matter was to be returned to court for further hearing.

At the subsequent hearing the court found that indeed mother had made the home clean and safe and that the children could therefore remain in her custody under the supervision of a caseworker from the Lancaster County Department of Public Welfare. The court further determined that the court should retain jurisdiction of the matter and that the case be reviewed by the court every 6 months or on application of any interested party showing a change in circumstances requiring a different disposition.

The record then discloses a long series of hearings, orders, and conscientious efforts by the separate juvenile court to provide mother with every reasonable opportunity to improve her mental and physical condition so that she could have custody of her children. More than a dozen hearings were held between September 20, 1976, and September 4, 1980, when the

parental rights of the parents were finally terminated.

The record details an almost hopeless situation due to mother's mental condition which apparently is not reversible.

The home was constantly unsafe. On one occasion Chadd was found wandering in the streets unsupervised after 10 p.m. His mother was not at home. Chadd was found dirty, with a bad cold, and not appropriately dressed.

On several occasions mother was committed to either a Lincoln hospital or the Lincoln Regional Center for psychiatric treatment.

Many times during the 4 years, the children were moved between their mother and foster homes. Each time the court exercised great restraint, hoping to permit mother to regain custody of her children. Each effort by the court was met with failure by mother.

At a hearing held on December 4, 1978, mother admitted that the children were without proper care and supervision because mother had been admitted to the Lincoln Regional Center and was being held at the Lincoln Regional Center. By reason thereof the children were once again removed from the family home, Robin being placed with the maternal grandparents and Chadd being placed in foster care.

On May 12 and 13, 1980, a further hearing was held on the petition to terminate the parental rights of the parents. In its order entered on May 30, 1980, the separate juvenile court detailed all of the many hearings and trial placements which had occurred between April 28, 1976, and May 12, 1980. Specifically, the court found that mother has a mental illness which will continue for a prolonged, indefinite period; that she fails and refuses to take medication on a regular basis; and that the mental illness causes her to have psychotic episodes, and while being in a psychotic episode she is a threat to the safety of her children. The record discloses bizarre and irrational behavior by mother, including episodes of exposing herself to others and

making improper sexual advances toward one of Chadd's foster mothers.

The court further noted that while Chadd was living with mother he exhibited signs of anxiety in the school classroom and that this anxiety in the classroom was reduced when he was placed in a stable foster family home. The court further found that to return the children to the custody of mother was a threat to the physical safety of the children and also a threat to the psychological well-being of the children. All of these findings are amply supported in the record.

Dr. Burton Zung, clinical psychologist, testified that mother was unable to meet the emotional needs of her children. His conclusion was that no further services were available to help mother and that her parental rights should be terminated.

Dr. James Anthony, psychiatrist and consultant, diagnosed mother as a manic depressive and stated that she could not effectively parent while in that state.

Dr. Somasundaram Rajendran, another psychiatrist, also diagnosed mother as a manic depressive. He further stated that mother was a psychotic who suffered from delusions and was unable to take care of herself or her children. He also noted that mother had no insight into her problems, which made her possible treatment all the more unlikely.

Marge Ludden, Lancaster County social worker, told of mother's inability to provide a stable environment for her children because of her numerous changes in residence and because of the numerous jobs she had. She concluded that no further social services were left to help mother and recommended that her parental rights be terminated.

And finally, Chadd's foster mother, Linda Rappl, testified that Chadd's behavior was very unruly after being in mother's custody, but that it had improved markedly since living in the Rappl household. She also testified concerning mother's failure to provide Chadd with proper medical care and failure to properly clothe

him and Robin in cold weather. Finally, she testified in detail to the sexual advances made by mother toward her while Chadd was present.

We believe little purpose would be served to set out in further detail all of the evidence. Suffice it to say the evidence clearly and convincingly established that the children were neglected and dependent and the best interests of the children demanded that the parental rights of mother be terminated.

As a result of all the evidence, the trial court terminated the parental rights of mother as of May 30, 1980. The issue regarding the parental rights of the father was continued until July 22, 1980. Thereafter, on June 30, 1980, the father presented a plan concerning the care and custody of the children. By reason of that plan being proposed, the separate juvenile court set aside its previous order terminating the parental rights of mother so as to afford the father an opportunity to implement the plan. On August 28, 1980, a further hearing was held, at which time the court was advised that the father did not desire to proceed with the plan and did not desire to obtain custody of the children. By reason thereof the trial court concluded that the best interests of the children now demanded that the parental rights of both parents be terminated as to the minor children. On September 4, 1980, the separate juvenile court did terminate the parental rights of both parents to the minor children. The father has not appealed from that order and, as to the father, the order is final. It is only with regard to mother that an appeal has been taken and that we need consider at this time.

As we have frequently noted, no case presents for the court a more difficult problem than a case involving the termination of parental rights. No solution is ever adequate to meet the problem. Yet this court is obligated to protect the interests of minor children and must do the best it can under the circumstances. As we noted in *In re Interest* of *Hill*, 207 Neb. 233, 239, 298 N.W.2d 143, 146 (1980): "Everyone wishes to do that which appears

to be best for the minor children, yet one cannot be certain what is really best in each situation. It is for that reason that we have established certain basic rules by which we are to be governed in cases of this nature. These rules are intended to recognize the integrity of the family and to bring about parental termination only when that appears to be required and no other reasonable alternative exists."

Moreover, as we noted in *In re Interest of J.L.L.*, *ante* p. 76, 84-85, 306 N.W.2d 175, 180-81 (1981): "[T]he right of a parent to maintain the custody of his or her children is a natural but not inalienable right and the public has a paramount interest in the protection of the rights of a child."

The instant case is an example of the trial court making every effort to provide mother the opportunity to rehabilitate herself so as to properly care for her children. The record further discloses that mother is simply unable to accomplish that result due to her mental condition. While that is regrettable and may very well be a matter over which mother has no control, the courts cannot ignore their obligation and duty to provide for the best interests of the minor children. Neb. Rev. Stat. § 43-209(5) (Reissue 1978) was specifically designed to address the very problem found in this case. That section of the statute provides in part: "The court may terminate all parental rights between the parents . . . and such child when the court finds such action to be in the best interests of the child and it appears by the evidence . . . (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."

The evidence is without question that mother's mental illness will continue for a prolonged, indefinite period and while so mentally affected she is unable to discharge her parental responsibilities. Furthermore, there is more than sufficient evidence from which this

court can find by clear and convincing evidence that the best interests of the children in this case demanded termination of parental rights.

While we have frequently held that an appeal of a juvenile proceeding to this court is heard de novo upon the record, we have further held that the findings of fact by the trial court will be accorded great weight because the trial court heard and observed the parties and witnesses. See, *In re Interest of Kain, ante* p. 229, 307 N.W.2d 119 (1981); *In re Interest of J.L.L., supra; In re Interest of McKee,* 208 Neb. 623, 304 N.W.2d 918 (1981). The evidence in this case fully and completely supports the action taken by the separate juvenile court in terminating the parental rights of mother. To do otherwise would be wholly improper. We might wish it to be otherwise. Good intentions either on the part of mother or this court are not sufficient. Only providing for the best interests of the children is sufficient. Hope as we might to discover some other alternative which might permit mother to retain the children, we are unable to do so.

The judgment of the separate juvenile court terminating the parental rights of mother to the two minor children, Chadd Chirnside and Robin Chirnside, is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL L. MEYER, ALSO KNOWN AS MIKE MEYER, AND KAREN M. MEYER, ALSO KNOWN AS KIRBY MEYER, APPELLANTS.

311 N.W.2d 520

Filed October 23, 1981. Nos. 43898, 43899.

1. **Search Warrants: Constitutional Law.** The provisions of Neb. Rev. Stat. § 29-411 (Reissue 1979), providing for entry for search pursuant to warrant "without giving notice of his authority and purpose, if the

judge or magistrate issuing a search warrant has inserted a direction therein that the officer executing it shall not be required to give such notice . . . . The judge or magistrate may so direct only upon proof under oath, to his satisfaction that the property sought may be easily or quickly destroyed or disposed of . . . if such notice be given," do not offend the fourth amendment prohibition against unreasonable search and seizure.

2. **Search and Seizure: Judicial Notice.** A court may take judicial notice of the fact that substances such as cocaine, LSD, and certain forms of prepared marijuana may be easily and quickly disposed of by flushing down a toilet or drain.
3. **Search Warrants: Affidavits.** Although an affidavit supporting a search warrant may be based on hearsay information and need not reflect the direct personal observations of the affiant, the magistrate must be informed of some of the underlying circumstances relied on by the person providing the information and some of the underlying circumstances from which the affiant concluded that the informant, whose identity was not disclosed, was creditable or his information reliable.
4. ——:——. An affidavit for a search warrant is not defective simply because it is based on hearsay, so long as the affidavit discloses a substantial basis for crediting the hearsay. Firsthand knowledge of an informant, acquired by sight or hearing, is self-corroborating and tends to fulfill both aspects of the *Aguilar* test.
5. **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.

Appeal from the District Court for York County: WILLIAM H. NORTON and BRYCE BARTU, Judges. Affirmed.

Dennis D. Burchard for appellants.

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

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

CLINTON, J.

The defendants, Michael L. Meyer and Karen M. Meyer, husband and wife, were charged in three counts as follows: (1) Possession of cocaine with intent to deliver, (2) possession of lysergic acid diethylamide,

otherwise known as LSD, and (3) possession of marijuana with intent to manufacture and deliver; all contrary to the provisions of Neb. Rev. Stat. § 28-416 (1)(a) and (3) (Cum. Supp. 1980). A jury trial was waived. In the trial before the court both defendants were found guilty. Each was sentenced to concurrent terms on each count of 1 to 2 years, Michael to be imprisoned in the Nebraska Penal and Correctional Complex and Karen in the Nebraska Center for Women.

On appeal to this court the defendants have assigned and argued the following alleged errors: (1) The trial judge erred in denying their respective motions to suppress various items of evidence seized in the search of their residence pursuant to a "no-knock" search warrant; and (2) In imposing sentence the trial judge erred in considering the recommendations and contents of letters from the probation officer dated October 10, 1980, without, it is claimed, making the contents known to defendants' counsel.

The contentions of the defendants with reference to the search and seizure issue are: (1) That with certain exceptions, the unannounced entry of police officers into a private residence, with or without a warrant, is a violation of the prohibition against unreasonable searches and seizures contained in the fourth amendment to the Constitution of the United States; and (2) The affidavit presented to the magistrate and upon which the warrant was based is insufficient to establish probable cause. In support of their contentions, the defendants rely principally upon *Payton v. New York*, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980), and *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964), respectively.

Neb. Rev. Stat. § 29-411 (Reissue 1979) provides, insofar as relevent to the issues in evidence in this case: "In executing . . . a search warrant . . . the officer may break open any . . . door . . . of a dwelling . . . if, after notice of his office and purpose, he is refused

admittance; *or without giving notice of his authority and purpose, if the judge or magistrate issuing a search warrant has inserted a direction therein that the officer executing it shall not be required to give such notice . . . . The judge or magistrate may so direct only upon proof under oath, to his satisfaction that the property sought may be easily or quickly destroyed or disposed of . . . if such notice be given . . . .*" (Emphasis supplied.)

In the case before us, the warrant contained the above statutory "no-knock" direction and was issued upon an affidavit which we summarize as follows. The affiant, a Nebraska State Patrol drug investigator, stated that he had been involved in numerous investigations involving controlled substance activities and had general familiarity with the slang terms for the various controlled substances; that on October 1, 1979, he interviewed a confidential informant whose information had proven reliable in the past and as a result of which previous arrests and convictions for controlled substance violations had been made; and that the affiant believed the informant was reliable in the present instance. Based upon his own personal observation in the defendants' residence, the informant told the affiant that Mike Meyer had in his possession in said residence within the past 10 days quantities of "coke," "hash," and "pot." In the drug vernacular these terms refer to cocaine, concentrated marijuana, and marijuana. The affiant had overheard a conversation relating to the sale of controlled substances at the residence of the defendants and had made a personal surveillance of the outside of the residence. A separate sentence and paragraph in the affidavit was as follows: "The cocaine is located in a tupperware container located on the first floor of the residence very close to a toilet area." The affiant recited that it had been his experience that persons who deal in controlled substances keep devices and paraphernalia used in the preparation, sorting, processing, and packaging of the substances; that some drugs may be

quickly disposed of or destroyed; and that unless the warrant provided for nighttime entry without notice on this particular night, the first of October, the substances may not be present the next day.

On the night of October 1, following surveillance of the premises and observing lights on in the house and a man present in the house sitting near a window upon which the drapes were not tightly drawn, the police made a forcible entry into the residence without notice.

The ensuing search resulted in the seizure of cocaine, processed and growing marijuana, and LSD, as well as various items of drug paraphernalia. Also found were a variety of other drugs, some of which, but not all, were controlled substances.

The first question with which we are confronted is whether the holding of the Supreme Court of the United States in *Payton v. New York*, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980), nullifies the provision of § 29-411 pertaining to unannounced entries with warrant. We conclude it does not. *Ker v. California*, 374 U.S. 23, 83 S. Ct. 1623, 10 L. Ed. 2d 726 (1963), countenances the procedure authorized in the portion of the statute which we have quoted.

Payton involved the unannounced entry into a residence without a warrant to make, what the court referred to as, a routine felony arrest; in other words, an arrest upon probable cause but without warrant and absent any exigent circumstances. In *Payton*, the person to be arrested was charged with homicide and was absent from the residence at the time the entry was made. As a result of the entry, the firearm which had been used in the homicide was seized. The court held that a motion to suppress the use of the firearm as evidence should have been sustained. It further held that absent exigent circumstances the residence may not be entered without a warrant and that a warrant founded on probable cause carries with it limited authority to enter a building when there is reason to

believe the suspect is within the structure. In *Payton*, no question concerning the necessity of announcing identity and purpose before entry was involved.

Ker v. California, supra, involved the following facts. Officers, in the course of a controlled substances investigation, observed what appeared to be a drug transaction between the defendant and another. They followed the defendant to his apparent residence and, with the aid of a passkey obtained from the landlord, made an unannounced entry for the purpose of preventing the destruction of evidence.

The Court, in its discussion in the above opinion, recognized that in general the validity of an arrest, absent constitutional restriction, is controlled by state law. In discussing the exclusionary rule of *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961), it said in *Ker* at 31: "Mapp, however, established no assumption by this Court of supervisory authority over state courts, cf. *Cleary v. Bolger*, 371 U.S. 392, 401 (1963), and, consequently, it implied no total obliteration of state laws relating to arrests and searches in favor of federal law." The Court held the search was justified as incident to a valid arrest on probable cause and there was probable cause (we have not recited all the pertinent evidence) to believe a felony offense had been or was being committed on the premises. The evidence established the information came from a reliable informant. The Court assumed the entry by key was equivalent to a breaking. It expressly approved the opinion of the California Supreme Court in *People v. Maddox*, 46 Cal. 2d 301, 306, 294 P.2d 6, 9 (1956), which said: "Suspects have no constitutional right to destroy or dispose of evidence, and no basic constitutional guarantees are violated because an officer succeeds in getting to a place where he is entitled to be more quickly than he would, had he complied with section 844." Section 844 permitted officers to make forced entry after identifying themselves and announcing their purpose.

The U.S. Supreme Court said in *Ker* at 40: "Here justification for the officers' failure to give notice is uniquely present. In addition to the officers' belief that Ker was in possession of narcotics, which could be quickly and easily destroyed, Ker's furtive conduct in eluding them shortly before the arrest was ground for the belief that he might well have been expecting the police." The summary appearing in the reporter preceding the opinion says in part at 23: "The States are not precluded from developing working rules governing arrests, searches and seizures to meet 'the practical demands of effective criminal investigation and law enforcement,' provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain."

The defendants also cite *Sabbath v. United States*, 391 U.S. 585, 88 S. Ct. 1755, 20 L. Ed. 2d 828 (1968). That case did not involve a determination of the reasonableness of an entry and search under constitutional provisions. It involved only the requirements of the federal statute requiring "notice of authority and purpose" and whether the search and arrest were valid under the statute. The Court, in its opinion, pointed out that the statute codified the common law, and held that since the requirements of the statute had been violated, the arrest and search were invalid. No warrant was involved in this case. The holding in *Sabbath* has no application to the facts before us.

Supporting the view we take here, in addition to *People v. Maddox, supra*, is *State v. Young*, 76 Wash. 2d 212, 455 P. 2d 595 (1969).

We believe we can take judicial notice of the fact that substances such as cocaine, LSD, and certain forms of prepared marijuana may be easily and quickly disposed of by merely flushing them down a toilet or drain, both of which were located in the residence in the case before us. *People v. De Lago*, 16 N.Y.2d

289, 213 N.E.2d 659, 266 N.Y.S.2d 353 (1965).

The second question related to the validity of the search warrant is whether or not the affidavit submitted to the magistrate upon which the search warrant was issued is sufficient to satisfy the constitutional requirement of probable cause. In *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964), the Supreme Court of the United States said: "Although an affidavit supporting a search warrant may be based on hearsay information and need not reflect the direct personal observations of the affiant, the magistrate must be informed of some of the underlying circumstances relied on by the person providing the information and some of the underlying circumstances from which the affiant concluded that the informant, whose identity was not disclosed, was creditable or his information reliable." (Syllabus of the court.) In applying the above test, we have said: "An affidavit for a search warrant is not defective simply because it is based on hearsay, so long as the affidavit discloses a substantial basis for crediting the hearsay. Firsthand knowledge of an informant, acquired by sight or hearing, is self-corroborating and tends to fulfill both aspects of the Aguilar test." *State v. Howard*, 188 Neb. 494, 197 N.W.2d 641 (1972) (syllabi of the court).

In the present case the affidavit contains the information that the affiant was acquainted with the informant; that the informant had previously provided useful and reliable information and that arrests and convictions had resulted from that information. Furthermore, it appears from the affidavit that the information as to the presence of controlled substances in the residence was obtained by the informant's personal observation while in the residence in the recent past. The affidavit contains details of the facts observed, to wit, the nature of the controlled substances, the nature of the containers in which one of the substances was located, and the location thereof, includ-

ing the fact that it was located near a toilet. The defendants urge that the sentence of the affidavit we have quoted earlier in this opinion does not specifically show the source of the information as to the location of the Tupperware container holding cocaine. Even without that specific information the affidavit is sufficient. However, the affidavit must be read in a commonsense and realistic fashion. Taking the affidavit as a whole, it is clearly inferable that the information contained in the particular sentence was based upon the personal observation of the informant. Affidavits for warrants must be tested in a commonsense, realistic fashion. *State v. Glouser*, 193 Neb. 190, 226 N.W.2d 328 (1975). We hold the affidavit was sufficient to establish probable cause, and as such the warrant in the form in which it was issued, entry without announcement of identity and purpose, was properly authorized.

The defendants argue that the trial court, in imposing sentence, erred in considering the contents and recommendations of the probation officer made in separate letters, dated October 10, 1980, addressed to the court pertaining to each of the defendants. The defendants' counsel asserts the letters were not part of the presentence investigation and were not shown to counsel before sentencing on October 24, 1980. Counsel alleges in his brief that the letters contained false information which would have been rebutted had he known the contents. However, he does not identify the false information. The pertinent letters are before us and came to us in the envelope in which the presentence investigation report was transmitted. Also included are a number of letters of character reference submitted by the defendants at the time of sentencing. We have no reason to doubt counsel's assertion that he did not see the letters; however, that fact does not appear in the record. Neither do we have any reason to believe that the court concealed the letters from counsel.

However, we have examined the letters and they contain few factual references. Those few factual references made are also found in various parts of the presentence investigation which counsel admittedly examined. One example of such a reference is the fact that controlled substances other than those which relate to the charges filed were found in the residence. This fact appears in the presentence investigation. The remaining portions of the letters are largely conclusions and recommendations. The same conclusions and recommendations could be reached by the sentencing judge based upon the information in the presentence investigation. Even if the defendants or their counsel did not see the letters, no prejudicial error resulted. "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.'" *State v. Stranghoener*, 208 Neb. 598, 603, 304 N.W.2d 679, 682 (1981).

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
MARK W. PROSSER, APPELLANT.

311 N.W.2d 525

Filed October 23, 1981. Nos. 44006, 44007.

1. **Criminal Law: Sentences.** The District Court after arrest may consider time spent in a medical institution pursuant to a valid mental health

commitment in determining credit for time to be applied against the sentence.

2. ____: ____. It was not an abuse of discretion for the trial court to fail to give credit for time spent in a mental institution where the sentence pronounced was not the statutory maximum for the offense.

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

Richard G. Kopf of Cook & Kopf, P.C., for appellant.

Paul L. Douglas, Attorney General, and Martel J. Bundy for appellee.

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

WHITE, J.

The appellant, Mark W. Prosser, pursuant to a plea bargain, pleaded guilty to three counts contained in two informations: Count I, subjecting another person to sexual penetration and overcoming such person by threat of force, Neb. Rev. Stat. § 28-319 (Reissue 1979); count IV, use of a firearm to commit a felony, Neb. Rev. Stat. § 28-1205 (Reissue 1979); and escape from confinement while under arrest for a felony, Neb. Rev. Stat. § 28-912 (Reissue 1979). Sexual assault, a Class II felony, is punishable by a maximum of 50 years' imprisonment and a minimum of 1 year's imprisonment. Use of a firearm in the commission of a felony is a Class III felony and provides for a maximum penalty of 20 years' imprisonment or a $25,000 fine, or both, with a minimum of 1 year's imprisonment. Escape is also a Class III felony with the same penalties.

The court sentenced the appellant on the sexual assault charge to a minimum of 8 years and a maximum of 12 years in the Nebraska Penal and Correctional Complex, and awarded credit for 178 days spent in jail. The court sentenced the appellant to a minimum of 1 year and a maximum of 18 months on the commission of a felony with a firearm charge. This sentence was to be served consecutively to the sexual assault charge. On

the escape charge, the court sentenced the appellant to 1 year's imprisonment to be served concurrently with the sexual assault charge. The court, after examination by court-appointed psychiatrists, determined that the appellant was a treatable, mentally disordered sex offender and ordered him confined in the Lincoln Regional Center. The appellant does not appeal from that finding.

The appellant's assignments of error are: (1) The district judge failed to credit time spent by the appellant while involuntarily committed to a mental institution while awaiting trial; and (2) The district judge's sentences were excessive in light of the unanimous opinion of the medical experts that incarceration would neither protect the public nor serve the rehabilitative needs of the appellant.

Appellant was arrested for the crime of sexual assault on May 2, 1979, the same date as the date of the offense. He requested bail but it was not granted. While in custody, the appellant escaped by covering a plastic fork with aluminum foil and persuading the deputy sheriff that he had a knife. On the next day he voluntarily surrendered himself to his attorney. On May 21, 1979, the appellant was bound over to the District Court for trial. While awaiting trial in the District Court, the appellant was apparently examined by a psychiatrist retained by the State of Nebraska, and apparently pursuant to some plea negotiations which are reflected in the ultimate disposition of the case, the State of Nebraska commenced an action before the Dawson County Mental Health Board to have the appellant found to be a mentally ill dangerous person. After being found to be a mentally ill dangerous person, the appellant was committed to the River Oaks Psychiatric Hospital in New Orleans, Louisiana, and ordered to pay the costs of his treatment. The parents of the appellant were apparently financially able to afford such treatment. Appellant was a patient in the hospital from September 5, 1979, to May 28, 1980, when he left the

hospital without permission. He was subsequently arrested in New Orleans, Louisiana, on or about October 30, 1980. He was returned to Dawson County, Nebraska. It is the period of September 5, 1979, to May 28, 1980, the time spent by the appellant in the psychiatric hospital in Louisiana, which is the basis for the first error claimed. The record is clear that the trial judge was aware of the time spent in the psychiatric hospital. He referred to it in his sentencing remarks and determined not to afford the appellant any credit for time spent in the hospital. Neb. Rev. Stat. § 83-1,106 (Reissue 1976) provides in part: "(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 for which a prison sentence is imposed or as a result of the conduct on which such a charge is based. *This shall specifically include, but shall not be limited to, time spent in custody prior to trial, during trial, pending sentence, pending the resolution of an appeal, and prior to delivery of the offender to the custody of the Department of Correctional Services.*" (Emphasis supplied.)

While there are no cases in Nebraska suggesting that credit for time spent in a mental hospital prior to sentence cannot be given, it seems from the clear wording of the statute that the court may consider time spent in a medical institution pursuant to a valid mental health commitment in determining credit for time to be applied against the sentence. We have further held that it is within the trial court's discretion whether to grant credit for time spent in jail prior to sentencing.

The appellant further cites our case of *State v. Blazek*, 199 Neb. 466, 259 N.W.2d 914 (1977), as authority for the proposition that it is an abuse of discretion not to give credit for time spent in custody while awaiting trial. The appellant misapprehends the holding in that case. While we did hold in syllabus No. 4 of *Blazek* that "Ordinarily a defendant should be given credit for time spent in jail prior to sentencing," the specific holding

in that case is that where the maximum term of the sentence pronounced is the statutory maximum for the offense, credit for jail time must be given. The court suggested that constitutional difficulties might thereby arise whereby a defendant would be, in fact, in custody for a period longer than the statute authorized. The appellant was sentenced to a maximum possible term of 13½ years. If the maximum term was imposed and the sentence imposed was consecutive, the appellant could have received a term of 90 years. Although the record is not totally clear on this subject, it can be inferred that the mental commitment was initiated, if not at the request of, at least with the willing cooperation of appellant and his parents who were apparently financially able to bear the rather extraordinary cost of the confinement. The confinement was ordered to be a minimum 1 year in the River Oaks sanitarium. It is true from the reports which were received in evidence that appellant was making excellent progress in resolving what can only be charitably called severe mental problems. The appellant negated any such treatment and any long-term effects of that treatment by going a.w.o.l. from the institution and concealing himself from the authorities for a period of nearly 6 months. The trial court did properly take into consideration the appellant's deliberate frustration of the purpose of the mental health commitment by removing himself from the hospital. We are unable to say that it was an abuse of discretion in so doing. *Blazek, supra,* does not command a different result. The appellant suggests that since this is a nonbailable offense, the failure to credit for the time spent in the mental hospital was a violation of appellant's equal protection and due process rights. He does not cite any authority that so directly holds. All cases on which the appellant relied, which will not be cited here, simply are cases in which a statute authorizes the court to grant such credit. As we have stated above, there is nothing within the Nebraska statutes that would prohibit such credit if

the trial court determined to give it. The question here, however, is simply whether or not the trial court abused its discretion. We are unable to conclude that it did so. The assignment of error is without merit.

The second assignment of error is that the sentences are excessive and a violation of the rehabilitative needs of the appellant. There was testimony received from a psychiatrist that ultimate incarceration in the Nebraska Penal Complex would be harmful to the appellant and would undoubtedly render him more dangerous on discharge than he is admittedly at this time. Further psychiatric testimony indicates that the appellant is suffering from a mental disorder that makes him antagonistic toward women, unsure of them, and likely to take out his hostilities in violent sexual acts. All agree that the appellant must be confined and should not be allowed at liberty.

The offense for which the appellant pleaded guilty merits the sentence which the court imposed. The appellant accosted and stopped an automobile operated by a young female on a rural road near Lexington, Nebraska. He used a gun to force her from the automobile and discharged the gun either accidentally or purposefully, removed her to his own automobile, took her farther into the country, and there forcibly raped her twice. While awaiting trial on the charges, he escaped from custody and further escaped from a mental hospital to which the trial court and the State had ordered him committed. The trial court took into account, in weighing these matters, the seriousness of the offense, the dangerousness of the offender, and the prior extended misdemeanor record of the appellant. It then concluded that, both for the protection of society and in view of the seriousness of the crimes, the sentences imposed were appropriate. It is well established in this state, as to require no citations, that a sentence imposed within the limits of the statute will not be disturbed on appeal absent an abuse of discretion. We find no abuse of discretion.

The assignments of error of the appellant are without merit and the judgment and sentences are therefore affirmed.

AFFIRMED.

McCOWN and CLINTON, JJ., concur in result.

STATE OF NEBRASKA, APPELLEE, V. DELMA LOZANO, APPELLANT.

311 N.W.2d 529

Filed October 23, 1981. No. 44008.

1. **Wiretaps.** 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.
2. ——. Neither specific nor all possible investigative techniques must be tried before orders for wiretaps can be issued, nor is the government required to use a wiretap only as a last resort.
3. ——. It is not necessary for the State to utilize all investigative techniques before making an application for a wiretap.
4. **Wiretaps: Affidavits.** An affidavit is sufficient if it contains a full and complete statement of the underlying factual circumstances which justify the issuance of an order authorizing a wiretap.
5. ——: ——. Staleness is an issue which must be decided on the peculiar facts of each case.
6. ——: ——. Documents incorporated into an affidavit by reference need not be sworn to separately.
7. **Criminal Trials.** A trial court is not required to make written conclusions of fact and conclusions of law in a criminal trial.

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

David T. Schroeder for appellant.

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

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

BOSLAUGH, J.

After trial to the court upon stipulated facts, the defendant was convicted on one count of possession of more than 1 pound of marijuana and one count of possession of cocaine. She was sentenced to 1 year's imprisonment on each count, the sentences to run consecutively.

On appeal the principal assignments of error relate to the sufficiency of the evidence to sustain the order authorizing the interception of wire communications. Evidence obtained as a result of the wiretap was also used to obtain a search warrant. The defendant contends her motions to suppress filed in the trial court should have been sustained.

Specifically, the defendant argues that the application for the wiretaps failed to set out full and complete statements as to whether other investigative procedures had been tried and failed or why it reasonably appeared they would be unlikely to succeed. Neb. Rev. Stat. § 86-705 (Reissue 1976) provides in part: "Each application for an order authorizing or approving the interception of a wire or oral communication . . . shall include the following information: . . . (c) 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 if tried or to be too dangerous . . . ."

The application, filed on January 29, 1980, incorporated the affidavits of two Scottsbluff, Nebraska, police officers, a Nebraska State Patrol drug investigator, and an informant. The police officers' affidavits set out in detail the various investigative methods that had been tried in attempting to infiltrate a suspected narcotics ring involving people in Scottsbluff, including attempts to use undercover policemen from other jurisdictions, surveillance of the houses and activities of the parties

believed to be involved, and attempts to get information about the ring from victims. The affidavits noted that local officers were handicapped in their investigation attempts because they were instantly recognized by members of the ring; that the ring consisted mainly of black and Hispanic persons, and that currently there were no black or Hispanic officers available to the Scottsbluff Police Department to attempt infiltration; that in 1979 infiltration using police officers from the Cheyenne, Wyoming, police department was unsuccessful; that the persons involved in the ring were longtime friends, relatives, and associates and refused to deal with anyone they did not know; that dissatisfied customers of the ring would not give information to police; and that surveillance of the Lozano residence was not possible because the residence was out in the country and the openness of the surrounding area did not lend itself to covert operations.

In *State v. Kolosseus*, 198 Neb. 404, 415, 253 N.W.2d 157, 163 (1977), we said: "'There is no requirement that every investigative methodology be exhausted prior to application for a [wiretap] authorization. . . . It is sufficient that the government show that other techniques are impractical under the circumstances and that it would be unreasonable to require pursuit of those avenues of investigation.' . . . We conclude that what is required under the first alternative is that the application make a full and complete disclosure of all that has been done so that the court may make a judgment as to whether more should be required before a tap is authorized." In *State v. Holmes and Beardslee*, 208 Neb. 114, 121, 302 N.W.2d 382, 386 (1981), we held that "it is not necessary for the State to utilize all investigative techniques before making an application for a wiretap." We further noted there that "'wire tap "procedures were not to be routinely employed as the initial step in criminal investigation," but it is equally true "that the statute does not require the government to use a wire tap only as a last resort." United States v. Kerrigan,

514 F.2d 35 (9th Cir. 1975); United States v. Staino, 358 F. Supp. 852, 856-7 (E.D. Pa. 1973).'" *Id.* at 122, 302 N.W.2d at 386.

The affidavits in this case listed numerous investigative techniques that had been tried and failed, and also set out a number of reasons as to why other investigative procedures would be likely to fail. We find the affidavits were sufficiently detailed to satisfy the requirements of § 86-705(c).

The defendant also argues that the affidavits accompanying the application for wiretap authority were not sufficient to establish probable cause that she was committing, had committed, or was about to commit a crime enumerated by Neb. Rev. Stat. § 86-703 (Reissue 1976). One of the enumerated crimes in that section is "dealing in narcotic or other dangerous drugs." The affidavits set out several items having to do with the defendant, including information from a confidential informant, proven reliable by independent investigation, that she was selling dope through Bruce's Tavern in Scottsbluff. Searches of the defendant's residence on other occasions had revealed the presence of drug paraphernalia on the premises. Telephone toll records showed that within the 3 months before the application, several calls had been made from the defendant's telephone to Keystone Yacht Sales in Florida, an enterprise run by a person suspected of being a drug trafficker. Checks of license numbers on automobiles parked at the defendant's residence revealed that some of those automobiles were registered to persons known to be or reasonably suspected of being drug-law offenders.

The defendant's main argument in this respect is that the information in the affidavits referring to her came from undisclosed informants and was remote in time from the date of the application. However, the affidavits stated that the information from informants had been verified by independent investigation. The information obtained was sufficiently specific and detailed

to meet the reliability tests set out in *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964), and *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969).

As to the remoteness issue, *United States v. Hyde*, 574 F.2d 856, 865 (5th Cir. 1978), *rehearing denied* 579 F.2d 643, states: "[T]he staleness issue must be examined more liberally when a continuing pattern of criminal activity is alleged. . . . [S]taleness is an issue which must be decided on the peculiar facts of each case, and . . . a mechanical count of days is of little assistance in this determination. Here, the affidavit alleged a conspiracy that had continued for at least 2 years. It included information considerably less than 2 months old as well as the most recent telephone records available. It was permissible . . . to infer that if criminal conversations had been occurring over this telephone line over the past 2 years, they had not mysteriously stopped within the past month. We cannot disturb on staleness grounds his finding of probable cause."

We find similar circumstances in the present case. The applications alleged an ongoing conspiracy; the information in the affidavits showed that the investigation, as well as criminal activity, had continued up to the very day of the application; and the telephone records relied upon were current as of late December 1979, less than 1 month before the application was made. The information in the affidavits was sufficiently close in time to the application to allow a finding of probable cause as against the defendant. The assignment of error is without merit.

The defendant next argues that the search warrant used to conduct the search of her residence was defective on its face and that the supporting affidavit did not establish probable cause. The argument as to defectiveness is that the transcripts of intercepted telephone calls referred to in the supporting affidavit were not supported by oath or affirmation as required by Neb. Rev. Stat. § 29-814.01 (Cum. Supp. 1980). Here, the

affidavit referred to and incorporated the transcripts of the telephone calls. This was sufficient to satisfy the requirements of the statute.

The defendant further complains that the county judge did not testify specifically as to which transcripts he relied upon in issuing the search warrant.

The issuing magistrate's inability to recall specifically which transcripts he relied upon does not prevent a finding that he did have probable cause to issue the warrant. He testified that he considered each transcript referred to in the affidavit to be part of the application, and the transcripts which refer to criminal activity of the defendant sufficiently establish probable cause to support the issuance of the warrant. The assignment of error is without merit.

The defendant further contends the sentences imposed were excessive. Under the circumstances in this case, the sentences imposed were minimal and the record shows no abuse of discretion.

The defendant complains that the trial court refused to make specific findings of fact and conclusions of law. Neb. Rev. Stat. § 25-1127 (Reissue 1979), upon which the defendant relies, has no application to criminal proceedings.

The judgment of the District Court is affirmed.

AFFIRMED.

KATHERINE A. BURROWS, APPELLANT, V. A. BYRON JACOBSEN, APPELLEE.

311 N.W.2d 880

Filed October 30, 1981. No. 43477.

1. **Negligence: Evidence.** The question of the existence of negligence or contributory negligence is for the trier of fact whenever different minds may reasonably draw different conclusions 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 the jury.
2. **Motor Vehicles.** It is unlawful for the driver of a vehicle to turn left unless and until such movement can be made with reasonable safety.
3. **Motor Vehicles: Right-of-Way.** The driver of a vehicle who intends to turn left at an intersection is to yield the right-of-way to any vehicle approaching from the opposite direction which is within the intersection or approaching so close as to constitute an immediate hazard.
4. **Right-of-Way: Words and Phrases.** By "right-of-way" is meant the right of one vehicle to proceed in a lawful manner in preference to another approaching under such circumstances of direction, speed, and proximity as to give rise to danger of a collision unless one grants precedence to the other.
5. **Proper Lookout.** A motorist must see what is in plain sight.
6. **Proper Lookout: Right-of-Way.** Although one in a favored position may assume, until he has warning, notice, or knowledge to the contrary, that others will use a highway lawfully, he must nonetheless keep a proper lookout and watch where he is driving.
7. **Right-of-Way.** One does not forfeit his right-of-way by driving at an unlawful speed.
8. **Negligence.** Negligence is not presumed and the mere happening of an accident does not prove negligence.
9. **Negligence: Proof.** Where, in an action to recover for personal injuries, the jury is properly instructed as to the burden of proving the negligence charged against defendant as a proximate cause of the injury, the defense that the negligence of a third person not a party to the action is the sole proximate cause is not an affirmative plea in avoidance of plaintiff's cause and imposes no burden of proof upon defendant with relation thereto, but is entirely consistent with and provable under the general issue where the burden of proof remains with the plaintiff to prove the alleged negligence of the defendant.

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

James W. Crampton for appellant.

Ray C. Simmons, P.C., for appellee.

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

WHITE, J.

On August 11, 1978, the plaintiff, Katherine A. Burrows, was injured in an automobile accident at the intersection of Highway 370 and 84th Street, in Papillion, Nebraska. The plaintiff was a passenger in her own automobile driven by Robert C. Miller who was attempting to make a left turn onto 84th Street from Highway 370 in Sarpy County when the automobile was struck by the automobile of the defendant, A. Byron Jacobsen. After the accident the plaintiff complained of a sore back and neck and was taken to the Midlands Community Hospital for treatment. The plaintiff's automobile was being driven east and the defendant's automobile west on Highway 370.

Plaintiff brought an action for damages for personal injuries and medical expenses in the Douglas County District Court. The action was removed to Sarpy County District Court. Trial was had to a jury and a verdict was returned for the defendant. Following motions for new trial or judgment notwithstanding the verdict, which were overruled, the plaintiff appealed. Plaintiff raised the following assignments of error on appeal: (1) The trial court erred in failing to direct a verdict for the plaintiff and in failing to find the defendant negligent as a matter of law; (2) The trial court erred in overruling plaintiff's objection to jury instruction No. 5; and (3) The trial court erred in not granting plaintiff's motions for a new trial and judgment notwithstanding the verdict.

We will discuss the first and third assignments of error together. The plaintiff cites *Fangmeyer v. Reinwald*, 200 Neb. 120, 124-25, 263 N.W.2d 428, 431 (1978). *Fangmeyer* states: "It is clear, however, that the question of the existence of negligence or contributory negligence is for the trier of fact whenever different

minds may reasonably draw different conclusions from the evidence, and a directed verdict is proper only when reasonable minds cannot differ. [Citations omitted.] 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 the jury." We said in *Schanaman v. Ramirez*, 206 Neb. 212, 215-16, 292 N.W.2d 39, 41-42 (1980): "Plaintiff's claims must be tested in accordance with the following rules of substantive law.

"It is unlawful for the driver of a vehicle to turn left unless and until such movement can be made with reasonable safety. Neb. Rev. Stat. § 39-652 (Reissue 1978). The driver of a vehicle who intends to turn left at an intersection is to yield the right-of-way to any vehicle approaching from the opposite direction which is within the intersection or approaching so close as to constitute an immediate hazard. Neb. Rev. Stat. § 39-636 (Reissue 1978); *Floridia v. Farlee*, 201 Neb. 39, 266 N.W.2d 204 (1978). By 'right-of-way' is meant the right of one vehicle to proceed in a lawful manner in preference to another approaching under such circumstances of direction, speed, and proximity as to give rise to danger of a collision unless one grants precedence to the other. Neb. Rev. Stat. § 39-602(81) (Supp. 1979). A motorist must see what is in plain sight. *Davis v. Spindler*, 156 Neb. 276, 56 N.W.2d 107 (1952); *Caldwell v. Heckathorn*, 176 Neb. 704, 127 N.W.2d 182 (1964). A driver who fails to see another who is favored over him is guilty of negligence as a matter of law. *Bonnes v. Olson*, 197 Neb. 309, 248 N.W.2d 756 (1976); *Nichols v. McArdle*, 170 Neb. 382, 102 N.W.2d 848 (1960). However, although one in a favored position may assume, until he has warning, notice, or knowledge to the contrary, that others will use a highway lawfully, he must nonetheless keep a proper lookout and watch where he is driving. *Nichols v. McArdle, supra; Bonnes v. Olson, supra; Hayes v. Anderson Concrete Co., Inc.*, 186 Neb. 771, 186 N.W.2d

477 (1971). One does not forfeit his right-of-way by driving at an unlawful speed. *Epperson v. Utley*, 191 Neb. 413, 215 N.W.2d 864 (1974). Negligence is not presumed and the mere happening of an accident does not prove negligence. *Farro v. Rubottom*, 202 Neb. 120, 274 N.W.2d 149 (1979); *Wolcott v. Drake*, 162 Neb. 56, 75 N.W.2d 107 (1956)."

The evidence indicates that Highway 370 is a two-lane highway until it approaches the intersection of 84th Street where it broadens into a four-lane highway. The automobile in which plaintiff was riding approached the intersection, stopped for a red light, signaled an intention to turn left, and when the light changed to green it slowly started to execute the left turn. As the driver cleared the southernmost lane of the westbound lanes, in front of two motorcyclists who were waiting in the westbound lane to turn left, or south, onto 84th Street, the driver saw the defendant's westbound automobile out of the corner of his eye and the vehicles collided in the northernmost lane of westbound Highway 370. The plaintiff introduced testimony and an admission against interest that the defendant's speed was between 60 and 70 miles per hour. The admission was denied by the defendant.

Applying the evidence to the law at hand, it is clear that different minds could reasonably draw different conclusions from the evidence. The location of the accident and the evidence of the circumstances surrounding the accident indicate that the defendant was approaching the intersection and was close enough to constitute an immediate hazard. There is no evidence indicating why plaintiff's driver failed to see the defendant's vehicle approaching the intersection until immediately before the collision.

We conclude, as did the trial court, that there was a jury question as to the negligence of the defendant and, further, that there was evidence of negligence of the plaintiff's driver which should have been submitted to the jury on the issue of whether the negligence of plain-

tiff's driver was the sole proximate cause of the accident. The plaintiff's first and third assignments of error are without merit.

The court's instruction No. 5 is drawn from and is nearly identical to NJI 2.01A (1975 Pocket Part) which reads as follows: "One of the issues in this case is whether the (accident, collision, occurrence) was caused by the conduct of (name of third person not a party to suit). If you find the sole proximate cause of the (accident, collision, occurrence) was the conduct of (name of third person), then your verdict should be for the defendant.

"The burden of proof on this issue is on the plaintiff; that is, the plaintiff has the burden to prove that some negligence of defendant as set forth in Instruction _____ was the proximate cause or a proximately-contributing cause of the (accident, collision, occurrence) and that therefore the negligence of (name) was not the sole proximate cause thereof."

We said in syllabus No. 4 in *Schmidt v. Johnson*, 184 Neb. 643, 171 N.W.2d 64 (1969): "Where, in an action to recover for personal injuries, the jury is properly instructed as to the burden of proving the negligence charged against defendant as a proximate cause of the injury, the defense that the negligence of a third person not a party to the action is the sole proximate cause is not an affirmative plea in avoidance of plaintiff's cause and imposes no burden of proof upon defendant with relation thereto, but is entirely consistent with and provable under the general issue where the burden of proof remains with the plaintiff to prove the alleged negligence of the defendant." See, also, *Fynbu v. Strain*, 190 Neb. 719, 211 N.W.2d 917 (1973). The plaintiff complains that the instruction was misleading. We disagree.

No error being shown, the judgment of the trial court is affirmed.

AFFIRMED.

JAY A. LENSTROM ET AL., APPELLANTS, V. CHARLES THONE, GOVERNOR, ET AL., APPELLEES.

311 N.W.2d 884

Filed October 30, 1981. No. 43481.

1. **Constitutional Law: Colleges and Universities.** The Scholarship Award Program, provided by Neb. Rev. Stat. §§ 85-980 to 85-9,102 (Cum. Supp. 1980), does not violate Neb. Const. art. VII, § 11, or art. XIII, § 3.
2. **Legislative Power: Constitutional Law.** The Legislature has plenary legislative authority limited only by the state and federal Constitutions.
3. ____:____ The Nebraska Constitution is not a grant but, rather, a restriction on legislative power, and the Legislature may legislate on any subject not inhibited by the Constitution.
4. ____:____ The Nebraska Constitution is not a grant but a restriction of legislative power. Consequently, courts can enforce only those limitations which the Constitution imposes.
5. **Constitutional Law: Legislative Power: Public Purpose.** Unless restricted by some provision of the state or federal Constitution, the Legislature may enact laws and appropriate funds for the accomplishment of any public purpose. It is for the Legislature to decide in the first instance what is and what is not a public purpose, but its determination is not conclusive on the courts. However, to justify a court in declaring a statute invalid because its object is not a public purpose, the absence of public purpose must be so clear and palpable as to be immediately perceptible to the reasonable mind.
6. **Constitutional Law: Legislative Power.** Implied restrictions on the legislative power are not to be inferred unless the restriction is one that is clearly implied.
7. **Constitutional Law: Public Purpose.** Legislation which serves a public purpose is not constitutionally impermissible because incidental benefits may accrue to others.
8. **Constitutional Law: Statutes.** A duly enacted statute is presumed constitutional and may not be invalidated by the court unless clearly in contravention of a provision of fundamental law or of public policy.

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

Kermit A. Brashear II and Pamela K. Black of Nelson & Harding for appellants.

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

James W. R. Brown of Fitzgerald, Brown, Leahy, Strom, Schorr & Barmettler, amicus curiae.

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

CLINTON, J.

This is an action commenced in the District Court for Lancaster County, praying for a declaratory judgment determining the constitutionality of 1978 Neb. Laws, L.B. 743, codified as Neb. Rev. Stat. §§ 85-980 to 85-9,102, inclusive (Cum. Supp. 1980). L.B. 743, commonly referred to as the Scholarship Award Program (hereinafter the Act), provides for a financial assistance program to "enable eligible undergraduate Nebraska residents to receive educational services in an eligible postsecondary educational institution of this state," § 85-981, all as defined by the Act.

The Act is administered by the Nebraska Coordinating Commission for Postsecondary Education. § 85-983. An award is a grant of money by the commission to an eligible student for educational expenses. § 85-992. Section 85-994 prescribes the conditions which attached to an award and eligibility requirements needed to attain an award. These include: (1) Direct distribution of the award to the student; (2) Enrollment in an eligible institution and maintenance of a minimal standard of performance; (3) The maximum amount of the award; "(4) The award is given on the basis of substantial financial need"; (5) The period covered by the award; (6) An agreement that the award be used only for educational expenses; "(7) The individual is not pursuing a course of study which is pervasively sectarian and creditable toward a theological or divinity degree"; and (8) Compliance with rules and regulations of the commission.

Eligible postsecondary educational institutions include both public and private institutions which are: "(1) Located in Nebraska;

"(2) Primarily engaged in instruction of students;

"(3) Satisfying the provisions of Nebraska law re-

lating to the approval, licensure, and accreditation of schools, colleges, and universities; and

"(4) Offering courses of instruction in regularly scheduled classes to regularly enrolled undergraduate students who reside in Nebraska and have received high school diplomas or their equivalent." § 85-984.

The petition alleges facts indicating the plaintiffs are persons eligible for the program. The defendants are the members of the Nebraska Coordinating Commission for Postsecondary Education. Also joined as defendants are the Governor, the Attorney General, the State Treasurer, and the State Auditor. The petition alleges the defendant Attorney General has rendered an opinion stating the Act is unconstitutional and, for that reason, the defendants have refused to implement the program as provided for by the Legislature. As such, the plaintiffs have been deprived of their opportunity to participate in the award program.

The defendants filed a demurrer to the plaintiffs' petition. The District Court sustained the demurrer, finding the Act, on its face, violated the portion of Neb. Const. art. VII, § 11, which provides: "Notwithstanding any other provision in the Constitution, appropriation of public funds shall not be made to any school or institution of learning not owned or exclusively controlled by the state or a political subdivision thereof . . . ." The petition was dismissed by the District Court, and the plaintiffs have appealed to this court.

The defendants contend the statute is unconstitutional because it attempts to appropriate public funds in support of educational institutions not owned or exclusively controlled by the state, and because it attempts to extend the credit of the state to private individuals, that is, the students who would be the beneficiaries of the program.

The contention of the defendants with reference to article VII, § 11, may be summarized as follows: The scholarship program may inure to the benefit of private

postsecondary educational institutions because recipients may or will use some of the awards to pay tuition and fees and this constitutes a benefit to the institutions prohibited by article VII, § 11. They state the issues presented in this case are controlled by the prior opinions of this court in *State ex rel. Rogers v. Swanson*, 192 Neb. 125, 219 N.W.2d 726 (1974), and *Gaffney v. State Department of Education*, 192 Neb. 358, 220 N.W.2d 550 (1974).

They recognize the language of article VII, § 11, was amended by the voters in 1972, but assert the change made no substantive difference in the meaning of the section. Prior to the 1972 amendment the Constitution prohibited the appropriation of public funds "in aid of any sectarian or denominational school or college, or any educational institution which is not exclusively owned and controlled by the state or a governmental subdivision thereof." In 1972 this provision was amended to read: "Appropriation of public funds shall not be made *to* any school or institution of learning not owned or exclusively controlled by the state or a political subdivision thereof." (Emphasis supplied.)

We will first discuss the proposition that the result in this case is controlled by our opinions in *State ex rel. Rogers v. Swanson, supra*, and *Gaffney v. State Department of Education, supra. Rogers* involved an act of the Legislature which provided for tuition grants to students attending private colleges only, and was enacted prior to the 1972 amendment to article VII, § 11. With reference to the language change in the constitutional amendment, the court said in *Rogers* the amendment did not affect the question involved because an act of the Legislature, unconstitutional when enacted, is null and void from its inception and, therefore, is not validated by a subsequent amendment to the Constitution authorizing its passage. We, in that case, expressly refrained from expressing an opinion on the effect of the constitutional change.

The opinion, however, noted the trial judge had found the purpose of the act was to aid private colleges and not to enable students to attend colleges of their choice. We sustained that finding. In that case we relied upon, among others, the precedent of *Hartness v. Patterson*, 255 S.C. 503, 179 S.E.2d 907 (1971). In *Hartness* the Supreme Court of South Carolina applied a provision of the South Carolina Constitution which prohibited the use of the property or credit of the state "directly or indirectly" in aid of any church-controlled college and held that the clear purpose of the scholarship act was to aid "independent institutions of higher learning." The South Carolina court held the act unconstitutional.

Gaffney, supra, involved an act of our Legislature which provided for the loan of secular textbooks to children enrolled in private elementary schools. This statute, too, was enacted before the 1972 amendment to our Constitution. We held the act unconstitutional. The case was decided upon the basis of the constitutional provision as it existed at the time the statute was enacted. It is apparent in the two cases mentioned we did not decide the effect of the 1972 amendment.

The literal language of the amendment prohibits "appropriation . . . to" any school not owned by the state. The defendants assert this language has a broader meaning than its literal language imports. They would urge the Constitution prohibits any use of public funds which might either directly or indirectly aid a private school and that the 1972 amendment did not change the prior prohibition in any way. In supporting this argument, they point to the language in A Summary of Constitutional Amendments Proposed by the Nebraska Legislature (Neb. Legislative Council, March 1972). "The adoption of this proposed amendment would retain the above-mentioned prohibitions against sectarian instruction in public schools, the appropriation of public funds to any non-public school, and the requirement of any religious tests or quali-

fications for public school teachers or pupils, although these provisions would be re-worded somewhat. The meanings would remain the same." *Id.* at 28.

Even if that statement was deemed in any way "interpretive" of the provision, the plain language of the 1972 amendment does not support the defendants' contention. The statement of the Nebraska Legislative Council, simply put, is that the 1972 amendment retained the prohibition against "the appropriation of public funds to any nonpublic school," and that "the meanings would remain the same." The statement's effect is only that the prohibition against the appropriation of "public funds to any nonpublic school" would remain. That is what the Constitution says.

Defendants also argue the failure to enact a rather confusing constitutional amendment in 1976 somehow affects the meaning of the constitutional provisions adopted in 1920 and 1972. We know of no legal basis for such a contention. Even if the voters in 1976 expressed disapproval of a proposed amendment, such disapproval does not affect a change in constitutional interpretation.

In *Gaffney v. State Department of Education*, 192 Neb. 358, 362, 220 N.W.2d 550, 553 (1974), while discussing the previous language of the article in question, we said: "It [article VII, § 11] says what it means and means what it says." We think that the same statement must be applied to the language as changed. The effect of the literal language of the amendment is to prohibit appropriations made "to" a nonpublic school.

The holding of the Supreme Court of South Carolina in *Hartness v. Patterson*, 255 S.C. 503, 179 S.E.2d 907 (1971), upon which we relied heavily in *State ex rel. Rogers v. Swanson*, 192 Neb. 125, 219 N.W.2d 726 (1974), has no application under the present constitutional language when applied to the statutory plan before us in this case. In the case of *Americans*

United v. Rogers, 538 S.W.2d 711 (Mo. 1976), the Supreme Court of Missouri said a tuition grant program to students of both public and private colleges, much like the one before us, did not offend various provisions of the Missouri Constitution, viz, prohibitions against use of public funds for a nonpublic purpose and use of public money directly or indirectly in aid of any denomination or religion. Under slightly different constitutional provisions the Alabama Supreme Court held similarly in *Ala. Ed. Ass'n v. James*, 373 So. 2d 1076 (Ala. 1979).

Certain fundamental constitutional principles must guide, and always have guided, us when the constitutional bounds of legislative power are questioned. The first principle is the Legislature has plenary legislative authority limited only by the state and federal Constitutions. *Swanson v. State*, 132 Neb. 82, 271 N.W. 264 (1937); *Dwyer v. Omaha-Douglas Public Building Commission*, 188 Neb. 30, 195 N.W.2d 236 (1972); *Orleans Education Assn. v. School Dist. of Orleans*, 193 Neb. 675, 229 N.W.2d 172 (1975). The Nebraska Constitution is not a grant but, rather, a restriction on legislative power, and the Legislature may legislate on any subject not inhibited by the Constitution. *State ex rel. Meyer v. County of Lancaster*, 173 Neb. 195, 113 N.W.2d 63 (1962). The state Constitution is not a grant but a restriction of legislative power. Consequently, courts can enforce only those limitations which the Constitution imposes. *United Community Services v. The Omaha Nat. Bank*, 162 Neb. 786, 77 N.W.2d 576 (1956). Unless restricted by some provision of the state or federal Constitution, the Legislature may enact laws and appropriate funds for the accomplishment of any public purpose. It is for the Legislature to decide in the first instance what is and what is not a public purpose, but its determination is not conclusive on the courts. However, to justify a court in declaring a statute invalid because its object is not a public purpose, the absence of public

purpose must be so clear and palpable as to be immediately perceptible to the reasonable mind. *Chase v. County of Douglas*, 195 Neb. 838, 241 N.W.2d 334 (1976). Implied restrictions on the legislative power are not to be inferred unless the restriction is one that is clearly implied. *State ex rel. Meyer v. County of Lancaster, supra.* Legislation which serves a public purpose is not constitutionally impermissible because incidental benefits may accrue to others. *Chase v. County of Douglas, supra; Cosentino v. City of Omaha*, 186 Neb. 407, 183 N.W.2d 475 (1971); *State ex rel. School Dist. of Hartington v. State Board of Education*, 188 Neb. 1, 195 N.W.2d 161 (1972). A duly enacted statute is presumed constitutional and may not be invalidated by the court unless clearly in contravention of a provision of fundamental law or of public policy. *United Community Services v. The Omaha Nat. Bank, supra; Prendergast v. Nelson*, 199 Neb. 97, 256 N.W.2d 657 (1977).

In enacting the scholarship program, the Legislature made certain factfindings which they set forth in § 85-980. These were:

"(1) The provision of a higher education for all residents of this state who desire and are properly qualified for such an education is important to the welfare and security of this state and nation and consequently is an important public purpose;

"(2) Many qualified students are deterred by financial consideration from completing their education, with a consequent irreparable loss to this state and nation of talents vital to welfare and security;

"(3) The state can enhance its economic and social potential when the state's residents have the opportunity to contribute to the full extent of their capabilities through the removal of the financial barriers to their economic, social, and educational goals;

"(4) The state can enhance its educational objectives by the development of financial aid programs, including programs which enable the state to fully

qualify for federal student aid funds made available to the state through the Federal SSIG program under authority of Section 415 of the Higher Education Act of 1965, as amended, and related acts; and

"(5) To avoid the application of a double standard in carrying out its educational programs, the state needs to make certain that all students who qualify for aid stand equal to each other before the law, and that they be given the freedom, within reasonable and constitutional limits, to select the institutions of their choice in which to pursue their educational goals."

In the absence of some plain restriction in the Constitution, it is not for this court to say the scholarship awards for needy students, paid directly to the student, which may be used at any eligible institution, private or public, as defined by the Act, and which may not be used for pursuing courses of study which are pervasively sectarian and creditable toward a theological or divinity degree, do not serve a public purpose. Nor is it for this court to say the Legislature is not justified in making the finding a public purpose, which it did in this case.

The defendants also contend that the Act is unconstitutional because it violates Neb. Const. art. XIII, § 3, which provides: "The credit of the state shall never be given or loaned in aid of any individual, association, or corporation . . . ." They cite no authority, but argue it violates this article because it is a "gift." We think this position misconceives the true issue. We have said the purpose of the section is to prevent the state (or any subdivision thereof) from extending its credit to private enterprise. *United Community Services v. The Omaha Nat. Bank, supra.* See *Chase v. County of Douglas, supra.* In the first case cited, the question was whether public utilities districts could make contributions to the united fund. We there held the making of the gifts was a public purpose and did not violate article XIII, § 3, but did violate article VII, § 11, as it then existed. The question is whether the

Act serves a public purpose. We have already held that it does.

If article XIII, § 3, were extended to include "gifts" for public purposes, then all state welfare programs and many others would be unconstitutional. We find no authority which supports the defendants' position with reference to article XIII, § 3.

The holding of the District Court is reversed.

REVERSED.

WILLIAM S. STEPHEN AND DEBRA STEPHEN, APPELLANTS, V. CITY OF LINCOLN ET AL., APPELLEES.

311 N.W.2d 889

Filed October 30, 1981. No. 43490.

1. **Evidence: Appeal and Error.** The exercise by the trial court of its discretion in ruling on the admission or rejection of evidence will generally not be reviewed by an appellate court, unless it is clearly or plainly shown that the trial court abused its discretion.
2. **Negligence.** Contributory negligence is conduct for which plaintiff is responsible, amounting to a breach of the duty which the law imposes upon persons to protect themselves from injury, and which, concurring and cooperating with actionable negligence for which defendant is responsible, contributes to the injury complained of as a proximate cause.
3. **Evidence: Negligence: Juries.** Where evidence is in conflict and such that reasonable minds may draw different conclusions therefrom, the questions of negligence and comparative and contributory negligence are for the determination of the jury.
4. **Evidence: Juries.** It is the duty of the trial court to submit to the jury all material issues presented by the pleadings which find support in the evidence adduced.
5. **Directed Verdict.** A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom.
6. ——. 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.

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

Herbert J. Friedman and James E. Dunlevey of Friedman Law Offices for appellants.

Richard D. Sievers of Marti, Dalton, Bruckner, O'Gara & Keating, P.C., for appellees.

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

KRIVOSHA, C.J.

The appellants, Williams S. Stephen and Debra Stephen, husband and wife, appeal from the jury verdict finding against the Stephens and in favor of the appellee Lawrence G. Olson, a police officer employed by the City of Lincoln. They likewise appeal from a finding made by the District Court of Lancaster County, Nebraska, in favor of the City of Lincoln (City) and against the Stephens in an action simultaneously brought by the Stephens against the City under the provisions of the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1977), which grew out of the same events giving rise to the suit against Olson. The basis of appellants' appeal is that the trial court erred in sustaining defendants' motion in limine, and in refusing to permit the introduction into evidence by plaintiffs of police department procedural memoranda; in submitting to the jury for its consideration acts of alleged contributory negligence committed by plaintiff William S. Stephen, and in giving to the jury certain instructions, objected to by plaintiffs' counsel, relating to the acts of contributory negligence; and, finally, in overruling plaintiffs' motion for a directed verdict on the question of liability. We believe that the assignments of error are without merit and the judgment of the trial court dismissing the action must be affirmed.

On July 4, 1978, Lawrence Olson was assigned as a cruiser officer patrolling a district which included downtown O Street in Lincoln, Nebraska. At approximately 3:30 p.m. on that afternoon he received a call

from a police dispatcher in response to a burglary alarm on the 6th floor of the Terminal Building located at 9th and O Streets in the City of Lincoln. The traffic on this particular holiday was described as light to moderate. At the time of the dispatch Officer Olson was at 10th and New Hampshire Streets. He activated his red lights, checked to see that they were working, turned on the siren, and proceeded south on 9th Street. Defendant Olson was approximately 3 to 4 blocks from the location of the alarm when he turned off his siren in order not to alert the suspected criminal of his approach, but left his rotating red lights on. As he proceeded southbound on 9th Street he encountered two red traffic signals which he navigated successfully, as his was the only vehicle present. The officer came to a complete stop at the third red light, at 9th and O Streets, and waited for the eastbound and westbound traffic on O Street to stop for him even though it had the green light. After it had stopped, he proceeded to turn onto O Street, reaching a maximum speed of 5 m.p.h. The police cruiser cleared the front end of a westbound vehicle which had stopped for it, at which time defendant Olson saw plaintiff approaching westbound on his motorcycle. Olson testified that Mr. Stephen was not looking directly forward but finally did turn and look at the cruiser, which had come to a complete stop. Stephen swerved violently to the left and hit the front end of the cruiser.

Plaintiff had turned onto O Street at 10th Street and observed the light for 9th and O Streets 1 block to the west to be green. Plaintiff further observed a police car, with red lights flashing, stopped in front of the Terminal Building and all east-west traffic at the intersection that he was approaching stopped in spite of the green light. Plaintiff, however, accelerated through the block up to 30 m.p.h.

The chief of police testified that officers are to follow the "procedure" portion of a document prepared by the police department, entitled "Emergency Calls for

Service." Officer Olson responded to this call using red lights and siren. As he approached 9th and O Streets he turned off the siren, which was in accord with the "procedure."

We turn first to appellants' contention that the trial court erred in not permitting a certain document to be received into evidence. The document offered into evidence by appellants, identified as exhibit B, was entitled "Emergency Calls for Service—Dispatching Procedure, Code Definition, Use of Emergency Equipment, Vehicle Operation." The document consisted of several parts. The first part was entitled "Purpose," and explained the purpose of the document. The second portion was entitled "Discussion," and consisted of an explanation of the problems confronted by an emergency vehicle when answering a call. The third portion was entitled "Authority," and purported to set out the statutory authority for emergency vehicles, first by state statute and then by city ordinance. The last section was entitled "Procedure," and advised the officer as to the actual procedure to be used, depending upon the nature of the call.

Appellants sought to introduce the entire document, including a portion of the discussion section which read as follows: "A review of the complaints received by the Internal Affairs Unit has involved all of the areas discussed, and too, a study submitted by the Fleet Safety Committee has prompted their recommendation that the use of flashing red lights without activating the siren should be prohibited on emergency runs." The record is unclear as to just who makes up the Internal Affairs Unit or the Fleet Safety Committee. The record does, however, establish that this recommendation by the Fleet Safety Committee was not accepted by the police department and was never made a part of the procedure. Appellants sought to offer the entire document in evidence to prove that the officer had violated the department's own procedures by turning off his siren. While it is unclear from the record how omitting

the discussion portion of the procedure prejudiced appellants in view of the fact that the procedural portion was admitted in evidence, it is clear that the trial court did not exceed its discretion in denying to appellants the right to introduce hearsay statements, made by an unidentified group and rejected by the police department, for the purpose of establishing procedures to be followed by the police department.

Unless excepted by some specific provision of law, only relevant evidence is admissible at trial. Neb. Rev. Stat. §§ 27-401 and 27-402 (Reissue 1979). We have frequently had occasion to consider a trial court's refusal to admit irrelevant evidence, saying: "'The exercise by the trial court of its discretion in ruling on the admission or rejection of evidence will generally not be reviewed by an appellate court, unless it is clearly or plainly shown that the trial court abused its discretion.

"'Application of this principle has been made to rulings relating to the reception of evidence the admissibility of which turns upon its relevancy, evidence collateral to the main issue, or which bears remotely on issues involved; and to rulings relating to cumulative evidence, opinion evidence, evidence concerning a matter of common knowledge, and evidence which is otherwise competent but is claimed to have a tendency to excite undue prejudice.'" *Westover v. Kerr*, 168 Neb. 494, 498, 96 N.W.2d 421, 424 (1959). See, also, *Duffy v. Physicians Mut. Ins. Co.*, 191 Neb. 233, 214 N.W.2d 471 (1974).

Appellants argue that police department memoranda are relevant and admissible. Under certain circumstances and with proper foundation being laid, we agree with that claim. Such, however, is not the case here. The trial court admitted the relevant portions of the police memoranda into evidence. It was the irrelevant portion which was excluded. Appellants have failed to point out to us, and we are unable to discern on our own, how the rejected statements of a committee whose origin and official capacity is not shown constituted an abuse of

discretion by the trial court. The assignment must be rejected.

Appellants' second assignment of error, to the effect that the trial court erred in submitting acts of contributory negligence by plaintiff to the jury, is likewise unsupported by the record. The trial court instructed the jury that the defendant Olson maintains that plaintiff was contributorily negligent with regard to one or more of certain specific acts, to wit, failing to keep a proper lookout; failing to have his vehicle under reasonable control; failing to yield the right-of-way to an emergency vehicle; traveling at a speed in excess of that reasonable and prudent under the circumstances. In *Wertz v. Lincoln Liberty Life Ins. Co.*, 152 Neb. 451, 457, 41 N.W.2d 740, 744 (1950), we noted from the Restatement of Torts as follows: "'Contributory negligence is conduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection and which is a legally contributing cause, cooperating with the negligence of the defendant in bringing about the plaintiff's harm.'

" . . . 'The plaintiff's contributory negligence may be either

"'(a) an intentional and unreasonable exposure of himself to danger created by the defendant's negligence of which danger the plaintiff knows or has reason to know, or

"'(b) conduct which, in respects other than those stated in Clause (a), falls short of the standard to which the reasonable man should conform in order to protect himself from harm.'"

And in *Heinis v. Lawrence*, 160 Neb. 652, 657, 71 N.W.2d 127, 130 (1955), we said: "'"'Contributory negligence is conduct for which plaintiff is responsible, amounting to a breach of the duty which the law imposes upon persons to protect themselves from injury, and which, concurring and cooperating with actionable negligence for which defendant is responsible, contributes to the injury complained of as a proximate

cause.' * * * See Eaton v. Merritt, 135 Neb. 363, 281 N.W. 620. Want of ordinary care, and not knowledge of the danger, is the test of contributory negligence. * * *"'"

Further, in *Ellingson v. Dobson Brothers Constr. Co.*, 173 Neb. 659, 662, 114 N.W.2d 522, 525 (1962), we said: "'Where evidence is in conflict and such that reasonable minds may draw different conclusions therefrom, the questions of negligence and comparative and contributory negligence are for the determination of the jury.' Parks v. Metz, 140 Neb. 235, 299 N.W. 643. See, also, Grantham v. Watson Bros. Transp. Co., 142 Neb. 362, 6 N.W.2d 372."

While the instruction did not direct the jury to make any finding regarding the matter of contributory negligence, there was sufficient evidence from which the jury could reach that conclusion. With respect to speed, the testimony was that the speed limit between 9th and 10th on O Street was 25 m.p.h. By deposition, Stephen testified that he had accelerated up to 30 m.p.h. as he approached the accident scene. Accordingly, there was evidence of excessive speed. With regard to the failure to yield the right-of-way to emergency vehicles, the record contains abundant evidence upon which the jury could conclude that the defendant Olson was in fact operating an emergency vehicle and plaintiff failed to yield the right-of-way to it. There was likewise sufficient evidence from which the jury could conclude that plaintiff traveled a full city block in the face of a continuous green light with traffic stopped, thereby knowing something was amiss. There was further testimony that the cruiser could have been observed by plaintiff from his motorcycle in time to stop. From this evidence the jury could have found Stephen guilty of contributory negligence on any one or more of the points claimed and that his contributory negligence was the proximate cause of his injury. It is the duty of the trial court to submit to the jury all material issues presented by the pleadings which find support in the evidence adduced. *Jarosh v. Van Meter*, 171 Neb. 61, 105 N.W.2d

531 (1960). The second assignment of error must likewise be overruled.

We turn then to appellants' final assignment of error, that the trial court erred in failing to direct a verdict in favor of the Stephens on the question of liability. Appellants argue that if a driver 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, relying upon our decision in *Bonnes v. Olson*, 197 Neb. 309, 248 N.W.2d 756 (1976). The difficulty with that argument, however, is that under the circumstances in this case Stephen was not the favored vehicle. Quite to the contrary, the police car operating as an emergency vehicle was favored over Stephen. Although Stephen had the green light, if the officer did not disregard the safety of others on the street, the emergency vehicle was given the favored position by reason of state statute and city ordinance. See, Neb. Rev. Stat. §§ 39-608 and 39-640 (Reissue 1978), and Lincoln Municipal Ordinance §§ 10.32.030 and 10.32.031. That being the case, it cannot be said that the officer was liable as a matter of law for having failed to yield to Stephen, who was not entitled to the right-of-way under the circumstances of this case. The trial court would have committed reversible error if it had granted the motion for a directed verdict.

In *Stevens v. Kasik*, 201 Neb. 338, 343, 267 N.W.2d 533, 536 (1978), we said: "The party against whom a motion for a directed 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. Fangmeyer v. Reinwald, 200 Neb. 120, 263 N.W.2d 428 (1978); Garcia v. Howard, 200 Neb. 57, 262 N.W.2d 190 (1978)."

And in *Krug v. Laughlin*, 208 Neb. 367, 371, 303 N.W.2d 311, 313 (1981), we said: "A trial court should

direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom. *Woodsmall v. Marijo, Inc.*, 206 Neb. 405, 293 N.W.2d 378 (1980); *Foremost Ins. Co. v. Allied Financial Services, Inc.*, 205 Neb. 153, 286 N.W.2d 740 (1980); *Stevens v. Kasik*, 201 Neb. 338, 267 N.W.2d 533 (1978); *Garcia v. Howard*, 200 Neb. 57, 262 N.W.2d 190 (1978); *McCready v. Al Eighmy Dodge*, 197 Neb. 684, 250 N.W.2d 640 (1977).

"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. *Novotny v. McClintick*, 206 Neb. 99, 291 N.W.2d 252 (1980); *Foremost Ins. Co. v. Allied Financial Services, Inc., supra; Woodsmall v. Marijo, Inc., supra; Simet v. Sage, ante* p. 13, 301 N.W.2d 600 (1981)."

We conclude, therefore, that the assignments of error raised by appellants must be overruled and the action of the trial court in all respects affirmed.

AFFIRMED.

R. REBECCA DONOVAN, APPELLEE, V.
JAMES M. DONOVAN, APPELLANT.

311 N.W.2d 895

Filed October 30, 1981. No. 43512.

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

Chesley S. Baker of Lauritsen, Baker & Brownell for appellant.

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

Heard before BOSLAUGH, BRODKEY, and HASTINGS, JJ., and BLUE and CAPORALE, District Judges.

PER CURIAM.

This is an appeal in a proceeding for dissolution of a marriage. The trial court dissolved the marriage and divided the property. The parties had no children as a result of this marriage.

The petitioner wife was awarded title to the residence property subject to a mortgage in the amount of $16,686.40 and a judgment lien in the amount of $7,500 in favor of the respondent husband. The petitioner was also awarded a number of items of personal property, including a 1977 Datsun automobile, lawnmower, garden tiller with snowblower attachment, a 10-speed bicycle, and all other personal property then in her possession. In addition to the judgment lien on the house, the respondent was awarded items of personal property, including a tent, a black and white television set, a 1971 International pickup truck, a 1975 Subaru automobile, a 14-foot Starcraft boat with motor and trailer, ham radio equipment, and all other items then in his possession. The petitioner was allowed $300 attorney fees.

The respondent has appealed and contends the division of the marital property was erroneous. Specifically, the respondent requests an equal division of the equity in the residence property, which he contends had a value of $60,000. The petitioner valued the property at $45,000. On the basis of her value, the respondent was awarded approximately 25 percent of the equity in the property.

The record shows that the lot upon which the house was built was paid for with funds which the petitioner brought into the marriage. Since October of 1975 the petitioner has made all the mortgage payments out of her income, amounting to more than $10,000, and has paid for approximately $2,580 worth of improvements to the house out of her separate income, in

the form of paneling, wallpaper, a central air-conditioning unit, a pressure pump, and other items.

The distribution of property made by the trial court in a proceeding for dissolution of a marriage will not be disturbed in the absence of an abuse of discretion. Under the circumstances of this case, we believe the division made by the trial court was not patently unfair on the record. The judgment is therefore affirmed.

AFFIRMED.

ROBERT A. CRAWFORD, A MINOR, BY AND THROUGH HIS FATHER AND NEXT BEST FRIEND, GILBERT A. CRAWFORD, APPELLANT, V. WILLIAM A. HAM, APPELLEE.

311 N.W.2d 896

Filed October 30, 1981. No. 43537.

1. **Judgments: Appeal and Error.** In reviewing an appeal from the decision of a trail court in a law action, the review is not de novo. The judgment of the District Court will not be set aside on appeal unless it is clearly wrong and not supported by the evidence.
2. ____:____. In determining whether the evidence supports the findings of the trial court in an action at law where a jury has been waived, the evidence must be considered in the light most favorable to the successful party, all conflicts must be resolved in his favor, and he is entitled to the benefit of every inference that can reasonably be deduced from the evidence.
3. ____:____. In a law action tried to the court without a jury, the findings of the court have the effect of a jury verdict and will not be set aside on appeal unless they are clearly wrong.
4. **Negligence: Evidence.** A general allegation of negligence is good against a demurrer, and under such an allegation evidence of any fact which contributed to the injury sued for is competent and relevant.

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

Robert C. Wester of Schirber Law Offices, P.C., for appellant.

John P. Miller of Miller & Rowen, P.C., for appellee.

Heard before KRIVOSHA, C.J., WHITE, and HASTINGS, JJ., and GITNICK, District Judge, and COLWELL, Retired District Judge.

WHITE, J.

This is an appeal from the decision of the trial court in favor of the defendant and dismissing plaintiff's petition for damages for personal injuries resulting from a collision of a bicycle operated by the plaintiff's son, Robert A. Crawford, and a pickup camper operated by the defendant, William A. Ham. The parties waived a jury trial and submitted the cause to the court on the police reports and the depositions of the parties and the witnesses. Plaintiff assigns as error (1) that the decision was contrary to law and the facts, and (2) that the trial court improperly considered evidence of contributory negligence because it was not properly pleaded.

In reviewing an appeal from the decision of a trial court in a law action, the review is not de novo. The judgment of the District Court will not be set aside on appeal unless it is clearly wrong and not supported by the evidence. *Town & Country Realty of Kearney, Inc. v. Glidden*, 204 Neb. 820, 285 N.W.2d 828 (1979).

In determining whether the evidence supports the findings of the trial court in an action at law where a jury has been waived, the evidence must be considered in the light most favorable to the successful party, all conflicts must be resolved in his favor, and he is entitled to the benefit of every inference that can reasonably be deduced from the evidence. *Aurora Cooperative Elevator Co. v. Larson*, 204 Neb. 755, 285 N.W.2d 498 (1979); *Gehrke v. General Theatre Corp.*, 207 Neb. 301, 298 N.W.2d 773 (1980).

The facts most favorable to the prevailing party would establish that at or about dusk on October 21, 1978, Robert A. Crawford, who was then 13 years of age, had been playing with a companion at a play-

ground in LaVista, Nebraska, near a fire station, when the fire trucks left the station. Robert mounted a bicycle not equipped with lights and pursued the trucks at a fast rate of speed. The companion who had been playing with him also mounted a bicycle and pursued him eastward on Park View Boulevard. The defendant Ham had just emerged from his home at 7809 Park View Boulevard when he first heard the fire sirens and then observed the trucks drive past. He got into his camper truck, turned on the lights, front and rear, and started backing into the street. Defendant looked into the mirrors on each side of the camper truck and into the mirror above the dashboard, through the window of the cab and a glass door on the camper, and observed no one. As he backed into the street, he observed a movement in the right-hand mirror and immediately felt an impact where Robert's bicycle collided with the left rear of the camper. Shortly before the accident, Robert's companion had yelled to him and Robert had turned his head to look back and almost immediately collided with the camper.

Plaintiff suggests that since all evidence was in written form in the District Court, the reviewing court should review the case de novo uninfluenced by the decision of the trial court. He cites *State Farm Mut. Auto. Ins. Co. v. Budd*, 185 Neb. 343, 175 N.W.2d 621 (1970), in support of his contentions. In that case, the dispute arose out of the issue of the statute of limitations raised in an answer and the plaintiff's assertion in a reply that the defendant was equitably estopped from raising that defense. The evidence consisted entirely of correspondence and stipulations of the parties. This court's holding was that since it was in as good a position to weigh the facts as was the trial court, it would do so. However, the court also held that the decision on the submitted materials was "a question of law" and there were no disputed facts. Obviously, that is not the case here.

There were disputes in the deposition testimony of the parties and the witnesses, and the question was factual and not of law.

In any event, if the holding of *State Farm Mut. Auto. Ins. Co. v. Budd, supra,* was ever the law of this state, we would limit it to its specific facts. This court does not intend to change the standard of review in law actions. The standard of review will remain the same, and in a law action tried to the court without a jury the findings of the court have the effect of a jury verdict and will not be set aside on appeal unless they are clearly wrong. *McDowell Road Associates v. Barnes,* 198 Neb. 207, 252 N.W.2d 151 (1977). The evidence in the case before us supports the findings of fact, and the judgment of the trial court was not clearly wrong. The first assignment of error is not meritorious.

By the second assignment of error, the plaintiff seems to assert that the trial court could not consider evidence of contributory negligence. In his answer, the defendant Ham alleged that the negligence of Robert was the proximate cause of Robert's injuries. The plaintiff did not move the court for specifications of the negligence and raised the issue for the first time on his motion for new trial. The plaintiff cites no authority and, indeed, there is none. The rule in this state remains that "a general allegation of negligence is good against a demurrer, *and under such an allegation evidence of any fact which contributed to the injury sued for is competent and relevant.*" (Emphasis supplied.) *Chicago, R.I. & P.R. Co. v. O'Donnell,* 72 Neb. 900, 905, 101 N.W. 1009, 1010 (1904); *Bunselmeyer v. Hill,* 179 Neb. 140, 137 N.W.2d 354 (1965); *Behrens v. Gottula,* 160 Neb. 103, 69 N.W.2d 384 (1955). The assignment is without merit.

AFFIRMED.

DANIEL R. DRAWBRIDGE AND CYNTHIA MISTEREK, APPELLEES, V. DOUGLAS COUNTY, NEBRASKA, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, ET AL., APPELLANTS.

311 N.W.2d 898

Filed October 30, 1981. No. 43558.

1. **Highways: Negligence.** One who places an obstruction upon a highway in such a manner that it is dangerous to others using the highway has a duty to remove the obstruction or to use due care to warn others upon the highway of the danger incident to the obstruction.
2. ____: ____. A failure to so warn the traveling public is continuing negligence as distinguished from a condition.
3. **Motor Vehicles: Negligence.** The duty of a guest riding in an automobile is to use due care in keeping a lookout commensurate with that of an ordinarily prudent person under like circumstances. A guest is not required to use the same degree of care as devolves upon the driver. If a guest perceives danger, or should anticipate danger, he should warn the driver. Ordinarily a guest need not watch the road or advise the driver in the management of the car.
4. ____: ____. A guest may be guilty of contributory negligence, or assumption of risk, by riding or continuing to ride with a driver who he knows, or in the exercise of ordinary care and diligence should know, is so intoxicated that he is unable to operate the vehicle with proper prudence or skill.
5. ____: ____. Generally, it is negligence as a matter of law to drive so fast at night that the driver is unable to stop in time to avoid a collision with an object on the road which is within the range of his headlights.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Judgment in Drawbridge v. Douglas County affirmed. Cause in Misterek v. Douglas County remanded with directions.

Donald L. Knowles, Douglas County Attorney, and Jerry W. Katskee for appellants.

Ronald H. Stave of Sodoro, Johnson, Daly, Stave, Cavel & Coffey for appellees.

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

BOSLAUGH, J.

These cases were actions under the Nebraska Political Subdivisions Tort Claims Act against the County of Douglas, Nebraska, and James Paulison, a deputy sheriff employed by the county. They were consolidated for trial in the District Court and docketed as a single appeal in this court.

The plaintiffs were passengers in an automobile operated by Douglas Misterek when it collided with the rear of an automobile owned by Frank Vencil at approximately 12:45 a.m. on March 4, 1978. These actions were brought to recover the damages resulting from the injuries to the plaintiffs in the collision. Douglas Misterek assigned his cause of action arising out of the accident to his wife, Cynthia, and it was included in the action commenced by her.

The plaintiffs, the driver Misterek, and Kathleen Warren, plaintiff Drawbridge's companion for the evening, were returning to Omaha from LeShara after dinner and drinks in LeShara, Nebraska.

The plaintiff Daniel R. Drawbridge was riding in the rear seat of the Misterek automobile. The plaintiff Cynthia G. Misterek was riding in the front seat of the Misterek automobile. Both plaintiffs were injured in the collision.

The Vencil automobile had been involved in a collision with an automobile operated by Mark Hannan at approximately 11:30 p.m. that same night. After the collision with the Hannan automobile the Vencil automobile came to rest on the south side of the highway headed slightly southeast, with the rear end of the automobile partly on the pavement and partly on the shoulder of the highway. The evidence is in conflict as to the exact position and location of the Vencil automobile at the time it was struck by the Misterek automobile.

The collision between the Misterek automobile and the Vencil automobile occurred on Highway 64 approximately 1 mile east of the Platte River bridge. At that point the highway is level and runs generally east and

west. It is a two-lane paved highway. At the time of the accident the sky was overcast but there was no precipitation. The evidence is in conflict as to the condition of the surface of the highway, but it was described in the evidence as ice-covered, snowpacked, or basically dry.

At the time of the accident the Hannan automobile was stopped on the north shoulder of the highway, a short distance west of the Vencil automobile. A patrol vehicle operated by Paulison was parked behind the Hannan automobile. The headlights, four-way flasher lights, and the rotating lights on the top of the patrol vehicle were turned on and operating. Paulison also testified that the spotlight on the patrol vehicle was turned on and shining across the road in the direction of the Vencil automobile. There were no lights on the Vencil automobile at the time of the accident.

As the plaintiffs' car came over a small hill onto the flat stretch of road about ¾ to 1 mile west of the collision site, the plaintiffs and the driver testified that they noticed the rotating cruiser lights on the north side of the highway. The passengers in the Misterek vehicle, which was eastbound, testified that they saw no warning lights except the rotating lights on top of the cruiser.

Douglas Misterek, the driver, testified that he alternated between watching the activity on the north side of the highway and watching the entire road. Plaintiff Cynthia Misterek testified that her attention was mainly focused on the north side of the road until they passed the cruiser, and at that time she looked ahead and saw the Vencil vehicle about two to three car lengths away, at least half in the driving lane. Plaintiff Drawbridge also testified that the Vencil car was at least half on the roadway. Douglas Misterek's testimony was that the entire rear of the Vencil vehicle was in the driving lane.

Misterek further testified that he had reduced his speed to approximately 30 miles per hour or less as he approached the scene of the accident. He did not see the

Vencil automobile until it was about two car lengths away.

The trial court found generally for the plaintiffs and awarded the plaintiff Drawbridge damages in the amount of $1,750. The plaintiff Misterek was awarded damages in the amount of $2,750.

The defendants have appealed and contend the trial court erred in finding that defendant Paulison was negligent; in failing to find the negligence of Douglas Misterek was the sole proximate cause of the accident; in failing to find the plaintiffs' recovery was barred by contributory negligence and assumption of risk; and in not separating the damages awarded to Cynthia Misterek from those awarded to Douglas Misterek.

The petition alleged the defendant Paulison was negligent in failing to remove the Vencil automobile from the highway and in failing to warn oncoming traffic of the presence of the Vencil automobile on the highway.

The evidence is undisputed that the Vencil automobile was inoperable and that Paulison had ordered a tow truck shortly after he had arrived at the scene of the accident. There is no evidence which would sustain a finding that Paulison was negligent in failing to remove the Vencil automobile from the highway.

As to the alleged failure to warn, there was evidence that the Vencil car was dark in color, and the accident scene was unlighted except for the lights on the patrol vehicle which was parked on the shoulder on the north side of the highway several car lengths west of the Vencil automobile. Flares were available at the sheriff's office but there were none in the patrol vehicle operated by Paulison.

In *Johnson v. Metropolitan Utilities Dist.*, 176 Neb. 276, 280, 125 N.W.2d 708, 710 (1964), we said: "One who places an obstruction upon a highway in such a manner that it is dangerous to others using the highway has a duty to remove the obstruction or to use due care to warn others upon the highway of the danger incident to

the obstruction." A failure to so warn the traveling public is continuing negligence as distinguished from a condition. Although Paulison did not place the Vencil automobile upon the highway, he was present at the scene of the accident and was in charge of the situation. The trial court could find, under the facts and circumstances in this case, that he failed to use due care to warn approaching traffic that the eastbound lane of the highway was obstructed.

So far as contributory negligence and assumption of risk by the passengers are concerned, the defendants contend the plaintiffs failed to keep an adequate lookout, warn the driver of impending danger, and rode with a driver who they knew or should have known was unable to operate the vehicle with proper prudence or care.

The plaintiff Misterek, riding in the right front seat, testified that she was mostly watching the north side of the road until they were past the cruiser, and then turned her attention to the road in front of her. The plaintiff Drawbridge was seated in the right rear seat and was watching what he could see from that position. The plaintiff Misterek also testified that she uttered "a warning" as soon as she saw the Vencil vehicle, at about two to three car lengths away.

The duty of a guest riding in an automobile is to use due care in keeping a lookout commensurate with that of an ordinarily prudent person under like circumstances. A guest is not required to use the same degree of care as devolves upon the driver. If a guest perceives danger, or should anticipate danger, he should warn the driver. Ordinarily a guest need not watch the road or advise the driver in the management of the car. *Kuska v. Nichols Construction Co.*, 154 Neb. 580, 48 N.W.2d 682 (1951). The trial court could have found that plaintiffs were not negligent in this respect.

The defendants' major contention is that the plaintiffs were contributorily negligent in riding or continuing to ride with Douglas Misterek knowing that he was "intoxicated." Misterek had consumed about four bottles of

beer between 8 p.m. and midnight on the night of the collision, and had eaten a full meal, as had the other parties in his vehicle, during the same period of time. All parties involved testified that Misterek appeared sober and in control of his driving. Neither Paulison nor Deputy Sheriff Timmins testified that they suspected Misterek of intoxication. There was no evidence of blood or breath tests.

A guest may be guilty of contributory negligence, or assumption of risk, by riding or continuing to ride with a driver who he knows, or in the exercise of ordinary care and diligence should know, is so intoxicated that he is unable to operate the vehicle with proper prudence or skill. Knowledge that the driver has been drinking does not necessarily bar recovery by a guest. *Schaffer v. Bolz*, 181 Neb. 509, 149 N.W.2d 334 (1967). Where the driver is really and perceptibly under the influence of liquor and actual ascertainable intoxication exists to such a degree that the guest is charged with knowledge of it, his recovery will be barred. There was no evidence that Misterek was in such a state of intoxication, and both plaintiffs testified affirmatively that he was not. The trial court could have found that the plaintiffs were not contributorily negligent with regard to the "intoxication" issue and did not assume the risk.

Although the evidence did not establish that the negligence of Douglas Misterek was the sole proximate cause of the accident, the evidence did establish negligence on his part which was more than slight and sufficient to bar his recovery as a matter of law. Generally, it is negligence as a matter of law to drive so fast at night that the driver is unable to stop in time to avoid a collision with an object on the road which is within the range of his headlights. *McClellen v. Dobberstein*, 189 Neb. 669, 204 N.W.2d 559 (1973). Although the Vencil automobile was maroon in color and unlighted, and there was some evidence it was dirty, there was an additional circumstance in this case which required Misterek to exercise greater care in approach-

ing the scene of the accident. Misterek had observed the flashing lights on the patrol car for approximately a mile and had reduced his speed because he was aware that some type of an emergency situation might have occurred on the highway. Under these circumstances, his failure to see the Vencil vehicle, which he claimed was directly in front of him, was sufficient negligence to bar his recovery as a matter of law.

Since the trial court did not separate the damages awarded in the Cynthia Misterek action, it is necessary to remand that action for further findings with directions to reduce the award by the amount of damages, if any, which were awarded by reason of the cause of action assigned by Douglas Misterek.

The judgment of the District Court in the action brought by Daniel Drawbridge is affirmed. The action brought by Cynthia Misterek is remanded to the District Court for further proceedings in accordance with this opinion.

JUDGMENT IN DRAWBRIDGE V. DOUGLAS COUNTY AFFIRMED.

CAUSE IN MISTEREK V. DOUGLAS COUNTY REMANDED WITH DIRECTIONS.

IN RE ESTATE OF ESSIE E. SCHOCH, DECEASED. COMMERCIAL NATIONAL BANK AND TRUST COMPANY OF GRAND ISLAND, NEBRASKA, APPELLEE, V. DAISY R. KAIL, APPELLANT.

311 N.W.2d 903

Filed October 30, 1981. No. 43593.

1. **Judgments: Appeal and Error.** On appeal of an action at law in which a jury has been waived, the findings and judgment of the District Court as the trier of 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 they are not clearly wrong.

2. **Estates: Wills.** One possesses testamentary capacity if he understands the nature of his act in making a will, knows the extent and character of his property, knows and understands the proposed disposition of his property, and knows the natural objects of his bounty.
3. ____:____. Testamentary capacity is tested by the state of a testator's mind at the time he executes his will.
4. ____:____. Although competent evidence of a testator's condition of mind long before, closely approaching, and shortly after the execution of a will is admissible, it is received only to assist in revealing his state of mind at the time the will was executed.
5. **Estates: Wills: Proof.** It is the duty of the proponent of a will, in the first instance, to make a prima facie case as to testamentary capacity; it then devolves upon the contestant to overcome the presumption arising therefrom, after which the burden of proving testamentary capacity by a preponderance of the evidence devolves upon the proponent.
6. **Trial: Evidence.** A trial court has broad discretion to exclude cumulative evidence.
7. **Hearsay: Proof.** Under the residual hearsay exception found in Neb. Rev. Stat. § 27-804(2)(e) (Reissue 1979), the proponent of the evidence has the burden of establishing each of the conditions of admissibility imposed by the rule.
8. **Trial: Witnesses.** The unexplained failure of a party to call or examine an available witness who possesses peculiar knowledge may give rise to an inference that the testimony of such witness would not sustain the contention of the party.
9. ____:____. The relative convincing powers of the inferences to be drawn from failing to call or examine a witness and other evidence are for the determination of the trier of fact.
10. **Judgments: Appeal and Error.** In determining the sufficiency of the evidence to sustain the trial court's judgment in an action at law in which a jury has been waived, it must be considered most favorably to the successful party, every controverted fact must be resolved in that party's favor, and that party must have the benefit of every inference that can reasonably be deduced therefrom.

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

C. Russell Mattson of Mattson, Ricketts, Davies, Stewart, Calkins & Duxbury for appellant.

R. P. Cathcart of Ginsburg, Rosenberg, Ginsburg, Cathcart, Curry & Gordon for appellee.

Heard before WHITE and HASTINGS, JJ., and RIST and CAPORALE, District Judges, and RONIN, Retired District Judge.

CAPORALE, District Judge.

The appellant urges that the District Court erred when it affirmed the judgment of the county court and adjudged that her sister's last will and testament be admitted to probate. We affirm the findings and judgment of the District Court.

This is an action at law which, under the procedures existing at that time, was triable to a jury on appeal from the county court to the District Court. See Neb. Rev. Stat. §§ 25-1104, 30-1601, and 30-1606 (Reissue 1979). The parties elected to waive a jury. Accordingly, on this appeal, the findings and judgment of the District Court as the trier of 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 they are not clearly wrong. *Koperski v. Husker Dodge, Inc.* 208 Neb. 29, 302 N.W.2d 655 (1981); *In re Estate of Bouma,* 206 Neb. 209, 292 N.W.2d 37 (1980).

One possesses testamentary capacity if he understands the nature of his act in making a will, knows the extent and character of his property, knows and understands the proposed disposition of his property, and knows the natural objects of his bounty. *Anderson v. Claussen,* 196 Neb. 787, 246 N.W.2d 586 (1976); *Holman v. Morrison,* 186 Neb. 159, 181 N.W.2d 441 (1970). Such capacity is tested by the state of a testator's mind at the time he executes his will. *Thomas v. Vaughan,* 181 Neb. 673, 150 N.W.2d 241 (1967). Although competent evidence of a testator's condition of mind long before, closely approaching, and shortly after the execution of a will is admissible, it is received only to assist in revealing his state of mind at the time the will was executed. *In re Estate of Woodward,* 147 Neb. 270, 23 N.W.2d 75 (1946).

It is the duty of the proponent of a will, in the first instance, to make a prima facie case as to testamentary capacity; it then devolves upon the contestant to overcome the presumption arising therefrom, after which the burden of proving testamentary capacity

by a preponderance of the evidence devolves upon the proponent. *Moore v. Moore*, 158 Neb. 620, 64 N.W.2d 301 (1954); *In re Estate of Wahl*, 151 Neb. 812, 39 N.W.2d 783 (1949).

We review the appellant's assignments of error in light of the above-stated scope of review and rules relating to testamentary capacity and its proof. She asserts the following errors resulted in the erroneous finding that testatrix possessed the requisite capacity and the adjudication that the will be admitted to probate: (1) The admission into evidence of certain opinion evidence concerning mental competence; (2) The exclusion of certain hearsay evidence; and (3) The failure to give weight to inferences drawable from appellee's failure to call certain witnesses and to ask concerning testamentary capacity of a witness who did testify.

The will was executed August 1, 1968, and devised the major portion of the decedent's estate to her husband, if he survived; if not, to her and his nieces and nephews. The decedent's husband did not survive her.

The appellee, Commercial National Bank and Trust Company of Grand Island, Nebraska, as successor personal representative and proponent of the will, made a prima facie case on the issue of testamentary capacity. The attorney who drafted the will and acted as an attesting witness testified that on the date in question the testatrix possessed testamentary capacity. Thereafter, the appellant adduced evidence, as the contestant, that at various times before, closely approaching, and shortly after the will was executed, the decedent was markedly confused, unkempt, uncommunicative, and dressed inappropriately. There was medical evidence that the decedent suffered from chronic brain syndrome and was markedly senile. One physician testified that, in his opinion, if confusion in such persons is continuous, as was the case here so far as he was concerned, the mental

state is not variable. Another physician, on the other hand, opined that the mental condition of such persons can vary at different times from confused to clear.

In rebuttal, the proponent adduced testimony which contradicted that of the contestant on the questions of decedent's confusion, grooming, communicativeness, and manner of dress. One such witness, who testified to a number of transactions he had had with the decedent at various times, at one point stated he did not know whether the decedent knew and understood the will's provisions on the day she signed it. Subsequently, he was allowed to testify, over objection that the question had been asked and answered and proper foundation was lacking, that decedent was competent in August 1968. Although there may have been no foundation for an opinion as to decedent's testamentary capacity on the day the will was executed, that was not the question. The witness had testified as to an agreement decedent had entered into on August 15, 1968, and thus there was foundation for an opinion as to competency in August 1968 generally. Thus, appellant's first assignment of error is without merit.

The trial court excluded certain hearsay offered by the appellant, consisting of statements concerning decedent's mental state attributed to her dead husband and descriptions of testatrix's behavior imputed to one of her dead friends. Hearsay is not admissible, except under certain exceptions. Neb. Rev. Stat. § 27-802 (Reissue 1979). The hearsay statement of an unavailable declarant is not excluded, provided its probative value is not substantially outweighed by the factors enumerated in Neb. Rev. Stat. § 27-403 (Reissue 1979), even though not covered by specific exceptions, if there are equivalent circumstantial guarantees of trustworthiness as underlie the specific exceptions, and if "(i) the statement is offered as evidence of a material fact, (ii) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure

through reasonable efforts, and (iii) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence." Neb. Rev. Stat. § 27-804(2)(e) (Reissue 1979).

First, it should be noted that the trial court has broad discretion to exclude cumulative evidence. *Anson v. Fletcher*, 192 Neb. 317, 220 N.W.2d 371 (1974). Under the state of the record it could not be said that exclusion of the evidence offered would have constituted reversible error even if otherwise admissible. Secondly, the trial court was correct in excluding the hearsay which was offered, and therefore appellant's second assignment of error fails. In considering the residual exception found in the federal rule from which our statute is derived, Fed. R. Evid. 804(b)(5) (1975), the court in *Huff v. White Motor Corp.*, 609 F.2d 286 (7th Cir. 1979), first observed the trial court had a considerable measure of discretion in applying the exception. It then ruled that the proponent of the evidence had the burden of establishing each of the conditions of admissibility imposed by the rule. There is no showing here that the hearsay statements offered had any of the circumstantial guarantees of trustworthiness found in the specific exceptions. The reliability of the witness' testimony that the hearsay statement was in fact made is not a factor to be considered in deciding its admissibility. It is the circumstantial guarantees of trustworthiness of the speaker of the words at the time the utterances were made which control. *Huff v. White Motor Corp., supra.* No showing of the special trustworthiness of the deceased husband's comments at various times that the testatrix could no longer cope, could not be left at home, would not be able to help in the contest of another's will, and would forget having been away from home is made by the record. A variety of causes unrelated to the reasons contained in the hearsay may have existed.

The statements attributed to the dead friend concerning the testatrix's behavior were not shown to be more probative on the point for which offered than other evidence which could have been procured by reasonable effort. Nor was there any showing that the hearsay would serve the interests of justice by increasing the likelihood that the truth would be ascertained. The residual hearsay exceptions are to be used very rarely, and only in exceptional circumstances. *Huff v. White Motor Corp., supra; Wolfson v. Mutual Life Ins. Co. of New York*, 455 F. Supp. 82 (M.D. Pa. 1978). Such exceptional circumstances were not shown to exist in this case.

We now consider appellant's last assignment of error. The second attesting witness to the will was not called as a witness. A witness who had been identified by the proponent of the will as one who knew of testatrix's testamentary capacity on August 1, 1968, was called and did testify, but was not asked his opinion about testatrix's capacity on the day in question.

It is true, as argued by appellee, that the unexplained failure of a party to call or examine an available witness who possesses peculiar knowledge may give rise to an inference that the testimony of such witness would not sustain the contention of the party. *Dunbier v. Stanton*, 170 Neb. 541, 103 N.W.2d 797 (1960); *Medelman v. Stanton-Pilger Drainage Dist.*, 155 Neb. 518, 52 N.W.2d 328 (1952). It is likewise true, however, that the relative convincing powers of the inferences to be drawn from failing to call or examine a witness and other evidence are for the determination of the trier of fact. *Dunbier v. Stanton, supra.* In determining the sufficiency of the evidence to sustain the trial court's judgment, it must be considered most favorably to the successful party, every controverted fact must be resolved in that party's favor, and that party must have the benefit of every inference that can reasonably be deduced therefrom. *Urban-*

ovsky v. Foral, 191 Neb. 308, 215 N.W.2d 74 (1974); *McBride v. Fort Kearney Hotel, Inc.*, 185 Neb. 518, 176 N.W.2d 911 (1970).

A review of this record in light of the foregoing rules compels the conclusion that appellant's third assignment of error is likewise without merit, and that there is ample evidence to sustain the trial court's finding that the testatrix had testamentary capacity when she executed her will.

For the reasons stated, the judgment that the will be admitted to probate is affirmed.

AFFIRMED.

B TOWN, INC., A NEBRASKA CORPORATION, APPELLEE, V. CHET ALBRIGHT AND STEVE H. ALBRIGHT, DOING BUSINESS AS SINGER SEWING MACHINE SHOP, APPELLANTS.

311 N.W.2d 908

Filed October 30, 1981. No. 43634.

1. **Judgments: Appeal and Error.** In determining whether the evidence supports the findings of the trial court in an action at law where the jury has been waived, the evidence must be considered in the light most favorable to the successful party, all conflicts must be resolved in its favor, and that party is entitled to the benefit of every inference that can reasonably be deduced from the evidence.
2. ____: ____. The judgment of the trial court in an action at law where the jury has been waived has the effect of a verdict of the jury, and it will not be set aside on appeal unless clearly wrong.

Appeal from the District Court for Gage County: WILLIAM B. RIST, Judge. Affirmed.

Charles W. Balsiger for appellants.

Gary G. Thompson of Hubka, Kraviec & Thompson for appellee.

Heard before KRIVOSHA, C.J., WHITE, and HASTINGS, JJ., and GITNICK, District Judge, and COLWELL, Retired District Judge.

GITNICK, District Judge.

This is an action by the plaintiff-appellee, B Town, Inc., a Nebraska corporation, to recover rents, utility payments and garbage collection charges, and costs for other than usual repairs for the balance of the term of a written lease, after the defendants-appellants, Chet Albright and Steve H. Albright, doing business as Singer Sewing Machine Shop, had voluntarily vacated the premises. A jury was waived and the case was tried on a series of exhibits stipulated into evidence by the parties. The District Court found for the plaintiff and against the defendants for the sum of $6,118.91, plus interest and costs. The defendants have appealed.

The plaintiff was the owner of a building in the city of Beatrice, Nebraska, which comprised several commercial areas, one of which was leased to the defendants under the terms of a 3-year lease which commenced on December 1, 1978, at a monthly rental of $300, plus prorated utility charges and garbage collection services. On July 19, 1979, defendants gave notice of their intent to vacate the premises, effective July 31, 1979. Subsequently, plaintiff was able to relet the premises for a reduced monthly rental of $100, commencing September 1, 1979.

The defendants complain of the judgment rendered against them for two reasons. They argue that an ambiguity exists in the lease prepared by the landlord, which they argue must be construed against the landlord and which excuses the defendants from payment responsibility. Secondly, the defendants contend, in substance, that the subsequent reletting of the entirety of the building makes the defendants liable, if at all, for a lesser rental than found to be due by the trial court, which computed the rental to be due only on the rent attributable to the portion of the building originally leased to the defendants, reduced by the rental received on reletting. These contentions were resolved by the trial court and decided adversely to the defendants. We affirm the judgment of the trial court.

The pertinent provision of the lease which is in dispute reads as follows: "15. LIABILITY: 'Lessor' hereby agrees and releases the 'Lessee' harmless from and against loss, damage or liability occasioned by or growing out of or arising or resulting from any default hereunder, or any tortuous [sic] or negligent act on the part of the 'Lessor', 'Lessor's' agents, or employees."

Needless to say, the foregoing lease paragraph is not a model of grammatical lucidity. However, this court has long held that in the construction of the language of written instruments, including leases, every effort should be made to harmonize the language which presents the difficulty with the other provisions of the instrument, if that can be accomplished by the use of recognized and reasonable rules of construction.

The purpose of rules of construction are to arrive at and give effect to the intention of the parties from a review of the entire instrument, rather than to select particular words for the purpose of interpreting a particular provision. Leases are construed from the four corners of the instrument to arrive at the true intention of the parties. See, Neb. Rev. Stat. § 76-205 (Reissue 1976); *Omaha Country Club v. Dworak*, 186 Neb. 336, 183 N.W.2d 264 (1971).

The defendants' contention is that the "hold harmless" provision of paragraph 15 of the lease, as set forth, avoids the responsibility to pay rental or any related charges imposed by the lease. Defendants overlook the concise statements of the lease with regard to the payment of rent, in paragraph 3, and to the payment of utilities and common area maintenance charges, in paragraph 14, which are clear. Defendants further overlook the applicability of paragraph 17, which deals expressly with the event of default in the payment of rental or the failure to perform any of the covenants, agreements, or obligations of the lease, and gives to the landlord the right to sue for the difference between the rental reserved under the lease for the unexpired portion of the term and any lesser sum which the

landlord obtains in reletting the premises for the remainder of the lease term. This provision is more specific in content than the general provisions of paragraph 15 relating to default, and must control.

To adopt the defendants' contention would be to release the lessee from all obligations imposed on the tenant by the terms of the lease when the act of default is caused by the lessee. The defendants' contention is a convoluted interpretation of a paragraph which, while admittedly inartfully drawn, nevertheless should not be the basis for voiding what is otherwise a clear statement of the responsibilities imposed on each of the parties by the other provisions of the lease. A construction leading to an absurd, harsh, or unreasonable result should be avoided, if possible. 51C C.J.S. *Landlord and Tenant* § 232(4) (1968).

Defendants' further contention that the trial court erred in the assessment of damages by not giving proper consideration to the overall rental received from the reletting of the entire building of which the demised premises are a part, at the time of the vacation of the demised premises by the lessee, is without merit. The defendants did not allege and offered no evidence pertaining to any question of fraud in reletting the demised premises for less than fair market rental. The defendants' contention was resolved against them on a factual basis by the trial court, based upon the evidence which was introduced by stipulation. The defendants will not now be heard to complain of their lack of evidence necessary to support their contention.

The defendants are entitled only to a credit against the rental liability for the amount of rental received by the lessor for the premises formerly occupied by them, and subsequently relet by the lessor, from the date of reletting. This they received.

In the case in controversy, a jury trial was waived and trial was to the court. In determining whether the evidence supports the findings of the trial court in an action at law where the jury has been waived, the

evidence must be considered in the light most favorable to the successful party, all conflicts must be resolved in its favor, and that party is entitled to the benefit of every inference that can reasonably be deduced from the evidence. *Aurora Cooperative Elevator Co. v. Larson*, 204 Neb. 755, 285 N.W.2d 498 (1979).

The judgment of the trial court in an action at law where the jury has been waived has the effect of a verdict of the jury, and it will not be set aside on appeal unless clearly wrong. *Tibbs v. Fisher*, 208 Neb. 306, 303 N.W.2d 293 (1981).

The evidence here supports the findings and judgment of the trial court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. BURLEY C. COLEMAN, APPELLANT.

311 N.W.2d 911

Filed October 30, 1981. No. 43839.

1. **Indictments and Informations: Appeal and Error.** An information first questioned on appeal must be held sufficient unless it is so defective that by no construction can it be said to charge the offense for which the accused was convicted.
2. **Indictments and Informations.** A complaint or information is fatally defective only if its allegations can be true and still not charge a crime.
3. **Indictments and Informations: Waiver.** The accused shall be taken to have waived all defects which may be excepted to by a motion to quash, or a plea in abatement, by demurring to an indictment or pleading in bar or the general issue.

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

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

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

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

KRIVOSHA, C.J.

The appellant, Burley C. Coleman, appeals from a judgment and order of the District Court for Douglas County, Nebraska, finding him guilty of attempted robbery and sentencing him to a term of 5 to 7 years in the Nebraska Penal and Correctional Complex. In seeking reversal of his conviction Coleman claimed that the amended information to which he entered a plea of nolo contendere failed to charge him with all of the essential statutory elements of attempted robbery and was therefore fatally defective.

Coleman's argument is indeed ingenious, and if the appeal is examined in a vacuum, as counsel would have us do, one might reach the conclusion urged by Coleman. An appeal of this nature, however, is not to be examined in a vacuum, but rather in light of all of the filings and proceedings in the case. When that is done it becomes apparent that the claim is without merit and must be rejected and the judgment and sentence affirmed.

Coleman was originally charged in a four-count information. Count I charged that on December 21, 1979, Coleman "did then and there forcibly, and by violence or by putting in fear, take money from Christine Daluge, with the intent to steal." Count II claimed that he used a firearm to commit the felony described in count I. Count III charged that on December 21, 1979, Coleman "did then and there attempt to forcibly and by violence, or by putting in fear, attempt to take money from *McDonald's Restaurant* with the intent to steal." (Emphasis supplied.) Count IV charged Coleman with using a firearm to commit the felony set out in count III. A preliminary hearing was held in the municipal court for the city of Omaha and Coleman was bound over to the District Court for Douglas County on all four counts.

In the District Court Coleman filed a plea in abatement, maintaining that the evidence in the municipal court was insufficient to support a finding of probable cause to believe that a crime was committed. Based upon a review of the entire record made in the municipal court, the trial court overruled the plea in abatement. Thereafter, on July 16, 1980, Coleman appeared in the District Court with his attorney and, pursuant to a plea bargain, entered a plea of nolo contendere to a single count of robbery, the State agreeing to dismiss the other charges. For reasons which the record does not disclose, counts I, II, and IV were dismissed and count III was retained as the count to which Coleman entered his plea of nolo contendere. Count III charged that Coleman did, on December 21st, "forcibly and by violence, or by putting in fear, attempt to take money from McDonald's Restaurant with the intent to steal." It is by reason of that amended information to which Coleman entered a plea of nolo contendere that he now contends the charges should be dismissed. His argument is simply that the amended information fails to set out all of the essential elements of robbery, in violation of Neb. Rev. Stat. § 28-324 (Reissue 1979), in that the information fails to disclose the name of the person against whom the crime was committed. Under the provisions of the Nebraska robbery statute, § 28-324, a person commits robbery if, (1) with the intent to steal, (2) he forcibly and by violence, or by putting in fear, (3) takes from the person of another any money or personal property of any value whatever.

Coleman argues that because the amended complaint contained only the name "McDonald's Restaurant" and not the employee's name, one of the essential elements of the crime of robbery was omitted and the complaint is fatally defective to the extent that a subsequent plea does not constitute a waiver. While it is true, as urged by Coleman, that we have held that defects or omissions in the indictment or information which are of such a fundamental character as to make the indictment

wholly invalid are not subject to waiver (see *In re Interest of Durand*, 206 Neb. 415, 293 N.W.2d 383 (1980)), we have further held that an information first questioned on appeal must be held sufficient unless it is so defective that by no construction can it be said to charge the offense for which the accused was convicted. See, *State v. Lingle*, *ante* p. 492, 308 N.W.2d 531 (1981); *State v. Haile*, 185 Neb. 421, 176 N.W.2d 232 (1970).

We have also previously pointed out the difference between a fundamental defect in an information which may not be waived and a mere technical defect which is waived by a plea. In *Nelson v. State*, 167 Neb. 575, 581, 94 N.W.2d 1, 5 (1959), we said: "'It is the general rule that defects or omissions in the indictment or in the mode of finding the indictment, which are of such a fundamental character as to make the indictment wholly invalid, are not subject to waiver by the accused. * * * But it is equally the general rule that defects and omissions which run only to the form in which the various elements of the offense are stated, or to the fact that the pleading is [inartfully] drawn, are waived by not objecting thereto in some appropriate manner in the preliminary stages of the proceeding, or, as to some matters, before determination of the issue on the merits.'"

We have also held that a complaint or information is fatally defective only if its allegations can be true and still not charge a crime. See *Phillips v. State*, 154 Neb. 790, 49 N.W.2d 698 (1951). Either the omission of the employee's name was a defect apparent on the face of the complaint or the insertion of the name "McDonald's Restaurant," absent further extrinsic evidence, was sufficient to allege the charge of robbery.

If the defect was apparent on its face, the appropriate manner to attack the amended complaint would have been by a motion to quash. Neb. Rev. Stat. § 29-1808 (Reissue 1979) provides: "A motion to quash may be made in all cases when there is a defect apparent

upon the face of the record, including defects in the form of the indictment or in the manner in which an offense is charged." The effect of failing to object, as provided for in § 29-1808, is as provided for by Neb. Rev. Stat. § 29-1812 (Reissue 1979) which states: "The accused shall be taken to have waived all defects which may be excepted to by a motion to quash, or a plea in abatement, by demurring to an indictment or pleading in bar or the general issue." See, also, *State v. Workman*, 186 Neb. 467, 183 N.W.2d 911 (1971). Coleman's plea of nolo contendere to the amended charge was the equivalent of a plea of guilty and as such waives every defense to the charge, whether the defense is procedural, statutory, or constitutional. See *State v. Country*, 202 Neb. 509, 276 N.W.2d 110 (1979).

On the other hand, the name "McDonald's Restaurant," absent other evidence, does not on its face reveal that "McDonald's Restaurant" is not the name of a person but, rather, is the name of a corporation. To make that determination we must resort to other evidence in the record, including the arraignment and plea hearing. Once we do that, it is apparent the defect is not a fundamental defect which could not be waived by a plea.

The original information filed in this case clearly set out all of the necessary elements and, in the various counts, advised Coleman of the charges against him. Following his entry of a plea of nolo contendere, the record made in both the municipal court and District Court clearly establishes that all the facts necessary to sustain the conviction resulting from Coleman's plea, including the name of the employee of McDonald's Restaurant, were made known to Coleman. He was not in any manner misled or ill-advised as to the nature of the charge. The use of the term "McDonald's Restaurant" may have been inartful, but it was not so defective as to render the conviction void. It was clear that the money was taken from an employee of McDonald's Restaurant and not from an inanimate cor-

poration, and Coleman was aware of these facts before he entered his plea. We believe that when the entire record is examined, including the original information and the evidence presented at the hearing, there is not a fatal defect of the type that could not be waived by entering a plea. Coleman, by entering the plea, waived any such defect which may have existed. The conviction and sentence of the trial court must be affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. BURL HOLLOMAN, APPELLANT.

311 N.W.2d 914

Filed October 30, 1981. No. 44110.

1. **Criminal Trials: Effectiveness of Counsel.** Where one maintains that counsel was inadequate, one must likewise show how or in what manner that alleged inadequacy prejudiced one.
2. **Post Conviction: Effectiveness of Counsel: Proof.** In post conviction relief cases the person challenging the competency of counsel has the burden of proof to establish the counsel's incompetence.
3. **Post Conviction: Proof.** In a post conviction proceeding the burden of proof is on the movant to establish a basis for relief, and where such burden is not met a denial of that requested relief is required.
4. **Appeal and Error.** It is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine plausibility of explanations, or weight evidence. Such matters are for the trier of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.

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

J. David Thurber of John R. Doyle Law Offices 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.

KRIVOSHA, C.J.

The appellant, Burl Holloman, appeals from an order entered by the District Court for Douglas County, Nebraska, denying him post conviction relief sought pursuant to Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1979). The basis for his claim was that he had been denied effective assistance of court-appointed counsel during his trial on the merits. Specifically, Holloman claimed that his trial counsel failed to adequately represent him in that he failed to interview a known alibi witness and failed to call the witness at trial. He also alleged that his trial counsel failed to investigate the scene of the crime and Holloman's home. Following an evidentiary hearing the trial court found that Holloman's claims of inadequate counsel were without merit and denied post conviction relief. We have now examined the record in this matter and agree with the trial court. For that reason we affirm the judgment of the trial court denying post conviction relief.

Holloman was convicted by a jury of the forcible rape and robbery of a 76-year-old woman who lived in a house next to where Holloman lived. Holloman appealed that conviction to this court and we affirmed the conviction. See *State v. Holloman*, 197 Neb. 139, 248 N.W.2d 15 (1976). The facts of the case are adequately set out in our previous opinion and need not be repeated here except as is specifically necessary to decide this appeal.

The record in *Holloman, supra*, discloses that someone identified by the prosecutrix on three separate occasions as Holloman broke into her home at approximately 6:30 a.m. The assailant then forcibly raped the victim and afterwards robbed her of $20.

The victim identified Holloman as her assailant from photographs shown to her by the police, as well as at a police lineup and an in-court identification. When she reported the crime she advised the officers that her assailant was wearing a blue sweater at the time she

was attacked, and the evidence discloses that the assailant was wearing a shoe with a distinctive heel which left an impression on the damp fresh ground outside the victim's home. When Holloman was arrested the arresting officers observed a blue sweater on a chair next to Holloman's bed, which was seized and offered in evidence at trial. The officers also testified that they observed Holloman's shoes lying on the floor next to his bed. The shoes likewise were seized and offered as evidence in the trial. The heel prints matched those found on the ground outside the victim's home.

Holloman now argues as his first basis for post conviction relief that his court-appointed counsel inadequately represented him, in that counsel did not personally inspect either the home of the victim or Holloman's home so that he could have cross-examined both the victim concerning the attack and the arresting officers as to the location of the sweater and shoes which were seized.

The difficulty, however, with Holloman's argument is that, while Holloman suggests that counsel failed to adequately perform by not personally investigating the victim's home and Holloman's home, he fails to point out to us how such investigation would have in any manner disclosed evidence which would have been of benefit to Holloman during the trial. There was no question during the trial but that the victim had been attacked. Absent suggestion by Holloman as to how it would have made a difference in cross-examining the victim, we are totally at a loss to understand how an examination of the victim's home would have been of any benefit to Holloman in his defense.

Likewise with regard to the claim that counsel should have personally inspected Holloman's apartment so that he could have cross-examined the officers concerning the location of the sweater and the shoes, we are at a loss to understand the argument.

The arresting officer testified at a suppression hearing that after he had identified himself and advised Holloman that he was a suspect in an alleged rape, Holloman consented to the officers' entry into the apartment while Holloman dressed. The testimony then proceeds as follows:

"Q As Mr. Holloman was dressing, was he in your view at all times?

"A Yes, he was.

"Q You had no problems with him?

"A No problems, no.

"Q What happened then?

"A Well, while he was dressing, I noticed a couple pairs of shoes lying on the floor, right where he was sitting down putting his clothes on.

"Q And what did you do then, if anything?

"A I picked up these shoes and observed the heels on them.

"Q What did you observe about the heels?

"A On a pair of dress shoes I observed the heel had an impression similar to that which I had seen in the back yard of the residence of the victim, which was right next door.

"Q What did you do then?

"A I took these shoes as evidence.

"Q All right, were those in the same room as Mr. Holloman was then dressing in?

"A Yes, right next to him.

"Q Do you recall what kind of shoes those were?

"A Florsheim, I believe, they were.

"Q Now, what happened then?

"A Well, he continued to dress, and Officer Keavy pointed out a sweater, which was laying on the chair right next to the bed where he was sitting at.

"Q All right, what kind of sweater was it?

"A It was a light blue long-sleeved sweater, which was mentioned in the original report that the suspect was possibly wearing at the time of the assault.

"Q Was that in the same room in which Mr. Holloman

was dressing?

"A Yes.

"Q What did you do then?

"A I took the sweater as evidence."

The evidence with regard to the shoes and sweater is clear and straightforward. The officer testified that they were near or next to Holloman while he was dressing and that both Holloman and the clothes were in the officer's plain view at all times. Holloman now contends that had his counsel personally viewed his apartment, he might have been able to cross-examine the officer as to the location of the sweater and shoes. Yet he does not in any way advise us how the statements made by the officer were not true or how an investigation would have produced helpful evidence. We are totally at a loss to know how counsel's examination of Holloman's premises a month after his arrest could have possibly produced any evidence which would have discredited the officer's testimony to the effect that the shoes and sweater were in plain view. And Holloman does not advise us how such an investigation would have produced any evidence. He merely argues that if counsel had examined the premises of either the victim or Holloman, he might have in some manner conceived some ingenious argument which would have been of benefit to Holloman. Such a claim is not sufficient to entitle Holloman to post conviction relief. "[W]here one maintains that counsel was inadequate, one must likewise show how or in what manner the alleged inadequacy prejudiced one." *State v. Colgrove*, 207 Neb. 496, 500, 299 N.W.2d 753, 756 (1980). See, also, *State v. Harlan*, 205 Neb. 676, 289 N.W.2d 531 (1980). Likewise, we have frequently held in post conviction relief cases that the person challenging the competency of counsel has the burden of proof to establish the counsel's incompetence. See *State v. Kelly*, 190 Neb. 41, 205 N.W.2d 646 (1973). In a post conviction proceeding the burden of proof is on the movant to establish a basis for

relief, and where such burden is not met a denial of that requested relief is required. See, *State v. Pankey*, 208 Neb. 377, 303 N.W.2d 305 (1981); *State v. Auger & Uitts*, 200 Neb. 53, 262 N.W.2d 187 (1978). The record in this case simply fails to disclose how counsel's failure to examine the various premises in any way prejudiced Holloman. The trial court was correct in denying post conviction relief on that basis.

We now turn to the remaining ground raised by Holloman in his claim for post conviction relief. Holloman now maintains that his trial counsel inadequately represented him in that he did not interview a known alibi witness and call her to testify at trial. At best, the evidence in this case is in conflict as to whether the alibi witness in fact existed at the time of the original trial. At the post conviction hearing both Holloman and the alibi witness, a Brenda Mitchell, testified that they were with each other in bed at Holloman's apartment when the alleged attack was to have occurred and that, therefore, Holloman could not have been the attacker. Holloman's trial counsel denies that he was ever told about Brenda Mitchell being with Holloman at the time that the attack was alleged to have occurred. The evidence in the case would tend to support the statement of trial counsel.

At the initial trial, where Holloman did not testify, two witnesses were called by Holloman. They consisted of a Charles Bush and a Janice Mitchell, Brenda Mitchell's older sister. Both of them testified that Holloman had been with them at a party and was taken home around 6:30 a.m. No mention was made by either of the witnesses as to the presence of Brenda Mitchell. Brenda now maintains that the reason neither mentioned her name at trial was because she asked them not to. She said her reason for not wanting her presence to be disclosed was due to the fact that she was only 14 years of age and her parents had forbidden her to have any relations with Holloman. Neither Bush

nor Janice Mitchell testified at the post conviction trial in support of Brenda Mitchell's claim.

Furthermore, a Mr. Pitmon Foxall, an investigator for the public defender's office, from where Holloman's counsel was appointed, did in fact interview Brenda Mitchell before trial. During that interview she never mentioned being with Holloman, and in fact her statement was to the contrary. The report indicates that she told Foxall "she did not believe Holliman [sic] would do a thing like that, cause all he would have to do was come over and see her." The clear implication from the statements given by Brenda Mitchell to investigator Foxall was that she was not with Holloman at the time the alleged attack occurred.

There are further inconsistencies in her testimony. Brenda Mitchell testified at the post conviction hearing that she left Holloman's apartment when the police first attempted to talk to Holloman at approximately 7:30 a.m. She said she went next door to her own home where her sister, Janice, let her in. However, the investigative report prepared by Foxall, dated October 7, 1975, indicates that Janice advised Foxall that she was not, on the day of the attack, living at home, but, rather, was living with her cousin, Karen Mitchell. Court-appointed counsel further testified that during one of the initial interviews with Holloman, the matter of an alibi defense was discussed. At that time Holloman advised counsel that at the time of the alleged crime he was in bed and had no alibi. There was obviously a conflict in the evidence at the post conviction hearing which the trial court was required to resolve. It resolved that conflict in favor of the State and against Holloman. We cannot say that the trial court's determination in that regard was in error. "[I]t is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine 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." *State v. Fowler*, 201 Neb. 647, 658, 271 N.W.2d 341, 348 (1978). See, also, *State v. Tiff*, 199 Neb. 519, 260 N.W.2d 296 (1977). It is apparent to us, as it was obviously apparent to the trial court, that trial counsel did not call Brenda Mitchell to testify as an alibi witness because Brenda Mitchell did not exist as an alibi witness at the time of the trial. In fact, had she been called to testify then, as she now claims she would have testified, her testimony would have been in direct conflict with the testimony of two other witnesses already called without objection by Holloman. The trial court obviously concluded that the claim of Holloman to the effect that his trial counsel was inadequate was totally unsupported by any evidence and wholly without merit. We agree with that conclusion. The judgment of the trial court in denying post conviction relief is affirmed.

AFFIRMED.

LASHONDA WATSON, BY HER FATHER AND NEXT FRIEND, GEORGE W. WATSON, AND GEORGE W. WATSON, INDIVIDUALLY, APPELLEES, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLANT.

312 N.W.2d 256

Filed November 6, 1981. No. 43488.

1. **Tort Claims Act: Appeal and Error.** Findings of fact made by the District Court in a case brought under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1977), will not be disturbed on appeal unless clearly wrong.
2. **Recreation Liability Act: Words and Phrases.** The term "owner," as used in the Recreation Liability Act, Neb. Rev. Stat. §§ 37-1001 et seq. (Reissue 1978), includes a political subdivision as well as a private person.

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

Herbert M. Fitle, Omaha City Attorney, and James E. Fellows for appellant.

John H. Bernstein of Higgins & Okun for appellees.

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

HASTINGS, J.

On Friday, June 30, 1978, LaShonda Watson, age 2½ years, fell from a slippery slide located in Lake James Park and suffered a fractured leg. This action was brought by her father and next friend under the Nebraska Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1977), to recover damages from the defendant, City of Omaha, which owned and operated the public park. The District Court entered judgment in favor of the plaintiff in the total amount of $6,086.85. Although the City of Omaha assigns several errors in this appeal, including the sufficiency of the evidence to support the judgment, contributory negligence of the plaintiff and her parents, and the absence of negligence on the part of the defendant, the principal issue, and the one upon which a decision in this case turns, is the applicability of the Recreation Liability Act, Neb. Rev. Stat. §§ 37-1001 et seq. (Reissue 1978), to a municipality. We reverse and dismiss the action.

Sometime during the afternoon of the date of the accident, the plaintiff, together with her 10-year-old brother Kevin, two cousins, a sister, and a friend of Kevin's, all being 12 years of age or younger, went to the park to play. The children were playing on the slide in spite of the fact that they had noticed that the greater portion of the left handrail had been cut off and was missing. Both Kevin and LaShonda were on the second step from the platform when one of the cousins started doing a flip at the top of the slide. As a result of this activity, Kevin told LaShonda to get out of the way so that she would not get kicked. LaShonda started down,

holding on to the upper part of the left handrail that was still in place, but when she got to the point where the rail was missing she fell to the ground, fracturing her leg.

Witnesses provided conflicting accounts as to how long the handrail had been missing. Plaintiffs' witnesses stated the rail had been missing for approximately 2 weeks prior to the accident, while the maintenance people of the City of Omaha testified that it was in place as late as the morning of the accident. There was also evidence that the rail had been cut with a pipe cutter and that the ends of the rail where cut were not rusty. The City of Omaha was notified of the accident late that same afternoon by LaShonda's father. Mr. Watson testified further to observing that repairs had been made to the slide by the following Monday.

The Recreation Liability Act, particularly at §§ 37-1001, 37-1002, and 37-1005, provides in part that the purpose of the act is to "encourage owners of land to make available to the public land . . . for recreational purposes by limiting their liability . . ." and, consequently, "an owner of land owes no duty of care to keep the premises safe for . . . use by others for recreational purposes, or to give any warning of a dangerous condition . . ." except that liability is not limited "for willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity . . . ." The Political Subdivisions Tort Claims Act provides generally at §§ 23-2402(4) and 23-2407 that a political subdivision shall be liable for the negligent acts or omissions of its employees "in the same manner, and to the same extent as a private individual under like circumstances . . . ."

At the conclusion of all the evidence the district judge found that the damages to the plaintiff, as previously related, were a proximate result of the negligence of the City of Omaha without any contributory negligence on the part of the plaintiff or her parents, that the negligence of the City did not rise to the level of a willful or

malicious failure to guard or warn against a dangerous condition, but that the Recreation Liability Act, §§ 37-1001 et seq., did not apply to the defendant.

All the findings of fact made by the District Court are amply supported by the record, and therefore we cannot say that they are clearly wrong. Accordingly, they will not be disturbed on appeal. *Miles v. School Dist. No. 138*, 204 Neb. 105, 281 N.W.2d 396 (1979). Therefore, if the legal conclusion of the trial court that the Recreation Liability Act does not apply to the City of Omaha is proper, the judgment should be affirmed. Otherwise, it must be reversed and the case dismissed.

In support of the ruling of the District Court, the plaintiffs insist that it is necessary to turn to the legislative history of the Recreation Liability Act in order to determine the intent of the Legislature. In support of this position, plaintiffs cite the case of *PPG Industries Canada Ltd. v. Kreuscher*, 204 Neb. 220, 227, 281 N.W.2d 762, 767 (1979), where we said: "Where the language used in a statute is ambiguous, recourse should be had to the legislative purposes." However, plaintiffs overlook the admonition contained in *State ex rel. Halloran v. Hawes*, 203 Neb. 405, 279 N.W.2d 96 (1979), that a statute is open to construction only where the language used requires interpretation or may reasonably be considered to be ambiguous. Equally applicable is the following language from *Ragland v. Norris P. P. Dist.*, 208 Neb. 492, 497, 304 N.W.2d 55, 58 (1981): "'"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."'"

The conclusion reached by the District Court is not

without authority. In *Goodson v. Racine*, 61 Wis. 2d 554, 213 N.W.2d 16 (1973), that court, in construing a statute similar to ours, concluded: "Thus, the legislative intent of the statute is obvious and we hold that sec. 29.68, Stats., is not applicable to a municipality so as to limit its liability for persons injured while present on its property. The statute must be strictly construed so as to limit its effect to private landowners." *Id.* at 559, 213 N.W.2d at 19. In support of its position, the Wisconsin court quoted from the legislative act establishing this particular statute: "'An Act to create 29.68 of the statutes, relating to the limitations on liability of landowners who open *private* lands for recreational purposes.' (Emphasis supplied.)" No such statutory purpose appears in 1965 Neb. Laws, Ch. 193, p. 589, which created §§ 37-1001 et seq. See, also, *Loney v. McPhillips*, 268 Or. 378, 521 P.2d 340 (1974), wherein, by dicta, the Oregon Supreme Court suggested that the legislative purpose in enacting a similar act was to "encourage private owners to make their land available to the public for recreational purposes," and *Metropolitan Dade County v. Yelvington*, 392 So. 2d 911 (Fla. App. 1980), in which the court, without discussion or explanation, simply stated that its recreation liability act did not apply to a county.

However, to the contrary, and applying such acts to government ownership, are *Magro v. City of Vineland*, 148 N.J. Super. 34, 371 A.2d 815 (1977); *Stone Mountain Mem. Assn. v. Herrington*, 225 Ga. 746, 171 S.E.2d 521 (1969); *Rushing v. State, Through La. Health, Etc.*, 381 So. 2d 1250 (La. App. 1980); *Smith v. United States*, 383 F. Supp. 1076 (D. Wyo. 1974); *McClain v. United States*, 445 F. Supp. 770 (D. Or. 1978); *Gard v. United States*, 594 F.2d 1230 (9th Cir. 1979), construing Nevada's "sightseer statute"; *Hahn v. United States*, 493 F. Supp. 57 (M.D. Pa. 1980); and *Moore v. City of Torrance*, 101 Cal. App. 3d 66, 166 Cal. Rptr. 192 (1979). It should be noted that *Nelsen v. City of Gridley*, 113 Cal. App. 3d 87, 169 Cal. Rptr. 757 (1980), from the Court of Appeals of a dif-

ferent district, contains language critical of *Moore* and suggests that the application of the recreation liability act was limited to private owners. However, the statutes in California relating to governmental tort immunity vary in degree and complexity from our Political Subdivisions Tort Claims Act so that no clear-cut analogy can be made.

We may concede for the sake of argument that the original purpose of the "recreational liability acts" was to encourage private landowners to offer their lands for use by the public. See *Suggested State Legislation*, Vol. XXIV, Council of State Governments (1965), wherein it is stated at 150: "The suggested act which follows is designed to encourage availability of private lands by limiting the liability of owners to situations in which they are compensated for the use of their property and to those in which injury results from malicious or willful acts of the owner." We are also mindful of the reasoning of the Court of Common Pleas of Centre County, Pennsylvania, in an unreported opinion referred to in *Hahn v. United States*, *supra*. In that opinion, the state court found that at the time of passage of the Recreation Use of Land and Water Act, the Commonwealth already enjoyed sovereign immunity from tort actions and therefore it was not the intent of the Legislature to grant such "redundant immunity" by including the Commonwealth within the definition of "owner" as contained in the act.

However, we must consider the language of the Political Subdivisions Tort Claims Act, previously cited, which subjects a political subdivision to liability for the negligent acts or omissions of its employees "in the same manner, and to the same extent as a private individual under like circumstances." We did say in *Koepf v. County of York*, 198 Neb. 67, 71, 251 N.W.2d 866, 869 (1977), that "[t]he liability of a political subdivision under the Political Subdivisions Tort Claims Act is not an absolute liability, but consists of such liability as would exist in a private person or cor-

poration without that immunity." As stated in *Primo v. Bridgeton*, 162 N.J. Super 394, 400, 392 A.2d 1252, 1256 (1978): "Therefore the public entity is entitled to assert the defenses that a private property owner has in like circumstances."

Whatever the Legislature's intent was at the time of the enactment of the Recreation Liability Act, we believe that the definition of owner—"the term owner includes tenant, lessee, occupant, or person in control of the premises"—is sufficiently broad to cover a public entity. In *Stone Mountain Mem. Assn. v. Herrington, supra*, the Georgia court stated at 748-49, 171 S.E.2d at 523: "Defendants . . . contend that the 1965 Act was intended to apply merely to privately owned land . . . . Nothing on the face of this Act indicates in any way an intention on the part of the legislature to so limit its effect."

The Legislature, in enacting the Political Subdivisions Tort Claims Act and thereby declaring a political subdivision responsible for its torts in the same manner as a private individual, is presumed to have knowledge of previous legislation, including the Recreation Liability Act. *Wahlers v. Frye*, 205 Neb. 399, 288 N.W.2d 29 (1980). Having placed no limitation upon this declaration or upon the definition of "owner" in the Recreation Liability Act, we believe that the intent of the Legislature, as reflected by the clear language of both statutes, was to grant the same rights and privileges to governmental and private landowners alike.

Slippery slide activities are not specifically included within the definition of recreational purposes contained in the Recreation Liability Act. "[T]he term recreational purposes shall include, *but not be limited to*, any one or any combination of the following: Hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, water skiing, winter sports, and visiting, viewing, or enjoying historical, archaeological, scenic, or scientific sites, *or*

otherwise using land for purposes of the user." (Emphasis supplied.) § 37-1008(3). However, we believe that definition to be broad enough to include the normal activities afforded by public parks.

We therefore conclude that the term "owner of land," as used in the Recreation Liability Act, includes a political subdivision. This was the principal issue upon which the parties tried this action, and which we now determine was incorrectly decided by the trial court. However, under the record made in this case we are obligated to follow the findings of fact made by the District Court that there was no "willful or malicious failure to guard or warn" on the part of the defendant, and consequently we must conclude that no liability attached to the City of Omaha. The judgment of the District Court is reversed and plaintiffs' action is ordered dismissed.

REVERSED AND DISMISSED.

WHITE, J., dissenting.

I would agree with the cases cited in the majority opinion holding that absent anything on the face of the act indicating an intent to apply the Recreation Liability Act to municipalities, the act clearly does not apply.

The Recreation Liability Act was passed in 1965, at which time political subdivisions were immune from liability. It is clear from the legislative history that the act was passed to encourage private landowners to make their land and water areas available for recreational purposes such as fishing and hunting. There was no need to pass such an act to limit the liability of political subdivisions since they were already immune.

In 1969 the Political Subdivisions Tort Claims Act was adopted. In the absence of any legislative history, the majority presents that the Legislature played a great game of "now you have it, now you don't." Under the majority interpretation of the Political Subdivisions Tort Claims Act, the Legislature in reality retained

most of the immunity the act purported to surrender. We have today gutted the act.

Under the majority opinion, the Recreation Liability Act would not apply to activities such as swimming pools, picnic shelters, organized softball leagues, zoos, stadiums, and auditoriums, although it would presumably apply outside the boundaries where those activities take place. If an identical condition is present inside the boundaries of a swimming pool area, and outside, the person inside injured thereby might recover while the nonpaying person outside could not, under the identical circumstances. I find it difficult to believe the Legislature intended such a result.

I agree with the conclusions of the trial court that allowing the dangerous condition to exist for 2 weeks on an implement used principally by children of tender years was negligence. The legislative history makes it clear that the Legislature, in passing the Recreation Liability Act, intended only to limit the liability of owners of private lands. I would affirm.

MCCOWN, J., joins in this dissent.

ROBERT W. CAMERLINCK, A MINOR, BY AND THROUGH HIS PARENT AND NEXT FRIEND, ROBERT CAMERLINCK, APPELLANT, V. ANN J. THOMAS, GUARDIAN AD LITEM OF BYRON J. THOMAS (FORMERLY KNOWN AS JAMES E. CLAYTON III), A MINOR, APPELLEE.

312 N.W.2d 260

Filed November 6, 1981. No. 43506.

1. **Directed Verdict.** A motion for directed verdict or for judgment notwithstanding the verdict must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party 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.
2. **Minors: Negligence.** If the actor is a child, the standard of care to which

he must conform to avoid being negligent is that of a reasonable person of like age, intelligence, and experience under the circumstances.

3. **Trial: Minors: Negligence.** Where reasonable minds might draw different conclusions from the evidence, the question as to a child's negligence or contributory negligence under the circumstances is a matter for determination by the jury.

Appeal from the District Court for Douglas County: KEITH HOWARD, Judge. Reversed and remanded for a new trial.

Thomas J. Culhane of Erickson, Sederstrom, Leigh, Johnson, Koukol & Fortune, P.C., for appellant.

Joseph K. Meusey of Fraser, Stryker, Veach, Vaughn, Meusey, Olson & Boyer, P.C., for appellee.

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

BRODKEY, J.

The issue in this case is whether a child 6 years of age is chargeable with negligence as a matter of law. In this case, Robert Camerlinck, father and next friend of the plaintiff, Robert W. Camerlinck (Bobby), brought an action against Ann J. Thomas, mother of Byron J. Thomas (Jay), to recover damages for an injury sustained when Bobby was struck in his left eye with a stick by Jay Thomas while Jay was sliding down a playground slide. As Jay neared the bottom of the slide, he called out, "Hey, Bobby"; Bobby, who was standing near the bottom of the slide, turned around in response to the call and was struck in the left eye with a stick held by Jay. The blow pierced Bobby's eyeball and caused a laceration of the cornea and a prolapsed iris, necessitating surgical procedures and resulting in a permanent loss of vision to Bobby. Bobby was 4½ years of age at the time of the occurrence, and the defendant's son, Jay, was 6 years and 1 month old. At the close of the plaintiff's evidence, defendant moved for a directed verdict and dismissal of the petition because, as a matter of law, the defendant's son was a

child of tender years and not capable of actionable negligence. The trial court sustained defendant's motion and dismissed plaintiff's petition.

In his brief on appeal, plaintiff assigns as error the action of the trial court in ruling that Jay was incapable of negligence as a matter of law solely because of his age, and also in sustaining defendant's motion to dismiss, contending that the trial court should have submitted to the jury the question of whether Jay was negligent under the circumstances present in the case.

Since the trial court in this case directed a verdict and dismissed plaintiff's petition, we note that the standard of review applicable to this case has been stated as follows: "A motion for directed verdict or for judgment notwithstanding the verdict must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party 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." *Bear v. Auguy*, 164 Neb. 756, 760, 83 N.W.2d 559, 563 (1957). See, also, *Armer v. Omaha & Council Bluffs St. Ry. Co.*, 151 Neb. 431, 37 N.W.2d 607 (1949); *Syas v. Nebraska Methodist Hospital Foundation*, *ante* p. 201, 307 N.W.2d 112 (1981).

At this point, a review of the Nebraska case law dealing with the negligence of children is necessary. One of the earliest cases to discuss the question is *Huff v. Ames*, 16 Neb. 139, 19 N.W. 623 (1884). That case involved an action by a boy 11 years of age who was injured when his hand was caught between the rollers in a mill, resulting in the amputation of two of his fingers. The defendant claimed the injury resulted from the contributory negligence of the infant plaintiff. This court held that it was proper for the trial court to instruct the jury that in determining whether or not the plaintiff was guilty of negligence

it should take into consideration his age and discretion in determining that fact and that the same degree of caution and care should not be required of him as in the case of an adult under similar circumstances. In *Huff* the court pointed out: "'Of an infant of tender years less discretion is required, and the degree depends upon his age and knowledge. Of a child three years of age, less caution would be required than of seven, and of a child of seven less than one of twelve or fifteen. The caution required is according to the maturity and capacity of the child, and this is to be determined in each case by the circumstances of that case.'" *Id.* at 142, 19 N.W. at 624.

In 1914 we decided the case of *Dore v. Omaha & C.B. Street R. Co.*, 97 Neb. 250, 149 N.W. 792 (1914), in which we held that it cannot be said to be negligence as a matter of law for a child of the age of 7 years, after giving of signal for a streetcar to stop at the next street crossing, to leave his seat as the car approaches the desired crossing and stand in the doorway preparatory to leaving the car, when the car should stop at the indicated point for stopping. In that case we stated: "The strict rules of contributory negligence cannot be applied to a child of the age of plaintiff at that time. The facts necessarily found by the jury fail to show any negligence on his part, even could his age not excuse or exempt him from that charge." *Id.* at 255, 149 N.W. at 794.

In 1915 the issue was again presented to this court in *Sacca v. Omaha & C. B. Street R. Co.*, 98 Neb. 73, 152 N.W. 315 (1915). In *Sacca* this court stated: "It is urged that the court erred in taking away from the jury the question of contributory negligence on the part of the child. Without attempting to fix the exact age at which a child may be said to be responsible for his acts, and capable of being guilty of negligence, we believe that this child, who was under six years of age, cannot, under all of the circumstances of the case, be charged with negligence, and that the action of the

court in withdrawing this question from the jury was not prejudicial. The child was of such tender years that it cannot be deemed in law possessed of sufficient discretion to make it guilty of negligence for its failure to exercise due care for its safety." *Id.* at 76, 152 N.W. at 316.

In 1917 we held in *Rule v. Claar Transfer & Storage Co.*, 102 Neb. 4, 165 N.W. 883 (1917), that, as a general rule, whether a child 11 years of age is of sufficient knowledge, discretion, and appreciation of danger that it may be held guilty of contributory negligence is a question for the jury to determine. Quoting from the opinion in that case: "It is also argued that a party cannot complain of the negligence of another where his own negligence concurs in producing the injury, and that a child 11 years of age living in the city and of ordinary intelligence may be guilty of contributory negligence as a matter of law. Of the soundness of these propositions we have little doubt. The general rule is that whether contributory negligence may be attributed to a child of such tender years is a matter for the jury under all the circumstances of each case. *Breedlove v. Gates*, 91 Neb. 765. It is only in an extreme case where the facts show plainly knowledge and appreciation of the danger to be incurred if a certain act is performed, such as in the case of *Johnston v. New Omaha T.H.E.L. Co.*, 78 Neb. 27, that a court will declare as a matter of law that a child of that age may be guilty of contributory negligence. The writer has always been of the view that the *Johnston* case is an exception to the general rule, and its doctrine should not be further extended. Even if it were established that the plaintiff was of full age and discretion and 'cut the corner' in violation of the ordinance, yet this would not necessarily establish contributory negligence as a matter of law. *Chicago, B. & Q. R. Co. v. Metcalf*, 44 Neb. 848, 859; *Missouri P. R. Co. v. Geist*, 49 Neb. 489, 496." *Id.* at 7-8, 165 N.W. at 884.

De Griselles v. Gans, 116 Neb. 835, 219 N.W. 235

(1928), involved an accident between a truck and an 8-year-old boy who ran out of an open yard behind a brick building. The court held as a matter of law that the act of the child was the proximate cause of the collision; but in the opinion, Redick, District Judge, stated: "The plaintiff's decedent, on account of his tender age, is not chargeable with contributory negligence, but in determining the existence of negligence upon the part of the defendant, having no notice of the presence of children, the same rules apply in both cases; and while the boy is not chargeable with negligence, if his act, whether negligent or not, was the proximate cause of his death, there can be no recovery." *Id.* at 843, 219 N.W. at 238.

The statements contained in the *Sacca* and *De Griselles* cases, *supra*, were repeated and affirmed in the subsequent case of *McKinney v. Wintersteen*, 122 Neb. 679, 241 N.W. 112 (1932), in which case this court held that a child 6 years of age is not possessed of sufficient discretion to make her guilty of negligence, or contributory negligence, for her failure to exercise due care for her safety.

That same year this court decided the case of *Siedlik v. Schneider*, 122 Neb. 763, 241 N.W. 535 (1932), which involved the alleged contributory negligence of a boy 7 years of age. In that case this court held that a child of tender years is not chargeable with contributory negligence, and that an instruction submitting that question to the jury was error. In *Siedlik* the court, citing as authority the *Sacca* and *De Griselles* cases, stated: "A child of tender years—and it must be conceded that the plaintiff was a child of tender years—is not chargeable with negligence or with contributory negligence." *Id.* at 765, 241 N.W. at 536.

Siedlik was followed in 1947 by the case of *Tews v. Bamrick and Carroll*, 148 Neb. 59, 26 N.W.2d 499 (1947), which case involved a minor 5 years of age who ran into the side of a truck tractor and was

injured. In the opinion in that case, this court, citing as authority the *McKinney*, *Siedlik*, and *De Griselles* cases, stated: "It can be here said that the conduct of the boy was undoubtedly negligent, but we have often said a child of tender years is not chargeable with contributory negligence." *Id.* at 66, 26 N.W. 2d at 504.

The issue before us was discussed in more detail in the case of *Armer v. Omaha & Council Bluffs St. Ry. Co.*, 151 Neb. 431, 37 N.W.2d 607 (1949), which case involved the capacity for negligence of an 11-year-old girl. In that case the court held that the age when an infant during his minority may be capable of understanding and avoiding dangers encountered while traveling upon a public street in a city cannot be fixed by arbitrary rule, and generally is a question of fact for the jury, and that whether or not an infant between 11 and 12 years of age is of sufficient knowledge, discretion, and appreciation of danger that he may be subject to the defense of contributory negligence is generally a question of fact and not of law. Because of its excellent discussion, we quote rather extensively from the opinion of the court at 437-38, 37 N.W.2d at 610-11: "The appellant was about three months past 11 years of age, and cannot be charged with the degree of caution required of an adult in guarding against possible accidents while traveling upon and crossing a street in a city. There is no arbitrary rule fixing the time at which a child during its minority may be declared wholly capable or incapable of understanding and avoiding dangers to be encountered while engaged in such an activity. It is generally considered that such a question is one of fact to be decided by a jury. Whether or not negligence may be attributed to a child of such tender years is usually a matter for a jury under the circumstances of each case. It is only in an extreme situation where the facts show plainly knowledge and appreciation of the danger to be incurred, if certain action is had, that a court may decide as a matter of law that a child of such an age

was guilty of negligence, or that his act or omission was the proximate cause of the happening in question. It was a question for the jury whether or not the appellant, a child slightly more than 11 years of age, was or could be negligent, and whether or not any act or omission on her part was the proximate cause of the collision. Tews v. Bamrick, 148 Neb. 59, 26 N.W.2d 499; Rule v. Claar Transfer & Storage Co., 102 Neb. 4, 165 N.W. 883; Chicago, B. & Q. R.R. Co. v. Russell, 72 Neb. 114, 100 N.W. 156; Kauffman v. Fundaburg, 123 Neb. 340, 242 N.W. 658; McKinney v. Wintersteen, 122 Neb. 679, 241 N.W. 112; Siedlik v. Schneider, 122 Neb. 763, 241 N.W. 535.

"The conduct of appellant as shown by this record should not, her age considered, conclusively bar her right of recovery, conceding that she was a bright, intelligent girl; had lived in Omaha and had on occasions ridden bicycles on the streets for two years; and was as familiar with the operations of vehicles and bicycles on the street as any girl of her age and discretion would usually be. She doubtless knew that there was danger of injury in traveling in the street and in turning to the left to cross the street. Nearly any child of her age would answer, if asked, that it knew if it fell in the river it might be drowned; if it fell in the fire it would be burned; or if it got in the way of a streetcar or a motor vehicle it would be injured and possibly killed; but mere childish knowledge of everyday things does not necessarily establish that they appreciate or understand the necessity for keeping away from, or not doing these things. They act on impulse, and often the greater the danger, the greater the challenge. They do dangerous things without thought of the consequences that may follow what they do, and to conclude as a matter of law that a child of such an age as the appellant should be held to the high standards demanded of adults in looking after their own and the safety of others is opposed to good judgment and sound law. The infant is favored by

the law not so much on his lack of knowledge as because of indiscretion, imprudence, lack of judgment, and impulsiveness.

"What is required of an infant is the exercise of that degree of care which an ordinary prudent child of the same capacity to appreciate and avoid danger would use in the same situation. Smith v. Smith-Peterson Co., 56 Nev. 79, 45 P. 2d 785, 100 A.L.R. 440; Sadlowski v. Meeron, 240 Mich. 306, 215 N.W. 422; Hackert v. Prescott, 165 Minn. 134, 205 N.W. 893; Annotation, 107 A.L.R. 4; Annotation, 174 A.L.R. 1174; Collins v. Weise, 110 Neb. 552, 194 N.W. 450; 45 C.J., Negligence, § 552, p. 998."

Armer was followed by the case of *Adams v. Welliver*, 155 Neb. 331, 51 N.W.2d 739 (1952), which involved a minor 9 years of age. In that case the court ruled that the age when an infant during its minority may be capable of understanding and avoiding dangers encountered while traveling upon a public street in a city cannot be fixed by arbitrary rule, and is generally a question of fact for the jury. The court also ruled that whether or not an infant between 9 and 10 years of age is of sufficient knowledge, discretion, and appreciation of danger that he may be subject to the defense of contributory negligence is generally a question of fact and not of law. The court also held that what is required of an infant is the exercise of that degree of care which an ordinary prudent child of the same capacity to appreciate and avoid danger would use in the same situation. In its opinion in *Adams* the court quoted at length from *Armer* and *De Griselles*, and concluded by stating at 341, 51 N.W.2d at 745: "The cases determined by this court which hold that an infant of tender years is not chargeable with contributory negligence appear to be cases where the infant is shown to be 7 years old or less, and where the evidence discloses the infant did not possess sufficient knowledge, discretion, and appreciation of the danger that he might be subject to the defense of

contributory negligence."

The case of *Bear v. Auguy*, 164 Neb. 756, 83 N.W.2d 559 (1957), held that whether or not a minor between 14 and 15 years of age is of sufficient knowledge, discretion, and appreciation of danger that he may be subject to the defense of contributory negligence is generally a question of fact and not of law. The court also reiterated the rule previously stated that the degree of care required of a minor is that which an ordinarily prudent child of the same capacity to appreciate and avoid danger would use in the same situation. In its opinion in *Bear* the court stated at 767-69, 83 N.W.2d at 567: "The standard of care required of a minor such as the plaintiff at the time of the accident is set forth in Armer v. Omaha & C.B. St. Ry. Co., 151 Neb. 431, 37 N.W.2d 607. The plaintiff was 14 years and nearly 8 months of age at the time of the accident, and cannot be charged with the same degree of caution required of an adult in guarding against possible accidents while traveling upon and crossing a street in a city. There is no arbitrary rule fixing the time at which a child during his minority may be declared wholly capable or incapable of understanding and avoiding dangers to be encountered while engaged in such an activity. Whether or not negligence may be attributed to a minor of the age of the plaintiff is usually a matter for a jury under the circumstances of each case. It is only in an extreme situation where the facts show plainly knowledge and appreciation of the danger that may be incurred, if certain action is had, that a court may decide as a matter of law that a minor of such an age was guilty of negligence, or that his act or omission was the proximate cause of the happening in question. See, Tews v. Bamrick, 148 Neb. 59, 26 N.W.2d 499; Rule v. Claar Transfer & Storage Co., 102 Neb. 4, 165 N.W. 883; Chicago, B. & Q. R.R. Co. v. Russell, 72 Neb. 114, 100 N.W. 156; Kauffman v. Fundaburg, 123 Neb. 340, 242 N.W. 658; McKinney v. Wintersteen, 122 Neb. 679, 241

N.W. 112; Siedlik v. Schneider, 122 Neb. 763, 241 N.W. 535.

"The conduct of the plaintiff as shown by this record should not, his age considered, conclusively bar his right of recovery, conceding that he was a bright and intelligent boy, had lived in Omaha, was acquainted with the use of bicycles as most boys of his age are, and was familiar with the operation of motor bicycles having ridden thereon with other boys although this was the first occasion upon which he had operated one.

"What is required of a minor is the exercise of that degree of care which an ordinarily prudent child of the same capacity to appreciate and avoid danger would use in the same situation. Smith v. Smith-Peterson Co., 56 Nev. 79, 45 P.2d 785, 100 A.L.R. 440; Sadlowski v. Meeron, 240 Mich. 306, 215 N.W. 422; Hackert v. Prescott, 165 Minn. 134, 205 N.W. 893; Annotation, 107 A.L.R. 4; Annotation, 174 A.L.R. 1174; Collins v. Weise, 110 Neb. 552, 194 N.W. 450; 65 C.J.S., Negligence, § 146, p. 789; Locklin v. Fisher, 264 App. Div. 452, 36 N.Y.S.2d 162." In *Bear* the court held that the evidence was such that reasonable minds might draw different conclusions therefrom, and stated at 771, 83 N.W.2d at 569: "This being true, *the questions of negligence and contributory negligence are for the jury.*" (Emphasis supplied.)

Shortly after releasing our opinion in *Bear* this court decided the case of *Connors v. Pantano*, 165 Neb. 515, 86 N.W.2d 367 (1957), which case involved a slightly different question, that is, whether a child of the tender age of 4 years and 7 months was legally incapable of committing a willful and intentional act of destroying property within the purview of Neb. Rev. Stat. § 43-801 (Reissue 1952). The court held that a child of that age was incapable of so doing because he had not at that age sufficiently attained the use of those qualities of attention, intelligence, judgment, and reason that would be necessary for him to be capable of doing such act

willfully and intentionally. However, in the opinion in that case this court stated at 518-19, 86 N.W.2d at 369: "A comparable line of cases of this and other courts are those dealing with contributory negligence. Although an infant is liable for his torts (Churchill v. White, *supra*), we have often held a child of tender years cannot be charged with contributory negligence even though the latter does not require intent. See, Siedlik v. Schneider, 122 Neb. 763, 241 N.W. 535; Tews v. Bamrick, 148 Neb. 59, 26 N.W.2d 499. And this same holding has been applied to primary negligence. See Shaske v. Hron, 266 Wis. 384, 63 N.W.2d 706. As stated in Shaske v. Hron, *supra*: 'There is an age of a child at which general experience declares him to be non sui juris, and it has been generally considered that a child under five and one-half years of age is incapable of either contributory or primary negligence.' In the same opinion the court quotes from Restatement, Torts, § 283(e), p. 743, as follows: 'If he is "so young as to be manifestly incapable of exercising any of those qualities of attention, intelligence, and judgment which are necessary to enable him to perceive a risk and to realize its unreasonable character," he is generally held incapable of negligence.'"

In *Eden v. Klaas*, 166 Neb. 354, 89 N.W.2d 74 (1958), this court ruled that a child 5 years of age may not properly be charged with contributory negligence.

This case was followed by *Vacanti v. Montes*, 180 Neb. 232, 142 N.W.2d 318 (1966), in which we held that what is required of an infant is the exercise of that degree of care which an ordinary prudent child of the same capacity to appreciate and avoid danger will use in the same situation; and that the age that an infant during its minority may be capable of understanding and avoiding dangers encountered while traveling upon a public street in a city cannot be fixed by arbitrary rule, and is generally a question of fact for the jury. However, in that case the infant involved

was between 9 and 10 years of age, and the court instructed the jury that whether or not negligence may be attributed to a minor of the age of the plaintiff is a matter for the jury to determine under all the circumstances of the case. This court stated that the instruction quite fully and correctly set forth the standard of duty and care required of the plaintiff as a minor and the law concerning contributory negligence as applied to her as stated in *Adams v. Welliver*, 155 Neb. 331, 51 N.W.2d 739 (1952).

Nine years later, this court decided *Gadeken v. Langhorst*, 193 Neb. 299, 226 N.W.2d 632 (1975), which involved the question of whether a minor 11 years of age could be guilty of negligence. The court, citing as authority *Bear v. Auguy*, 164 Neb. 756, 83 N.W.2d 559 (1957), and *Sacca v. Marshall*, 180 Neb. 855, 146 N.W.2d 375 (1966), held that a minor 11 years of age is required to exercise that degree of care which an ordinarily prudent child of the same capacity to appreciate and avoid danger would use in the same situation; and, also, that whether negligence may be attributed to a minor 11 years of age is usually a question of fact for the jury. In *Korbelik v. Johnson*, 193 Neb. 356, 361, 227 N.W.2d 21, 24 (1975), we stated: "Even if a child is not capable of contributory negligence, if such child's conduct can be considered the sole proximate cause of his injury there can be no recovery," citing as authority *De Griselles v. Gans*, 116 Neb. 835, 219 N.W. 235 (1928).

The most recent expression by this court on the question before us appears to be that contained in the case of *Caradori v. Fitch*, 200 Neb. 186, 263 N.W.2d 649 (1978), which involved an 11-year-old girl who was struck and killed by a vehicle while she was riding a bicycle. In that case the court restated the rule that a minor is held to the exercise of that degree of care which an ordinarily prudent child of the same capacity to appreciate and avoid danger would use. In the opinion the court stated: "The defendant first objects

to the instruction which detailed to the jury the standard of care of a child. The instruction recited that a minor is held to the exercise of that degree of care which an ordinarily prudent child of the same capacity to appreciate and avoid danger would use. The instruction was consistent with Nebraska law. See, Bear v. Auguy, 164 Neb. 756, 83 N.W.2d 559; Armer v. Omaha & C. B. St. Ry. Co., 151 Neb. 431, 37 N.W.2d 607." *Id.* at 188-89, 263 N.W.2d at 652.

It is obvious from a review of the foregoing authorities that the law of Nebraska as to whether a child of tender years, particularly a child of the age of Jay in this case, may be chargeable with negligence is, to say the least, not definitely settled, and our court has on various occasions pronounced totally different rules of law with reference to the question presented. It must be conceded, as a review of the foregoing authorities reveals, that this court has on occasions held that a child of tender years is not chargeable with contributory negligence as a matter of law, and the cases enunciating this rule have involved children ranging in age from 5 years of age to 11 years of age. In addition, we have also held that an ordinary, bright and intelligent boy of 12 who, having knowledge of the danger arising from electric light and power wires but not of its extent, purposely takes hold of such a wire in order to obtain a shock is guilty of contributory negligence. *Johnston v. New Omaha Thomson-Houston Electric Light Co., on rehearing,* 78 Neb. 27, 113 N.W. 526 (1907).

The more recent cases, however, appear to uphold the rule that there is no arbitrary rule fixing the time at which a child during his minority may be wholly capable or incapable of understanding and avoiding dangers to be encountered, and that whether or not negligence may be attributed to a minor is usually a matter for the jury. It should also be noted that although the cases in some jurisdictions distinguish between negligence and contributory negligence of

minors, Nebraska has been consistent in its holding that the same standards should apply in either situation. See, *Bear v. Auguy, supra; Connors v. Pantano*, 165 Neb. 515, 86 N.W.2d 367 (1957). Other jurisdictions have ruled to the same effect. See, *Goss v. Allen*, 70 N.J. 442, 360 A.2d 388 (1976); *DeLuca v. Bowden*, 42 Ohio St. 2d 392, 329 N.E.2d 109 (1975); *Zuckerbrod v. Burch*, 88 N.J. Super. 1, 210 A.2d 425 (1965); *Dunn v. Teti*, __ Pa. Super. Ct. __, 421 A.2d 782 (1980).

It appears that the rule advocated by the defendant in this case, which attempts to fix a minimum age below which a child is held to be incapable of negligence, is not the majority rule in this country, but, in fact, is a minority rule. Professor William L. Prosser discusses the matter in his treatise, "The Law of Torts," and reaches that conclusion, stating: "Some courts have attempted to fix a minimum age, below which the child is held to be incapable of all negligence. Although other limits have been set, those most commonly accepted are taken over from the arbitrary rules of the criminal law, as to the age at which children are capable of crime. Below the age of seven, the child is arbitrarily held to be incapable of any negligence; between seven and fourteen he is presumed to be incapable, but may be shown to be capable; from fourteen to twenty-one he is presumed to be capable, but the contrary may be shown. These multiples of seven are derived originally from the Bible, which is poor reason for such arbitrary limits; and the analogy of the criminal law is certainly of dubious value where neither crime nor intent is in question. The great majority of the courts have rejected any such fixed and arbitrary rules of delimitation, and have held that children well under the age of seven can be capable of some negligent conduct. Undoubtedly there is an irreducible minimum, probably somewhere in the neighborhood of four years of age, but it ought not to be fixed by rules

laid down in advance without regard to the particular case. As the age decreases, there are simply fewer possibilities of negligence, until finally, at some indeterminate point, there are none at all." W. Prosser, Law of Torts, *Negligence: Standard of Conduct* § 32 at 155-56 (4th ed. 1971). See, also, F. Harper & F. James, Law of Torts, *The Nature of Negligence* § 16.8 (1956).

We believe that the best statement of the rule with reference to the negligence of children is stated in Restatement (Second) of Torts § 283 A (1965), and the Comment to that section. The rule itself is cited in that work as follows at 14: "If the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable person of like age, intelligence, and experience under like circumstances." The Restatement states that the rule contained in that section is commonly applied to children of tender years. In Comment b of that section the Restatement discusses the *"Special standard for children,"* and we quote from that Comment at 15-16:

"The special standard to be applied in the case of children arises out of the public interest in their welfare and protection, together with the fact that there is a wide basis of community experience upon which it is possible, as a practical matter, to determine what is to be expected of them.

"A child of tender years is not required to conform to the standard of behavior which it is reasonable to expect of an adult. His conduct is to be judged by the standard of behavior to be expected of a child of like age, intelligence, and experience. A child may be so young as to be manifestly and utterly incapable of exercising any of those qualities of attention, perception, knowledge, experience, intelligence, and judgment which are necessary to enable him to perceive a risk and to realize its unreasonable character. On the other hand, it is obvious that a minor who has not yet attained his majority may be quite as capable as an adult of exercising such qualities. Some courts have

endeavored to lay down fixed rules as to a minimum age below which the child is incapable of being negligent, and a maximum age above which he is to be treated like an adult. Usually these rules have been derived from the old rules of the criminal law, by which a child under the age of seven was considered incapable of crime, and one over fourteen was considered to be as capable as an adult. The prevailing view is that in tort cases no such arbitrary limits can be fixed. Undoubtedly there is a minimum age, probably somewhere in the vicinity of four years, below which negligence can never be found; but with the great variation in the capacities of children and the situations which may arise, it cannot be fixed definitely for all cases.

"Between the two extremes there are children whose capacities are infinitely various. The standard of conduct required of the child is that which it is reasonable to expect of children of like age, intelligence, and experience. 'Intelligence' includes other mental capacities, but does not include judgment, which is an exercise of capacity rather than the capacity itself. The fact that the child is mentally retarded, or that he is unusually bright for his years, is to be taken into account; but once such account is taken, the child is still required to exercise the judgment of a reasonable person of that intelligence. Likewise to be taken into account are the circumstances under which the child has lived, and his experience in encountering particular hazards, or the education he has received concerning them. If the child is of sufficient age, intelligence, and experience to understand the risks of a given situation, he is required to exercise such prudence in protecting himself, and such caution for the safety of others, as is common to children similarly qualified.

"It is impossible to lay down definite rules as to whether any child, or any class of children, should be able to appreciate and cope with the dangers of

many situations. A child of ten may in one situation have sufficient capacity to appreciate the risk involved in his conduct, and to realize its unreasonable character, but in another situation he may lack the necessary mental capacity or experience to do so; and in the case of another child of ten of different mental capacity or experience a different conclusion may be reached in the same situation."

Our review of the case law and discussion by commentators convinces us that the rule embodied in the Restatement, *supra*, should be followed in this jurisdiction; and we hereby apply it to the facts of this case and adopt it for future application.

In the instant case it would appear that at least a fact question with reference to Jay's capacity to realize that his actions presented a risk of harm to the plaintiff was present and should have been submitted to the jury. It appears from the record that Jay had attended 1 year of school and that his performance as a student had been at least average. The school he attended was located 4 or 5 blocks from his grandmother's home and he was permitted by his mother to return to his grandmother's home from school each day by himself. His mother testified that she permitted this because she felt he was experienced and mature enough to take care of himself. The park in which the plaintiff was injured was located near the home of Jay's grandmother, and Jay was frequently permitted to play in the park, unsupervised and unattended. Defendant testified that she had no doubt about his ability to take care of himself while alone in the park, and that she frequently talked with him about what he should and should not do when playing with other children, and had cautioned him against throwing things in the direction of other children's faces. Defendant testified that Jay seemed to understand her directions and warnings. This set of circumstances, we believe, presented a jury question on the issue of Jay's capacity for negligence, and also

whether or not his conduct was negligent.

We conclude that the trial court erred in directing a verdict in favor of the defendant and in dismissing plaintiff's petition. We therefore reverse the judgment and remand the case for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

CLINTON, J., dissents.

RICHARD E. FOWLER, APPELLANT, V. NATIONAL BANK OF COMMERCE TRUST AND SAVINGS ASSOCIATION, APPELLEE.

312 N.W.2d 269

Filed November 6, 1981. No. 43549.

1. **Pleadings: Judicial Notice.** While a court will not ordinarily take judicial notice of its records in another case, it is proper in considering a demurrer to take judicial notice of the records in another case which is so closely interwoven as to be interdependent.
2. **Pleadings: Demurrer.** Leave to amend a petition should ordinarily be granted after a demurrer is sustained. However, when it is clear that no reasonable possibility exists that plaintiff will, by amendment, be able to state a cause of action, leave to amend may be denied.
3. **Criminal Law: Collateral Estoppel.** A prior criminal proceeding can work a collateral estoppel in a subsequent civil proceeding, if the question involved is distinctly put in issue and directly determined in the criminal action.

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

Richard E. Fowler, pro se.

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

Heard before BOSLAUGH, MCCOWN, CLINTON, and BRODKEY, JJ., and STANLEY, District Judge.

CLINTON, J.

The plaintiff, Richard E. Fowler (Fowler), brought this action in the District Court for Lancaster County

against the National Bank of Commerce Trust and Savings Association (NBC) for its alleged negligence in maintaining the ledgers of the deposit account of Steak-O-Rama, the former employer of Fowler. In the petition it is claimed the alleged negligence caused Fowler to be convicted of the crime of embezzlement and to be sentenced to a term in the penitentiary. NBC filed a demurrer to Fowler's third amended petition on the ground the petition did not state a cause of action and also joined therewith a motion to dismiss the petition on the ground of collateral estoppel. The trial court sustained the demurrer, took judicial notice of prior proceedings pertaining to Fowler's conviction of embezzlement, and dismissed the petition. Fowler has appealed to this court. He makes several assignments of error which, in substance, allege that the court erred in sustaining the demurrer and dismissing the petition.

Fowler's third amended petition or complaint alleged he was convicted in the District Court for Lancaster County of the crime of embezzling the sum of $433.37 from Steak-O-Rama, his employer. The above amount constituted the receipts of the restaurant for the day of January 25, 1974. The petition alleged that the records of the bank were not introduced in evidence at his trial. Fowler further alleges in the petition that NBC negligently maintained Steak-O-Rama's deposit records on the specific dates of January 21, 1974, and February 4, 1974. He does not allege he deposited the receipts of January 25, 1974, in the bank, nor does he allege any error in the bank records with respect to the receipts of which he was accused of embezzling.

At the hearing on the demurrer and the motion to dismiss, the ledgers for the month of January 1974 were received in evidence, as was Fowler's testimony from the preliminary hearing and portions of the bill of exceptions from the criminal trial. The court, upon request, took judicial notice of the records of the criminal prosecution and the later post conviction proceeding.

The conviction and the denial of post conviction relief were appealed to this court and affirmed. *State v.*

Fowler, 193 Neb. 420, 227 N.W.2d 589 (1975); *State v. Fowler*, 201 Neb. 647, 271 N.W.2d 341 (1978).

Even if we assume NBC owes a duty to Fowler in relation to keeping the records of his employer (a question we need not decide), it is clear the petition does not state a cause of action as it does not allege any fact or facts which tend to show a causal connection between the bank's alleged negligence and Fowler's conviction.

We now quote and adopt the following portions of the trial court's memorandum opinion: "Defendant also moves the Court to dismiss the plaintiff's action with prejudice. Leave to amend should ordinarily be granted after a demurrer is sustained, especially in respect to an original complaint, if there is a reasonable possibility that a cause of action can be stated. *Cagle, Inc. v. Sammons*, 198 Neb. 595, 604, 254 N.W.2d 398, 404 (1977). This is, however, the third time a demurrer has been sustained to Mr. Fowler's attempts to state a cause of action against the National Bank of Commerce. Furthermore, the defendant contends that there is no reasonable possibility that plaintiff can state a cause of action against it.

"The defendant relies on the records of this Court in the prior criminal proceeding against Mr. Fowler to support its assertion that no cause of action can be stated. National Bank of Commerce has asked this Court to take judicial notice of its records in those proceedings and has introduced into evidence certain portions of the testimony therein in support of its motion.

"While a court will not ordinarily take judicial notice of its records in another case, it is proper in considering a demurrer to take judicial notice of the records in another case which is so closely interwoven as to be interdependent. *Knapp v. City of Omaha*, 175 Neb. 576, 122 N.W.2d 513 (1963) [other citations omitted]. In the case at bar, in which plaintiff alleges his criminal conviction is the result of the defendant's negligence, it is clearly proper for this Court to take judicial notice of the records in Mr. Fowler's criminal case, *State v.*

Fowler, Docket 39, Page 119, District Court of Lancaster County, Nebraska.

"A review of the record of Mr. Fowler's trial, motion for new trial and postconviction relief proceeding establishes that the plaintiff has never contended that he made a deposit of the missing January 25, 1974 cash receipts of Steak-O-Rama. Instead, he has stated and testified under oath that he placed the money in a deposit bag and put it in a cabinet in the Steak-O-Rama store rather than depositing it, and that was the last he ever saw of it.

"Since the deposit was never made, any error in the deposit records of the defendant could not have resulted in Mr. Fowler's wrongful conviction. Therefore, there is no possibility that Mr. Fowler will be able to state a cause of action against the defendant. Accordingly, the plaintiff will not be given leave to amend his complaint. *Evans v. Metropolitan Utilities District*, 184 Neb. 172, 166 N.W.2d 411 (1969)."

The records in the post conviction proceeding, of which this court may take judicial notice, show the issue pertaining to the bank's records was litigated in that action. In the post conviction action, Fowler alleged and testified that his counsel should have introduced the bank records. His counsel testified he had examined the records. He decided not to introduce them because the records, tending only to confirm Fowler's position at trial that he never made the deposit, would not have been helpful to Fowler's case.

Prior criminal proceedings can work an estoppel in a subsequent civil proceeding, so long as the question involved was "distinctly put in issue and directly determined" in the criminal action. *McNally v. Pulitzer Pub. Co.*, 532 F.2d 69, 76 (8th Cir. 1976), citing *Emich Motors v. General Motors*, 340 U.S. 558, 71 S. Ct. 408, 95 L. Ed. 534 (1951). See, also, *Cardillo v. Zyla*, 486 F.2d 473 (1st Cir. 1973); *Rosenberg v. Martin*, 478 F.2d 520 (2d Cir. 1973).

AFFIRMED.

OPAL J. STURM AND MERLE STURM, HER HUSBAND; BLANCHE GLADYS JENNINGS AND IVAN JENNINGS, HER HUSBAND; AND BETHEL L. ZIETTLOW, APPELLANTS, V. RAYMOND W. MAU AND BEULAH L. MAU, HUSBAND AND WIFE, APPELLEES.

312 N.W.2d 272

Filed November 6, 1981. No. 43588.

1. **Equity: Appeal and Error.** In an equity action it is the duty of the Supreme Court to try the issues de novo upon the record and reach an independent conclusion without being influenced by the findings of the trial court, except, where the credible evidence is in conflict, to give weight to the fact that the trial court saw the witnesses and observed their demeanor while testifying, that it inspected the premises, and that its examination constituted evidence tending to influence belief or unbelief of the matters at issue in the case.
2. **Prescriptive Easements: Adverse Possession: Proof.** A prescriptive right is not looked upon with favor, and generally must be proved by clear, convincing, and satisfactory evidence.
3. **Highways: Adverse Possession: Prescriptive Easements.** To establish a road or highway by prescription, there must be a use by the general public, under a claim of right adverse to the owner of the land, of some particular or defined line of travel, and the use must be uninterrupted and without substantial change for 10 years, the period of time necessary to bar an action to recover the land.
4. **Prescriptive Easements: Adverse Possession: Proof.** Ordinarily, where a claimant has shown open, visible, continuous, and unmolested use of land for a period of time sufficient to acquire an easement by adverse user, the use will be presumed to be under a claim of right. Under such circumstances, the owner of the servient estate, in order to avoid acquisition of an easement by prescription, has the burden of rebutting the presumption by showing the use to have been permissive.
5. **Prescriptive Easements: Adverse Possession.** The presumption of adverse use does not arise when a prescriptive easement is claimed over land which is unenclosed and which has no defined pathway across it.
6. **Appeal and Error.** Error may not be predicated upon a ruling which excludes evidence, unless a substantial right of the party is affected.
7. **Adverse Possession.** If the initial entry is adverse, an actual claim of ownership is not necessary to establish a claim of right.
8. ——. If adverse possession continues for the required 10 years, the adverse holding ripens into ownership in the absence of explanatory circumstances affirmatively showing the contrary, such as occupancy under a lease, an easement, or a permissive use; the title of the true owner is lost by his inaction.

9. **Highways: Adverse Possession: Prescriptive Easements.** It is not indispensable to the establishment of a highway by prescription that there be no deviation in the line of travel; if the course of travel has remained substantially unchanged for the full period, it is sufficient even though at times, to avoid encroachments, obstructions, or the like, there have been slight changes in the line of travel.
10. ____: ____: ____. A diminution in the number of users does not constitute an abandonment of a road acquired by prescription.

Appeal from the District Court for Thayer County: ORVILLE L. COADY, Judge. Reversed and remanded with directions.

Baldwin & McKernan for appellants.

Marti, Dalton, Bruckner, O'Gara & Keating, P.C., and Ronald R. Brackle for appellees.

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

CAPORALE, District Judge.

Plaintiffs-appellants seek to establish, by prescriptive easement, a road in favor of the public across land owned by the defendants-appellees.

The trial court denied plaintiffs any relief and dismissed their petition. For the reasons set forth hereinafter, we reverse the judgment of the trial court.

In this equity action it is our duty to try the issues de novo upon the record and reach an independent conclusion without being influenced by the findings of the trial court, except, where the credible evidence is in conflict, to give weight to the fact that the trial court saw the witnesses and observed their demeanor while testifying, that it inspected the premises, and that its examination constituted evidence tending to influence belief or unbelief of the matters at issue in the case. Neb. Rev. Stat. § 25-1925 (Reissue 1979); *O'Neill Production Credit Assn. v. Mitchell*, *ante* p. 206, 307 N.W.2d 115 (1981); *Schmidt v. Chimney Rock Irrigation Dist.*, *ante* p. 1, 305 N.W.2d 888 (1981); *Sullivan v. Hoffman*, 207 Neb. 166, 296 N.W.2d 707 (1980).

A prescriptive right is not looked upon with favor, and generally must be proved by clear, convincing, and satisfactory evidence. *Svoboda v. Johnson*, 204 Neb. 57, 281 N.W.2d 892 (1979); *Fischer v. Grinsbergs*, 198 Neb. 329, 252 N.W.2d 619 (1977); *Mehling v. Deines*, 191 Neb. 287, 214 N.W.2d 627 (1974).

To establish a road or highway by prescription, there must be a use by the general public, under a claim of right adverse to the owner of the land, of some particular or defined line of travel, and the use must be uninterrupted and without substantial change for 10 years, the period of time necessary to bar an action to recover the land. Neb. Rev. Stat. § 25-202 (Reissue 1979); *Smith v. Bixby*, 196 Neb. 235, 242 N.W.2d 115 (1976); *State v. Kilberg*, 192 Neb. 661, 223 N.W.2d 665 (1974); *Dunnick v. Stockgrowers Bank of Marmouth*, 191 Neb. 370, 215 N.W.2d 93 (1974).

Ordinarily, where a claimant has shown open, visible, continuous, and unmolested use of land for a period of time sufficient to acquire an easement by adverse user, the use will be presumed to be under a claim of right. Under such circumstances, the owner of the servient estate, in order to avoid acquisition of an easement by prescription, has the burden of rebutting the presumption by showing the use to have been permissive. *Svoboda v. Johnson, supra; Fischer v. Grinsbergs, supra; Smith v. Bixby, supra; Dunnick v. Stockgrowers Bank of Marmouth, supra.* The above-stated general rule is subject to an exception. The presumption of adverse use does not arise when a prescriptive easement is claimed over land which is unenclosed and which has no defined pathway across it. *Svoboda v. Johnson, supra; Stubblefield v. Osborn*, 149 Neb. 566, 31 N.W.2d 547 (1948). See, also, 4 H. Tiffany, Law of Real Property § 1196.1 (3d ed. 1975).

It is with the foregoing standard of review and principles of law in mind that we review the evidence to determine whether, as claimed by plaintiffs, the trial court erred in finding that the public's use of the

pathway was neither adverse nor under a claim of right.

Until the early 1950s, north-south Highway 53 lacked a bridge across the Little Blue River in the area of the juncture of Sections 23, 24, 25, and 26, Township 3 North, Range 1 West of the 6th P. M., Thayer County, Nebraska. From 1934, at the latest, to 1950, at the earliest, the general public, without permission from or interference by anyone, used an east-west pathway, 20 feet wide, across land owned by the defendants and their predecessors in title. The route began at a point adjoining plaintiffs' land, thence eastward along the north boundary line of the northeast quarter of said Section 26 and south boundary line of the southeast quarter of said Section 23, to a point joining Highway 53. There have been minor variations in the course of the way over the years due to the inherent nature of the area traversed, and due to rains, floods, and natural causes and conditions. The origin, terminus, course, location, and use of the route remained substantially unchanged.

Since the Highway 53 bridge was built, travel over the route has diminished. The pathway has been used mostly for farming operations, and by hunters and fishermen. Since about 1967 some travelers have asked permission to use the road and some have paid consideration to defendants for its use; others have done neither. In about 1977 defendants padlocked a gate which existed at the east end of the pathway when they purchased the land in 1959.

The record is silent as to whether defendants' predecessors in title gave permission for travelers to cross their land by the route in question. However, the evidence clearly, convincingly, and satisfactorily establishes that the user was open, notorious, visible, continuous, and unmolested from at least 1934 to 1950, a period in excess of 10 years. Therefore, the crucial question becomes whether the presumption of adverse use arises. We find it does.

Since at least 1912 this court has held to the view that

open, continuous, and unmolested use of a roadway across the premises of another for a period fo 10 years gives rise to a presumption that the user was under a claim of right, and that where one seeks to close a way over his land which has been enjoyed by his neighbor for such a period, he has the burden of showing that the use was permissive. *Majerus v. Barton*, 92 Neb. 685, 139 N.W. 208 (1912). The most recent application of that rule is found in *Svoboda v. Johnson*, 204 Neb. 57, 281 N.W.2d 892 (1979), which granted private easements, but denied a public one. Defendants, on the other hand, rely on three cases in which an exception to the general rule was applied. Defendants argue that those three cases hold that the presumption does not apply when dealing with unenclosed land and that those cases control the disposition of this case. They do not control. In the first case relied on by defendants, *Connot v. Bowden*, 189 Neb. 97, 200 N.W.2d 126 (1972), the court ruled that the evidence failed to establish a roadway easement across adjoining land, not because the presumption did not apply but because the use was not shown to be continuous and uninterrupted for the required period of time. Another case relied upon by defendants, *Stubblefield v. Osborn*, 149 Neb. 566, 31 N.W.2d 547 (1948), involved unplatted islands used for hunting purposes. In denying claimant an easement, the court ruled the evidence established the original entry and use was permissive. It is true that in the third case, *Scoville v. Fisher*, 181 Neb. 496, 149 N.W.2d 339 (1967), we denied a prescriptive easement over an unenclosed and open town lot, stating that evidence land is unenclosed is sufficient to rebut the presumption of adverse use. However, as observed in *Scoville*, the general rule must be interpreted in light of the facts of each case. In *Stubblefield*, there was no defined pathway across the unenclosed land; in the case at bar there is such a defined pathway. The result in this case is ordained by *Svoboda v. Johnson, supra*, which stated the applicable rule to be that "even though land may be unenclosed,

where there is a well-defined path or roadway thereon, the rule as to a presumption of adverse use applies, and places the burden on the landowner to establish that the use by the claimant of the prescriptive right was permissive." *Id.* at 67-68, 281 N.W.2d at 900.

In this connection, defendants argue that the trial court erred in refusing to receive in evidence certain exhibits which they claim would have constituted conclusive evidence that the user was permissive. The exhibits to which they refer tend to show that in 1945, 1950, and 1951, Thayer County paid to one of defendants' predecessors in title $20 on each of three occasions and $25 on one occasion either as rent for a "roadway" or for "right-of-way." On April 1, 1952, Thayer County paid the same predecessor in title $50 for "Release of Agreement." Even if it were to be assumed that the payments were for permission to use the pathway, receipt of the exhibits into evidence would not have changed the resolution of the permissive use issue. The payments were not made until after the full 10-year prescriptive period. Thus, if it were error to have sustained the objections to receipt of the exhibits, it was harmless error. Error may not be predicated upon a ruling which excludes evidence, unless a substantial right of the party is affected. Neb. Rev. Stat. §§ 25-853 and 27-103 (Reissue 1979); *Harrigfeld v. Nebraska Liquor Control Commission*, 203 Neb. 741, 280 N.W.2d 61 (1979).

The evidence fails to rebut the presumption of adverse use; we therefore hold that the trial court erred in finding that the public's use of the pathway in question was not adverse.

We must now consider whether the evidence establishes that the user was under a claim of right. We hold that it does. If the initial entry is adverse, an actual claim of ownership is not necessary to establish a claim of right. If adverse possession continues for the required 10 years, the adverse holding ripens into ownership in the absence of explanatory circumstances

affirmatively showing the contrary, such as occupancy under a lease, an easement, or a permissive use; the title of the true owner is lost by his inaction. *Svoboda v. Johnson*, 204 Neb. 57, 281 N.W.2d 892 (1979); *Barnes v. Milligan*, 196 Neb. 50, 241 N.W.2d 508 (1976); *Purdum v. Sherman*, 163 Neb. 889, 81 N.W.2d 331 (1957).

It is not indispensable to the establishment of a highway by prescription that there be no deviation in the line of travel; if the course of travel has remained substantially unchanged for the full period, it is sufficient even though at times, to avoid encroachments, obstructions, or the like, there have been slight changes in the line of travel. *Satterfield v. Dunne*, 180 Neb. 274, 142 N.W.2d 345 (1966); *Pierce v. Rabe*, 177 Neb. 745, 131 N.W.2d 183 (1964).

The evidence establishes that the course of travel across defendants' land has remained substantially unchanged for the full period from 1934 to 1950, more than the 10 years required to establish adverse possession, and, indeed, to the present. That remaining element has therefore been proved.

The fact that there has been a diminution in the number of travelers on the road since the bridge was built in 1950 over the Little Blue River at Highway 53 does not constitute an abandonment of the road. *Smith v. Bixby*, 196 Neb. 235, 242 N.W.2d 115 (1976).

The evidence thus compels a finding that the plaintiffs have established a roadway in favor of the public across defendants' land, 20 feet wide, located as stated earlier in this opinion.

The findings and judgment of the trial court are reversed, and the cause is remanded for the entry of a judgment consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

RALPH SULLIVAN, APPELLANT, V. GENERAL UNITED LIFE INSURANCE COMPANY, APPELLEE, SAPP BROS. LEASING, INC., INSURANCE DIVISION, NOW KNOWN AS LEE SAPP INSURANCE, INC., INTERVENOR-APPELLEE.

312 N.W.2d 277

Filed November 6, 1981. No. 43636.

Equity: Pleadings. The prayer of a pleading tenders no issue, and neither adds to nor takes from the evidence required of either party. The prayer for general relief in an equity action is as broad as the pleadings and the equitable powers of the court sufficient to authorize any judgment to which the party is entitled under the pleadings and the evidence.

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

Michael W. Heavey of Dwyer, O'Leary & Martin, P.C., for appellant.

Jim L. Kuhn of Liakos & Kuhn for appellee.

Heard before KRIVOSHA, C.J., WHITE, and HASTINGS, JJ., and GITNICK, District Judge, and COLWELL, Retired District Judge.

COLWELL, Retired District Judge.

This is an equity suit on an oral contract assigning insurance commissions. Plaintiff, Ralph Sullivan, sues defendant, General United Life Insurance Company, for a declaratory judgment and judgment for commissions. General answers and pays commissions into court. Intervenor, Sapp Bros. Leasing Inc., Insurance Division, now known as Lee Sapp Insurance, Inc., alleges an oral contract and written assignment of commissions between it and plaintiff for all commissions earned from General, and prays to determine valid assignment or in the alternative for judgment for commissions, for declaratory judgment, and for equitable relief.

Plaintiff and intervenor each filed motions for summary judgment. Upon hearing, a partial summary

judgment was granted that plaintiff's written assignment of commissions was void and contrary to Neb. Rev. Stat. § 36-213 (Reissue 1978), and that plaintiff did revoke his written assignment on November 17, 1978. The court ordered the cause to proceed to trial on the remaining issues, including the terms of the oral contract and the rights of the parties therein. Upon trial, judgment was entered in favor of intervenor that it was entitled to all renewal and new commissions earned by plaintiff from General on policies written prior to December 7, 1978. Plaintiff appeals, assigning as error (1) the award of renewal commissions on policies written prior to August 1, 1977, and (2) exclusion of relevant evidence. This de novo review follows.

Briefly, the facts are that on August 1, 1977, plaintiff and Lee H. Sapp concluded negotiations and orally agreed to start a new insurance sales agency. Plaintiff was experienced in insurance sales and management, and he possessed several agency sales contracts, including one with General. Sapp was to provide the financing. A corporation would be formed; ownership would be 50-50; plaintiff would handle all sales and management; plaintiff's compensation would be $1,500 a month, business expenses, and use of a car; and plaintiff agreed to assign to the corporation all commissions thereafter due to him on policies sold by him as agent for General, whether new or renewals.

Sapp arranged for plaintiff to borrow funds to buy stock in the corporation and the stock was held by the lender as collateral. Plaintiff ultimately paid for and received stock representing a 40 percent interest in the corporation. Plaintiff received and was paid the agreed compensation. For the first few months, plaintiff's commissions from General were paid by check to him, and he endorsed them to intervenor. Later, plaintiff executed and filed with General a written assignment of commissions, and thereafter all General commissions, new and renewals, were paid by check to intervenor until this controversy arose and the plaintiff filed a re-

vocation of assignment with General.

The terms of the oral agreement and of the written assignment were generally performed by plaintiff and intervenor. Personal conflict developed between plaintiff and Sapp concerning plaintiff diverting to himself some General commissions, plaintiff's claim that Sapp was attempting to force him out of the business, and the payment and delivery of plaintiff's stock certificates. On December 7, 1978, plaintiff severed his working relationship with intervenor.

Plaintiff's main argument is that the judgment awarding to intervenor the renewal commissions on policies written prior to August 1, 1977, exceeded its prayer for relief, particularly referring to that part which states: "[T]hat the Assignment of Commissions dated August 1, 1977, be declared to be valid and in full force and effect, or in the alternative that the Court determine that the Intervenor is entitled to all commissions earned from the policies of insurance sold and issued through the efforts of the Intervenor or its employees, including Ralph Sullivan, from and after August 1, 1977 . . . ."Plaintiff cites as authority *Schmidt v. Richman Gordman, Inc.*, 191 Neb. 345, 215 N.W.2d 105 (1974), which was a law action and a jury verdict.

The prayer of a pleading tenders no issue, and neither adds to nor takes from the evidence required of either party. The prayer for general relief in an equity action is as broad as the pleadings and the equitable powers of the court sufficient to authorize any judgment to which the party is entitled under the pleadings and the evidence. *Standard Reliance Ins. Co. v. Schoenthal*, 171 Neb. 490, 106 N.W.2d 704 (1960); *Sechovec v. Harms*, 187 Neb. 70, 187 N.W.2d 296 (1971).

Intervenor having prayed for equitable relief, there is no merit to plaintiff's argument. Further, the evidence conclusively supports intervenor's pleadings and the judgment in its favor.

Plaintiff claims error that the court rejected certain evidence to show that intervenor breached the oral con-

tract, including evidence of a controversy between plaintiff and Sapp for the payment and delivery of corporate stock to plaintiff. The court did receive plaintiff's evidence in this area until the record revealed that the stock had been delivered to plaintiff, at which time a ruling was made that such evidence was not relevant. Under the pleadings and the court order defining the trial issues, such evidence was not relevant and no substantial right of the plaintiff was affected. See Neb. Rev. Stat. §§ 27-106 and 27-403 (Reissue 1979).

AFFIRMED.

DIANE K. HARB, APPELLANT, V. HERBERT H. HARB, APPELLEE.

312 N.W.2d 279

Filed November 6, 1981. No. 43641.

Child Support. Where the custodial parent has removed the minor children from the jurisdiction of the trial court, the costs of exercising reasonable visitation by a noncustodial parent is a factor which may be considered along with all other attendant circumstances in determination of a modification of an existing award for child support.

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

John S. Mingus of Mingus & Mingus for appellant.

Herbert H. Harb, pro se.

Heard before KRIVOSHA, C.J., MCCOWN, and HASTINGS, JJ., and KORTUM and GRANT, District Judges.

KORTUM, District Judge.

This is an appeal from an order modifying and increasing the amount of child support payments in a divorce decree.

The original divorce decree entered on July 15, 1970, granted custody of the twin daughters of the parties to the appellant herein, granted the appellee herein rights

of reasonable visitation, and provided for child support in the sum of $40 per month for each child, a total of $80 per month.

At the time of the original divorce decree the appellant was a student at the University of Nebraska and the appellee a student at Bryan Memorial Hospital. The appellant was not employed at the time of the original decree. The earnings of the appellee at that time were a gross amount of $2,269 and net earnings of $1,815.87.

At the time of the modification hearing the appellant was a self-employed insurance agent with gross earnings of $13,944.37 and a net income of $7,103.14. The appellee at that time had gross earnings of $26,967.14 and a net income of $17,658.03 from his employment as a registered nurse.

In 1971, after the original divorce, the appellant moved to Alaska where she and the children lived until 1975. She then moved to the state of Washington where she now resides.

The appellee lived in Nebraska for some time after the original decree and now lives in Michigan.

The trial court took extensive evidence relating to the present needs of the minor children and to the need for increased support. In its order of modification the trial court noted that it was taking into consideration the fact that the appellant had removed the children from the state of Nebraska and the result would be a greater expense to the appellee of exercising his visitation rights.

The court modified the child support upward to provide for support of $100 per month per child. The appellant brings this appeal, alleging that the increase was insufficient and that the trial court erred in taking into consideration the possible increased expenses of the appellee in exercising his visitation rights.

The proceedings in a divorce case with reference to an adjudication of child support is a continuation of the divorce suit and one of its incidents. *Johnson v. Johnson*, 177 Neb. 445, 129 N.W.2d 262 (1964).

The factors to be considered by the trial court in its determination of a child support award are clearly set forth in the cases. In determining the amount of child support to be awarded, the status, character, and situation of the parties and attendant circumstances must be considered. The financial position of the husband as well as the estimated costs of support of the children must be taken into account. *Brus v. Brus*, 203 Neb. 161, 277 N.W.2d 683 (1979).

There is no mathematical formula for computing child support awards and each case must stand on its own facts. A resort to other cases, although similar factually, cannot be determinative of the child support issue, since each case requires subjective reasoning and analysis based on the evidence and the witnesses before the court. *Boroff v. Boroff*, 204 Neb. 217, 281 N.W.2d 760 (1979).

Neb. Rev. Stat. § 42-364 (Reissue 1978) provides for the revision or modification of child support orders. Where there has been a change in circumstances the same rules apply as in the original divorce in determining whether child support payments should be increased or reduced. The added expense of exercising visitation is only one factor to be considered along with others in setting or modifying child support allowances.

Where the custodial parent has removed the minor children from the jurisdiction of the trial court, the costs of exercising reasonable visitation by a noncustodial parent is a factor which may be considered along with all other attendant circumstances in determination of a modification of an existing award for child support.

The decision of the trial court is correct and the judgment is affirmed.

AFFIRMED.

LESLIE ENGEL, APPELLEE, V. NEBRASKA METHODIST HOSPITAL, APPELLANT.

312 N.W.2d 281

Filed November 6, 1981. No. 43926.

1. **Workmen's Compensation: Appeal and Error.** The scope of review in the Nebraska Supreme Court for findings of fact made by the three-judge panel of the Nebraska Workmen's Compensation Court after rehearing is that those findings of fact shall have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong.
2. **Workmen's Compensation: Words and Phrases.** The causation test of exertion "greater than nonemployment life" is applied by this court only in cases of heart attacks alleged to have been caused by the employment and not to other types of injury.
3. **Workmen's Compensation: Proof.** When a workmen's compensation claimant is alleged to have suffered a disability rising out of and in the course of his employment which consists of the aggravation of a preexisting condition, 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.

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

Kirk S. Belcha and Richard E. Putnam of Baird, Holm, McEachen, Pedersen & Hamann for appellant.

James R. Welsh and Robert V. Roach of Welsh, Sibbernsen & Bowen for appellee.

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

CLINTON, J.

This is an appeal from an award made to the plaintiff Engel by a three-judge panel of the Nebraska Workmen's Compensation Court on rehearing. The award was $168.10 per week so long as the defendant remained permanently disabled. The employer, Nebraska Methodist Hospital, appeals to this court. We affirm.

There is no dispute as to the evidence. Engel was employed by the hospital as a maintenance supervisor. At the time of the alleged injury on December 31, 1979, he

and two other employees, in the course of the employment, lifted a carpet weighing about 100 pounds. Plaintiff testified that at the time a severe pain shot into his lower back and down his legs. The plaintiff's condition worsened after the incident and had not improved at the time of trial. Since the incident he has been unable to engage in any kind of physical activity, including activities he engaged in prior to the accident such as lawnmowing, snow removal, changing tires, and the work required in his hospital employment. He had not been able to return to work at the time of trial.

In 1967, while serving in the Army in Vietnam, he was wounded in the back and other parts of the body by an exploding mortar shell. As a consequence, he draws a veteran's disability pension. The evidence further shows that he has a spondylolysis, a congenital defect in the bony connection between vertebrae. Such a condition is usually painless until affected by physical trauma. Before he was wounded, the spondylolysis was asymptomatic. After his war injuries he had some pain in his back, but returned to active duty as an instructor in the use of the .50-caliber machine gun. He was honorably discharged in 1969. After his discharge he worked on an assembly line in a lawnmower factory for a period of time. He also studied heating and air-conditioning at a trade school and received a degree in that field. When unable to find employment in that trade, he accepted a position as a hospital custodian at the Veterans Administration Hospital. He also worked for the Quaker Oats Company as a manual laborer, which required lifting and stooping. In May of 1973 he began his employment as a maintenance supervisor with the defendant, Nebraska Methodist Hospital, and worked there until the occurrence of the lifting incident out of which this workmen's compensation claim arises. In his hospital employment he washed walls and windows, shampooed carpets, carried buckets of water, and performed required duties. Prior to the incident of December 31, 1979, he had physical "complications"

arising from his Vietnam wounds, including back pain, and he was examined periodically by doctors of the Veterans Administration to determine his continuing eligibility for disability payments.

The pertinent and only medical testimony in this case, as shown on the direct and cross-examination of the attending physician, is as follows:

"Q Doctor, based upon your experience as a medical physician and based upon your examination of Mr. Leslie Engel, do you have an opinion you can state with reasonable medical certainty as to the cause of Leslie Engel's injuries that you found as a result of your examination?

"A It's my opinion, after examining him, that there were two episodes in his life that caused him to have a painful spondylolysis. The first was the Vietnam injury which then gave him a certain level of back pain that I would describe as minimal to moderate. The injury of December of '79 made the spondylolysis become even more painful, a level that I would describe as moderate to severe.

"Q This is the injury he received on December 31, 1979, while lifting the carpeting, as described to you?

"A That's correct.

"Q Doctor, again based upon your medical expertise and your examination of Leslie Engel, do you have an opinion that you can state with reasonable medical certainty as to the period of time that Mr. Leslie Engel has been totally disabled as a result of the injuries he suffered on December 31, 1979?

"A From December 31, 1979, through the present.

"Q Do you have an opinion you can state with reasonable medical certainty as to whether or not he will require treatment in the future, as a result of the injuries he suffered on December 31, 1979?

"A Yes.

I feel very strongly that he should have a spinal fusion.

"Q What would be, in your opinion, the approximate

cost of this spinal fusion, taking into account the hospitalization, and surgery fees, and so forth? Just a rough estimate.

"A About $10,000.

. . . .

"Q I think when we were visiting last night, you told me that there was nothing peculiar about the work place that caused the experience of more pain December 31, 1979, and that other types of strenuous activity — I think were your words — away from the work place could have also caused this condition. Is that a fair assessment?

"A Yeah.

I think that any strenuous activity could cause a person with spondylolysis to become more symptomatic.

"Q I think the example that I used last night was, for instance, the strenuous activity involved in changing a tire.

"A Yes.

"Q Would you agree with me that that would be the type of thing in everyday life that could set this spondylolysis off?

"A Yes."

The hospital assigns errors in its brief which raise the following propositions: (1) Where the employee aggravates a preexisting disease or condition, the test of legal causation requires the plaintiff to show the exertion at the work place was greater than the usual level of exertion present in the normal nonemployment life of the workman or any other person; and (2) The employee must prove the injury was not the result of the normal progression of his preexisting condition which would have been sustained even in the absence of the accident.

The following principles govern our review in this case. A judgment, order, or award of the Nebraska Workmen's Compensation Court may be modified, reversed, or set aside only upon the grounds that (1) the court acted without or in excess of its powers, (2) the judgment, order, or award was procured by fraud,

(3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award, or (4) the findings of fact do not support the order or award. *Chrisman v. Greyhound Bus Lines, Inc.*, 208 Neb. 6, 301 N.W.2d 595 (1981). When determining whether the evidence is sufficient to sustain an award of the three-judge panel of the Nebraska Workmen's Compensation Court after rehearing, such evidence must be considered in the light most favorable to the successful party. The successful party must receive the benefit of every reasonably deducible inference, and every controverted fact must be resolved in his favor. *Chrisman v. Greyhound Bus Lines, Inc., supra.* The findings of fact made by the three-judge panel of the Nebraska Workmen's Compensation Court after rehearing shall have the same force and effect in this court as a jury verdict in a civil case and will not be set aside unless clearly wrong. *White v. Father Flanagan's Boys' Home*, 207 Neb. 528, 300 N.W.2d 15 (1980).

To support its first claim, the hospital relies upon the following cases: *Sellens v. Allen Products Co., Inc.*, 206 Neb. 506, 293 N.W.2d 415 (1980), and *Chrisman v. Greyhound Bus Lines, Inc., supra.*

The hospital argues that in the case of an aggravation of a preexisting condition, liability should not be imposed when the exertion causing the injury is no greater than that occurring in nonemployment activity. The defendant reasons that nonemployment activity could have triggered the disability at any time. As such, it is alleged, the back injury occurring during employment is merely coincidental, and the employer should not be held liable under the circumstances.

The exertion "greater than nonemployment life" test has been applied by this court only in cases involving heart attacks allegedly caused by the activities or stress of employment. *Chrisman v. Greyhound Bus Lines, Inc., supra; Sellens v. Allen Products Co., Inc., supra; Hyatt v. Kay Windsor, Inc.*, 198 Neb. 580, 254 N.W.2d 92

(1977); *Newbanks v. Foursome Package & Bar, Inc.*, 201 Neb. 818, 272 N.W.2d 372 (1978); *Beck v. State*, 184 Neb. 477, 168 N.W.2d 532 (1969); *Brokaw v. Robinson*, 183 Neb. 760, 164 N.W.2d 461 (1969).

The rationale for the rule is discussed at some length in *Sellens, supra* at 509-11. Where a person suffers from a preexisting condition which he claims is aggravated by his employment, he has an increased burden of proving causation. The exertion "greater than nonemployment life" test is simply an application of the increased burden of proof required in preexisting condition cases to the unique problems of proving causation of a myocardial infarction. We find no reason to extend the rule to other cases where the proof of causation is not usually as complex.

In the second proposition, to wit, the employee must prove the injury was not the result of the normal progression of his preexisting condition which would have been sustained even in the absence of the accident, the hospital proposes a rather subtle interpretation of the governing legal principle which distorts the underlying reason for the rule. The employer emphasizes the language "would have been sustained even in the absence of the accident," and argues that a normal progression of the disease would most probably have, at some time, resulted in the disability for which compensation is sought. The language this court has sometimes used in stating the principle, when read in the abstract, might lead one to that conclusion, but it is plain that is not its meaning when we consider the facts of individual cases. The question simply is whether the plaintiff suffered an injury arising out of and in the course of his employment which aggravated the preexisting condition and resulted in the disability. The principle does not require the claimant to prove that the disease or condition will not sometime *in the future* through natural progression result in disability.

The most accurate statement of the principle is found in *Aguallo v. Western Potato, Inc.*, 208 Neb. 66, 302

N.W.2d 41 (1981). "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." (Syllabus of the court.) The phrase "even in the absence of the accident," which we find in some cases, for example, *Taylor v. Benton*, 205 Neb. 203, 209, 286 N.W.2d 755, 758 (1980), is not to be taken to refer to possible future progression. It is enough that the accident aggravated, accelerated, or inflamed the preexisting condition.

AFFIRMED.

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

LAURELL E. SCHUERMAN, APPELLANT, V. ARLIN G. SCHUERMAN, APPELLEE.

312 N.W.2d 286

Filed November 6, 1981. No. 43985.

Appeal from the District Court for Saline County: ORVILLE L. COADY, Judge. Affirmed.

H. Jeanne Thorough of Kelley & Thorough for appellant.

A. James McArthur for appellee.

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

PER CURIAM.

The instant appeal involves a domestic relations matter.

The court, having reviewed the record in this case de novo, agrees with the result reached by the trial court. The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GEARY DANDRIDGE, APPELLANT.

312 N.W.2d 286

Filed November 6, 1981. No. 44022.

1. **Criminal Law: Evidence.** Generally, it is within the discretion of the trial court whether evidence of other crimes is admissible.
2. ____: ____. It is also within the discretion of the trial court whether other offenses are sufficiently similar to the one charged so that evidence of the other offenses has probative value.
3. ____:____. In determining whether evidence of other crimes is admissible, important considerations are remoteness in point of time and unique, almost "signature-like" similarity between the charged crime and the other crimes.
4. ____:____. In determining whether the suppression of evidence was prejudicial to an accused, it must be evaluated in the context of the entire record.
5. **Motions for New Trial: Evidence.** If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.
6. **Prosecuting Attorneys.** There is no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work.
7. ____. Remarks of the prosecutor in final summation of the evidence to the jury which do not mislead and unduly influence the jury and thereby prejudice the rights of the defendant do not constitute misconduct.
8. **Witnesses: Jury Instructions.** The fact that an accomplice has been guilty of willful false swearing on a material matter does not automatically discredit his testimony as a matter of law in all cases. Ordinarily, his credibility is a question for the jury under a proper cautionary instruction.
9. **Prosecutorial Misconduct.** An argument by a prosecuting attorney which is based on the evidence and inferences drawn therefrom does not ordinarily constitute misconduct.

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

Dennis R. Keefe, Lancaster County Public Defender, and Gerald L. Soucie for appellant.

Paul L. Douglas, Attorney General, and Sharon M. Lindgren for appellee.

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

BOSLAUGH, J.

After trial to a jury the defendant was convicted of robbery, use of a firearm in the commission of a felony, and being an habitual criminal. He was sentenced to consecutive terms of imprisonment for 10 years on each count.

The defendant has appealed and has assigned as error (1) failure to admit evidence of other similar crimes committed while the defendant was incarcerated as proof that defendant was not guilty of the robbery charged, (2) failure to declare a mistrial when the State violated a pretrial order, (3) misconduct of the county attorney in failing to disclose statements made by the defendant's accomplice, (4) prosecutorial misconduct in failing to disclose the true nature of the plea bargain with a prosecuting witness who was granted immunity, (5) prosecutorial misconduct in failing to disclose exculpatory evidence, (6) prosecutorial misconduct in vouching for the credibility of a witness for the State, (7) prosecutorial misconduct in using the testimony of a witness who had failed a polygraph examination, and (8) the imposition of consecutive habitual criminal sentences where both crimes arose out of one transaction.

The robbery took place at the Burger King Restaurant in Lincoln, Nebraska, on September 17, 1979. The robbery was perpetrated by two black men, one about 6 feet 3 inches tall and the other approximately 5 feet 7 or 8 inches tall. Both men wore homemade masks over their faces. The employees, except the manager, were ordered into a utility room in the building. The taller man brandished a gun while the shorter man ordered the restaurant manager to open the cash drawers and took the money.

On September 27, 1979, the defendant and Elizabeth Hipple were stopped by police near 49th and Claire

Streets in Lincoln, pat-searched, and taken to police headquarters for questioning concerning the Burger King robbery. After lengthy questioning Hipple gave a statement to police in which she admitted that she, the defendant, and Kevin Ginger had committed the robbery. According to Hipple, on the evening of September 16, 1979, she, the defendant, and Ginger drove around the north part of Lincoln in her automobile while the defendant and Ginger discussed robbing the Burger King Restaurant. Ginger showed Hipple a homemade mask made out of a T-shirt that he intended to wear. Hipple saw the defendant remove a pistol from his pocket, place a bullet in the chamber, and put the pistol back in his pocket.

Late that evening the car was parked at 25th and Dudley Streets, and the defendant and Ginger left the automobile. Hipple waited in the car at 25th and Dudley for an estimated 1 to 1½ hours. When the defendant and Ginger returned to the car the defendant directed her to open the trunk, and the defendant and Ginger climbed into the trunk. She then drove to Ginger's apartment. When they arrived at the apartment she opened the trunk, and the defendant and Ginger got out. Hipple stated that there was money strewn around the trunk. The three of them picked up all the money and went into Kevin Ginger's apartment where the defendant counted the money and divided it. Hipple received about $500. Hipple and the defendant spent the remainder of the night at Ginger's apartment, and left early the next morning.

Approximately five Burger King employees, including the manager, were in the building at the time of the robbery. They testified, in substance, that shortly after closing, when one of the employees was taking out the trash, two men accosted him in the alley behind the restaurant and forced him back into the building. The men ordered the employees, except the manager, into a utility room. The taller robber grabbed the manager and demanded to know where the money was. The

shorter man then took over the task of getting the money, going up to the front of the restaurant with the manager, while the tall man stood at the back, holding the gun and making threatening comments. After the shorter man had obtained the money, both men left and the police were called. The testimony of the employees corroborated Hipple's testimony as to what the defendant had told her about what had happened inside the restaurant during the robbery.

Hipple testified that while the police were following her automobile on the night of the arrest, the defendant handed a .38-caliber automatic pistol to her and asked her to hide it. Hipple hid the gun in the front of her jeans, and it was not found during the pat-search. Later, while she was being questioned at the police station, she requested permission to use the bathroom, and hid the gun in a wastebasket. Sometime later she advised her attorney about the gun. The attorney notified the police who then retrieved the gun.

In exchange for her testimony as a witness for the State, Hipple was granted immunity from prosecution "from anything that arose out of the transaction that took place involving the Burger King robbery or incidents related thereto." There was some testimony at the trial that she would not be charged with being a felon in possession of a firearm and carrying a concealed weapon, but at the end of the trial it was stipulated that "the County Attorney's Office is still empowered to file said charges."

Before the trial commenced, defense counsel made a motion in limine to forbid the State's witnesses from using the words "polygraph" or "polygraph room" in their testimony. The motion was sustained and the county attorney was ordered to advise his witnesses to use the words "interview" or "interview room" in their testimony. During the trial Detective Van Butsel used the words "polygraph room" twice in his testimony. At a hearing on the defendant's motion for a mistrial, Van Butsel testified that he had not been told by the county

attorney to not use those words. The motion for mistrial was overruled.

At trial the defendant's counsel offered evidence of other robberies which had occurred in Lincoln while the defendant was in jail and unable to post bond. The method of operation used in these robberies was similar in nature to the Burger King robbery. A motion in limine by the State to prevent the introduction of this evidence was sustained.

After arraignment, the defendant waived a preliminary hearing in exchange for the county attorney's promise to turn over all police reports concerning the robbery. At the sentencing hearing in August 1980, defense counsel discovered, from the presentence report, that he had not received a number of police reports, some of which contained material which he thought was exculpatory. Sentencing was deferred, and a motion for new trial based on newly discovered evidence was filed. After a hearing on the motion, the motion was overruled.

In his first assignment of error the defendant contends the trial court erred in sustaining the State's motion in limine regarding evidence of similar, unsolved robberies in Lincoln which were committed while defendant was in jail and unable to post bond. The defendant argues this evidence was admissible to show lack of identity because "nearly identical robberies" were being perpetrated while the defendant was in jail.

The evidence offered related to robberies at Taco John's and Marion's liquor store in Lincoln, Nebraska. These robberies were committed by two black men, one tall and one short, near closing time, and in each robbery the shorter man took the money. At the hearing on the motion, the witnesses to the Taco John's robbery were unable to give as complete a description of the robbers as was the witness to the Marion's robbery. The evidence is that the robbers at Taco John's did not wear masks, although they did at Marion's.

The State argues that the subsequent robberies were too remote in time or not sufficiently similar to the Burger King robbery for the evidence to be admissible. Generally, it is within the discretion of the trial court whether evidence of other crimes is admissible. *State v. Ellis*, 208 Neb. 379, 303 N.W.2d 741 (1981). It is also within the discretion of the trial court whether other offenses are sufficiently similar to the one charged so that evidence of the other offenses has probative value.

In determining whether evidence of other crimes is admissible, important considerations are remoteness in point of time and unique, almost "signature-like" similarity between the charged crime and the other crimes. *Commonwealth v. Murphy*, 282 Mass. 593, 185 N.E. 486 (1933). In the present case, the subsequent robberies occurred at Taco John's on November 18, 1979, 2 months after the Burger King robbery, and at Marion's liquor store on January 28, 1980, 4 months thereafter. While there were similarities among elements of all the robberies, there were also a number of dissimilarities. The parties were dressed differently; in some cases they wore masks and not in others; and in only two of the robberies was a gun used. There was evidence that an employee present at the Taco John's robbery had made a positive identification of one of the robbers, but the employee did not testify at the hearing in this case. We believe the three robberies were not so uniquely similar as to be sufficiently probative of defendant's innocence of the Burger King robbery that it was an abuse of discretion to sustain the motion.

In his second assignment of error the defendant contends the trial court erred in failing to declare a mistrial when the State's witness, Van Butsel, twice used the term "polygraph room" in describing where the gun was found which Hipple had hidden in the restroom at the police station. The defendant argues that the jurors could have inferred that Hipple had been in the polygraph room, or had taken a polygraph examination. Aside from describing the basement restroom as near

the polygraph room, Van Butsel's testimony in no way connected Hipple with the polygraph room. Although Van Butsel testified that he had not been told of the court's order in limine, neither Van Butsel's testimony nor that of any other witness placed Hipple in the polygraph room, or in any way indicated that she had taken a polygraph examination. The violation of the order did not result in substantial prejudice to any of the defendant's rights.

The defendant next contends that a new trial should have been granted because the State failed to disclose statements made by Kevin Ginger, in direct violation of the court's pretrial order; because the State failed to disclose "exculpatory" material contained in police reports regarding two black males in a blue station wagon who had been hanging around the Burger King restaurant for 2 days prior to the robbery; and because of information regarding Shelley Snyder's possible complicity in the robbery of the Burger King.

The statements of Kevin Ginger, which were not furnished to the defendant, contained a version of events taking place immediately before the robbery which was substantially at variance with the testimony of Hipple.

The reports concerning the blue station wagon and the possible complicity in the robbery by Shelley Snyder, a Burger King employee, were not in the possession of the county attorney until the sentencing hearing, 4 months after trial.

Although Kevin Ginger's statement contained in the police report conflicted with Hipple's testimony, it implicated the defendant in the Burger King robbery. In *Evans v. Janing*, 489 F.2d 470 (8th Cir. 1973), the Eighth Circuit stated: "[T]he sole purpose for which the police report might have been used in evidence would have been to impeach the testimony of the key witness. . . [S]uppressed *impeachment evidence* requires a higher standard of materiality than would be imposed for evidence directly related to guilt. 'As to evidence [admissible] only for the purpose of impeachment or

credibility attack, nondisclosure or suppression, to be violative of due process, would in our opinion, unless the situation is otherwise tainted, have to be of such inherent significance as to represent fundamental unfairness.'"

In *United States v. Agurs*, 427 U.S. 97, 111-13, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976), the U.S. Supreme Court stated: "[T]he fact that such evidence was available to the prosecutor and not submitted to the defense places it in a different category than if it had simply been discovered from a neutral source after trial. For that reason the defendant should not have to satisfy the severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal. . . . [I]f the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt."

Hipple's out-of-court statements made prior to trial contained a number of inconsistencies as compared to her testimony at trial. She was cross-examined thoroughly as to them by the defendant's counsel in an attempt to impeach her credibility. When the record as a whole is considered, the evidence against the defendant was substantial. We do not believe the suppression of the police report containing the statements of Ginger was prejudicial to the defendant.

As to the other "exculpatory material" contained in the police reports, the parties admit that the county attorney did not have these reports in his possession until long after trial. The information about the blue station wagon and the possible complicity of Snyder were early leads which the police abandoned. In *Moore*

v. Illinois, 408 U.S. 786, 795, 92 S. Ct. 2562, 33 L. Ed. 2d 706 (1971), the U.S. Supreme Court stated: "We know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case. Here, the elusive 'Slick' was an early lead the police abandoned when eyewitnesses to the killing and witnesses to Moore's presence at the Ponderosa were found." The "exculpatory material" contained in the police reports was at best vague and insubstantial. Even if the county attorney had known of these reports before trial, the failure to disclose them to the defense would not have been prejudicial error.

The defendant's fourth assignment of error is that the trial court erred in not granting a new trial because of the State's failure to disclose the true nature of the plea bargain made with Elizabeth Hipple in exchange for her testimony. This assignment is argued in conjunction with the assignment that the trial court erred in not granting a new trial because of "prosecutorial misconduct in presenting the testimony of Elizabeth Hipple as true, when the prosecutor knew that she had failed a polygraph examination regarding her involvement in the robbery."

The defendant contends that conflicting statements made by the county attorney as to the extent and nature of Hipple's plea bargain constituted "false evidence" knowingly presented by the State.

Of the charges which could have been filed against Hipple, robbery and use of a firearm had definitely been dropped in exchange for her testimony. As to carrying a concealed weapon and felon in possession of a firearm, the parties stipulated that the county attorney was still empowered to file those charges against her. If this constituted "false evidence," any error was waived by the stipulation.

The defendant contends the county attorney incorrectly stated the nature of immunity available under Nebraska law in his closing argument and that this was

prejudicial to the defendant. We believe the allusion to "use immunity" in the final argument was not prejudicial. In *Kennedy v. State*, 171 Neb. 160, 175, 105 N.W.2d 710, 720 (1960), we said: "'Remarks of the prosecutor in final summation of the evidence to the jury which do not mislead and unduly influence the jury and thereby prejudice the rights of the defendant do not constitute misconduct.'" In *State v. Ellis*, 208 Neb. 379, 398, 303 N.W.2d 741, 753 (1981), we said: "'Although the prosecutor was less than artful at times, it does not appear that his conduct was meant to, or did, inflame the prejudices or excite the passions of the jury against the defendant.'"

The defendant also contends that the prosecutor knowingly presented false evidence by allowing Elizabeth Hipple to testify when he knew that she had failed a polygraph examination on the night of her arrest. After taking the polygraph examination, Hipple changed her story and admitted her participation in the robbery, which she had denied while taking the test.

The testimony Hipple gave at trial included her acknowledgment of her own participation in the robbery. The only time she denied her participation was before and during the polygraph examination on the night of her arrest. The same night, she admitted her own participation and continued to do so from then on.

As was noted in *State v. Oglesby*, 188 Neb. 211, 212, 195 N.W.2d 754, 755 (1972): "The fact an accomplice has been guilty of willful false swearing on a material matter does not automatically discredit his testimony as a matter of law in all cases. Ordinarily, his credibility is a question for the jury under a proper cautionary instruction." As we said in *State v. Leisy*, 207 Neb. 118, 128, 295 N.W.2d 715, 722 (1980): "The facts concerning [the accomplice's] background, motivation, credibility, and inconsistent statements were all before the jury. It was for them to determine the truth." The trial court did not err in refusing to grant a new trial on this ground.

The defendant's sixth assignment of error is that the trial court erred in not granting a new trial because of "prosecutorial misconduct in repeatedly vouching for the credibility of Elizabeth Hipple during questioning and during his statements to the jury."

The county attorney elicited from Hipple the fact that she understood that testifying for the State in this case meant giving testimony against the defendant, and that she understood that she was not immune from prosecution for perjury. In his closing argument the county attorney again noted that Hipple was not immune from prosecution for perjury. The defendant contends this testimony and the closing remarks amounted to the prosecutor "vouching for the credibility" of Hipple's testimony.

Kennedy v. State, supra, states at 175, 105 N.W.2d at 720-21: "'An argument by a prosecuting attorney, which is based on the evidence and inferences drawn therefrom, does not ordinarily constitute misconduct.'" Hipple's testimony as to the conduct of the robbery substantially tracked the testimony of the eyewitnesses. From this the jury could infer that Hipple was telling the truth. The testimony and argument that she was not immune from prosecution for perjury was no more than a correct statement of the law. Neb. Rev. Stat. § 29-2011.01 (Reissue 1979). The trial court did not err in refusing to grant a new trial on this ground.

The defendant's final assignment of error is that the District Court erred in imposing consecutive habitual criminal sentences of 10 years on both counts when the two crimes arose out of the same incident. His argument is that the use of a firearm in the commission of a felony statute, Neb. Rev. Stat. § 28-1205 (Reissue 1979), is an enhancement statute, and that by finding the defendant to be an habitual criminal as to both the robbery and the firearms-use statute, the defendant's sentence was doubly enhanced. The defendant likens the situation to the statute which makes third-offense driving while intoxicated a felony, while the first two offenses are

misdemeanors. Neb. Rev. Stat. § 39-669.07 (Reissue 1978).

The fallacy is in the defendant's argument that his sentence is being "doubly enhanced for one offense." Section 28-1205, which forbids the use of a firearm in the commission of a felony, specifically states: "(3) The crime defined in this section shall be treated as a separate and distinct offense from the felony being committed . . . ." Even though the two charges of which defendant was convicted arose out of the same transaction, they were separate and distinct offenses. The defendant's "double enhancement" argument is without merit, and the sentence was proper.

The judgment of the District Court is affirmed.

AFFIRMED.

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

WILLIAM R. KOCH, APPELLEE, V.
SANDRA L. KOCH, APPELLANT.

312 N.W.2d 294

Filed November 6, 1981. No. 44056.

1. **Child Custody.** In determining the question of which parent should have care and custody of the minor child upon the dissolution of a marriage, the paramount consideration must be the best interests of the child.
2. **Child Custody: Appeal and Error.** In evaluating the general concept of the best interests and welfare of the child, it is settled and fundamental law that this court will give weight to the fact that the trial judge saw and observed the witnesses and the attitude of the parties at the trial.
3. **Child Custody.** Among the factors to be considered in determining the best interests of a child are consideration as to the moral fitness of the parents, the respective environments offered by each parent, the emotional relationship between the child and its parents, and the age, sex, and health of the child.
4. ——. When a controversy arises between the natural parents as to the custody of a minor child, no presumption shall exist that one parent is more fit to have custody than the other.

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

Timothy J. Augustyn of Gross, Welch, Vinardi, Kauffman & Day, P.C., for appellant.

William E. Gast of Gast & Kielty for appellee.

Heard before BOSLAUGH, MCCOWN, CLINTON, and BRODKEY, JJ., and STANLEY, District Judge.

BRODKEY, J.

Sandra L. Koch has appealed from an order of the District Court of Douglas County, Nebraska, dissolving the marriage of the parties and awarding custody of their minor child to the father, William R. Koch, with visitation rights to the mother, Sandra. The only assignment of error alleged by the appellant is that the order of the District Court is contrary to the law and against the clear weight of the evidence adduced at trial. We affirm.

The record reveals that the parties were married in Omaha, Nebraska, on August 24, 1974, and had one child, Cassandra Lee Koch, born October 15, 1976. Since the time of his marriage, William has been continuously employed as a dockworker with an Omaha truckline company, working the 4 a.m. to 12:30 p.m. shift. Sandra worked as a grocery store clerk and at a local clothing company after the marriage until she became pregnant. The appellant stayed at home with the child for 2 years after the child was born.

It appears that the parties' marital relationship began to deteriorate after the appellant returned to the work force in April of 1979. The appellant blames the deterioration on the time William spent in repairing cars and adding an addition to the house. During the period between April 1979 and the time of the trial in October of 1980, Sandra obtained employment at four separate businesses in the Omaha area. The evidence also discloses that during this period Sandra became involved in an extramarital relationship with another man.

The parties attempted counseling to resolve their

marital difficulties. After one visit, however, the psychiatrist informed William that he need not return. The doctor also informed Sandra that she should end her extramarital relationship, which she did for a short time; however, she admitted to reentering the relationship. Finally, in May of 1980, Sandra took her child and separated from her husband.

On July 2, 1980, William filed a petition for dissolution of marriage. The parties agreed to a temporary order for support and attorney fees, and the temporary custody of the child was granted to Sandra. In the final decree of the dissolution, entered by the trial court on November 21, 1980, custody of Cassandra was awarded to William, subject to reasonable rights of visitation by the respondent, Sandra. In addition, the court ordered that Sandra was not obligated to pay child support.

In determining the question of which parent should have care and custody of a minor child upon the dissolution of a marriage, the paramount consideration must be the best interests of the child. *Kringel v. Kringel*, 207 Neb. 241, 298 N.W.2d 150 (1980); *Curfman v. Curfman*, 207 Neb. 1, 295 N.W.2d 299 (1980); *Whitlatch v. Whitlatch*, 206 Neb. 527, 293 N.W.2d 856 (1980); *Sikes v. Sikes*, 205 Neb. 441, 288 N.W.2d 43 (1980). As was noted in *Christensen v. Christensen*, 191 Neb. 355, 215 N.W.2d 111 (1974), the judgment concerning the best interests of a child is quite subjective in nature and, this being so, many factors must be considered in light of the circumstances of each particular case. The general considerations of the moral fitness of the parents, the respective environments offered by each parent, the emotional relationships between the child and its parents, and the age, sex, and health of the child are some of the many factors for the court to consider. In evaluating the general concept of the best interests and welfare of the child, it is settled law that this court will give weight to the fact that the trial judge saw and observed the witnesses and the attitude of the parties at trial. In addition, this court has stated that sexual mis-

conduct is a factor, although not necessarily determinative, which may be properly considered in determining the best interests of the child. *Ahlman v. Ahlman*, 201 Neb. 273, 267 N.W.2d 521 (1978); *Lockard v. Lockard*, 193 Neb. 400, 227 N.W.2d 581 (1975).

We have also stated the general rule to be that when a controversy arises between the natural parents as to the custody of a minor child, no presumption shall exist that one parent is more fit to have custody of the child than the other. *Turner v. Turner*, 205 Neb. 6, 286 N.W.2d 100 (1979). See, also, Neb. Rev. Stat. § 42-364(2) (Reissue 1978).

In the decree entered in this matter, the court found that both parties were fit and proper persons to have the care, custody, and control of Cassandra, but that the best interests of the child would be served by awarding custody to the father. At trial, the court made it clear that its findings were not based on the extramarital relationship maintained by the appellant. The evidence adduced at trial clearly supports the order of the court. Evidence as to the living environment of the parties reveals that William demonstrated a healthy daily routine during the time the parties were married. William did most of the household chores, washed the clothes, bathed Cassandra, read to her, and did the dishes. The appellee has maintained steady employment and his parents have indicated a willingness to assist him with the upbringing of his daughter.

The evidence in regard to the appellant reveals that she did not maintain a clean living environment; and her own mother, Barbara Fulkerson, testified that Sandra did not maintain a clean house. The appellant has not maintained stable employment and has indicated uncertainty as to her future finances. She has indicated a willingness to find a roommate, but has no one definite in mind. The appellant's sister has offered to live with her, but it was indicated that she would be getting married shortly after the trial. The evidence is unclear as to both the stability of the home environment and the

proper financial support that Cassandra could expect to receive from her mother.

The discretion of the trial court in the granting or changing of custody of minor children, while subject to review, will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. *Allen v. Allen*, 198 Neb. 544, 253 N.W.2d 853 (1977). From a review of the entire record, the trial court gave full and studied consideration to the best interests of Cassandra, and there is no showing that the trial court abused its discretion.

The award of custody to William is supported by the weight of the evidence, and we therefore affirm the judgment of the trial court.

AFFIRMED.

IN RE INTEREST OF KENNY EUGENE AND RANDY ALAN HITT, CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. JOY DELLA HITT, APPELLANT.

312 N.W.2d 297

Filed November 6, 1981. No. 44122.

1. **Parental Rights.** An order of the juvenile court terminating the parental rights under Neb. Rev. Stat. § 43-209 (Reissue 1978) must be based on clear and convincing evidence or it must be reversed.
2. ——. The right of parents to maintain custody of their child is a natural right, subject only to the paramount interests which the public has in the protection of the rights of a child.
3. ——. A court of this state may not properly deprive a parent of the custody of a minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship or has forfeited that right.

Appeal from the Separate Juvenile Court of Douglas County. Reversed and remanded with directions.

Roger R. Holthaus for appellant.

Donald L. Knowles, Douglas County Attorney, and

Francis T. Belsky for appellee.

Barbara L. Hosford, guardian ad litem.

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

KRIVOSHA, C.J.

Joy Della Hitt (mother), the natural mother of Kenny Eugene Hitt and Randy Alan Hitt, appeals from an order entered by the separate juvenile court of Douglas County, Nebraska, terminating her parental rights to her minor children. She assigns as error the fact that the trial court erred in ruling that the remarriage of short duration by appellant to the natural father of the children, who had been previously denied visitation rights with his children and whose parental rights were subsequently terminated, caused the children to come within the meaning of Neb. Rev. Stat. § 43-209(2) (Reissue 1978) in that the mother has substantially and continuously or repeatedly neglected the children and refused to give them necessary parental care and protection. We agree with the position tendered by the mother and reverse the action of the separate juvenile court.

An order of the juvenile court terminating the parental rights under § 43-209 must be based on clear and convincing evidence or it must be reversed. See, *In re Interest of Kimsey*, 208 Neb. 193, 302 N.W.2d 707 (1981); *In re Interest of Hiatt, ante* p. 195, 307 N.W.2d 108 (1981).

Furthermore, the right of parents to maintain custody of their child is a natural right, subject only to the paramount interests which the public has in the protection of the rights of a child. See *In re Interest of Kimsey, supra.* A court of this state may not properly deprive a parent of the custody of a minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship or has forfeited that right. *In re Interest of D., ante* p. 529,

308 N.W.2d 729 (1981).

Unfortunately, as is too often the situation in cases of this type, the in-court testimony by live witnesses is relatively scant. The bulk of the evidence was based on conclusionary letters from various agencies, which were not subject to cross-examination. We have previously indicated that if this court is to be able to examine the record de novo in order to determine that the evidence justifying the termination of parental rights is clear and convincing, something more than informal reports must be offered in evidence. Nevertheless, the evidence in this case, such as it is, is virtually without dispute.

Based upon our examination of the record, we are unable to conclude that either the best interests of the children require that the mother's parental rights be terminated or that the evidence to support that position is clear and convincing.

The evidence discloses that the mother was, for some 5 years prior to April of 1980, a chronic alcoholic. For a period of several months in 1978 and 1979, after the mother was divorced from the father, the father, by arrangement with the mother, had custody of the minor children. It was, in part at least, during that time, while the minor children were with the father, that the father committed a series of sexual assaults upon the children which ultimately resulted in the court terminating his parental rights to the children and sentencing him to the penitentiary for sexual assault on the children. On appeal to this court, the action in sentencing the father to the penitentiary was affirmed. See *State v. Hitt*, 207 Neb. 746, 301 N.W.2d 96 (1981).

Initially, a petition and motion seeking temporary custody of the children were filed by the county attorney against both the father and the mother alleging the father's abuse and the mother's failure to protect the children. A hearing on the petition seeking temporary custody was held on April 18, 1979,

and temporary custody was placed in the county. However, the mother was granted reasonable rights of visitation with the children, which she regularly exercised. A further hearing on the petition was held on November 5, 1979. Following that hearing the court, on December 27, 1979, found that grounds existed to terminate the parental rights of the father but not the mother. The court found that events which occurred prior to November 5, 1979, were insufficient to terminate the mother's parental rights, though sufficient to find that the children were neglected and dependent. The court continued jurisdiction over the children and granted the mother continuing rights of visitation. On February 15, 1979, the court entered an order terminating the father's parental rights. During all of this time, the mother was granted rights of visitation with the children, which she exercised at least in part.

The record further reflects that on January 11, 1980, while the mother was in the midst of a drinking bout, she remarried her former husband. It is unclear whether she ever lived with him following the remarriage. However, at no time during the entire brief remarriage were the children living with the mother or exposed to the father.

Nevertheless, based solely upon the fact that the mother had remarried, the county attorney filed a petition to terminate the parental rights of the mother. Apparently, the action of the county attorney was not without effect. Upon learning of the action taken by the county attorney, the mother set about once and for all to attempt to rehabilitate herself. Sometime in April of 1980 she had herself admitted to the Cherokee Mental Health Institute to begin treatment for her alcoholism. There she remained and was rehabilitated.

A hearing on the motion to terminate was held on July 31, 1980. At that time the county attorney offered in evidence the marriage certificate, and rested.

At the disposition hearing on August 25, 1980, the

State offered several written reports. The State's first exhibit was a report dated August 12, 1980, and signed by Dr. Beverly Mead, consulting psychiatrist. The report was solely with regard to Kenny and provided in part: "While it is not our custom to make recommendations, but to instead present only facts as they are documented in our files, it is felt that this particular case warrants special consideration due to Ken's strong feelings and ties to his mother. Therefore, the staff at Saratoga 01, in consultation with Dr. Mead, make the following recommendations which should be considered as a unit or package:

"One: Ken should be placed in foster care as soon as a suitable placement can be found.

"Two: It is felt that for the above reasons Ken's mother should retain visitation rights as allowed by the laws of Nebraska and the normal procedures of the foster care program."

Exhibit 2 was a letter signed by Mr. Todd J. Bruett, coordinator, Child & Family Psychiatry Services. Among the recommendations was the following: "That both boys, if possible, be allowed to maintain some type of contact with their biological mother. Kenny's attachment to his mother appears to be stronger than Randy's but both would profit should Mrs. Hitt continue to progress."

Exhibit 3 was a report signed by Michael J. Meredith, Douglas County Social Services. While the report recommends termination of the mother's parental rights, there is little factual basis upon which the determination is based. The report concludes by saying: "Despite Mrs. Hitt's current improvement I seriously doubt the family can ever be successfully reunited. The seperation [sic] of over 16 months is the primary reason for this. The vast improvement shown by both boys, especially Randy, indicates that it would be in their best interests to terminate their mother's parental rights."

Exhibit 4 was a letter from Nebraska Children's

Home Society to the court concerning Randy. It made no recommendation concerning the mother's parental rights.

The mother also testified at the hearing that she realized the problem that she had previously had with alcohol and admitted that she was indeed an alcoholic. She further testified, however, that she had made significant strides with regard to her drinking and that she believed she did in fact now have it under control. She stated that she had strong and adverse feelings toward her former husband and that if he appeared she would call the police and have him arrested. Her testimony was supported by Nancy Zimbra, social worker for Cherokee Mental Health Institute.

Based upon this meager record, the court entered an order terminating her parental rights. As we have previously indicated, we believe that the evidence simply will not support the action of the trial court. If the record reflects anything, it reflects that at the time the court determined to terminate the parental rights, the mother had made a substantial and important improvement in both her own physical condition and her relationship with the children. The mere fact that the mother, in a moment of intoxication, foolishly remarried the father, absent any other evidence indicating that the father was thereby given the opportunity to have access to the children, does not justify finding the mother unfit nor justify terminating her parental rights. Quite to the contrary, the evidence is somewhat encouraging that the mother has indeed attempted to put her life together and, with continued care from others, can indeed become a real mother to the children. The State should afford her the opportunity to do so.

It appears to us that at the very moment the mother has finally shown some strength regarding her own life and the life of her children, she is rejected by the court. The record does not seem to justify such action. If the

mother can continue in the future as she has in the immediate past, there is no reason to believe that she will not be an adequate mother to her minor children.

The evidence, at the present time, does not, however, indicate that the mother is able to assume all the responsibility for the care and maintenance of her minor children. It would therefore appear to be appropriate that her parental rights be restored, but that the county retain temporary custody of the children and keep them in foster care. A program should be developed, however, whereby visitation and contact between the mother and her two minor children are permitted whenever possible, to the end that, through aid of the county, the mother can have permanent custody of her children once again in the not-too-distant future. The order of the separate juvenile court terminating the parental rights of the mother is reversed and the matter is remanded to the separate juvenile court with directions to develop a program whereby the mother may exercise broad visitation rights with the minor children and may attempt, at the earliest possible moment, to regain permanent custody of her minor children. Should such efforts prove unsuccessful, the county has sufficient authority to take necessary and appropriate action at that time.

REVERSED AND REMANDED WITH DIRECTIONS.

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Acknowledgments.

A mortgage on real estate, other than as to the homestead, executed and delivered by the mortgagor is valid between the parties, even though it was not lawfully acknowledged. O'Neill Production Credit Assn. v. Mitchell 206

Actions.

1. Where the loan receipt under which the insurer advances money to an insured obligates the insurer to bear the expense of all legal proceedings pursued in prosecuting the claims of the insured which the insured has pledged to the insurance company, it is improper to charge the insured with any of the expenses of litigation. Hammond v. Nebraska Nat. Gas Co. 616
2. An insurer which recovers, on behalf of its insured in a negligence action brought against a third person, the amount which the insurer has paid the insured is entitled to the judgment interest awarded on that amount, even though the loan receipt under which the insurer advanced funds to the insured provides that the loan is without interest, as such interest is not paid directly or indirectly by the insured but is paid by the third party with whom the insured has ceased to have concern and privity. Hammond v. Nebraska Nat. Gas. Co. 616

Adverse Possession.

1. To claim by adverse possession, the claimant must show by a preponderance of the evidence actual, open, exclusive, and continuous possession under a claim of ownership for 10 years. Wiedeman v. James E. Simon Co., Inc. 189
2. To gain title by adverse possession against a true owner, acts of dominion over the land must be so open, notorious, and hostile as to put an ordinarily prudent person on notice of the fact that his lands are in the adverse possession of another. Wiedeman v. James E. Simon Co., Inc. 189
3. Sufficiency of possession depends upon the character of the land and the use that can reasonably be made of it. Wiedeman v. James E. Simon Co., Inc. 189
4. When a fence is constructed as a boundary line, although it is not the actual boundary line, and the parties claim ownership of land up to the fence for the uninterrupted statutory period, the claimant gains title to such land by adverse possession. Wiedeman v. James E. Simon Co., Inc. 189
5. A prescriptive right is not looked upon with favor, and generally must be proved by clear, convincing, and satisfactory evidence. Sturm v. Mau 865

6. To establish a road or highway by prescription, there must be a use by the general public, under a claim of right adverse to the owner of the land, of some particular or defined line of travel, and the use must be uninterrupted and without substantial change for 10 years, the period of time necessary to bar an action to recover the land. Sturm v. Mau 865
7. Ordinarily, where a claimant has shown open, visible, continuous, and unmolested use of land for a period of time sufficent to acquire an easement by adverse user, the use will be presumed to be under a claim of right. Under such circumstances, the owner of the servient estate, in order to avoid acquisition of an easement by prescription, has the burden of rebutting the presumption by showing the use to have been permissive. Sturm v. Mau 865
8. The presumption of adverse use does not arise when a prescriptive easement is claimed over land which is unenclosed and which has no defined pathway across it. Sturm v. Mau 865
9. If the initial entry is adverse, an actual claim of ownership is not necessary to establish a claim of right. Sturm v. Mau 865
10. If adverse possession continues for the required 10 years, the adverse holding ripens into ownership in the absence of explanatory circumstances affirmatively showing the contrary, such as occupancy under a lease, an easement, or a permissive use; the title of the true owner is lost by his inaction. Sturm v. Mau 865
11. It is not indispensable to the establishment of a highway by prescription that there be no deviation in the line of travel; if the course of travel has remained substantially unchanged for the full period, it is sufficent even though at times, to avoid encroachments, obstructions, or the like, there have been slight changes in the line of travel. Sturm v. Mau . 865
12. A diminution in the number of users does not constitute an abandonment of a road acquired by prescription. Sturm v. Mau 865

Affidavits.

1. As a general rule, an affidavit is not admissible to establish facts material to the issue being tried. Doyle v. Union Ins. Co. 385
2. Although an affidavit supporting a search warrant may be based on hearsay information and need not reflect the direct personal observations of the affiant, the magistrate must be informed of some of the underlying circumstances relied on by the person providing the information and some of the underlying circumstances from which the affiant concluded that the informant, whose identity was not disclosed, was creditable or his information reliable. State v. Meyer ... 757
3. An affidavit for a search warrant is not defective simply

because it is based on hearsay, so long as the affidavit discloses a substantial basis for crediting the hearsay. Firsthand knowledge of an informant, acquired by sight or hearing, is self-corroborating and tends to fulfill both aspects of the *Aguilar* test. State v. Meyer 757
4. An affidavit is sufficient if it contains a full and complete statement of the underlying factual circumstances which justify the issuance of an order authorizing a wiretap. State v. Lozano 772
5. Staleness is an issue which must be decided on the peculiar facts of each case. State v. Lozano 772
6. Documents incorporated into an affidavit by reference need not be sworn to separately. State v. Lozano 772

Aiding and Abetting.

Aiding and abetting involves some participation in the criminal act and must be evidenced by some word, act, or deed. No particular acts are necessary; nor is it necessary that any physical part in the commission of the crime is taken or that there was an express agreement therefor. Mere encouragement or assistance is sufficient. State v. Loveless 583

Alimony.

1. In determining whether alimony should be awarded, the ultimate test is one of reasonableness.
   Watkins v. Watkins 14
   Johnson v. Johnson 317
2. Although alimony and allocation of property rights are distinguishable and have different purposes in marriage dissolution proceedings, they are still closely related in the matter of determining the amount to be allowed, and circumstances may require that they be considered together to determine whether the court has abused its discretion. Kullbom v. Kullbom 145
3. A judgment of the trial court fixing the amount of alimony or making distribution of the property will not be disturbed on appeal in the absence of an abuse of discretion. Kocarnik v. Kocarnik 454

Appeal and Error.

1. In an action in equity, it is the duty of the Supreme Court to try the issues de novo upon the record and to reach an independent conclusion without being influenced by the findings of the trial court, except, where the credible evidence is in conflict, to give weight to the fact that the trial court saw the witnesses and observed their demeanor while testifying, that it inspected the premises, and that its examination con-

stituted evidence tending to influence belief or unbelief of the matters at issue in the case.
Schmidt v. Chimney Rock Irrigation Dist. 1
McDonald's Corp. v. Markim, Inc. 49
O'Neill Production Credit Assn. v. Mitchell 206
Knoell Constr. Co., Inc. v. Hanson 461
Sturm v. Mau 865

2. In cases involving custody of neglected or dependent children and the termination of parental rights in juvenile court, the findings of the trial court will not be disturbed on appeal unless they are against the weight of the evidence.
In re Interest of Wagner and Russell 33

3. The judgment of the trial court in a law action where a jury has been waived has the effect of a jury verdict and will not be set aside unless clearly wrong.
Moss v. Speck 46
Honstein Trucking v. Sandhills Beef, Inc. 422
Crawford v. Ham 802
In re Estate of Schoch 812
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4. 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.
In re Interest of J.L.L. 76
In re Interest of Kain 229

5. 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. LaGord Assoc. v. County of Cass 99

6. 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.
LaGord Assoc. v. County of Cass 99

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. Sharski 122

8. Dissolution of marriage actions are tried de novo on the record; however, this court, in reaching its decision, 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. Kullbom v. Kullbom . 145
9. It is not the province of this court to resolve conflicts in the evidence, pass upon the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
State v. Farr 163
State v. Rolling 243
State v. Holloman 828
10. This court will not interfere on appeal with a conviction based upon evidence unless it is so lacking in probative force that the court can say as a matter of law that it is insufficient to support a verdict of guilt beyond a reasonable doubt. State v. Rolling 243
11. In a workmen's compensation case, the findings by the Workmen's Compensation Court have the force and effect of a jury verdict and will not be set aside unless clearly wrong.
Osteen v. A.C. and S., Inc. 282
Riha v. St. Mary's Church & School, Inc. 539
12. An order overruling a special appearance is not a final order from which an appeal can be taken. State v. Jones 296
13. In the absence of a final order which disposes of a case, this court has neither authority nor jurisdiction to act on an attempted appeal and the same will be dismissed. State v. Jones 296
14. Where the record affirmatively shows that the only ruling complained of is clearly right and plainly in accordance with law, an appeal will be dismissed as frivolous. State v. Jones 296
15. This court is not inclined to disturb the division of property made by the trial court unless it is patently unfair on the record.
Johnson v. Johnson 317
Redmond v. Redmond 745
16. Errors assigned but not discussed will generally not be considered by the Supreme Court. Johnson v. Johnson 317
17. In a proceeding brought under the Political Subdivisions Tort Claims Act, the findings of fact by the trial court will not be overturned unless clearly wrong. Lee v. City of Omaha 345
18. When a litigant has approved instructions in the trial court, either by word or act, he cannot thereafter effectively complain of instructions given.
Lane v. State Farm Mut. Automobile Ins. Co. 396
Wooley v. Kittle 669

19. Instructions must be taken as a whole and construed together, and where the instructions covered the issues and fairly submitted the case to the jury, the jury's verdict will not be disturbed unless it is clearly erroneous. Lane v. State Farm Mut. Automobile Ins. Co. 396
20. The trial court ordinarily has a better opportunity for practically appraising the award of attorney fees, and an appellate court will only interfere to correct a patent injustice where the allowance is clearly excessive or insufficient. Lane v. State Farm Mut. Automobile Ins. Co. 396
21. Upon an appeal from an order of the commission granting a certificate, this court may decide only whether the commission acted within the scope of its authority and whether the order in question was reasonable and not arbitrarily made. In re Application of Greyhound Lines, Inc. 430
22. This court will not disturb an order of the commission based on evidence unless the evidence shows that the order was unreasonable or arbitrary. In re Application of Greyhound Lines, Inc. 430
23. Filing of a notice of appeal in this court vests exclusive jurisdiction in this court. State v. Ditter 452
24. In the absence of a motion for new trial in a criminal case, the only issues remaining for argument are whether the pleadings support the judgment and whether the judgment is excessive. State v. Ditter 452
25. A judgment of the trial court fixing the amount of alimony or making distribution of the property will not be disturbed on appeal in the absence of an abuse of discretion. Kocarnik v. Kocarnik 454
26. An appeal to the District Court from action of the county board of equalization is heard as in equity, and upon appeal therefrom to this court it is tried de novo. Lincoln Tel. & Tel. Co. v. County Board of Equalization 465
27. A proper judgment will not be reversed because the trial court gave an erroneous reason for its rendition. Lincoln Tel. & Tel Co. v. County Board of Equalization 465
28. In a law action it is not within the province of the Supreme Court to weigh or resolve conflicts in the evidence. The credibility of witnesses and the weight to be given their testimony are for the trier of fact. Trout v. Olson Bros. Mfg. Co. 477
29. A verdict by a jury based upon conflicting evidence will not be set aside on appeal unless it is clearly wrong. Trout v. Olson Bros. Mfg. Co. 477
30. A sentence imposed which is within the statutory limits will not be disturbed on appeal absent an abuse of discretion. State v. Jackson 486
31. An information first questioned on appeal must be held sufficient unless it is so defective that by no construction can it

be said to charge the offense of which the accused was convicted. State v. Lingle 492
32. A complaint charging a statutory misdemeanor substantially in the language of the statute will be liberally rather than technically construed, and if a defect is amendable, it will be held sufficient on appeal in the absence of objection in the trial court. State v. Lingle 492
33. When complaint is made of the refusal of the District Court to give an instruction asked, the burden is upon the party complaining to show not only that he was probably prejudiced by the refusal of the court to give the instruction, but he must also show that the entire instruction was correct as a proposition of law and applicable to the facts in evidence in the case. State v. Lingle 492
34. On an appeal to the Supreme Court from an order of the Nebraska Public Service Commission, administrative or legislative in nature, the only questions to be determined are whether the commission acted within the scope of its authority and if the order complained of is reasonable and not arbitrarily made. Herman Bros., Inc. v. Spector Industries, Inc. 513
35. The determination of what is consistent with the public interest, or public convenience and necessity, is one that is peculiarly for the determination of the Nebraska Public Service Commission. If there is evidence to sustain the finding of the commission, this court cannot intervene.
Herman Bros., Inc. v. Spector Industries, Inc. 513
In re Application of Best 524
36. The trial court has no jurisdiction to enter an order after the defendant has perfected his appeal to the Supreme Court. Beavers v. Graham 556
37. An action for termination of parental rights is reviewed by this court de novo upon the record. In re Interest of Bird Head 575
38. Failure to object to instructions after they are submitted to counsel for review precludes raising objections to said instructions on appeal. Wooley v. Kittle 669
39. Under Neb. Ct. R. 8.a.2.(3) (Rev. 1977), we may, on appeal, notice plain errors not assigned. In re Interest of Burbanks and Rima 676
40. In the absence of a timely motion for new trial, a notice of appeal must be filed within 1 month after the rendition of the judgment or decree or the making of the final order. Novak v. Nelsen 728
41. The exercise by the trial court of its discretion in ruling on the admission or rejection of evidence will generally not be reviewed by an appellate court, unless it is clearly or plainly shown that the trial court abused its discretion. Stephen v. City of Lincoln 792

42. In reviewing an appeal from the decision of a trial court in a law action, the review is not de novo. The judgment of the District Court will not be set aside on appeal unless it is clearly wrong and not supported by the evidence. Crawford v. Ham 802
43. In determining whether the evidence supports the findings of the trial court in an action at law where a jury has been waived, the evidence must be considered in the light most favorable to the successful party, all conflicts must be resolved in his favor, and he is entitled to the benefit of every inference that can reasonably be deduced from the evidence.
Crawford v. Ham 802
In re Estate of Schoch 812
B Town, Inc. v. Albright 819
44. An information first questioned on appeal must be held sufficient unless it is so defective that by no construction can it be said to charge the offense for which the accused was convicted. State v. Coleman 823
45. Findings of fact made by the District Court in a case brought under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1977), will not be disturbed on appeal unless clearly wrong. Watson v. City of Omaha .. 835
46. Error may not be predicated upon a ruling which excludes evidence, unless a substantial right of the party is affected. Sturm v. Mau 865
47. The scope of review in the Nebraska Supreme Court for findings of fact made by the three-judge panel of the Nebraska Workmen's Compensation Court after rehearing is that those findings of fact shall have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong. Engel v. Nebraska Methodist Hospital 878
48. In evaluating the general concept of the best interests and welfare of the child, it is settled and fundamental law that this court will give weight to the fact that the trial judge saw and observed the witnesses and the attitude of the parties at the trial. Koch v. Koch 896

Appearance Bonds.

A defendant who is released following imposition of sentence to reappear upon further order of the court has been "released from custody under . . . a conditioned release" within the meaning of Neb. Rev. Stat. § 29-908 (Reissue 1979). State v. Robinson 726

Arrests.

1. An arrest is taking custody of another person for the purpose of holding or detaining him to answer a criminal charge. It is

defined as the taking, seizing, or detaining of the person of another. State v. White 218
2. To effect an arrest there must be actual or constructive seizure or detention of the person arrested, or his voluntary submission to custody, and the restraint must be under real or pretended legal authority. State v. White 218
3. Constructive, as distinguished from physical, restraint sufficient to constitute a constructive seizure or detention of an arrestee exists where an officer has the intention to effect an arrest, that intention has in some way been communicated to the arrestee, the arrestee understands that he is under legal restraint, and the officer has the apparent present power to control the person even though he has not yet asserted physical control. State v. White 218
4. A touching is not necessarily essential to effectuate an arrest. State v. White 218
5. A lesser-included offense is one which is necessarily established by proof of the greater offense. To be a lesser-included offense, the elements of the lesser offense must be such that it is impossible to commit the greater without at the same time having committed the lesser. Resisting arrest is not a lesser-included offense of escape for, among other reasons, the crime of escape does not necessarily involve the use of force. State v. White 218
6. Neb. Rev. Stat. § 28-416(6)(a) (Reissue 1979) merely authorizes the issuance of citation in the case of certain violations and does not prohibit a police officer from arresting the offender whenever otherwise authorized by law. State v. Watts 371
7. The constitutionality of a search incident to an arrest does not depend on whether there is any indication that the person arrested possesses weapons or evidence. The fact of a lawful arrest, standing alone, authorizes a search. State v. Watts 371
8. In making an arrest, an officer may use whatever force is reasonably necessary. Reasonable force is generally considered to be that which an ordinarily prudent and intelligent person, with the knowledge and in the situation of the arresting officer, would have deemed necessary under the circumstances. State v. Lingle 492
9. The officer is not required to determine at his peril the precise amount of force necessary in each instance and to use that much and no more, and he may be guided by the reasonable appearances and the nature of the case in determining the amount of force to be used. State v. Lingle 492
10. The reasonableness of the force used in effecting an arrest is a question for the jury. State v. Lingle 492
11. 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. Nowicki 640

12. Probable cause is to be evaluated by the collective information of the police engaged in a common investigation. State v. Nowicki 640

Assault.

Multiple injuries including a cerebral concussion and nasal fracture constitute serious bodily injuries which will support a conviction for first degree assault under Neb. Rev. § 28-308(1) (Reissue 1979). State v. Sare 91

Attachments.

Upon dissolution of an attachment, ordinarily all property attached should be returned to the defendant owner. Ceres Fertilizer, Inc. v. Beekman 447

Attorney Fees.

1. Either the county court or the District Court on appeal ordinarily has discretionary power and authority to order payment of costs and, in proper cases, to order payment of reasonable fees to attorneys for services rendered to a good faith trustee out of the trust estate in litigation. In re Guardianship of Bremer 267
2. There is no rule which requires a trial court to necessarily award attorney fees in accordance with the value of the services in a divorce case. The award of attorney fees is discretionary with the trial court and depends upon a variety of factors, including all the circumstances, such as the amount of the division of property and alimony awarded, the earning capacity of the parties, and the general equities of the situation. Johnson v. Johnson 317
3. An attorney's claim for professional services against persons sui juris, or against the property of such persons, must rest upon a contract of employment, express or implied, made with the person sought to be charged or with his agent. Doyle v. Union Ins. Co. 385
4. In determining the award of attorney fees, the court *may consider* the actual agreement existing between a litigant and his attorney, including an obligation to pay a contingent fee, particularly if such contract is customary in the locality. However, such agreement is neither the sole factor nor a factor to be given any greater weight than any other factor. The test is whether the fee is reasonably compensatory for the services rendered. Lane v. State Farm Mut. Automobile Ins. Co. 396

5. The trial court ordinarily has a better opportunity for practically appraising the award of attorney fees, and an appellate court will only interfere to correct a patent injustice where the allowance is clearly excessive or insufficient. Lane v. State Farm Mut. Automobile Ins. Co. 396
6. The award of attorney fees and the taxing of costs is discretionary with the District Court. Kocarnik v. Kocarnik 454
7. Under the "common fund" doctrine, where the holder of subrogation rights does not come into the action, whether he refuses to do so or acquiesces the action brought by the plaintiff, but accepts the avails of the litigation, he is subjected to his proportionate share of the expenses thereof, including attorney fees. However, this rule is not applicable where the party sought to be charged has employed his or its own attorney and has actively participated in the litigation, and such counsel has not terminated, abandoned, or acquiesced in the representation of his client by other counsel. Hammond v. Nebraska Nat. Gas Co. 616

Attorneys' Liens.

To be entitled to an attorney's lien under Neb. Rev. Stat. § 7-108 (Reissue 1977), it is first necessary that an attorney-client relationship, either express or implied, exists. Hammond v. Nebraska Nat. Gas Co. 616

Bonds.

A bond does not cover defaults of the principal occurring prior to the effective date of the bond, unless the bond expressly provides otherwise, for it cannot be assumed that the surety intended to be bound by the past delinquencies of the principal. Stock v. Meissner 636

Breach of Warranty.

1. A purchaser of goods under the Uniform Commercial Code claiming a breach of warranty must prove not only the warranty and the breach thereof; he must also prove the cause of the loss and the extent thereof. Settell's, Inc. v. Pitney Bowes, Inc. 26
2. The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods as accepted and the value they would have had if they had been as warranted. Settell's, Inc. v. Pitney Bowes, Inc. 26

Brokers.

1. A broker is not entitled to a commission from a seller for producing a ready, willing, and able buyer, where the buyer is only willing to execute an option and the seller does not

prevent exercise of the option. DaLee Realty, Inc. v. Kuhl 6
2. A broker earns his commission and becomes entitled thereto when he produces a purchaser who is ready, able, and willing to purchase at a price and upon terms specified by the principal or satisfactory to him. Oehlrich v. Gateway Realty of Columbus, Inc. 417

Causes of Action.
A cause of action has been defined as consisting of a primary right possessed by the plaintiff and a corresponding duty devolving upon the defendant, combined with a delict or wrong done by the defendant. Gaspar v. Flott 260

Child Custody.
1. The public has a paramount interest in the protection of children from abuse and neglect. In re Interest of Wood and Linden 18
2. The principal concern in custody cases is the best interests of the child.
   In re Interest of Wood and Linden 18
   Wible v. Wible 708
3. In cases involving custody of neglected or dependent children and the termination of parental rights in juvenile court, the findings of the trial court will not be disturbed on appeal unless they are against the weight of the evidence. In re Interest of Wagner and Russell 33
4. A decree awarding custody of a minor child and 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 of a nature requiring modification in the best interests of the child. Helgenberger v. Helgenberger 184
5. Sexual misconduct is a factor which may be considered in determining what is in the best interests of minor children, but it is not necessarily determinative. The nature of the act or acts, the circumstances surrounding the commission thereof, and the probable effects as are related to the future welfare of the children must be carefully considered. Helgenberger v. Helgenberger 184
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 injurious to the health, safety, and well-being of the child, the best interests of the child become paramount. In re Interest of Hiatt .. 195
7. When a controversy arises between the natural parents as to the custody of minor children, no presumption shall exist that one parent is more fit to have custody of the children than the other.

Kocarnik v. Kocarnik 454
Koch v. Koch 896

8. A child custody proceeding includes "any action which results in the termination of the parent-child relationship." 25 U.S.C.A. § 1903 (Supp. 1963 to 1980). In re Interest of Bird Head 575
9. In determining the question of who should have the care and custody of children upon the dissolution of a marriage, the paramount consideration is the best interests and welfare of the children.
Wible v. Wible 708
Koch v. Koch 896
10. 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. Wible v. Wible 708
11. In evaluating the general concept of the best interests and welfare of the child, it is settled and fundamental law that this court will give weight to the fact the trial judge saw and observed the witnesses and the attitude of the parties at the trial. Koch v. Koch 896
12. Among the factors to be considered in determining the best interests of a child are consideration as to the moral fitness of the parents, the respective environments offered by each parent, the emotional relationship between the child and its parents, and the age, sex, and health of the child. Koch v. Koch 896

Child Support.

1. A decree awarding custody of a minor child and 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 of a nature requiring modification in the best interests of the child. Helgenberger v. Helgenberger 184
2. Where the custodial parent has removed the minor children from the jurisdiction of the trial court, the costs of exercising reasonable visitation by a noncustodial parent is a factor which may be considered along with all other attendant circumstances in determination of a modification of an existing award for child support. Harb v. Harb 875

Collateral Estoppel.

A prior criminal proceeding can work a collateral estoppel in a subsequent civil proceeding, if the question involved is distinctly put in issue and directly determined in the criminal action. Fowler v. Nat. Bank of Commerce 861

Colleges and Universities.

The Scholarship Award Program, provided by Neb. Rev. Stat. §§ 85-980 to 85-9,102 (Cum. Supp. 1980), does not violate Neb. Const. art. VII, § 11, or art. XIII, § 3. Lenstrom v. Thone 783

Commission of Industrial Relations.

1. The Commission of Industrial Relations, as an administrative body, has no power or authority other than that specifically conferred by statute or by a construction necessary to accomplish the plain purpose of the act. IBEW Local 763 v. Omaha P.P. Dist. 335
2. Under the provisions of Neb. Rev. Stat. § 48-819 (Cum. Supp. 1980), the Commission of Industrial Relations has no authority to enforce its own orders, such orders only being enforceable in an appropriate proceeding in courts of this state. IBEW Local 763 v. Omaha P.P. Dist. 335
3. An order of the Commission of Industrial Relations constitutes a contract between the parties, enforceable as any other contract entered into by the parties. IBEW Local 763 v. Omaha P.P. Dist. 335
4. An order of the Commission of Industrial Relations, once sued upon, may bear prejudgment interest, just as certain other contracts sued upon may bear prejudgment interest; however, such fact does not authorize the Commission of Industrial Relations to order the payment of interest as a part of its order. Such authority lies solely with an appropriate court and comes into effect only when entered by that appropriate court, in the same manner to which any other suit upon a contract would be subject to the payment of prejudgment interest if and when ordered by an appropriate court. IBEW Local 763 v. Omaha P.P. Dist. 335

Confessions.

1. In determining whether the State has shown the admissibility of custodial statements by the requisite degree of proof, this court will accept the factual determination and credibility choices made by the trial judge unless they are clearly erroneous, and in so doing we will look to the totality of the circumstances.
   State v. Teater 127
   State v. Strickland 133
2. To be admissible, a statement or confession must be free and voluntary. It must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. State v. Teater 127
3. The admissibility of statements obtained after the person in

custody has decided to remain silent depends under *Miranda* on whether his right to cut off questioning was scrupulously honored. State v. Strickland 133
4. The applicable standard to determine the admissibility of statements made by an accused during a custodial interrogation is whether the accused intelligently, knowingly, and voluntarily waived his right to remain silent and his right to have counsel present at that time. State v. Strickland ... 133
5. The standards to determine the admissibility of statements made after an illegal arrest are: (1) The administration of the *Miranda* warnings prior to the statement; (2) The temporal proximity of the arrest and the confession; (3) The intervening circumstances between the initial detention and the challenged statements; (4) The purpose and flagrancy of the official misconduct; and (5) The voluntariness of the statement must be established. State v. Smith 505
6. Where there is one confession by a defendant properly admitted into evidence and there was strong corroborative evidence of the guilt of the defendant, the admission of another confession, even though it should have been excluded, is harmless error. State v. Smith 505
7. A statement by an interrogating officer that, if the person being questioned would give a statement to the officer, the officer would advise the county attorney that the person being questioned had cooperated by giving a statement is not such an inducement as to render a statement given under such circumstances involuntary and, therefore, subject to being suppressed. State v. Muenchau and Brown 552

Consideration.
1. A preexisting debt is a valuable and sufficient consideration for a mortgage given to secure that debt. O'Neill Production Credit Assn. v. Mitchell 206
2. A real estate mortgage given to secure the preexisting debt of another is supported by valuable and sufficient consideration. O'Neill Production Credit Assn. v. Mitchell 206
3. While executory and before a breach, the terms of a written contract may be changed by a subsequent parol agreement; and such subsequent agreement requires no new consideration. First Data Resources, Inc. v. Omaha Steaks Int., Inc. 327

Constitutional Law.
1. Neb. Rev. Stat. § 43-209 (Reissue 1978) is sufficiently definite, both facially and as applied in this case, to withstand constitutional attack based on vagueness. In re Interest of J.L.L. 76
2. The sixth amendment right to assistance of counsel at a

police lineup attaches only at or after the time that adversary judicial proceedings have been initiated against the defendant by the filing of an indictment or information. State v. Smith 86

3. A preindictment or preinformation lineup may be challenged on due process grounds if the lineup is unnecessarily suggestive and conducive to irreparable mistaken identification. State v. Smith 86
4. When the Legislature chooses to inaugurate reforms in the area of economics or social welfare, it is not required to make the choice between attacking every aspect of a problem or not attacking the problem at all, as long as the action has a rational basis and is free from invidious discrimination. Otto v. Hahn 114
5. The one attacking the exemption of farm laborers from the provisions of the Workmen's Compensation Act as a violation of equal protection has the burden of proving that there is no rational basis for the classification. Otto v. Hahn 114
6. 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. Sharski 122
7. Ordinances and statutes are presumed to be constitutional, and their unconstitutionality must be clearly established. Courts will not pass upon a question of constitutionality unless it becomes necessary to do so. State v. Austin 174
8. So long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file, generally rests entirely in his discretion. Within the limits set by the Legislature's constitutionally valid definition of chargeable offenses, the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation so long as the selection was not deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification. State v. White 218
9. Article III, § 2, of the Constitution of the United States, which grants original jurisdiction to the Supreme Court of the United States in cases in which a state may be a party, is neither a mandatory nor an exclusive grant of jurisdiction so as to deprive the state courts of jurisdiction in cases involving a state and one of its citizens. State v. Jones 296
10. The rule that a person cannot be twice put in jeopardy for the same offense has no application where two separate and distinct crimes are committed by one and the same act. The constitutional inhibition is directed to the identity of the offense and not to the act. State v. Stabler 298
11. The Legislature may provide for the trial of petty offenses in

violation of a city or village ordinance without a jury when Article I, § 6, of the Constitution of Nebraska is not violated. State v. Flores 302
12. A defendant who is charged with the violation of a city ordinance, with a maximum authorized penalty of 6 months' incarceration, is not entitled to a jury trial under the U.S. Constitution. State v. Flores 302
13. The constitutionality of a search incident to an arrest does not depend on whether there is any indication that the person arrested possesses weapons or evidence. The fact of a lawful arrest, standing alone, authorizes a search. State v. Watts 371
14. The capacity to claim the protection of the fourth amendment as to unreasonable searches and seizures depends not upon a property right in the invaded place but upon whether the person who claims the protection of the amendment has a legitimate expectation of privacy in the invaded place. State v. Cemper 376
15. A person has no legitimate expectation of privacy in an open field in which he has no personal ownership or possessory rights, and cannot claim the protection of the fourth amendment as to unreasonable searches and seizures. State v. Cemper 376
16. Conditions in probation orders requiring the probationer to submit to warrantless searches, to the extent that they contribute to the rehabilitation process and are done in a reasonable manner, are valid and constitutional. State v. Lingle 492
17. Neb. Rev. Stat. §§ 86-701 to 86-712 (Reissue 1976) provide their own exclusionary rule which exists separate and independent of any court-created exclusionary rule involving the fourth amendment. State v. Aulrich 546
18. The provisions of Neb. Rev. Stat. § 29-411 (Reissue 1979), providing for entry for search pursuant to warrant "without giving notice of his authority and purpose, if the judge or magistrate issuing a search warrant has inserted a direction therein that the officer executing it shall not be required to give such notice . . . . The judge or magistrate may so direct only upon proof under oath, to his satisfaction that the property sought may be easily or quickly destroyed or disposed of . . . if such notice be given," do not offend the fourth amendment prohibition against unreasonable search and seizure. State v. Meyer 757
19. The Scholarship Award Program, provided by Neb. Rev. Stat. §§ 85-980 to 85-9,102 (Cum. Supp. 1980), does not violate Neb. Const. art. VII, § 11, or art. XIII, § 3. Lenstrom v. Thone 783
20. The Legislature has plenary legislative authority limited only by the state and federal Constitutions. Lenstrom v.

Thone 783
21. The Nebraska Constitution is not a grant but, rather, a restriction on legislative power, and the Legislature may legislate on any subject not inhibited by the Constitution. Lenstrom v. Thone 783
22. The Nebraska Constitution is not a grant but a restriction of legislative power. Consequently, courts can enforce only those limitations which the Constitution imposes. Lenstrom v. Thone 783
23. Unless restricted by some provision of the state or federal Constitution, the Legislature may enact laws and appropriate funds for the accomplishment of any public purpose. It is for the Legislature to decide in the first instance what is and what is not a public purpose, but its determination is not conclusive on the courts. However, to justify a court in declaring a statute invalid because its object is not a public purpose, the absence of public purpose must be so clear and palpable as to be immediately perceptible to the reasonable mind. Lenstrom v. Thone 783
24. Implied restrictions on the legislative power are not to be inferred unless the restriction is one that is clearly implied. Lenstrom v. Thone 783
25. Legislation which serves a public purpose is not constitutionally impermissible because incidental benefits may accrue to others. Lenstrom v. Thone 783
26. A duly enacted statute is presumed constitutional and may not be invalidated by the court unless clearly in contravention of a provision of fundamental law or of public policy. Lenstrom v. Thone 783

Constitutional Rights.

A defendant who pleads guilty to a misdemeanor in which a sentence of imprisonment is legally permissible is entitled to be informed of the nature of the charges against him, the right to assistance of counsel, the right to confront witnesses against him, the right to a jury trial, and the privilege against self-incrimination, and the record must affirmatively show a voluntary and intelligent waiver of these rights. State v. Tweedy 649

Contempt.

1. The disobedience of an injunction must be willful before a breach of it may be punished as a contempt. Sprunk v. Ditter 156
2. If there is a question as to what a court intends by its order, a party who acts on his own interpretation does so at his peril. Sprunk v. Ditter 156
3. An award of damages is improper in a contempt proceeding.

Sprunk v. Ditter 156
4. One cannot be held in contempt of court for acts which became prohibited by a court order entered subsequent to their commission. Grady v. Grady 311
5. An action to enforce a court order is normally a mere civil contempt and requires the appropriate standard of proof applicable thereto. Grady v. Grady 311

Contracts.
1. The nature of a contract as an option or obligation to purchase is to be determined not by the name which the parties have given it but by the nature of the obligation which it imposes. DaLee Realty, Inc. v. Kuhl 6
2. Where a contract is on a regular printed form prepared by one party, an ambiguous provision in the printed portion should be construed most strictly against such party. DaLee Realty, Inc. v. Kuhl 6
3. Where defects in materials, construction, or workmanship are remediable without materially injuring or reconstructing any substantial portion of the building, the measure of damages is the cost of remedying the defects. Moss v. Speck 46
4. Where the defects cannot be remedied without reconstruction of or material injury to a substantial portion of the building, the measure of damages is the difference between the value as constructed and the value if built according to the contract. Moss v. Speck 46
5. Absent contrary statutory provisions, manufacturers are free to enter into franchise agreements for the distribution of their products as they see fit. McDonald's Corp. v. Markim, Inc. 49
6. Generally, any person may do business with whomsoever he desires. Also, he may refuse business relations with any person whomsoever, whether the refusal is based on reason, whim, or prejudice. McDonald's Corp. v. Markim, Inc. .. 49
7. A contract which provides that an existing franchise holder must be given first consideration for an extension or renewal of the term does not mean that such franchisee must be given thoughtful or sympathetic regard in preference to anyone else, but only that the franchisee's qualifications be examined first and that a decision by the franchisor regarding the granting or denying of such extension must be actually and honestly exercised. Such decision must be made with entire good faith and not captiously or capriciously. McDonald's Corp. v. Markim, Inc. 49
8. As a general rule, the covenants of a contract will be considered and held as dependent conditions to be performed by the respective parties unless it is clear that the parties intended them to be independent. Gaspar v. Flott 260

9. While executory and before a breach, the terms of a written contract may be changed by a subsequent parol agreement; and such subsequent agreement requires no new consideration. First Data Resources, Inc. v. Omaha Steaks Int., Inc. 327
10. In order for an agreement to be voidable by reason of economic duress, it must not only have been obtained be means of pressure brought to bear, but the resulting agreement must be unjust, unconscionable, or illegal. First Data Resources, Inc. v. Omaha Steaks Int., Inc. 327
11. A party cannot maintain an action on a contract without a prior substantial compliance on its part. First Data Resources, Inc. v. Omaha Steaks Int., Inc. 327
12. A right to recover on a contract does not obtain when the party seeking to recover has performed its obligations in a negligent manner. First Data Resources, Inc. v. Omaha Steaks Int., Inc. 327
13. A party to whom performance is owed should receive at least approximately what it bargained for. First Data Resources, Inc. v. Omaha Steaks Int., Inc. 327
14. "Substantial performance" is a relative term and whether it exists or not is a question to be determined in each case with reference to the existing facts and circumstances. First Data Resources, Inc. v. Omaha Steaks Int., Inc. 327
15. An order of the Commission of Industrial Relations constitutes a contract between the parties, enforceable as any other contract entered into by the parties. IBEW Local 763 v. Omaha P.P. Dist. 335
16. If a contract contemplates that an agent shall receive compensation for sales of which the agent was the procuring cause, the agent is entitled to a commission on sales procured by him although the sales were actually consummated by the principal after the termination of the agency. Oehlrich v. Gateway Realty of Columbus, Inc. 417
17. When the provisions of a contract, together with the facts and circumstances that aid in ascertaining the intent of the parties thereto, are not in dispute, the proper construction of such contract is a question of law. Oehlrich v. Gateway Realty of Columbus, Inc. 417
18. By failing to make demand, a party to a contract to whom payment is due on demand cannot do away with the statute of limitations. Stock v. Meissner 636
19. Performance of an oral contract for the sale of goods that is capable of apportionment is enforceable only as to that portion that has been either fully or partially performed. In re Estate of Nelsen 730
20. A delivery alone by the seller is insufficient to take an oral contract for the sale of goods of the price of $500 or more out of the statute of frauds. The goods must have been re-

ceived and accepted before avoidance of the statute of frauds is recognized. In re Estate of Nelsen 730
21. The interpretation given a contract by the parties themselves while engaged in the peformance of it is one of the best indications of the true intent of their contract, and should be given great, if not controlling, influence. Strayer v. City of Omaha 734

Convictions.
1. This court will not interfere on appeal with a conviction based upon evidence unless it is so lacking in probative force that the court can say as a matter of law that it is insufficient to support a verdict of guilt beyond a reasonable doubt. State v. Rolling 243
2. In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. State v. Rolling 243
3. No defendant, once convicted, is entitled to be placed on probation as a matter of law. State v. Johnson 308

Costs.
1. Either the county court or the District Court on appeal ordinarily has discretionary power and authority to order payment of costs and, in proper cases, to order payment of reasonable fees to attorneys for services rendered to a good faith trustee out of the trust estate in litigation. In re Guardianship of Bremer 267
2. The award of attorney fees and the taxing of costs is discretionary with the District Court. Kocarnik v. Kocarnik 454
3. Where the loan receipt under which the insurer advances money to an insured obligates the insurer to bear the expense of all legal proceedings pursued in prosecuting the claims of the insured which the insured has pledged to the insurance company, it is improper to charge the insured with any of the expense of litigation. Hammond v. Nebraska Nat. Gas Co. 616

Courts.
1. Article III, § 2, of the Constitution of the United States, which grants original jurisdiction to the Supreme Court of the United States in cases in which a state may be a party, is neither a mandatory nor an exclusive grant of jurisdiction so as to deprive the state courts of jurisdiction in cases involving a state and one of its citizens. State v. Jones 296

2. The trial court has no jurisdiction to enter an order after the defendant has perfected his appeal to the Supreme Court. Beavers v. Graham 556

Criminal Attempt.

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. State v. Sharski 122

Criminal Defendants.

A defendant who is released following imposition of sentence to reappear upon further order of the court has been "released from custody under . . . a conditioned release" within the meaning of Neb. Rev. Stat. § 29-908 (Reissue 1979). State v. Robinson 726

Criminal Law.

1. In determining whether the State has shown the admissibility of custodial statements by the requisite degree of proof, this court will accept the factual determination and credibility choices made by the trial judge unless they are clearly erroneous, and in so doing we will look to the totality of the circumstances.
   State v. Teater 127
   State v. Strickland 133
2. To be admissible, a statement or confession must be free and voluntary. It must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. State v. Teater 127
3. It is competent for the prosecution to put in evidence all relevant facts and circumstances which tend to establish any of the constituent elements of the crime with which the accused is charged even though such facts and circumstances may prove or tend to prove that the defendant committed other crimes. State v. White 218
4. So long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file, generally rests entirely in his discretion. Within the limits set by the Legislature's constitutionally valid definition of chargeable offenses, the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation so long as the selection was not deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification. State v. White 218

5. Law enforcement officers may enter private premises without either an arrest or a search warrant to preserve life or property, to render first aid and assistance, or to conduct a general inquiry into an unsolved crime, provided they have reasonable grounds to believe that there is an urgent need for such assistance and protective action, or to promptly launch a criminal investigation involving a substantial threat of imminent danger to either life, health, or property, and provided, further, that they do not enter with an accompanying intent to either arrest or search. If, while on the premises, they inadvertently discover incriminating evidence in plain view, or as a result of some activity on their part that bears a material relevance to the initial purpose for their entry, they may lawfully seize it without a warrant. State v. Resler 249
6. The basic elements of the emergency doctrine exception may be summarized in the following manner: (1) The police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property; (2) The search must not be primarily motivated by intent to arrest and seize evidence; and (3) There must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched. State v. Resler 249
7. In determining whether two charges constitute the same offense, the test to be applied is whether each charge requires proof of different facts or evidence. State v. Stabler 298
8. A distinction exists between an offense and the unlawful act out of which it arises, it being possible that two or more distinct offenses may grow out of the same transaction or act. State v. Stabler 298
9. The rule that a person cannot be twice put in jeopardy for the same offense has no application where two separate and distinct crimes are committed by one and the same act. The constitutional inhibition is directed to the identity of the offense and not to the act. State v. Stabler 298
10. A lesser-included offense is one which includes some of the elements of the crime charged without the addition of any element irrelevant to the crime charged. State v. Stabler 298
11. When sentencing a criminal defendant to a term of imprisonment under the indeterminate sentencing statute, the minimum limit of the sentence fixed by the court shall not be less than the minimum provided by law nor more than one-third the maximum term. Neb. Rev. Stat. § 83-1,105 (Reissue 1976). State v. Thomas 304
12. In the absence of a motion for new trial in a criminal case, the only issues remaining for argument are whether the

pleadings support the judgment and whether the judgment is excessive. State v. Ditter 452
13. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admissible if elicited from him or established by public record during cross-examination, but only if the crime was punishable by death or imprisonment in excess of 1 year under the law under which he was convicted, or involved dishonesty or false statement. State v. Lingle 492
14. The District Court after arrest may consider time spent in a medical institution pursuant to a valid mental health commitment in determining credit for time to be applied against the sentence. State v. Prosser 766
15. It was not an abuse of discretion for the trial court to fail to give credit for time spent in a mental institution where the sentence pronounced was not the statutory maximum for the offense. State v. Prosser 766
16. A prior criminal proceeding can work a collateral estoppel in a subsequent civil proceeding, if the question involved is distinctly put in issue and directly determined in the criminal action. Fowler v. Nat. Bank of Commerce 861
17. Generally, it is within the discretion of the trial court whether evidence of other crimes is admissible. State v. Dandridge 885
18. It is also within the discretion of the trial court whether other offenses are sufficiently similar to the one charged so that evidence of the other offenses has probative value. State v. Dandridge 885
19. In determining whether evidence of other crimes is admissible, important considerations are remoteness in point of time and unique, almost "signature-like" similarity between the charged crime and the other crimes. State v. Dandridge 885
20. In determining whether the suppression of evidence was prejudicial to an accused, it must be evaluated in the context of the entire record. State v. Dandridge 885

Criminal Trials.
1. An in-court identification based on the witness' observations at the time of the alleged crime is admissible. State v. Jackson 486
2. The criteria for determining whether identification testimony will be admissible after a suggestive lineup are the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. State v. Jackson 486

3. A trial court is not required to make written conclusions of fact and conclusions of law in a criminal trial. State v. Lozano 772
4. Where one maintains that counsel was inadequate, one must likewise show how or in what manner that alleged inadequacy prejudiced one. State v. Holloman 828

Damages.
1. Where water from another source has been added to the water for which a defendant is liable and the combined water causes damage, it is incumbent upon the plaintiff to establish either that his entire damages would have occurred from the waters for which the defendant is liable, or to establish the amount of the damage caused by the water for which the defendant is liable. Schmidt v. Chimney Rock Irrigation Dist. 1
2. Where there has been misrepresentation in the sale of real estate, the measure of damages is the difference between the value of the property conveyed and the value of the property if it had been as represented. Bibow v. Gerrard 10
3. The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods as accepted and the value they would have had if they had been as warranted. Settell's, Inc. v. Pitney Bowes, Inc. 26
4. Damages must be pled and proved, and the failure to offer proof on the issue of the value of goods as accepted will foreclose the method of determining damages from the court's consideration. Settell's, Inc. v. Pitney Bowes, Inc. 26
5. The trial court must refrain from submitting to the jury the issue of damages where the evidence is such that it cannot determine the issue without indulging in speculation and conjecture. Settell's, Inc. v. Pitney Bowes, Inc. 26
6. Where defects in materials, construction, or workmanship are remediable without materially injuring or reconstructing any substantial portion of the building, the measure of damages is the cost of remedying the defects. Moss v. Speck 46
7. Where the defects cannot be remedied without reconstruction of or material injury to a substantial portion of the building, the measure of damages is the difference between the value as constructed and the value if built according to the contract. Moss v. Speck 46
8. An award of damages is improper in a contempt proceeding. Sprunk v. Ditter 156
9. It is a fundamental principle of the law of damages that a person who suffers personal injury because of the negligence of another is entitled to recover for the reasonable value of medical care and expense incurred for the treatment of the

injuries to the time of trial, as well as the cost of those reasonably certain to be incurred in the future. Stanek v. Swierczek 357
10. The cost of a general health policy may not be substituted for proof of past and future medical expenses. Stanek v. Swierczek 357

Deceptive Trade Practices.
1. Comparative advertising which is untrue, misleading, or deceptive is unlawful. Kirsch Fabric Corp. v. Brookstein Enterprises, Inc. 666
2. Deceptive trade practices and unfair competition may be enjoined under Nebraska law. Kirsch Fabric Corp. v. Brookstein Enterprises, Inc. 666

Deeds.
Upon delivery and acceptance of an unambiguous deed, all prior negotiations and agreements are deemed merged therein. Bibow v. Gerrard 10

Demurrer.
Leave to amend a petition should ordinarily be granted after a demurrer is sustained. However, when it is clear that no reasonable possibility exists that plaintiff will, by amendment, be able to state a cause of action, leave to amend may be denied. Fowler v. Nat. Bank of Commerce 861

Directed Verdict.
1. A motion for a directed verdict should be sustained only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion.
   Settell's, Inc. v. Pitney Bowes, Inc. 26
   Stephen v. City of Lincoln 792
   Camerlinck v. Thomas 843
2. The party against whom a verdict is directed is entitled to have all controverted facts resolved in his favor and to have the benefit of every reasonable inference deducible from the evidence.
   Syas v. Nebraska Methodist Hospital Foundation 201
   Stephen v. City of Lincoln 792
   Camerlinck v. Thomas 843

Divorce.
1. Dissolution of marriage actions are tried de novo on the record; however, this court, in reaching its decision, 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. Kullbom v. Kullbom . 145

2. When a personal relationship with another under the institution of marriage has deteriorated to the point that the parties can no longer live together, the marriage is irretrievably broken. Johnson v. Johnson 317
3. The rules for determining division of property in an action for dissolution of marriage provide no mathematical formula by which such awards can be precisely determined; they are to be determined by the facts in each case. Johnson v. Johnson 317
4. Generally speaking, awards in cases of this kind vary from one-third to one-half the value of the property involved, depending upon the facts and circumstances of the particular case, and particularly so where the marriage is of long duration and the parties are the parents of the children involved. Johnson v. Johnson 317
5. In an action for dissolution of marriage, a court may divide property between the parties in accordance with the equities of the situation, irrespective of how legal title is held. Johnson v. Johnson 317
6. There is no rule which requires a trial court to necessarily award attorney fees in accordance with the value of the services in a divorce case. The award of attorney fees is discretionary with the trial court and depends upon a variety of factors, including all the circumstances, such as the amount of the division of property and alimony awarded, the earning capacity of the parties, and the general equities of the situation. Johnson v. Johnson 317

Double Jeopardy.

The rule that a person cannot be twice put in jeopardy for the same offense has no application where two separate and distinct crimes are committed by one and the same act. The constitutional inhibition is directed to the identity of the offense and not to the act. State v. Stabler 298

Effectiveness of Counsel.

1. Where one maintains that counsel was inadequate, one must likewise show how or in what manner that alleged inadequacy prejudiced one. State v. Holloman 828
2. In post conviction relief cases the person challenging the competency of counsel has the burden of proof to establish the counsel's incompetence. State v. Holloman 828

Emancipation.

1. The emancipation of a child by a parent may be proved by circumstantial evidence or by an express agreement, or implied from the conduct of the parties. Accent Service Co., Inc. v. Ebsen 94

2. Where a minor departs from the family home with parental consent, takes his personal belongings with him, thereafter furnishes his own support and receives nothing from his parent, that minor becomes emancipated, thereby relieving the parent from liability to those who furnish necessaries of life to the minor. Accent Service Co., Inc. v. Ebsen .. 94

Emergency Vehicles.

1. The driver of an emergency vehicle has a duty not to drive in reckless disregard for the safety of others. Lee v. City of Omaha 345
2. The provisions of Neb. Rev. Stat. § 39-608 (Reissue 1978) shall not relieve the driver of an emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect such driver from the consequences of his reckless disregard for the safety of others. Lee v. City of Omaha 345
3. A police officer pursuing a traffic violator is required to observe the care which a reasonably prudent man would exercise in the discharge of official duties of a like nature under like circumstances. Lee v. City of Omaha 345

Employment Security Law.

1. Under the Nebraska Employment Security Law a week of unemployment with respect to any individual shall mean any week during which he performs less than full-time work and the wages payable to him with respect to such week are less than his weekly benefit amount. Hanlon v. Boden 169
2. The disqualification of employees of educational institutions and professional athletes for unemployment benefits under Neb. Rev. Stat. § 48-628(h) and (i) (Reissue 1978) does not include professional symphony musicians. Hanlon v. Boden 169
3. The beneficent provisions of an unemployment compensation act should receive a liberal construction in favor of those claiming benefits under it. Hanlon v. Boden 169

Equity.

1. In an action in equity, it is the duty of the Supreme Court to try the issue de novo upon the record and to reach an independent conclusion without being influenced by the findings of the trial court, except, where the credible evidence is in conflict, to give weight to the fact that the trial court saw the witnesses and observed their demeanor while testifying, that it inspected the premises, and that its examination constituted evidence tending to influence belief or unbelief of the matters at issue in the case.
   Schmidt v. Chimney Rock Irrigation Dist. 1

McDonald's Corp. v. Markim, Inc. 49
O'Neill Production Credit Assn. v. Mitchell 206
Knoell Constr. Co., Inc. v. Hanson 461
Sturm v. Mau 865

2. Although mortgage clauses which undertake to secure subsequent debts are not favored in equity and are carefully scrutinized and strictly construed, they will, in the absence of other legal prohibition, be enforced to the extent they are determined to have been within the intent of the parties. O'Neill Production Credit Assn. v. Mitchell 206
3. Where a court of equity has properly acquired jurisdiction in a suit for equitable relief, it will make a complete adjudication of all matters properly presented and involved in the case and ordinarily will grant such relief, legal or equitable, as may be required, and thus avoid unnecessary litigation. Ogle v. Lincoln Real Estate, Inc. 704
4. The prayer of a pleading tenders no issue, and neither adds to nor takes from the evidence required of either party. The prayer for general relief in an equity action is as broad as the pleadings and the equitable powers of the court sufficient to authorize any judgment to which the party is entitled under the pleadings and the evidence. Sullivan v. General United Life Ins. Co. 872

Estates.

1. If not otherwise compensated for services rendered, any visitor, lawyer, physician, conservator, or special conservator appointed in a protective proceeding is entitled to reasonable compensation from the estate. In re Guardianship of Bremer 267
2. Either the county court or the District Court on appeal ordinarily has discretionary power and authority to order payment of costs and, in proper cases, to order payment of reasonable fees to attorneys for services rendered to a good faith trustee out of the trust estate in litigation. In re Guardianship of Bremer 267
3. One possesses testamentary capacity if he understands the nature of his act in making a will, knows the extent and character of his property, knows and understands the proposed disposition of his property, and knows the natural objects of his bounty. In re Estate of Schoch 812
4. Testamentary capacity is tested by the state of a testator's mind at the time he executes his will. In re Estate of Schoch 812
5. Although competent evidence of a testator's condition of mind long before, closely approaching, and shortly after the execution of a will is admissible, it is received only to assist in revealing his state of mind at the time the will was executed. In re Estate of Schoch 812

6. It is the duty of the proponent of a will, in the first instance, to make a prima facie case as to testamentary capacity; it then devolves upon the contestant to overcome the presumption arising therefrom, after which the burden of proving testamentary capacity by a preponderance of the evidence devolves upon the proponent. In re Estate of Schoch 812

Estoppel.

Where the statutory requirements of signature and acknowledgment by both husband and wife to encumbrance of a homestead are wanting, they cannot be supplied by estoppel. An interest in the homestead simply will not pass nor be created unless the documents for that purpose are signed and acknowledged by both husband and wife. O'Neill Production Credit Assn. v. Mitchell 206

Evidence.

1. It is not the province of this court to resolve conflicts in the evidence, pass upon the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
   State v. Farr 163
   Trout v. Olson Bros. Mfg. Co. 477
2. Where there is a total lack of evidence to establish that defendant dumped or deposited refuse upon his property on the dates alleged in the complaints, in violation of Lincoln Municipal Code § 8.28.020, defendant's convictions and sentences must be vacated and set aside. State v. Austin 174
3. It is competent for the prosecution to put in evidence all relevant facts and circumstances which tend to establish any of the constituent elements of the crime with which the accused is charged even though such facts and circumstances may prove or tend to prove that the defendant committed other crimes. State v. White 218
4. In determining the sufficiency of evidence necessary to sustain an award of the Nebraska Workmen's Compensation Court, such evidence must be considered most favorably to the successful party, every controverted fact must be resolved in his or her favor, and he or she must receive the benefit of every inference reasonably deducible from it.
   Osteen v. A.C. and S., Inc. 282
   Lee v. City of Omaha 345
5. In determining whether two charges constitute the same offense, the test to be applied is whether each charge requires proof of different facts or evidence. State v. Stabler 298

6. If an answer properly pleads a defense, it is error to prohibit a defendant from offering evidence in support thereof. First Data Resources, Inc. v. Omaha Steaks Int., Inc. 327
7. Unless the character of the injury is objective, that is, where its nature and effect are plainly apparent, then it is a subjective condition necessitating expert testimony. Mack v. Dale Electronics, Inc. 367
8. Where the claimed injuries are of such a character as to require skilled and professional persons to determine the cause and extent thereof, the question is one of science. Such a question must necessarily be determined from the testimony of skilled professional persons and cannot be determined from the testimony of unskilled witnesses having no scientific knowledge of such injuries. The employee must show by competent medical testimony a causal connection between the alleged injury, the employment, and the disability. Mack v. Dale Electronics, Inc. 367
9. It is within the discretion of the District Court to take testimony orally for the determination of issues of fact arising upon motions, and not a right of either party to compel the adduction of such testimony. Doyle v. Union Ins. Co. 385
10. In order to make a sufficient showing for new trial upon the ground of newly discovered evidence, the proof in support thereof must show that such evidence was then available which neither the litigant nor his counsel could have discovered by the exercise of reasonable diligence, that it was not merely cumulative, but competent, relevant, and material and with relation to a material issue, and of such character as to reasonably justify a belief that its admission would probably bring about a different result if a new trial were granted. Kocarnik v. Kocarnik 454
11. The plaintiff in a workmen's compensation case must prove by a preponderance of the evidence that his disability is the result of an accident arising out of his employment. Riha v. St. Mary's Church & School, Inc. 539
12. The presence of a preexisting disease or condition enhances the degree of proof required to establish that the injury arose out of the employment. Riha v. St. Mary's Church & School, Inc. 539
13. Where the injury is not of an objective nature, a causal connection between the accident and the disability must be established by expert medical testimony. Riha v. St. Mary's Church & School, Inc. 539
14. In an action for wrongful death, the plaintiff may establish by a preponderance of the evidence that the wrongful act or omission of the defendant was the proximate cause of death and such connection may be shown by circumstantial

evidence. Beebe v. Sorensen Sand & Gravel Co. 559
15. The question of the existence of negligence or contributory negligence is for the trier of fact whenever different minds may reasonably draw different conclusions 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 the jury. Burrows v. Jacobsen 778
16. The exercise by the trial court of its discretion in ruling on the admission or rejection of evidence will generally not be reviewed by an appellate court, unless it is clearly or plainly shown that the trial court abused its discretion. Stephen v. City of Lincoln 792
17. Where evidence is in conflict and such that reasonable minds may draw different conclusions therefrom, the questions of negligence and comparative and contributory negligence are for the determination of the jury. Stephen v. City of Lincoln 792
18. It is the duty of the trial court to submit to the jury all material issues presented by the pleadings which find support in the evidence adduced. Stephen v. City of Lincoln 792
19. A general allegation of negligence is good against a demurrer, and under such an allegation evidence of any fact which contributed to the injury sued for is competent and relevant. Crawford v. Ham 802
20. A trial court has broad discretion to exclude cumulative evidence. In re Estate of Schoch 812
21. Generally, it is within the discretion of the trial court whether evidence of other crimes is admissible. State v. Dandridge 885
22. It is also within the discretion of the trial court whether other offenses are sufficiently similar to the one charged so that evidence of the other offenses has probative value. State v. Dandridge 885
23. In determining whether evidence of other crimes is admissible, important considerations are remoteness in point of time and unique, almost "signature-like" similarity between the charged crime and the other crimes. State v. Dandridge 885
24. In determining whether the suppression of evidence was prejudicial to an accused, it must be evaluated in the context of the entire record. State v. Dandridge 885
25. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt. State v. Dandridge 885

Expert Witnesses.

1. Although it is frequently stated that medical testimony must be given with "reasonable medical certainty," it is sufficient when such testimony is stated in terms of "probability." In this connection, "reasonable certainty" and "reasonable probability" are one and the same thing. Lane v. State Farm Mut. Automobile Ins. Co. 396
2. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise. Neb. Rev. Stat. § 27-702 (Reissue 1979).
   Lane v. State Farm Mut. Automobile Ins. Co. 396
   State v. Loveless 583
3. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. Neb. Rev. Stat. § 27-703 (Reissue 1979). Lincoln Tel. & Tel. Co. v. County Board of Equalization 465
4. The value of an opinion of an expert is no stronger than the facts upon which it is based. Riha v. St. Mary's Church & School, Inc. 539

Extradition.

Requiring the execution of a waiver of extradition as a condition precedent to probation does not render the waiver involuntary without a specific showing of how such a condition was coercive as applied in the particular case. State v. Lingle 492

Fees.

If not otherwise compensated for services rendered, any visitor, lawyer, physician, conservator, or special conservator appointed in a protective proceeding is entitled to reasonable compensation from the estate. In re Guardianship of Bremer 267

Final Orders.

1. An order overruling a special appearance is not a final order from which an appeal can be taken. State v. Jones 296
2. In the absence of a final order which disposes of a case, this court has neither authority nor jurisdiction to act on an attempted appeal and the same will be dismissed. State v. Jones 296

Fraud.

1. Where there has been misrepresentation in the sale of real estate, the measure of damages is the difference between the value of the property conveyed and the value of the property if it had been as represented. Bibow v. Gerrard 10
2. Where ordinary prudence would have prevented the deception, an action for the fraud perpetuated by such deception will not lie. Bibow v. Gerrard 10

Guardians Ad Litem.

A guardian ad litem may not waive the substantive rights of the ward, but must require proper legal proof. In re Interest of Burbanks and Rima 676

Guardian and Conservators.

1. An order of a county court approving a final settlement of the accounts of a guardian or conservator, made or entered at a formal hearing of which all interested parties had notice, is a judgment which becomes res judicata and can only be vacated on such proof of fraud as would justify the setting aside of any other judgment. In re Guardianship of Bremer 267
2. If the object of a petition is to set aside an order approving a final account between a guardian or a conservator and his ward for fraud, it must allege some distinct and specific act of fraud from which the petitioner suffered injury. It is also necessary that such petitioner negative all fault or negligence on his part. In re Guardianship of Bremer 267

Hearsay.

Under the residual hearsay exception found in Neb. Rev. Stat. § 27-804(2)(e) (Reissue 1979), the proponent of the evidence has the burden of establishing each of the conditions of admissibility imposed by the rule. In re Estate of Schoch . 812

Highways.

1. One causing an obstruction on the highway must use ordinary care to prevent injury to others using the highway.
   Brown v. Nebraska P.P. Dist. 61
   Drawbridge and Misterek v. Douglas County 806
2. An obstruction includes anything which will interfere with the public's use of the highway easement, and includes inanimate objects or substances which are just as dangerous and obstructive as solid obstructions. Brown v. Nebraska P.P. Dist. 61
3. Unless specifically made applicable, the provisions of Neb. Rev. Stat. §§ 39-601 to 39-6,122 (Reissue 1978), except those provisions relative to careless driving and to reckless driving, shall not apply to: (1) Persons, teams of draft animals,

motor vehicles, and other equipment while actually engaged in work upon the surface of a highway but shall apply to such persons and vehicles when traveling to or from such work. Neb. Rev. Stat. § 39-606 (Reissue 1978). Beebe v. Sorensen Sand & Gravel Co. 559

4. Whether or not a person is "actually engaged in work upon the surface of a highway" at the time of an alleged occurrence, so as to come under the provisions of Neb. Rev. Stat. § 39-606 (Reissue 1978), may be a question of fact, depending on the circumstances. Beebe v. Sorensen Sand & Gravel Co. 559
5. A failure to so warn the traveling public is continuing negligence as distinguished from a condition. Drawbridge and Misterek v. Douglas County 806
6. To establish a road or highway by prescription, there must be a use by the general public, under a claim of right adverse to the owner of the land, of some particular or defined line of travel, and the use must be uninterrupted and without substantial change for 10 years, the period of time necessary to bar an action to recover the land. Sturm v. Mau 865
7. It is not indispensable to the establishment of a highway by prescription that there be no deviation in the line of travel; if the course of travel has remained substantially unchanged for the full period, it is sufficient even though at times, to avoid encroachments, obstructions, or the like, there have been slight changes in the line of travel. Sturm v. Mau ... 865
8. A diminution in the number of users does not constitute an abandonment of a road acquired by prescription. Sturm v. Mau 865

Homesteads.

Where the statutory requirements of signature and acknowledgment by both husband and wife to encumbrance of a homestead are wanting, they cannot be supplied by estoppel. An interest in the homestead simply will not pass nor be created unless the documents for that purpose are signed and acknowledged by both husband and wife. O'Neill Production Credit Assn. v. Mitchell 206

Homicide.

A sentence to life imprisonment for second degree murder is effective as an indeterminate sentence of 10 years to life. State v. Moore 88

Identification Procedures.

1. The sixth amendment right to assistance of counsel at a police lineup attaches only at or after the time that adversary judicial proceedings have been initiated against the defendant by the filing of an indictment or information. State v.

Smith 86
2. A preindictment or preinformation lineup may be challenged on due process grounds if the lineup is unnecessarily suggestive and conducive to irreparable mistaken identification. State v. Smith 86
3. An in-court identification based on the witness' observations at the time of the alleged crime is admissible. State v. Jackson 486
4. The criteria for determining whether identification testimony will be admissible after a suggestive lineup are the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. State v. Jackson 486

Indian Child Welfare Act.
1. Continued hearings in a proceeding are not subsequent proceedings within the meaning of the Indian Child Welfare Act. 25 U.S.C.A. § 1923 (Supp. 1963 to 1980). In re Interest of Bird Head 575
2. A child custody proceeding includes "any action which results in the termination of the parent-child relationship." 25 U.S.C.A. § 1903 (Supp. 1963 to 1980). In re Interest of Bird Head 575

Indictments and Informations.
1. The sixth amendment right to assistance of counsel at a police lineup attaches only at or after the time that adversary judicial proceedings have been initiated against the defendant by the filing of an indictment or information. State v. Smith 86
2. A preindictment or preinformation lineup may be challenged on due process grounds if the lineup is unnecessarily suggestive and conducive to irreparable mistaken identification. State v. Smith 86
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. State v. Sharski 122
4. An information first questioned on appeal must be held sufficient unless it is so defective that by no construction can it be said to charge the offense of which the accused was convicted.
   State v. Lingle 492
   State v. Coleman 823

5. A complaint charging a statutory misdemeanor substantially in the language of the statute will be liberally rather than technically construed, and if a defect is amendable, it will be held sufficient on appeal in the absence of objection in the trial court. State v. Lingle 492
6. An information or complaint must inform the accused, with reasonable certainty, of the charge being made against him in order that he may prepare his defense thereto and also be able to plead the judgment rendered thereon as a bar to later prosecution for this same offense. State v. Lingle 492
7. A complaint or information is fatally defective only if its allegations can be true and still not charge a crime. State v. Coleman 823
8. The accused shall be taken to have waived all defects which may be excepted to by a motion to quash, or a plea in abatement, by demurring to an indictment or pleading in bar or the general issue. State v. Coleman 823

Injunction.
1. Injunctive relief is preventive, protective, and prohibitory; it will not issue to afford a remedy for what is past but only to prevent future mischief. Rights already lost and wrongs already perpetrated cannot be restrained or remedied by injunction. Schmidt v. Chimney Rock Irrigation Dist. ... 1
2. The disobedience of an injunction must be willful before a breach of it may be punished as a contempt. Sprunk v. Ditter 156
3. Deceptive trade practices and unfair competition may be enjoined under Nebraska law. Kirsch Fabric Corp. v. Brookstein Enterprises, Inc. 666

Insurance.
1. The cost of a general health policy may not be substituted for proof of past and future medical expenses. Stanek v. Swierczek 357
2. It is the duty of an insured to advise the agent as to the insurance he wants, including the limits of the policy to be issued. Manzer v. Pentico 364
3. Neb. Rev. Stat. § 60-509.01 (Reissue 1978), providing for uninsured motorist coverage, was enacted for the benefit of the innocent victim of a financially irresponsible motorist, and is to be liberally construed to fully accomplish that purpose. Lane v. State Farm Mut. Automobile Ins. Co. .. 396
4. It is not a prerequisite to recovery under an uninsured motorist policy provision that judgment first be obtained against the uninsured motorist as a condition precedent to bringing suit against the automobile liability insurer. Lane v. State Farm Mut. Automobile Ins. Co. 396

5. An arrangement between an insurer and an insured, whereby the former loans to the latter the amount of a loss under the terms of a policy of insurance, to be repaid only if the insured made a recovery from a third person, is a lawful agreement, and the loan thus made is not such a payment of insurance as to make the insurer the real party in interest. Hammond v. Nebraska Nat. Gas Co. 616
6. Where the loan receipt under which the insurer advances money to an insured obligates the insurer to bear the expense of all legal proceedings pursued in prosecuting the claims of the insured which the insured has pledged to the insurance company, it is improper to charge the insured with any of the expenses of litigation. Hammond v. Nebraska Nat. Gas Co. 616
7. An insurer which recovers, on behalf of its insured in a negligence action brought against a third person, the amount which the insurer has paid the insured is entitled to the judgment interest awarded on that amount, even though the loan receipt under which the insurer advanced funds to the insured provides that the loan is without interest, as such interest is not paid directly or indirectly by the insured but is paid by the third party with whom the insured has ceased to have concern and privity. Hammond v. Nebraska Nat. Gas Co. 616

Interest.

1. The trial court has the inherent power, in adjusting the rights of the parties, to provide that a money allowance to be paid in installments shall not draw interest until a certain date. Johnson v. Johnson 317
2. An insurer which recovers, on behalf of its insured in a negligence action brought against a third person, the amount which the insurer has paid the insured is entitled to the judgment interest awarded on that amount, even though the loan receipt under which the insurer advanced funds to the insured provides that the loan is without interest, as such interest is not paid directly or indirectly by the insured but is paid by the third party with whom the insured has ceased to have concern and privity. Hammond v. Nebraska Nat. Gas Co. 616

Investigative Stops.

1. A police officer may in appropriate circumstances and in a proper manner approach a person for the purpose of investigating possible criminal behavior even though there is no probable cause to make an arrest. State v. Ebberson .. 41
2. The test of whether an investigative stop is justified is whether the police officer has a reasonable suspicion founded upon articulable facts which indicate that criminal

activity has occurred or is occurring and that the suspect may be involved. State v. Ebberson 41
3. An investigatory stop must be justified by objective manifestation that the person stopped is, has been, or is about to be engaged in criminal activity. In determining what cause is sufficient to authorize police to stop a person, the totality of the circumstances — the whole picture — must be taken into account. State v. Ebberson 41
4. Police officers may stop any person in a public place whom they reasonably suspect of committing, who has committed, or who is about to commit a crime, and may demand of that person his name, address, and an explanation of his actions. State v. Nowicki 640
5. Police officers must have a particularized and objective basis for suspecting the person stopped of criminal activity. The assessment of the totality of circumstances includes all of the objective observations and considerations, as well as the suspicion drawn by a trained and experienced police officer by inference and deduction that the individual stopped is or has been or is about to be engaged in criminal behavior. State v. Nowicki 640

Invitor-Invitee.
1. A possessor of land is not an insurer of the safety of business invitees on its land. Syas v. Nebraska Methodist Hospital Foundation 201
2. A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he (1) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, (2) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (3) fails to exercise reasonable care to protect them against the danger. Syas v. Nebraska Methodist Hospital Foundation 201

Judgments.
1. The judgment of the trial court in a law action where a jury has been waived has the effect of a jury verdict and will not be set aside unless clearly wrong.
   Moss v. Speck 46
   Crawford v. Ham 802
   B Town, Inc. v. Albright 819
2. Where there is a total lack of evidence to establish that defendant dumped or deposited refuse upon his property on the dates alleged in the complaints, in violation of Lincoln Municipal Code § 8.28.020, defendant's convictions

and sentences must be vacated and set aside. State v. Austin 174

3. A decree awarding custody of a minor child and 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 of a nature requiring modification in the best interests of the child. Helgenberger v. Helgenberger 184

4. An order of a county court approving a final settlement of the accounts of a guardian or conservator, made or entered at a formal hearing of which all interested parties had notice, is a judgment which becomes res judicata and can only be vacated on such proof of fraud as would justify the setting aside of any other judgment. In re Guardianship of Bremer 267

5. Where the record affirmatively shows that the only ruling complained of is clearly right and plainly in accordance with law, an appeal will be dismissed as frivolous. State v. Jones 296

6. In determining the sufficiency of the evidence to sustain a judgment, it must be considered in the light most favorable to the successful party, every controverted fact must be resolved in his or her favor, and he or she is entitled to the benefit of every inference that can reasonably be deduced from the evidence.
   Lee v. City of Omaha 345
   Crawford v. Ham 802
   In re Estate of Schoch 812
   B Town, Inc. v. Albright 819

7. A judgment denying probation and imposing a sentence within the limits prescribed by statute will not be disturbed in the absence of an abuse of discretion. State v. Rosenberry 383

8. It is not a prerequisite to recovery under an uninsured motorist policy provision that judgment first be obtained against the uninsured motorist as a condition precedent to bringing suit against the automobile liability insurer. Lane v. State Farm Mut. Automobile Ins. Co. 396

9. If there is evidence to sustain the finding of the commission, this court cannot intervene. It is only where the findings of the commission are against all the evidence that this court may hold that the commission's finding on the evidence is arbitrary and capricious. In re Application of Greyhound Lines, Inc. 430

10. The recovery of a judgment for a debt, except to the extent that it has been satisfied, does not prevent later proceedings to enforce a security interest under the Uniform Commercial Code given to secure its payment. Ceres Fertilizer, Inc. v.

Beekman 447
11. A proper judgment will not be reversed because the trial court gave an erroneous reason for its rendition. Lincoln Tel. & Tel. Co. v. County Board of Equalization 465
12. A judgment which is unduly broad and makes prospective findings is erroneous. Kirsch Fabric Corp. v. Brookstein Enterprises, Inc. 666
13. In reviewing an appeal from the decision of a trial court in a law action, the review is not de novo. The judgment of the District Court will not be set aside on appeal unless it is clearly wrong and not supported by the evidence.
Crawford v. Ham 802
In re Estate of Schoch 812

Judicial Notice.
1. Where cases are interwoven and interdependent and the controversy involved has already been considered and determined by the court in former proceedings involving one of the parties now before it, the court has the right to examine its own records and take judicial notice of its own proceedings and judgments in the former action.
Sherwood v. Brown 68
Fowler v. Nat. Bank of Commerce 861
2. A court may take judicial notice of the fact that substances such as cocaine, LSD, and certain forms of prepared marijuana may be easily and quickly disposed of by flushing down a toilet or drain. State v. Meyer 757

Juries.
1. The reasonableness of the force used in effecting an arrest is a question for the jury. State v. Lingle 492
2. Where evidence is in conflict and such that reasonable minds may draw different conclusions therefrom, the questions of negligence and comparative and contributory negligence are for the determination of the jury. Stephen v. City of Lincoln 792
3. It is the duty of the trial court to submit to the jury all material issues presented by the pleadings which find support in the evidence adduced. Stephen v. City of Lincoln 792

Jurisdiction.
1. Article III, § 2, of the Constitution of the United States, which grants original jurisdiction to the Supreme Court of the United States in cases in which a state may be a party, is neither a mandatory nor an exclusive grant of jurisdiction so as to deprive the state courts of jurisdiction in cases involving a state and one of its citizens. State v. Jones .. 296
2. The Commission of Industrial Relations, as an administra-

tive body, has no power or authority other than that specifically conferred by statute or by a construction necessary to accomplish the plain purpose of the act. IBEW Local 763 v. Omaha P.P. Dist. 335
3. Under the provisions of Neb. Rev. Stat. § 48-819 (Cum. Supp. 1980), the Commission of Industrial Relations has no authority to enforce its own orders, such orders only being enforceable in an appropriate proceeding in courts of this state. IBEW Local 763 v. Omaha P.P. Dist. 335
4. Filing of a notice of appeal in this court vests exclusive jurisdiction in this court.
State v. Ditter 452
Beavers v. Graham 556
5. Where a court of equity has properly acquired jurisdiction in a suit for equitable relief, it will make a complete adjudication of all matters properly presented and involved in the case and ordinarily will grant such relief, legal or equitable, as may be required, and thus avoid unnecessary litigation. Ogle v. Lincoln Real Estate, Inc. 704

Jury Instructions.
1. Jury instruction that a landlord may, in the absence of unusual circumstances, if any it finds, without violating its duty to exercise reasonable care for the safety of a tenant or a tenant's visitors, await the end of a snowstorm and a reasonable time thereafter before removing ice and/or snow from outside entrances, walks, platforms, or steps, *disapproved.* Danner v. Myott Park, Ltd. 103
2. A jury instruction which misstates issues or defenses and has a tendency to confuse the jury is erroneous. Danner v. Myott Park, Ltd. 103
3. When a litigant has approved instructions in the trial court, either by word or act, he cannot thereafter effectively complain of instructions given. Lane v. State Farm Mut. Automobile Ins. Co. 396
4. Instructions must be taken as a whole and construed together, and where the instructions covered the issues and fairly submitted the case to the jury, the jury's verdict will not be disturbed unless it is clearly erroneous. Lane v. State Farm Mut. Automobile Ins. Co. 396
5. When complaint is made of the refusal of the District Court to give an instruction asked, the burden is upon the party complaining to show not only that he was probably prejudiced by the refusal of the court to give the instruction, but he must also show that the entire instruction was correct as a proposition of law and applicable to the facts in evidence in the case. State v. Lingle 492
6. A party may not tender an instruction to the court and

then, after an adverse verdict, object to its submission to the jury. Wooley v. Kittle 669
7. Failure to object to instructions after they are submitted to counsel for review precludes raising objections to said instructions on appeal. Wooley v. Kittle 669
8. The fact that an accomplice has been guilty of willful false swearing on a material matter does not automatically discredit his testimony as a matter of law in all cases. Ordinarily, his credibility is a question for the jury under a proper cautionary instruction. State v. Dandridge 885

Jury Trials.
1. The Legislature may provide for the trial of petty offenses in violation of a city or village ordinance without a jury when Article I, § 6, of the Constitution of Nebraska is not violated. State v. Flores 302
2. A defendant who is charged with the violation of a city ordinance, with a maximum authorized penalty of 6 months' incarceration, is not entitled to a jury trial under the U.S. Constitution. State v. Flores 302
3. What amounts to gross negligence in any given case must depend upon the facts and circumstances. What would amount to gross negligence under certain circumstances might, under different circumstances, be even slight negligence. Ordinarily, the question of negligence, whether slight or gross, is one of fact. If the evidence respecting it is in conflict and is such that ordinary minds might draw different conclusions therefrom, then a question of fact is presented for the jury to determine. Beebe v. Sorensen Sand & Gravel Co. 559

Jury Verdicts.
1. A verdict by a jury based upon conflicting evidence will not be set aside on appeal unless it is clearly wrong. Trout v. Olson Bros. Mfg. Co. 477
2. After a verdict by a jury a motion for new trial must be made within 10 days after the verdict was rendered and accepted by the court, not from the date judgment was entered on the verdict. Novak v. Nelsen 728

Juvenile Courts.
1. Neb. Rev. Stat. § 43-209 (Reissue 1978) sets out six independent conditions, any one of which existing alone will justify termination of parental rights. In re Interest of Wood and Linden 18
2. There is no requirement that the court must implement a rehabilitation program for the parent of a child found to be dependent and neglected. In re Interest of Wood and

Linden 18
3. Where the juvenile court has made a finding of neglect under Neb. Rev. Stat. § 43-209(2) (Reissue 1978), it need not afford the parent opportunity to correct the conditions underlying the finding before terminating parental rights. In re Interest of Wagner and Russell 33
4. 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.
In re Interest of J.L.L. 76
In re Interest of Kain 229
5. Neb. Rev. Stat. § 43-209 (Reissue 1978) is sufficiently definite, both facially and as applied in this case, to withstand constitutional attack based on vagueness. In re Interest of J.L.L. 76
6. Continued hearings in a proceeding are not subsequent proceedings within the meaning of the Indian Child Welfare Act. 25 U.S.C.A. § 1923 (Supp. 1963 to 1980). In re Interest of Bird Head 575

Legislative Intent.
1. When interpreting legislative acts we are concerned with the intent of the Legislature in adopting the same. Otto v. Hahn 114
2. In determining that intent, we consider the history of the legislation and weigh a reasonable interpretation against an unreasonable or absurd construction. Otto v. Hahn ... 114
3. When the Legislature chooses to inaugurate reforms in the area of economics or social welfare, it is not required to make the choice between attacking every aspect of a problem or not attacking the problem at all, as long as the action has a rational basis and is free from invidious discrimination. Otto v. Hahn 114
4. 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. State v. Farr 163
5. The legislative intent, when apparent from the whole statute, is not to be thwarted by strained and unusual interpretations of particular words not required under the circumstances. State v. Farr 163

Legislative Power.
1. The Legislature has plenary legislative authority limited only by the state and federal Constitutions. Lenstrom v.

Thone 783
2. The Nebraska Constitution is not a grant but, rather, a restriction on legislative power, and the Legislature may legislate on any subject not inhibited by the Constitution. Lenstrom v. Thone 783
3. The Nebraska Constitution is not a grant but a restriction of legislative power. Consequently, courts can enforce only those limitations which the Constitution imposes. Lenstrom v. Thone 783
4. Unless restricted by some provision of the state or federal Constitution, the Legislature may enact laws and appropriate funds for the accomplishment of any public purpose. It is for the Legislature to decide in the first instance what is and what is not a public purpose, but its determination is not conclusive on the courts. However, to justify a court in declaring a statute invalid because its object is not a public purpose, the absence of public purpose must be so clear and palpable as to be immediately perceptible to the reasonable mind. Lenstrom v. Thone 783
5. Implied restrictions on the legislative power are not to be inferred unless the restriction is one that is clearly implied. Lenstrom v. Thone 783

Lesser-Included Offense.
1. A lesser-included offense is one which is necessarily established by proof of the greater offense. To be a lesser-included offense, the elements of the lesser offense must be such that it is impossible to commit the greater without at the same time having committed the lesser. Resisting arrest is not a lesser-included offense of escape for, among other reasons, the crime of escape does not necessarily involve the use of force. State v. White 218
2. A lesser-included offense is one which includes some of the elements of the crime charged without the addition of any element irrelevant to the crime charged. State v. Stabler .. 298

Liability.
1. Where a worker has contracted an occupational disease by exposure to a harmful substance over a period of years in the course of successive employments, the employer who most recently exposed the worker to the harmful substance is liable to pay the entire award. Osteen v. A.C. and S., Inc. .. 282
2. Where the employment at the time of disability was not of a kind contributing to the disease, the employer at the time of the most recent exposure which bears a causal relation to the disability is generally liable for the entire compensation. Osteen v. A.C. and S., Inc. 282
3. An injurious exposure must be of the type which could

cause the disease, given prolonged exposure, and once the requirement of some contributing exposure has been met, courts will not go on to weigh the relative amount or duration of the exposure under various employers. Osteen v. A.C. and S., Inc. 282

Libel and Slander.

1. An action for slander must be brought within 1 year from the date the cause of action accrues. Lathrop v. McBride ... 351
2. An action for slander accrues at the time of publication. Lathrop v. McBride 351
3. A slander is published when the words are spoken and understood by a third person to pertain to the person slandered. Lathrop v. McBride 351
4. Ignorance of the publication or of the evidence probative of the plaintiff's claim does not postpone the operation of the statute of limitations. Lathrop v. McBride 351

Limitations of Actions.

1. Where an occupational disease results from the continual absorption of small quantities of some deleterious substance from the environment of the employment over a considerable period of time, an afflicted employee can be held to be injured only when the accumulated effects of the substance manifest themselves, which is when the employee became disabled and entitled to compensation; and the date of injury, within the meaning of the Workmen's Compensation Act, is the date when the disability is first incurred and the period of limitations runs from that date. Osteen v. A.C. and S., Inc. 282
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5. Ignorance of the publication or of the evidence probative of the plaintiff's claim does not postpone the operation of the statute of limitations. Lathrop v. McBride 351
6. The statute of limitations begins to run when a cause of action accrues. Stock v. Meissner 636
7. By failing to make demand, a party to a contract to whom payment is due on demand cannot do away with the statute of limitations. Stock v. Meissner 636

Loans.

An arrangement between an insurer and an insured, whereby

the former loans to the latter the amount of a loss under the terms of a policy of insurance, to be repaid only if the insured made a recovery from a third person, is a lawful agreement, and the loan thus made is not such a payment of insurance as to make the insurer the real party in interest. Hammond v. Nebraska Nat. Gas Co. 616

Minors.

1. The emancipation of a child by a parent may be proved by circumstantial evidence or by an express agreement, or implied from the conduct of the parties. Accent Service Co., Inc. v. Ebsen 94
2. Where a minor departs from the family home with parental consent, takes his personal belongings with him, thereafter furnishes his own support and receives nothing from his parent, that minor becomes emancipated, thereby relieving the parent from liability to those who furnish necessaries of life to the minor. Accent Service Co., Inc. v. Ebsen 94
3. A parent may be held liable for necessaries of life furnished to an emancipated minor, where the parent orally or in writing agrees to the payment for such necessaries. Accent Service Co., Inc. v. Ebsen 94
4. If the actor is a child, the standard of care to which he must conform to avoid being negligent is that of a reasonable person of like age, intelligence, and experience under the circumstances. Camerlinck v. Thomas 843
5. Where reasonable minds might draw different conclusions from the evidence, the question as to a child's negligence or contributory negligence under the circumstances is a matter for determination by the jury. Camerlinck v. Thomas 843

Miranda Rights.

1. Once *Miranda* warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.
   State v. Teater 127
   State v. Strickland 133
2. The applicable standard to determine the admissibility of statements made by an accused during a custodial interrogation is whether the accused intelligently, knowingly, and voluntarily waived his right to remain silent and his right to have counsel present at that time. State v. Strickland 133

Misdemeanors.

1. Where an individual is convicted of a misdemeanor and given an indeterminate sentence which is to be served in an institution under the jurisdiction of the Department of

Correctional Services, the provisions of Neb. Rev. Stat. § 83-1,105 (Reissue 1976) should apply. State v. Johnson ... 308
2. A defendant who pleads guilty to a misdemeanor in which a sentence of imprisonment is legally permissible is entitled to be informed of the nature of the charges against him, the right to assistance of counsel, the right to confront witnesses against him, the right to a jury trial, and the privilege against self-incrimination, and the record must affirmatively show a voluntary and intelligent waiver of these rights. State v. Tweedy 649

Mortgages.
1. A preexisting debt is a valuable and sufficient consideration for a mortgage given to secure that debt. O'Neill Production Credit Assn. v. Mitchell 206
2. A real estate mortgage given to secure the preexisting debt of another is supported by valuable and sufficient consideration. O'Neill Production Credit Assn. v. Mitchell 206
3. Although mortgage clauses which undertake to secure subsequent debts are not favored in equity and are carefully scrutinized and strictly construed, they will, in the absence of other legal prohibition, be enforced to the extent they are determined to have been within the intent of the parties. O'Neill Production Credit Assn. v. Mitchell 206
4. A mortgage on real estate, other than as to the homestead, executed and delivered by the mortgagor is valid between the parties, even though it was not lawfully acknowledged. O'Neill Production Credit Assn. v. Mitchell 206

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. Nokes 293

Motions for New Trial.
1. In the absence of a motion for new trial in a criminal case, the only issues remaining for argument are whether the pleadings support the judgment and whether the judgment is excessive. State v. Ditter 452
2. A motion for new trial filed while the case is on appeal to this court is a nullity. State v. Ditter 452
3. In order to make a sufficient showing for new trial upon the ground of newly discovered evidence, the proof in support thereof must show that such evidence was then available which neither the litigant nor his counsel could have discovered by the exercise of reasonable diligence, that it was not merely cumulative, but competent, relevant,

and material and with relation to a material issue, and of such character as to reasonably justify a belief that its admission would probably bring about a different result if a new trial were granted. Kocarnik v. Kocarnik 454
4. After a verdict by a jury a motion for new trial must be made within 10 days after the verdict was rendered and accepted by the court, not from the date judgment was entered on the verdict. Novak v. Nelsen 728
5. In the absence of a timely motion for new trial, a notice of appeal must be filed within 1 month after the rendition of the judgment or decree or the making of the final order. Novak v. Nelsen 728
6. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt. State v. Dandridge 885

Motions to Dismiss.

A party against whom a motion to dismiss is made is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be drawn from the evidence, and if there is any evidence which will sustain a finding for the plaintiff, it may not be disregarded and the case decided as a matter of law. Beebe v. Sorensen Sand & Gravel Co. 559

Motor Carriers.

1. The burden is on the applicant for a certificate of public convenience and necessity to show he has met all the requirements of the statutes. In re Application of Greyhound Lines, Inc. 430
2. In determining the issue of public convenience and necessity, controlling questions are whether the operation will serve a useful purpose responsive to a public demand or need; whether this purpose can or will be served as well by existing carriers; and whether it can be served by applicant in a specified manner without endangering or impairing the operations of existing carriers contrary to public interest. In re Application of Greyhound Lines, Inc. 430
3. In considering a determination of the public convenience and necessity, the utility of a "closed door" policy and the value of a competitive market to the public must be considered. In re Application of Greyhound Lines, Inc. 430
4. The purpose of the Nebraska Motor Carrier Act was regulation for the public interest. Its purpose was not to

stifle legitimate competition but to foster it. In re Application of Greyhound Lines, Inc. 430

5. Where commission approval of a transfer of authority is requested under Neb. Rev. Stat. § 75-318 (Reissue 1976), and an issue of dormancy is properly raised, the Nebraska Public Service Commission must determine both the fact of dormancy and, on the basis of the evidence, whether the public convenience and necessity require the transfer. Herman Bros., Inc. v. Spector Industries, Inc. 513
6. There are no mechanical rules for determining when rights have become dormant, and the test of substantiality must be used to resolve the issue. Pertinent factors include whether the rights involve general or specified commodities, the character of the area served in terms of industry and population, the number of carriers involved in a similar service, whether the rights are radial or nonradial, and whether the financial and material capabilities of the carrier have been utilized as far as practicable. Herman Bros., Inc. v. Spector Industries, Inc. 513

Motor Vehicles.

1. A traveler on a highway, when approaching a railroad crossing, has a duty to look and listen for the approach of trains. He must look, where by looking he could see, and listen, where by listening he could hear, and if he fails without a reasonable excuse to exercise such precautions, then he is guilty of contributory negligence more than slight as a matter of law and no recovery can be had for damages resulting from a collision with a passing train. Wyatt v. Burlington Northern, Inc. 212
2. A motorist approaching a railroad grade crossing shall stop and not proceed across the crossing, until he can do so safely, if a train approaching within approximately one quarter mile of the crossing emits a signal audible from such distance, or the train is plainly visible and in hazardous proximity to the crossing. Neb. Rev. Stat. § 39-655(1) (Reissue 1978). Wyatt v. Burlington Northern, Inc. 212
3. The duty of a motorist approaching a grade crossing is such that even if the train fails to give warning signals of its approach to the crossing, the motorist can not recover if he recklessly fails and neglects to have his vehicle under control where by looking and listening at the proper time he could have seen the approaching train in time to stop before reaching the crossing. Wyatt v. Burlington Northern, Inc. 212
4. There is no duty on the part of the engineer operating a railroad train to yield the right-of-way to a motorist approaching a grade crossing until the situation is such as to

indicate to a reasonably prudent person that to proceed would probably result in a collision. At that time it becomes the duty of the engineer to exercise ordinary care to avoid an accident, even to the extent of yielding the right-of-way. Wyatt v. Burlington Northern, Inc. 212

5. The sudden emergency rule cannot be successfully invoked by either party in a negligence case unless there is competent evidence to support a conclusion that a sudden emergency actually existed, and then it cannot be successfully invoked by one who has brought that emergency upon himself by his own acts or who has not used due care to avoid it. Stanek v. Swierczek 357
6. It is a general principle that it is negligence as a matter of law for a motorist to drive a motor vehicle on a public highway at such a rate of speed that it cannot be stopped or turned aside in time to avoid an obstruction discernible within the range of his vision ahead, and the rule applies to driving in the daytime when vision is obstructed by physical conditions. Stanek v. Swierczek 357
7. Generally, less stringent warrant requirements have been applied to vehicles. State v. Watts 371
8. One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. State v. Watts 371
9. The smell of marijuana, standing alone, is sufficient to furnish probable cause for the warrantless search of a motor vehicle where there is sufficient foundation as to the expertise of the officer making the search. State v. Watts 371
10. The finding of a quantity of suspected illicit drugs by an officer making a legitimate search of an automobile may serve to substantiate that officer's suspicions and furnish additional probable cause for him to make a complete search of the vehicle. State v. Watts 371
11. Neb. Rev. Stat. § 60-509.01 (Reissue 1978), providing for uninsured motorist coverage, was enacted for the benefit of the innocent victim of a financially irresponsible motorist, and is to be liberally construed to fully accomplish that purpose. Lane v. State Farm Mut. Automobile Ins. Co. 396
12. It is not a prerequisite to recovery under an uninsured motorist policy provision that judgment first be obtained against the uninsured motorist as a condition precedent to bringing suit against the automobile liability insurer. Lane v. State Farm Mut. Automobile Ins. Co. 396
13. Unless specifically made applicable, the provisions of Neb. Rev. Stat. §§ 39-601 to 39-6,122 (Reissue 1978), except

those provisions relative to careless driving and to reckless driving, shall not apply to: (1) Persons, teams of draft animals, motor vehicles, and other equipment while actually engaged in work upon the surface of a highway but shall apply to such persons and vehicles when traveling to or from such work. Neb. Rev. Stat. § 39-606 (Reissue 1978). Beebe v. Sorensen Sand & Gravel Co. 559

14. It is unlawful for the driver of a vehicle to turn left unless and until such movement can be made with reasonable safety. Burrows v. Jacobsen 778
15. The driver of a vehicle who intends to turn left at an intersection is to yield the right-of-way to any vehicle approaching from the opposite direction which is within the intersection or approaching so close as to constitute an immediate hazard. Burrows v. Jacobsen 778
16. The duty of a guest riding in an automobile is to use due care in keeping a lookout commensurate with that of an ordinarily prudent person under like circumstances. A guest is not required to use the same degree of care as devolves upon the driver. If a guest perceives danger, or should anticipate danger, he should warn the driver. Ordinarily a guest need not watch the road or advise the driver in the management of the car. Drawbridge and Misterek v. Douglas County 806
17. A guest may be guilty of contributory negligence, or assumption of risk, by riding or continuing to ride with a driver who he knows, or in the exercise of ordinary care and diligence should know, is so intoxicated that he is unable to operate the vehicle with proper prudence or skill. Drawbridge and Misterek v. Douglas County 806
18. Generally, it is negligence as a matter of law to drive so fast at night that the driver is unable to stop in time to avoid a collision with an object on the road which is within the range of his headlights. Drawbridge and Misterek v. Douglas County 806

Municipal Corporations.

A city of the primary class is granted power by the Legislature to make all ordinances not inconsistent with the general laws of the state as may be necessary to promote the public health, safety, and welfare. The authority to enforce such ordinances is granted to such city in the area which is within the city or within 3 miles of the city and outside of any organized city or village. Neb. Rev. Stat. § 15-236 (Reissue 1977). State v. Austin 174

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2. Ordinances and statutes are presumed to be constitutional, and their unconstitutionality must be clearly established. Courts will not pass upon a question of constitutionality unless it becomes necessary to do so. State v. Austin 174
3. The Legislature may provide for the trial of petty offenses in violation of a city or village ordinance without a jury when Article I, § 6, of the Constitution of Nebraska is not violated. State v. Flores 302
4. A defendant who is charged with the violation of a city ordinance, with a maximum authorized penalty of 6 months' incarceration, is not entitled to a jury trial under the U.S. Constitution. State v. Flores 302

Negligence.
1. The question whether negligence is such a continuing and substantial factor in producing an accident as to be a proximate cause of the injury, taking into consideration the foreseeability of the intervening act, is a question of fact. Brown v. Nebraska P.P. Dist. 61
2. A possessor of land is not an insurer of the safety of business invitees on its land. Syas v. Nebraska Methodist Hospital Foundation 201
3. A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he (1) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, (2) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (3) fails to exercise reasonable care to protect them against the danger. Syas v. Nebraska Methodist Hospital Foundation 201
4. A traveler on a highway, when approaching a railroad crossing, has a duty to look and listen for the approach of trains. He must look, where by looking he could see, and listen, where by listening he could hear, and if he fails without a reasonable excuse to exercise such precautions, then he is guilty of contributory negligence more than slight as a matter of law and no recovery can be had for damages resulting from a collision with a passing train. Wyatt v. Burlington Northern, Inc. 212
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6. A right to recover on a contract does not obtain when the party seeking to recover has performed its obligations in a negligent manner. First Data Resources, Inc. v. Omaha Steaks Int., Inc. 327
7. The sudden emergency rule cannot be successfully invoked by either party in a negligence case unless there is competent evidence to support a conclusion that a sudden emergency actually existed, and then it cannot be successfully invoked by one who has brought that emergency upon himself by his own acts or who has not used due care to avoid it. Stanek v. Swierczek 357
8. It is a general principle that it is negligence as a matter of law for a motorist to drive a motor vehicle on a public highway at such a rate of speed that it cannot be stopped or turned aside in time to avoid an obstruction discernible within the range of his vision ahead, and the rule applies to driving in the daytime when vision is obstructed by physical conditions. Stanek v. Swierczek 357
9. It is a fundamental principle of the law of damages that a person who suffers personal injury because of the negligence of another is entitled to recover for the reasonable value of medical care and expense incurred for the treatment of the injuries to the time of trial, as well as the cost of those reasonably certain to be incurred in the future. Stanek v. Swierczek 357
10. In an action for wrongful death, the plaintiff may establish by a preponderance of the evidence that the wrongful act or omission of the defendant was the proximate cause of death and such connection may be shown by circumstantial evidence. Beebe v. Sorensen Sand & Gravel Co. 559
11. What amounts to gross negligence in any given case must depend upon the facts and circumstances. What would amount to gross negligence under certain circumstances might, under different circumstances, be even slight negligence. Ordinarily, the question of negligence, whether slight or gross, is one of fact. If the evidence respecting it is in conflict and is such that ordinary minds might draw different conclusions therefrom, then a question of fact is presented for the jury to determine.
    Beebe v. Sorensen Sand & Gravel Co. 559
    Stephen v. City of Lincoln 792

Camerlinck v. Thomas 843

12. The question of the existence of negligence or contributory negligence is for the trier of fact whenever different minds may reasonably draw different conclusions 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 the jury. Burrows v. Jacobsen 778
13. Negligence is not presumed and the mere happening of an accident does not prove negligence. Burrows v. Jacobsen ... 778
14. Where, in an action to recover for personal injuries, the jury is properly instructed as to the burden of proving the negligence charged against defendant as a proximate cause of the injury, the defense that the negligence of a third person not a party to the action is the sole proximate cause is not an affirmative plea in avoidance of plaintiff's cause and imposes no burden of proof upon defendant with relation thereto, but is entirely consistent with and provable under the general issue where the burden of proof remains with the plaintiff to prove the alleged negligence of the defendant. Burrows v. Jacobsen 778
15. Contributory negligence is conduct for which plaintiff is responsible, amounting to a breach of the duty which the law imposes upon persons to protect themselves from injury, and which, concurring and cooperating with actionable negligence for which defendant is responsible, contributes to the injury complained of as a proximate cause. Stephen v. City of Lincoln 792
16. A general allegation of negligence is good against a demurrer, and under such an allegation evidence of any fact which contributed to the injury sued for is competent and relevant. Crawford v. Ham 802
17. One who places an obstruction upon a highway in such a manner that it is dangerous to others using the highway has a duty to remove the obstruction or to use due care to warn others upon the highway of the danger incident to the obstruction. Drawbridge and Misterek v. Douglas County 806
18. A failure to so warn the traveling public is continuing negligence as distinguished from a condition. Drawbridge and Misterek v. Douglas County 806
19. The duty of a guest riding in an automobile is to use due care in keeping a lookout commensurate with that of an ordinarily prudent person under like circumstances. A guest is not required to use the same degree of care as devolves upon the driver. If a guest perceives danger, or should anticipate danger, he should warn the driver.

Ordinarily a guest need not watch the road or advise the driver in the management of the car. Drawbridge and Misterek v. Douglas County 806

20. A guest may be guilty of contributory negligence, or assumption of risk, by riding or continuing to ride with a driver who he knows, or in the exercise of ordinary care and diligence should know, is so intoxicated that he is unable to operate the vehicle with proper prudence or skill. Drawbridge and Misterek v. Douglas County 806
21. Generally, it is negligence as a matter of law to drive so fast at night that the driver is unable to stop in time to avoid a collision with an object on the road which is within the range of his headlights. Drawbridge and Misterek v. Douglas County 806
22. If the actor is a child, the standard of care to which he must conform to avoid being negligent is that of a reasonable person of like age, intelligence, and experience under the circumstances. Camerlinck v. Thomas 843

Notice.

Appellant, who was served with a summons and petition which notified him of the nature and purpose of the proceeding, its possible consequence, and the specific factual allegations on which termination of his parental rights might be based, received adequate notice. In re Interest of Bird Head 575

Options to Buy or Sell.

1. A broker is not entitled to a commission from a seller for producing a ready, willing, and able buyer, where the buyer is only willing to execute an option and the seller does not prevent exercise of the option. DaLee Realty, Inc. v. Kuhl 6
2. The nature of a contract as an option or obligation to purchase is to be determined not by the name which the parties have given it but by the nature of the obligation which it imposes. DaLee Realty, Inc. v. Kuhl 6
3. An option is a binding offer to sell or buy, but is not a purchase agreement. DaLee Realty, Inc. v. Kuhl 6

Parental Rights.

1. Neb. Rev. Stat. § 43-209 (Reissue 1978) sets out six independent conditions, any one of which existing alone will justify termination of parental rights. In re Interest of Wood and Linden 18
2. There is no requirement that the court must implement a rehabilitation program for the parent of a child found to be dependent and neglected. In re Interest of Wood and

Linden 18
3. The right of a parent to custody and control of his or her child is not an inalienable right.
In re Interest of Wood and Linden 18
In re Interest of J.L.L. 76
In re Interest of Chirnside 750
4. Where the juvenile court has made a finding of neglect under Neb. Rev. Stat. § 43-209(2) (Reissue 1978), it need not afford the parent opportunity to correct the conditions underlying the finding before terminating parental rights. In re Interest of Wagner and Russell 33
5. Although a parent's parental rights should not be terminated for the sole reason of conviction of crime and incarceration, the fact of incarceration may be considered along with other factors in determining whether parental rights should be terminated. In re Interest of Wagner and Russell 33
6. In cases involving custody of neglected or dependent children and the termination of parental rights in juvenile court, the findings of the trial court will not be disturbed on appeal unless they are against the weight of the evidence. In re Interest of Wagner and Russell 33
7. 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.
In re Interest of J.L.L. 76
In re Interest of Hiatt 195
In re Interest of Bird Head 575
In re Interest of Burbanks and Rima 676
In re Interest of Hitt 900
8. Parental rights between a parent and child may be terminated when the parent has abandoned the child for 6 months or more immediately prior to the filing of the petition and such action is in the best interests of the child. Neb. Rev. Stat. § 43-209 (Reissue 1978). In re Interest of Shelby 140
9. 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 Hiatt 195
10. 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 Hiatt 195
11. When natural parents cannot rehabilitate themselves within a reasonable time after the adjudication hearing, the best interests of the children require that a final disposition be

made without delay. In re Interest of Kain 229
12. The interest of the state which is protected by Neb. Rev. Stat. § 43-209 (Reissue 1978) is that of protecting minor children from serious abuse and serious neglect. In re Interest of Holley 437
13. The interest of the state protected by Neb. Rev. Stat. § 43-209 (Reissue 1978) is a compelling state interest. In re Interest of Holley 437
14. The word "may" in Neb. Rev. Stat. § 43-209 (Reissue 1978) is designed to allow the judge to weigh each individual case in the light of the degree of seriousness of the conduct, its effect upon the best interests of the child, the likelihood of continuation, and the results of attempted corrective measures, and then to determine whether or not parental rights must be terminated. Such discretion is not constitutionally impermissible. In re Interest of Holley 437
15. Rules governing termination of parental rights are intended to recognize the integrity of the family and to bring about parental termination only when that appears to be required and no other reasonable alternative exists.
In re Interest of Holley 437
In re Interest of D. 529
16. Courts have the discretion to experiment with foster care and visitation arrangements while keeping in mind that there is a compelling state interest to be protected and that the best interests of the child may require complete termination of parental rights eventually. In re Interest of Holley 437
17. The rule has been long established in this state that courts may not properly deprive a parent of the custody of a minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship or has forfeited that right. In re Interest of D. 529
18. Courts cannot deprive a parent of the custody of a child merely because the parent has limited resources or financial problems, or is not socially acceptable, nor because the parent's lifestyle is different or unusual. Neither can a court deprive the parent of the custody of a child merely because the court reasonably believes that some other person could better provide for the child. In re Interest of D. .. 529
19. Appellant, who was served with a summons and petition which notified him of the nature and purpose of the proceeding, its possible consequence, and the specific factual allegations on which termination of his parental rights might be based, received adequate notice. In re Interest of Bird Head 575
20. An action for termination of parental rights is reviewed by this court de novo upon the record. In re Interest of Bird

Head 575
21. Parental rights may not be terminated under the following provision of Neb. Rev. Stat. § 43-209(6) (Reissue 1978): "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," except where the correctional efforts have been directed to the conditions upon which the adjudication was based. In re Interest of Burbanks and Rima 676
22. The court may terminate all parental rights between the parents and such child when the court finds such action to be in the best interests of the child and it appears by the evidence that 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. In re Interest of Chirnside 750
22. The right of parents to maintain custody of their child is a natural right, subject only to the paramount interests which the public has in the protection of the rights of a child. In re Interest of Hitt 900
24. A court of this state may not properly deprive a parent of the custody of a minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship or has forfeited that right. In re Interest of Hitt 900

Plea Bargains.

A defendant has no legal basis to rely on a sentence recommended as part of a plea bargain where the trial court has made it clear that it was not in any way bound by such agreement. State v. Tweedy 649

Pleadings.

1. If the object of a petition is to set aside an order approving a final account between a guardian or a conservator and his ward for fraud, it must allege some distinct and specific act of fraud from which the petitioner suffered injury. It is also necessary that such petitioner negative all fault or negligence on his part. In re Guardianship of Bremer ... 267
2. An answer to a petition which fails to allege an essential element of a claimed defense of economic duress or business coercion is subject to a demurrer. First Data Resources, Inc. v. Omaha Steaks Int., Inc. 327
3. If an answer properly pleads a defense, it is error to prohibit a defendant from offering evidence in support thereof. First Data Resources, Inc. v. Omaha Steaks Int., Inc. 327

4. The term "application" is a generic term which includes, but is not limited to, motions. Doyle v. Union Ins. Co. 385
5. While a court will not ordinarily take judicial notice of its records in another case, it is proper in considering a demurrer to take judicial notice of the records in another case which is so closely interwoven as to be interdependent. Fowler v. Nat. Bank of Commerce 861
6. Leave to amend a petition should ordinarily be granted after a demurrer is sustained. However, when it is clear that no reasonable possibility exists that plaintiff will, by amendment, be able to state a cause of action, leave to amend may be denied. Fowler v. Nat. Bank of Commerce 861
7. The prayer of a pleading tenders no issue, and neither adds to nor takes from the evidence required of either party. The prayer for general relief in an equity action is as broad as the pleadings and the equitable powers of the court sufficient to authorize any judgment to which the party is entitled under the pleadings and the evidence. Sullivan v. General United Life Ins. Co. 872

Pleas.

1. Although the preferred procedure for ascertaining whether or not a factual basis exists to support a guilty plea is to inquire directly of the defendant, an examination before sentencing of a presentence report containing such facts is an acceptable alternative. State v. Tweedy 649
2. A plea of guilty must not only be intelligent and voluntary to be valid but the record must affirmatively disclose that the defendant entered his plea understandingly and voluntarily. State v. Tweedy 649
3. A defendant who pleads guilty to a misdemeanor in which a sentence of imprisonment is legally permissible is entitled to be informed of the nature of the charges against him, the right to assistance of counsel, the right to confront witnesses against him, the right to a jury trial, and the privilege against self-incrimination, and the record must affirmatively show a voluntary and intelligent waiver of these rights. State v. Tweedy 649

Political Subdivisions.

An appeal to the District Court from action of the county board of equalization is heard as in equity, and upon appeal therefrom to this court it is tried de novo. Lincoln Tel. & Tel. Co. v. County Board of Equalization 465

Political Subdivisions Tort Claims Act.

1. In a proceeding brought under the Political Subdivisions Tort Claims Act, the findings of fact by the trial court

will not be overturned unless clearly wrong. Lee v. City of Omaha 345
2. Findings of fact made by the District Court in a case brought under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1977), will not be disturbed on appeal unless clearly wrong. Watson v. City of Omaha 835

Post Conviction.
1. An evidentiary hearing in a proceeding for post conviction relief may be denied if the trial court finds, on examination of its files and records, that the proceeding is without foundation. State v. Nokes 293
2. A motion to vacate a judgment and sentence under the Post Conviction Act cannot be used as a substitute for an appeal or to secure a further review of issues already litigated. State v. Nokes 293
3. In post conviction relief cases the person challenging the competency of counsel has the burden of proof to establish the counsel's incompetence. State v. Holloman 828
4. In a post conviction proceeding the burden of proof is on the movant to establish a basis for relief, and where such burden is not met a denial of that requested relief is required. State v. Holloman 828

Prejudgment Interest.
1. Where the amount of a claim is liquidated, compensation in the form of prejudgment interest is allowed as a matter of right. First Data Resources, Inc. v. Omaha Steaks Int., Inc. 327
2. A claim is liquidated if the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance upon opinion or discretion. First Data Resources, Inc. v. Omaha Steaks Int., Inc. ... 327
3. An order of the Commission of Industrial Relations, once sued upon, may bear prejudgment interest, just as certain other contracts sued upon may bear prejudgment interest; however, such fact does not authorize the Commission of Industrial Relations to order the payment of interest as a part of its order. Such authority lies solely with an appropriate court and comes into effect only when entered by that appropriate court, in the same manner to which any other suit upon a contract would be subject to the payment of prejudgment interest if and when ordered by an appropriate court. IBEW Local 763 v. Omaha P.P. Dist. 335

Prescriptive Easements.
1. A prescriptive right is not looked upon with favor, and

generally must be proved by clear, convincing, and satisfactory evidence. Sturm v. Mau 865
2. To establish a road or highway by prescription, there must be a use by the general public, under a claim of right adverse to the owner of the land, of some particular or defined line of travel, and the use must be uninterrupted and without substantial change for 10 years, the period of time necessary to bar an action to recover the land. Sturm v. Mau 865
3. Ordinarily, where a claimant has shown open, visible, continuous, and unmolested use of land for a period of time sufficient to acquire an easement by adverse user, the use will be presumed to be under a claim of right. Under such circumstances, the owner of the servient estate, in order to avoid acquisition of an easement by prescription, has the burden of rebutting the presumption by showing the use to have been permissive. Sturm v. Mau 865
4. The presumption of adverse use does not arise when a prescriptive easement is claimed over land which is unenclosed and which has no defined pathway across it. Sturm v. Mau 865
5. It is not indispensable to the establishment of a highway by prescription that there be no deviation in the line of travel; if the course of travel has remained substantially unchanged for the full period, it is sufficient even though at times, to avoid encroachments, obstructions, or the like, there have been slight changes in the line of travel. Sturm v. Mau 865
6. A diminution in the number of users does not constitute an abandonment of a road acquired by prescription. Sturm v. Mau 865

Principal and Agent.
1. It is the duty of an insured to advise the agent as to the insurance he wants, including the limits of the policy to be issued. Manzer v. Pentico 364
2. If a contract contemplates that an agent shall receive compensation for sales of which the agent was the procuring cause, the agent is entitled to a commission on sales procured by him although the sales were actually consummated by the principal after the termination of the agency. Oehlrich v. Gateway Realty of Columbus, Inc. 417

Principal and Surety.
A bond does not cover defaults of the principal occurring prior to the effective date of the bond, unless the bond expressly provides otherwise, for it cannot be assumed that

the surety intended to be bound by the past delinquencies of the principal. Stock v. Meissner 636

Probable Cause.

1. The smell of marijuana, standing alone, is sufficient to furnish probable cause for the warrantless search of a motor vehicle where there is sufficient foundation as to the expertise of the officer making the search. State v. Watts 371
2. The finding of a quantity of suspected illicit drugs by an officer making a legitimate search of an automobile may serve to substantiate that officer's suspicions and furnish additional probable cause for him to make a complete search of the vehicle. State v. Watts 371
3. 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. Nowicki 640
4. Probable cause is to be evaluated by the collective information of the police engaged in a common investigation. State v. Nowicki 640

Probation and Parole.

1. No defendant, once convicted, is entitled to be placed on probation as a matter of law. State v. Johnson 308
2. When a court sentences an offender to probation, it shall attach such reasonable conditions as it deems necessary or likely to insure that the offender will lead a law-abiding life. State v. Lingle 492
3. Conditions in probation orders requiring the probationer to submit to warrantless searches, to the extent that they contribute to the rehabilitation process and are done in a reasonable manner, are valid and constitutional. State v. Lingle 492
4. While a person is on probation his expectations of privacy are less than those of other citizens not so categorized. State v. Lingle 492
5. Requiring the execution of a waiver of extradition as a condition precedent to probation does not render the waiver involuntary without a specific showing of how such a condition was coercive as applied in the particular case. State v. Lingle 492

Proof.

1. A purchaser of goods under the Uniform Commercial Code claiming a breach of warranty must prove not only the

warranty and the breach thereof; he must also prove the cause of the loss and the extent thereof. Settell's, Inc. v. Pitney Bowes, Inc. 26
2. Damages must be pled and proved, and the failure to offer proof on the issue of the value of goods as accepted will foreclose the method of determining damages from the court's consideration. Settell's, Inc. v. Pitney Bowes, Inc. 26
3. The one attacking the exemption of farm laborers from the provisions of the Workmen's Compensation Act as a violation of equal protection has the burden of proving that there is no rational basis for the classification. Otto v. Hahn 114
4. Unless the character of the injury is objective, that is, where its nature and effect are plainly apparent, then it is a subjective condition necessitating expert testimony. Mack v. Dale Electronics, Inc. 367
5. Where the claimed injuries are of such a character as to require skilled and professional persons to determine the cause and extent thereof, the question is one of science. Such a question must necessarily be determined from the testimony of skilled professional persons and cannot be determined from the testimony of unskilled witnesses having no scientific knowledge of such injuries. The employee must show by competent medical testimony a causal connection between the alleged injury, the employment, and the disability. Mack v. Dale Electronics, Inc. 367
6. The burden is on the applicant for a certificate of public convenience and necessity to show he has met all the requirements of the statutes. In re Application of Greyhound Lines, Inc. 430
7. The burden of proof is upon a taxpayer to establish his contention that the value of his property has not been fairly and proportionately equalized with all other property, resulting in a discriminatory, unjust, and unfair assessment. Lincoln Tel. & Tel. Co. v. County Board of Equalization 465
8. The plaintiff in a workmen's compensation case must prove by a preponderance of the evidence that his disability is the result of an accident arising out of his employment. Riha v. St. Mary's Church & School, Inc. 539
9. The presence of a preexisting disease or condition enhances the degree of proof required to establish that the injury arose out of the employment. Riha v. St. Mary's Church & School, Inc. 539
10. Where the injury is not of an objective nature, a causal connection between the accident and the disability must be established by expert medical testimony. Riha v. St. Mary's Church & School, Inc. 539
11. In an action for wrongful death, the plaintiff may establish by a preponderance of the evidence that the wrongful act or omission of the defendant was the proximate cause of death

and such connection may be shown by circumstantial evidence. Beebe v. Sorensen Sand & Gravel Co. 559

12. Where, in an action to recover for personal injuries, the jury is properly instructed as to the burden of proving the negligence charged against defendant as a proximate cause of the injury, the defense that the negligence of a third person not a party to the action is the sole proximate cause is not an affirmative plea in avoidance of plaintiff's cause and imposes no burden of proof upon defendant with relation thereto, but is entirely consistent with and provable under the general issue where the burden of proof remains with the plaintiff to prove the alleged negligence of the defendant. Burrows v. Jacobsen 778
13. It is the duty of the proponent of a will, in the first instance, to make a prima facie case as to testamentary capacity; it then devolves upon the contestant to overcome the presumption arising therefrom, after which the burden of proving testamentary capacity by a preponderance of the evidence devolves upon the proponent. In re Estate of Schoch 812
14. Under the residual hearsay exception found in Neb. Rev. Stat. § 27-804(2)(e) (Reissue 1979), the proponent of the evidence has the burden of establishing each of the conditions of admissibility imposed by the rule. In re Estate of Schoch 812
15. In post conviction relief cases the person challenging the competency of counsel has the burden of proof to establish the counsel's incompetence. State v. Holloman 828
16. In a post conviction proceeding the burden of proof is on the movant to establish a basis for relief, and where such burden is not met a denial of that requested relief is required. State v. Holloman 828
17. A prescriptive right is not looked upon with favor, and generally must be proved by clear, convincing, and satisfactory evidence. Sturm v. Mau 865
18. Ordinarily, where a claimant has shown open, visible, continuous, and unmolested use of land for a period of time sufficient to acquire an easement by adverse user, the use will be presumed to be under a claim of right. Under such circumstances, the owner of the servient estate, in order to avoid acquisition of an easement by prescription, has the burden of rebutting the presumption by showing the use to have been permissive. Sturm v. Mau 865
19. When a workmen's compensation claimant is alleged to have suffered a disability rising out of and in the course of his employment which consists of the aggravation of a preexisting condition, 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. Engel v. Nebraska Methodist Hospital 878

Proper Lookout.

1. A motorist must see what is in plain sight. Burrows v. Jacobsen 778
2. Although one in a favored position may assume, until he has warning, notice, or knowledge to the contrary, that others will use a highway lawfully, he must nonetheless keep a proper lookout and watch where he is driving. Burrows v. Jacobsen 778

Property Division.

1. Although alimony and allocation of property rights are distinguishable and have different purposes in marriage dissolution proceedings, they are still closely related in the matter of determining the amount to be allowed, and circumstances may require that they be considered together to determine whether the court has abused its discretion. Kullbom v. Kullbom 145
2. If the parties fail to agree upon a property settlement which the court finds to be conscionable, the court shall order an equitable division of the marital estate. The court shall include as part of the marital estate, for purposes of the division of property at the time of dissolution, any pension plans, retirement plans, annuities, and other deferred compensation benefits owned by either party, whether vested or not vested. Neb. Rev. Stat. § 42-366(8) (Cum. Supp. 1980). Kullbom v. Kullbom 145
3. The trial court retains broad discretion in valuing pension rights and in dividing such rights between the parties. Kullbom v. Kullbom 145
4. The rules for determining division of property in an action for dissolution of marriage provide no mathematical formula by which such awards can be precisely determined; they are to be determined by the facts in each case. Johnson v. Johnson 317
5. Generally speaking, awards in cases of this kind vary from one-third to one-half the value of the property involved, depending upon the facts and circumstances of the particular case, and particularly so where the marriage is of long duration and the parties are the parents of the children involved. Johnson v. Johnson 317
6. This court is not inclined to disturb the division of property made by the trial court unless it is patently unfair on the record.
   Johnson v. Johnson 317
   Kocarnik v. Kocarnik 454
   Redmond v. Redmond 745
7. The trial court has the inherent power, in adjusting the rights of the parties, to provide that a money allowance to be

paid in installments shall not draw interest until a certain date. Johnson v. Johnson 317
8. In an action for dissolution of marriage, a court may divide property between the parties in accordance with the equities of the situation, irrespective of how legal title is held. Johnson v. Johnson 317

Prosecuting Attorneys.
1. So long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file, generally rests entirely in his discretion. Within the limits set by the Legislature's constitutionally valid definition of chargeable offenses, the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation so long as the selection was not deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification. State v. White 218
2. There is no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work. State v. Dandridge 885
3. Remarks of the prosecutor in final summation of the evidence to the jury which do not mislead and unduly influence the jury and thereby prejudice the rights of the defendant do not constitute misconduct. State v. Dandridge 885

Prosecutorial Misconduct.
An argument by a prosecuting attorney which is based on the evidence and inferences drawn therefrom does not ordinarily constitute misconduct. State v. Dandridge 885

Proximate Cause.
1. The question whether negligence is such a continuing and substantial factor in producing an accident as to be a proximate cause of the injury, taking into consideration the foreseeability of the intervening act, is a question of fact. Brown v. Nebraska P.P. Dist. 61
2. The mere fact that one may become ill or experience pain during employment does not in and of itself prove that the employee is disabled as a result of an "accident" arising out of and in the course of employment, entitling the individual to compensation under the Nebraska Workmen's Compensation Act. In order to receive that compensation it is necessary that the employee establish that the difficulties which the employee is experiencing were caused by an "accident" as defined by the Workmen's Compensation Act. Mack v. Dale Electronics, Inc. 367

Public Purpose.
1. Unless restricted by some provision of the state or federal

Constitution, the Legislature may enact laws and appropriate funds for the accomplishment of any public purpose. It is for the Legislature to decide in the first instance what is and what is not a public purpose, but its determination is not conclusive on the courts. However, to justify a court in declaring a statute invalid because its object is not a public purpose, the absence of public purpose must be so clear and palpable as to be immediately perceptible to the reasonable mind. Lenstrom v. Thone 783

2. Legislation which serves a public purpose is not constitutionally impermissible because incidental benefits may accrue to others. Lenstrom v. Thone 783

Public Service Commission.

1. Upon an appeal from an order of the commission granting a certificate, this court may decide only whether the commission acted within the scope of its authority and whether the order in question was reasonable and not arbitrarily made.
   In re Application of Greyhound Lines, Inc. 430
   Herman Bros., Inc. v. Spector Industries, Inc. 513
2. This court will not disturb an order of the commission based on evidence unless the evidence shows that the order was unreasonable or arbitrary. In re Application of Greyhound Lines, Inc. 430
3. The determination of the public interest is one that is peculiarly for the determination of the commission. In re Application of Greyhound Lines, Inc. 430
4. If there is evidence to sustain the finding of the commission, this court cannot intervene. It is only where the findings of the commission are against all the evidence that this court may hold that the commission's finding on the evidence is arbitrary and capricious. In re Application of Greyhound Lines, Inc. 430
5. The determination of what is consistent with the public interest, or public convenience and necessity, is one that is peculiarly for the determination of the Nebraska Public Service Commission. If there is evidence to sustain the finding of the commission, this court cannot intervene.
   Herman Bros., Inc. v. Spector Industries, Inc. 513
   In re Application of Best 524
6. Where commission approval of a transfer of authority is requested under Neb. Rev. Stat. § 75-318 (Reissue 1976), and an issue of dormancy is properly raised, the Nebraska Public Service Commission must determine both the fact of dormancy and, on the basis of the evidence, whether the public convenience and necessity require the transfer. Herman Bros., Inc. v. Spector Industries, Inc. 513
7. There are no mechanical rules for determining when rights

have become dormant, and the test of substantiality must be used to resolve the issue. Pertinent factors include whether the rights involve general or specified commodities, the character of the area served in terms of industry and population, the number of carriers involved in a similar service, whether the rights are radial or nonradial, and whether the financial and material capabilities of the carrier have been utilized as far as practicable. Herman Bros., Inc. v. Spector Industries, Inc. 513

8. Before granting a certificate of convenience and necessity, the commission must find that the portion of the territory of another telephone company in which or into which the applicant proposes to construct new lines or extend its existing lines does not or will not, within a reasonable time, receive reasonably adequate telephone service from the telephone company already serving the territory. Neb. Rev. Stat. § 75-604(2) (Reissue 1976). In re Application of Best 524

Questions of Law.

When the provisions of a contract, together with the facts and circumstances that aid in ascertaining the intent of the parties thereto, are not in dispute, the proper construction of such contract is a question of law. Oehlrich v. Gateway Realty of Columbus, Inc. 417

Railroads.

1. A traveler on a highway, when approaching a railroad crossing, has a duty to look and listen for the approach of trains. He must look, where by looking he could see, and listen, where by listening he could hear, and if he fails without a reasonable excuse to exercise such precautions, then he is guilty of contributory negligence more than slight as a matter of law and no recovery can be had for damages resulting from a collision with a passing train. Wyatt v. Burlington Northern, Inc. 212
2. A motorist approaching a railroad grade crossing shall stop and not proceed across the crossing, until he can do so safely, if a train approaching within approximately one quarter mile of the crossing emits a signal audible from such distance, or the train is plainly visible and in hazardous proximity to the crossing. Neb. Rev. Stat. § 39-655(1) (Reissue 1978). Wyatt v. Burlington Northern, Inc. 212
3. The duty of a motorist approaching a grade crossing is such that even if the train fails to give warning signals of its approach to the crossing, the motorist can not recover if he recklessly fails and neglects to have his vehicle under control where by looking and listening at the proper time he could have seen the approaching train in time to stop before

reaching the crossing. Wyatt v. Burlington Northern, Inc. 212
4. There is no duty on the part of the engineer operating a railroad train to yield the right-of-way to a motorist approaching a grade crossing until the situation is such as to indicate to a reasonably prudent person that to proceed would probably result in a collision. At that time it becomes the duty of the engineer to exercise ordinary care to avoid an accident, even to the extent of yielding the right-of-way. Wyatt v. Burlington Northern, Inc. 212

Recreation Liability Act.
The term "owner," as used in the Recreation Liability Act, Neb. Rev. Stat. §§ 37-1001 et seq. (Reissue 1978), includes a political subdivision as well as a private person. Watson v. City of Omaha 835

Releases.
1. A release by an injured party of the tort-feasor responsible for the original injury does not, in the absence of language indicative of such an intention on the part of the parties, preclude an action by the injured party against a physician or hospital for negligent treatment of the original injury. Scheideler v. Elias 601
2. Two factors are controlling in determining the effect of an agreement purporting to operate as a release: (1) Whether the injured party has received full satisfaction; and (2) Whether the parties intended that the release be in full satisfaction of the injured party's claim, thus releasing all successive tort-feasors from liability. Such questions are for the trier of fact to decide. Scheideler v. Elias 601

Replevin.
The thresher's lien statute gives to the holder of a thresher's lien the rights of enforcement given to owners of secured interests in property as outlined in Neb. U.C.C. art. 9 (Reissue 1971), including the right to bring an action in replevin. Honstein Trucking v. Sandhills Beef, Inc. 422

Res Judicata
The conclusiveness of a prior judgment precluding subsequent litigation of the same cause of action between the same parties is much broader in its application than a determination of the questions actually involved in the prior action. Gaspar v. Flott 260

Right-of-Way.
1. There is no duty on the part of the engineer operating a railroad train to yield the right-of-way to a motorist approaching

a grade crossing until the situation is such as to indicate to a reasonably prudent person that to proceed would probably result in a collision. At that time it becomes the duty of the engineer to exercise ordinary care to avoid an accident, even to the extent of yielding the right-of-way. Wyatt v. Burlington Northern, Inc. 212

2. The driver of a vehicle who intends to turn left at an intersection is to yield the right-of-way to any vehicle approaching from the opposite direction which is within the intersection or approaching so close as to constitute an immediate hazard. Burrows v. Jacobsen 778
3. By "right-of-way" is meant the right of one vehicle to proceed in a lawful manner in preference to another approaching under such circumstances of direction, speed, and proximity as to give rise to danger of a collision unless one grants precedence to the other. Burrows v. Jacobsen 778
4. Although one in a favored position may assume, until he has warning, notice, or knowledge to the contrary, that others will use a highway lawfully, he must nonetheless keep a proper lookout and watch where he is driving. Burrows v. Jacobsen 778
5. One does not forfeit his right-of-way by driving at an unlawful speed. Burrows v. Jacobsen 778

Right to Counsel.

1. The sixth amendment right to assistance of counsel at a police lineup attaches only at or after the time that adversary judicial proceedings have been initiated against the defendant by the filing of an indictment or information. State v. Smith 86
2. Once the right to counsel and the right to remain silent have been invoked by a defendant, the defendant cannot be persuaded to waive his rights and there is a strong presumption against waiver. If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. State v. Teater 127

Rules of Evidence.

1. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. Neb. Rev. Stat. § 27-703 (Reissue 1979). Lincoln Tel. & Tel. Co. v. County

Board of Equalization 465
2. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise. Neb. Rev. Stat. § 27-702 (Reissue 1979). State v. Loveless 583

Search and Seizure.
1. Law enforcement officers may enter private premises without either an arrest or a search warrant to preserve life or property, to render first aid and assistance, or to conduct a general inquiry into an unsolved crime, provided they have reasonable grounds to believe that there is an urgent need for such assistance and protective action, or to promptly launch a criminal investigation involving a substantial threat of imminent danger to either life, health, or property, and provided, further, that they do not enter with an accompanying intent to either arrest or search. If, while on the premises, they inadvertently discover incriminating evidence in plain view, or as a result of some activity on their part that bears a material relevance to the initial purpose for their entry, they may lawfully seize it without a warrant. State v. Resler 249
2. The basic elements of the emergency doctrine exception may be summarized in the following manner: (1) The police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property; (2) The search must not be primarily motivated by intent to arrest and seize evidence; and (3) There must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched. State v. Resler 249
3. One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. State v. Watts 371
4. The finding of a quantity of suspected illicit drugs by an officer making a legitimate search of an automobile may serve to substantiate that officer's suspicions and furnish additional probable cause for him to make a complete search of the vehicle. State v. Watts 371
5. The constitutionality of a search incident to an arrest does not depend on whether there is any indication that the person arrested possesses weapons or evidence. The fact of a lawful arrest, standing alone, authorizes a search. State v. Watts 371
6. Under certain circumstances, a furtive movement can produce the legal justification to search an automobile. State v.

Watts 371
7. The capacity to claim the protection of the fourth amendment as to unreasonable searches and seizures depends not upon a property right in the invaded place but upon whether the person who claims the protection of the amendment has a legitimate expectation of privacy in the invaded place. State v. Cemper 376
8. A person has no legitimate expectation of privacy in an open field in which he has no personal ownership or possessory rights, and cannot claim the protection of the fourth amendment as to unreasonable searches and seizures. State v. Cemper 376
9. Conditions in probation orders requiring the probationer to submit to warrantless searches, to the extent that they contribute to the rehabilitation process and are done in a reasonable manner, are valid and constitutional. State v. Lingle 492
10. The voluntariness of the consent to search should be determined from the totality of all the circumstances surrounding it. State v. Billups 737
11. The question of whether a consent to search is voluntarily given is a question of fact. State v. Billups 737
12. When the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that the consent was given by the defendant, but may show that the permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected. State v. Billups 737
13. A court may take judicial notice of the fact that substances such as cocaine, LSD, and certain forms of prepared marijuana may be easily and quickly disposed of by flushing down a toilet or drain. State v. Meyer 757

Search Warrants.
1. Generally, less stringent warrant requirements have been applied to vehicles. State v. Watts 371
2. The provisions of Neb. Rev. Stat. § 29-411 (Reissue 1979), providing for entry for search pursuant to warrant "without giving notice of his authority and purpose, if the judge or magistrate issuing a search warrant has inserted a direction therein that the officer executing it shall not be required to give such notice . . . . The judge or magistrate may so direct only upon proof under oath, to his satisfaction that the property sought may be easily or quickly destroyed or disposed of . . . if such notice be given," do not offend the fourth amendment prohibition against unreasonable search and seizure. State v. Meyer 757
3. Although an affidavit supporting a search warrant may be based on hearsay information and need not reflect the direct

personal observations of the affiant, the magistrate must be informed of some of the underlying circumstances relied on by the person providing the information and some of the underlying circumstances from which the affiant concluded that the informant, whose identity was not disclosed, was creditable or his information reliable. State v. Meyer ... 757

4. An affidavit for a search warrant is not defective simply because it is based on hearsay, so long as the affidavit discloses a substantial basis for crediting the hearsay. Firsthand knowledge of an informant, acquired by sight or hearing, is self-corroborating and tends to fulfill both aspects of the *Aguilar* test. State v. Meyer 757

Second Injury Fund.

1. Under Neb. Rev. Stat. § 48-128 (Reissue 1978), if an employee who has a preexisting permanent partial disability which was known to the employer prior to the occurrence of a subsequent compensable injury receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability caused by the combined disabilities is substantially greater than that which would have resulted from the last injury considered alone and of itself, the employer at the time of the last injury is liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability, and for the additional disability the employee shall be compensated from the Second Injury Fund. Akins v. Happy Hour, Inc. 236
2. The purpose of Neb. Rev. Stat. § 48-128 (Reissue 1978) is not to provide compensation for the previous disability but to provide compensation for permanent partial or total disability resulting from a combination of the previous fact condition with a compensable injury. It is the previous fact condition combined with a second compensable injury causing permanent partial or total disability in fact that establishes the right of the employee to compensation from the Second Injury Fund. Akins v. Happy Hour, Inc. 236

Secured Transactions.

1. The recovery of a judgment for a debt, except to the extent that it has been satisfied, does not prevent later proceedings to enforce a security interest under the Uniform Commercial Code given to secure its payment. Ceres Fertilizer, Inc. v. Beekman 447
2. Upon dissolution of an attachment, ordinarily all property attached should be returned to the defendant owner. Ceres Fertilizer, Inc. v. Beekman 447

Sentences.

1. A sentence to life imprisonment for second degree murder is effective as an indeterminate sentence of 10 years to life. State v. Moore 88
2. When sentencing a criminal defendant to a term of imprisonment under the indeterminate sentencing statute, the minimum limit of the sentence fixed by the court shall not be less than the minimum provided by law nor more than one-third the maximum term. Neb. Rev. Stat. § 83-1,105 (Reissue 1976).
   State v. Thomas 304
   State v. Johnson 308
3. A judgment denying probation and imposing a sentence within the limits prescribed by statute will not be disturbed in the absence of an abuse of discretion. State v. Rosenberry 383
4. A sentence imposed which is within the statutory limits will not be disturbed on appeal absent an abuse of discretion. State v. Jackson 486
5. Upon conviction for the use of a firearm to commit a felony, the statute requires that any sentence is to be served consecutive to any other sentence imposed. State v. Jackson 486
6. When a court sentences an offender to probation, it shall attach such reasonable conditions as it deems necessary or likely to insure that the offender will lead a law-abiding life. State v. Lingle 492
7. A defendant has no legal basis to rely on a sentence recommended as part of a plea bargain where the trial court has made it clear that it was not in any way bound by such agreement. State v. Tweedy 649
8. 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. Meyer 757
9. The District Court after arrest may consider time spent in a medical institution pursuant to a valid mental health commitment in determining credit for time to be applied against the sentence. State v. Prosser 766
10. It was not an abuse of discretion for the trial court to fail to give credit for time spent in a mental institution where the sentence pronounced was not the statutory maximum for the offense. State v. Prosser 766

Sexual Misconduct.

Sexual misconduct is a factor which may be considered in determining what is in the best interests of minor children,

but it is not necessarily determinative. The nature of the act or acts, the circumstances surrounding the commission thereof, and the probable effects as are related to the future welfare of the children must be carefully considered. Helgenberger v. Helgenberger 184

Statute of Frauds.

A delivery alone by the seller is insufficient to take an oral contract for the sale of goods of the price of $500 or more out of the statute of frauds. The goods must have been received and accepted before avoidance of the statute of frauds is recognized. In re Estate of Nelsen 730

Statutes.

1. Neb. Rev. Stat. § 43-209 (Reissue 1978) is sufficiently definite, both facially and as applied in this case, to withstand constitutional attack based on vagueness. In re Interest of J.L.L. 76
2. Statutes in pari materia must be construed together. SID No. 1 v. County of Adams 108
3. An independent legislative act covering the entire subject of legislation to which it relates may incidentally modify or change existing statutes without referring to them. SID No. 1 v. County of Adams 108
4. Where a general statute, if standing alone, would include the same matter as the special act, and thus conflict with it, the special act will be considered as an exception to the general statute, whether it was passed before or after such general enactment. Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one; and where the general act is later, the special statute will be construed as remaining an exception to its terms, unless it is repealed in express words or by necessary implication. SID No. 1 v. County of Adams 108
5. 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. Sharski 122
6. Difficulty in determining the meaning of the language of a statute does not automatically render it unconstitutionally vague and ambiguous. State v. Sharski 122
7. 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. State v. Farr 163
8. The legislative intent, when apparent from the whole statute, is not to be thwarted by strained and unusual interpretations of particular words not required under the circumstances. State v. Farr 163

9. It is a fundamental rule of statutory construction that, if possible, a court will try to avoid a construction which leads to absurd, unjust, or unconscionable results. State v. Farr 163
10. A statute should be construed in the context of the object sought to be accomplished, the evils and mischief sought to be remedied, and the purpose to be served. State v. Farr .. 163
11. Ordinances and statutes are presumed to be constitutional, and their unconstitutionality must be clearly established. Courts will not pass upon a question of constitutionality unless it becomes necessary to do so. State v. Austin 174
12. Neb. Rev. Stat. § 28-416(6)(a) (Reissue 1979) merely authorizes the issuance of citation in the case of certain violations and does not prohibit a police officer from arresting the offender whenever otherwise authorized by law. State v. Watts 371
13. Neb. Rev. Stat. § 60-509.01 (Reissue 1978), providing for uninsured motorist coverage, was enacted for the benefit of the innocent victim of a financially irresponsible motorist, and is to be liberally construed to fully accomplish that purpose. Lane v. State Farm Mut. Automobile Ins. Co. .. 396
14. A duly enacted statute is presumed constitutional and may not be invalidated by the court unless clearly in contravention of a provision of fundamental law or of public policy. Lenstrom v. Thone 783

Subrogation.

Under the "common fund" doctrine, where the holder of subrogation rights does not come into the action, whether he refuses to do so or acquiesces the action brought by the plaintiff, but accepts the avails of the litigation, he is subjected to his proportionate share of the expenses thereof, including attorney fees. However, this rule is not applicable where the party sought to be charged has employed his or its own attorney and has actively participated in the litigation, and such counsel has not terminated, abandoned, or acquiesced in the representation of his client by other counsel. Hammond v. Nebraska Nat. Gas Co. 616

Substantial Performance.

1. A party to whom performance is owed should receive at least approximately what it bargained for. First Data Resources, Inc. v. Omaha Steaks Int., Inc. 327
2. "Substantial performance" is a relative term and whether it exists or not is a question to be determined in each case with reference to the existing facts and circumstances. First Data Resources, Inc. v. Omaha Steaks Int., Inc. 327

Summary Judgment.

1. The primary purpose of the summary judgment statute is to

pierce sham pleadings and to further dispose of cases where there is no genuine claim or defense. Brown v. Nebraska P.P. Dist. 61

2. The court examines the evidence, with a view most favorable to the party against whom the motion is directed, to discover if any real issue of fact exists. If reasonable persons might reach different conclusions, the motion should be denied and the case tried on its merits. Brown v. Nebraska P.P. Dist. 61

3. Summary judgment shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law.
   Manzer v. Pentico 364
   Oehlrich v. Gateway Realty of Columbus, Inc. 417

4. The issue on a motion for summary judgment is whether or not there is a genuine issue as to any material fact, and not how that issue should be determined. In considering such a motion, the trial court must take 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 be reasonably drawn from the evidence. Summary judgment is an extreme remedy and should be awarded only when the issue is clear beyond all doubt.
   Scheideler v. Elias 601
   Stock v. Meissner 636

Tape Recordings.

1. Tape recordings of relevant and material conversations are admissible as evidence of such conversations and in corroboration of oral testimony of the conversations, provided proper foundation is laid. State v. Loveless 583

2. Unless the unintelligible portions of a tape recording are so substantial as to render the recording as a whole untrustworthy, the recording is admissible and the decision whether to admit it should be left to the sound discretion of the trial judge. State v. Loveless 583

Taxation.

1. Neb. Rev. Stat. § 77-112 (Reissue 1976) does not require the taxing authorities to utilize all the factors set forth therein in ascertaining the actual value of property for taxation. Instead, they may use such factors or a combination thereof which are determined to be applicable in determining actual value under the Constitution of Nebraska. LaGord Assoc. v. County of Cass 99

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. LaGord Assoc. v. County of Cass 99
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. LaGord Assoc. v. County of Cass 99
4. Taxes on tangible property are to be levied by valuation uniformly and proportionately. Lincoln Tel. & Tel. Co. v. County Board of Equalization 465
5. The burden of proof is upon a taxpayer to establish his contention that the value of his property has not been fairly and proportionately equalized with all other property, resulting in a discriminatory, unjust, and unfair assessment. Lincoln Tel. & Tel. Co. v. County Board of Equalization 465
6. Authorities charged with the duty of valuing property for taxation are not limited to just one method of determining value, and the ultimate question is whether the method used ultimately attains a reasonable degree of uniformity in value. Lincoln Tel. & Tel. Co. v. County Board of Equalization 465
7. Tangible property is to be valued at actual value for tax purposes and assessed at 35 percent of actual value; however, an assessment will not be set aside merely because it was not assessed at actual value where property is proportionately valued in a reasonable degree. Lincoln Tel. & Tel. Co. v. County Board of Equalization 465
8. Approximation of value and uniformity is all that can be accomplished and substantial compliance with the requirement of equalization and uniformity of taxation laid down by the federal and state Constitutions is all that is required, and such provisions are satisfied when designed and manifest departure from the rules is avoided. Lincoln Tel. & Tel. Co. v. County Board of Equalization 465
9. In order for a taxpayer to secure a reduction in the assessed value of his property, it must be demonstrated that the assessed value is grossly excessive, or that its value has not

been fairly and proportionately equalized. Lincoln Tel. & Tel. Co. v. County Board of Equalization 465
10. For purposes of taxation, actual value, market value, and fair market value are synonymous terms. Lincoln Tel. & Tel. Co. v. County Board of Equalization 465

Telecommunications.
Before granting a certificate of convenience and necessity, the commission must find that the portion of the territory of another telephone company in which or into which the applicant proposes to construct new lines or extend its existing lines does not or will not, within a reasonable time, receive reasonably adequate telephone service from the telephone company already serving the territory. Neb. Rev. Stat. § 75-604(2) (Reissue 1976). In re Application of Best 524

Threshers' Liens.
1. The purpose of the thresher's lien law is to give notice by statute to all prospective purchasers of grain and to the owners thereof within 30 days after the completion of combining of the possible existence of a lien by the person who combined the grain. Honstein Trucking v. Sandhills Beef, Inc. 422
2. The purpose of the thresher's lien statute is to protect the rights to payment of the combiner who is not a party to the payment arrangements between the seller of the grain and the purchaser. Honstein Trucking v. Sandhills Beef, Inc. 422
3. The thresher's lien statute is remedial in nature and requires a liberal construction. Honstein Trucking v. Sandhills Beef, Inc. 422
4. The thresher's lien statute gives to the holder of a thresher's lien the rights of enforcement given to owners of secured interests in property as outlined in Neb. U.C.C. art. 9 (Reissue 1971), including the right to bring an action in replevin. Honstein Trucking v. Sandhills Beef, Inc. 422
5. Where one commingles property subject to a lien with other property alike in quality and value, the lien is not extinguished so long as there is on hand sufficient property alike in quality and value to satisfy the lien. Honstein Trucking v. Sandhills Beef, Inc. 422

Time.
1. After a verdict by a jury a motion for new trial must be made within 10 days after the verdict was rendered and accepted by the court, not from the date judgment was entered on the verdict. Novak v. Nelsen 728
2. In the absence of a timely motion for new trial, a notice of appeal must be filed within 1 month after the rendition of the

judgment or decree or the making of the final order. Novak v. Nelsen 728

Tort-feasors.

1. A release by an injured party of the tort-feasor responsible for the original injury does not, in the absence of language indicative of such an intention on the part of the parties, preclude an action by the injured party against a physician or hospital for negligent treatment of the original injury. Scheideler v. Elias 601
2. Two factors are controlling in determining the effect of an agreement purporting to operate as a release: (1) Whether the injured party has received full satisfaction; and (2) Whether the parties intended that the release be in full satisfaction of the injured party's claim, thus releasing all successive tort-feasors from liability. Such questions are for the trier of fact to decide. Scheideler v. Elias 601

Trial.

1. Where cases are interwoven and interdependent and the controversy involved has already been considered and determined by the court in former proceedings involving one of the parties now before it, the court has the right to examine its own records and take judicial notice of its own proceedings and judgments in the former action. Sherwood v. Brown 68
2. Jury instruction that a landlord may, in the absence of unusual circumstances, if any it finds, without violating its duty to exercise reasonable care for the safety of a tenant or a tenant's visitors, await the end of a snowstorm and a reasonable time thereafter before removing ice and/or snow from outside entrances, walks, platforms, or steps, *disapproved.* Danner v. Myott Park, Ltd. 103
3. A jury instruction which misstates issues or defenses and has a tendency to confuse the jury is erroneous. Danner v. Myott Park, Ltd. 103
4. Where the facts presented to sustain an issue are such that but one conclusion can be drawn when related to the applicable law, it is the duty of the court to decide the question as a matter of law and not submit it to a jury. Syas v. Nebraska Methodist Hospital Foundation 201
5. It is within the discretion of the District Court to take testimony orally for the determination of issues of fact arising upon motions, and not a right of either party to compel the adduction of such testimony. Doyle v. Union Ins. Co. 385
6. In a trial to the court in a law action, the findings of facts by the trial court have the force and effect of a jury verdict and will not be set aside unless clearly wrong. Honstein Trucking v. Sandhills Beef, Inc. 422

7. A trial court has broad discretion to exclude cumulative evidence. In re Estate of Schoch 812
8. The unexplained failure of a party to call or examine an available witness who possesses peculiar knowledge may give rise to an inference that the testimony of such witness would not sustain the contention of the party. In re Estate of Schoch 812
9. The relative convincing powers of the inferences to be drawn from failing to call or examine a witness and other evidence are for the determination of the trier of fact. In re Estate of Schoch 812
10. Where reasonable minds might draw different conclusions from the evidence, the question as to a child's negligence or contributory negligence under the circumstances is a matter for determination by the jury. Camerlinck v. Thomas ... 843

Trusts.

Where a constructive trust has been imposed, the court may trace the trust res into the hands of subsequent purchasers who are not bona fide purchasers for value and without notice. Sherwood v. Brown 68

Uniform Commercial Code.

1. A purchaser of goods under the Uniform Commercial Code claiming a breach of warranty must prove not only the warranty and the breach thereof; he must also prove the cause of the loss and the extent thereof. Settell's, Inc. v. Pitney Bowes, Inc. 26
2. The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods as accepted and the value they would have had if they had been as warranted. Settell's, Inc. v. Pitney Bowes, Inc. 26
3. The recovery of a judgment for a debt, except to the extent that it has been satisfied, does not prevent later proceedings to enforce a security interest under the Uniform Commercial Code given to secure its payment. Ceres Fertilizer, Inc. v. Beekman 447
4. Performance of an oral contract for the sale of goods that is capable of apportionment is enforceable only as to that portion that has been either fully or partially performed. In re Estate of Nelsen 730

Valuation.

1. Neb. Rev. Stat. § 77-112 (Reissue 1976) does not require the taxing authorities to utilize all the factors set forth therein in ascertaining the actual value of property for taxation. Instead, they may use such factors or a combination thereof which are determined to be applicable in determin-

ing actual value under the Constitution of Nebraska. LaGord Assoc. v. County of Cass 99
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. LaGord Assoc. v. County of Cass 99
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. LaGord Assoc. v. County of Cass 99
4. Taxes on tangible property are to be levied by valuation uniformly and proportionately. Lincoln Tel. & Tel. Co. v. County Board of Equalization 465
5. The burden of proof is upon a taxpayer to establish his contention that the value of his property has not been fairly and proportionately equalized with all other property, resulting in a discriminatory, unjust, and unfair assessment. Lincoln Tel. & Tel. Co. v. County Board of Equalization 465
6. Authorities charged with the duty of valuing property for taxation are not limited to just one method of determining value, and the ultimate question is whether the method used ultimately attains a reasonable degree of uniformity in value. Lincoln Tel. & Tel. Co. v. County Board of Equalization 465
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8. Approximation of value and uniformity is all that can be accomplished and substantial compliance with the requirement of equalization and uniformity of taxation laid down by the federal and state Constitutions is all that is required, and such provisions are satisfied when designed and manifest departure from the rules is avoided. Lincoln Tel. & Tel. Co. v. County Board of Equalization 465
9. In order for a taxpayer to secure a reduction in the assessed

value of his property, it must be demonstrated that the assessed value is grossly excessive, or that its value has not been fairly and proportionately equalized. Lincoln Tel. & Tel. Co. v. County Board of Equalization 465

10. For purposes of taxation, actual value, market value, and fair market value are synonymous terms. Lincoln Tel. & Tel. Co. v. County Board of Equalization 465

Waiver.

1. Once the right to counsel and the right to remain silent have been invoked by a defendant, the defendant cannot be persuaded to waive his rights and there is a strong presumption against waiver. If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. State v. Teater 127
2. The applicable standard to determine the admissibility of statements made by an accused during a custodial interrogation is whether the accused intelligently, knowingly, and voluntarily waived his right to remain silent and his right to have counsel present at that time. State v. Strickland ... 133
3. Requiring the execution of a waiver of extradition as a condition precedent to probation does not render the waiver involuntary without a specific showing of how such a condition was coercive as applied in the particular case. State v. Lingle 492
4. A defendant who pleads guilty to a misdemeanor in which a sentence of imprisonment is legally permissible is entitled to be informed of the nature of the charges against him, the right to assistance of counsel, the right to confront witnesses against him, the right to a jury trial, and the privilege against self-incrimination, and the record must affirmatively show a voluntary and intelligent waiver of these rights. State v. Tweedy 649
5. A guardian ad litem may not waive the substantive rights of the ward, but must require proper legal proof. In re Interest of Burbanks and Rima 676
6. The accused shall be taken to have waived all defects which may be excepted to by a motion to quash, or a plea in abatement, by demurring to an indictment or pleading in bar or the general issue. State v. Coleman 823

Warrantless Searches.

1. The smell of marijuana, standing alone, is sufficient to furnish probable cause for the warrantless search of a motor vehicle where there is sufficient foundation as to the ex-

pertise of the officer making the search. State v. Watts . 371
2. The voluntariness of the consent to search should be determined from the totality of all the circumstances surrounding it. State v. Billups 737
3. The question of whether a consent to search is voluntarily given is a question of fact. State v. Billups 737
4. When the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that the consent was given by the defendant, but may show that the permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected. State v. Billups 737

Waters.
1. Generally, where surface waters, which ordinarily result from rainfall or melted snow, collect and flow into a natural drainage channel or depression, they may not be dammed, diverted, or otherwise repelled by the owner of the land upon which they flow. Schmidt v. Chimney Rock Irrigation Dist. 1
2. Where water from another source has been added to the water for which a defendant is liable and the combined water causes damage, it is incumbent upon the plaintiff to establish either that his entire damages would have occurred from the waters for which the defendant is liable, or to establish the amount of the damage caused by the water for which the defendant is liable. Schmidt v. Chimney Rock Irrigation Dist. 1

Wills.
1. One possesses testamentary capacity if he understands the nature of his act in making a will, knows the extent and character of his property, knows and understands the proposed disposition of his property, and knows the natural objects of his bounty. In re Estate of Schoch 812
2. Testamentary capacity is tested by the state of a testator's mind at the time he executes his will. In re Estate of Schoch 812
3. Although competent evidence of a testator's condition of mind long before, closely approaching, and shortly after the execution of a will is admissible, it is received only to assist in revealing his state of mind at the time the will was executed. In re Estate of Schoch 812
4. It is the duty of the proponent of a will, in the first instance, to make a prima facie case as to testamentary capacity; it then devolves upon the contestant to overcome the presumption arising therefrom, after which the burden of proving testamentary capacity by a preponderance of the evidence devolves upon the proponent. In re Estate of

Schoch 812

Wiretaps.

1. Once it is determined that a wiretap is illegal, any evidence derived from the wiretap must be suppressed. State v. Aulrich 546
2. Neb. Rev. Stat. §§ 86-701 to 86-712 (Reissue 1976) provide their own exclusionary rule which exists separate and independent of any court-created exclusionary rule involving the fourth amendment. State v. Aulrich 546
3. 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. Lozano .. 772
4. Neither specific nor all possible investigative techniques must be tried before orders for wiretaps can be issued, nor is the government required to use a wiretap only as a last resort. State v. Lozano 772
5. It is not necessary for the State to utilize all investigative techniques before making an application for a wiretap. State v. Lozano 772
6. An affidavit is sufficient if it contains a full and complete statement of the underlying factual circumstances which justify the issuance of an order authorizing a wiretap. State v. Lozano 772
7. Staleness is an issue which must be decided on the peculiar facts of each case. State v. Lozano 772
8. Documents incorporated into an affidavit by reference need not be sworn to separately. State v. Lozano 772

Witnesses.

1. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admissible if elicited from him or established by public record during cross-examination, but only if the crime was punishable by death or imprisonment in excess of 1 year under the law under which he was convicted, or involved dishonesty or false statement. State v. Lingle 492
2. When a witness is cross-examined on a matter collateral to the issue, he cannot, as to his answer, be subsequently contradicted by the party putting the question. State v. Stewart 719
3. The unexplained failure of a party to call or examine an

available witness who possesses peculiar knowledge may give rise to an inference that the testimony of such witness would not sustain the contention of the party. In re Estate of Schoch 812
4. The relative convincing powers of the inferences to be drawn from failing to call or examine a witness and other evidence are for the determination of the trier of fact. In re Estate of Schoch 812
5. The fact that an accomplice has been guilty of willful false swearing on a material matter does not automatically discredit his testimony as a matter of law in all cases. Ordinarily, his credibility is a question for the jury under a proper cautionary instruction. State v. Dandridge 885

Words and Phrases.
1. An obstruction includes anything which will interfere with the public's use of the highway easement, and includes inanimate objects or substances which are just as dangerous and obstructive as solid obstructions. Brown v. Nebraska P.P. Dist. 61
2. Multiple injuries including a cerebral concussion and nasal fracture constitute serious bodily injuries which will support a conviction for first degree assault under Neb. Rev. Stat. § 28-308(1) (Reissue 1979). State v. Sare 91
3. An arrest is taking custody of another person for the purpose of holding or detaining him to answer a criminal charge. It is defined as the taking, seizing, or detaining of the person of another. State v. White 218
4. "Earning power," as used in Neb. Rev. Stat. § 48-121(2) (Reissue 1978), is not synonymous with wages, but includes eligibility to procure employment generally, ability to hold a job obtained, and capacity to perform the tasks of the work, as well as the ability of the workman to earn wages in the employment in which he is engaged or for which he is fitted. Akins v. Happy Hour, Inc. 236
5. A cause of action has been defined as consisting of a primary right possessed by the plaintiff and a corresponding duty devolving upon the defendant, combined with a delict or wrong done by the defendant. Gaspar v. Flott 260
6. When a personal relationship with another under the institution of marriage has deteriorated to the point that the parties can no longer live together, the marriage is irretrievably broken. Johnson v. Johnson 317
7. "Substantial performance" is a relative term and whether it exists or not is a question to be determined in each case with reference to the existing facts and circumstances. First Data Resources, Inc. v. Omaha Steaks Int., Inc. 327
8. The term "application" is a generic term which includes,

but is not limited to, motions. Doyle v. Union Ins. Co. ... 385
9. Although it is frequently stated that medical testimony must be given with "reasonable medical certainty," it is sufficient when such testimony is stated in terms of "probability." In this connection, "reasonable certainty" and "reasonable probability" are one and the same thing. Lane v. State Farm Mut. Automobile Ins. Co. 396
10. In making an arrest, an officer may use whatever force is reasonably necessary. Reasonable force is generally considered to be that which an ordinarily prudent and intelligent person, with the knowledge and in the situation of the arresting officer, would have deemed necessary under the circumstances. State v. Lingle 492
11. Whether or not a person is "actually engaged in work upon the surface of a highway" at the time of an alleged occurrence, so as to come under the provisions of Neb. Rev. Stat. § 39-606 (Reissue 1978), may be a question of fact, depending on the circumstances. Beebe v. Sorensen Sand & Gravel Co. 559
12. A child custody proceeding includes "any action which results in the termination of the parent-child relationship." 25 U.S.C.A. § 1903 (Supp. 1963 to 1980). In re Interest of Bird Head 575
13. By "right-of-way" is meant the right of one vehicle to proceed in a lawful manner in preference to another approaching under such circumstances of direction, speed, and proximity as to give rise to danger of a collision unless one grants precedence to the other. Burrows v. Jacobsen 778
14. The term "owner," as used in the Recreation Liability Act, Neb. Rev. Stat. §§ 37-1001 et seq. (Reissue 1978), includes a political subdivision as well as a private person. Watson v. City of Omaha 835
15. The causation test of exertion "greater than nonemployment life" is applied by this court only in cases of heart attacks alleged to have been caused by the employment and not to other types of injury. Engel v. Nebraska Methodist Hospital 878

Workmen's Compensation.
1. The whole character of the employment must be considered to determine whether an employee is a farm laborer within the meaning of the Workmen's Compensation Act. Otto v. Hahn 114
2. The one attacking the exemption of farm laborers from the provisions of the Workmen's Compensation Act as a violation of equal protection has the burden of proving that there is no rational basis for the classification. Otto v. Hahn 114
3. "Earning power," as used in Neb. Rev. Stat. § 48-121(2) (Reissue 1978), is not synonymous with wages, but includes

eligibility to procure employment generally, ability to hold a job obtained, and capacity to perform the tasks of the work, as well as the ability of the workman to earn wages in the employment in which he is engaged or for which he is fitted. Akins v. Happy Hour, Inc. 236

4. Under Neb. Rev. Stat. § 48-128 (Reissue 1978), if an employee who has a preexisting permanent partial disability which was known to the employer prior to the occurrence of a subsequent compensable injury receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability caused by the combined disabilities is substantially greater than that which would have resulted from the last injury considered alone and of itself, the employer at the time of the last injury is liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability, and for the additional disability the employee shall be compensated from the Second Injury Fund. Akins v. Happy Hour, Inc. 236
5. The purpose of Neb. Rev. Stat. § 48-128 (Reissue 1978) is not to provide compensation for the previous disability but to provide compensation for permanent partial or total disability resulting from a combination of the previous fact condition with a compensable injury. It is the previous fact condition combined with a second compensable injury causing permanent partial or total disability in fact that establishes the right of the employee to compensation from the Second Injury Fund. Akins v. Happy Hour, Inc. 236
6. Where an occupational disease results from the continual absorption of small quantities of some deleterious substance from the environment of the employment over a considerable period of time, an afflicted employee can be held to be injured only when the accumulated effects of the substance manifest themselves, which is when the employee became disabled and entitled to compensation; and the date of injury, within the meaning of the Workmen's Compensation Act, is the date when the disability is first incurred and the period of limitations runs from that date. Osteen v. A.C. and S., Inc. 282
7. Where a worker has contracted an occupational disease by exposure to a harmful substance over a period of years in the course of successive employments, the employer who most recently exposed the worker to the harmful substance is liable to pay the entire award. Osteen v. A.C. and S., Inc. 282
8. The policy of liberal construction of the Workmen's Compensation Act for the benefit of the claimant is the rule in Nebraska. Osteen v. A.C. and S., Inc. 282
9. Where the employment at the time of disability was not of a

kind contributing to the disease, the employer at the time of the most recent exposure which bears a causal relation to the disability is generally liable for the entire compensation. Osteen v. A.C. and S., Inc. 282

10. An injurious exposure must be of the type which could cause the disease, given prolonged exposure, and once the requirement of some contributing exposure has been met, courts will not go on to weigh the relative amount or duration of the exposure under various employers. Osteen v. A.C. and S., Inc. 282

11. In a workmen's compensation case, the findings by the Workmen's Compensation Court have the force and effect of a jury verdict and will not be set aside unless clearly wrong.
    Osteen v. A.C. and S., Inc. 282
    Riha v. St. Mary's Church & School, Inc. 539
    Engel v. Nebraska Methodist Hospital 878

12. In determining the sufficiency of evidence necessary to sustain an award of the Nebraska Workmen's Compensation Court, such evidence must be considered most favorably to the successful party, every controverted fact must be resolved in his or her favor, and he or she must receive the benefit of every inference reasonably deducible from it. Osteen v. A.C. and S., Inc. 282

13. All calculations to be made under the provisions of Neb. Rev. Stat. § 48-121 (Reissue 1978), and amendments thereof, have reference to wages, percentages, and results as of the time of injury. Osteen v. A.C. and S., Inc. 282

14. The mere fact that one may become ill or experience pain during employment does not in and of itself prove that the employee is disabled as a result of an "accident" arising out of and in the course of employment, entitling the individual to compensation under the Nebraska Workmen's Compensation Act. In order to receive that compensation it is necessary that the employee establish that the difficulties which the employee is experiencing were caused by an "accident" as defined by the Workmen's Compensation Act. Mack v. Dale Electronics, Inc. 367

15. Unless the character of the injury is objective, that is, where its nature and effect are plainly apparent, then it is a subjective condition necessitating expert testimony. Mack v. Dale Electronics, Inc. 367

16. Where the claimed injuries are of such a character as to require skilled and professional persons to determine the cause and extent thereof, the question is one of science. Such a question must necessarily be determined from the testimony of skilled professional persons and cannot be determined from the testimony of unskilled witnesses having no scientific knowledge of such injuries. The employee must

show by competent medical testimony a causal connection between the alleged injury, the employment, and the disability. Mack v. Dale Electronics, Inc. 367
17. The plaintiff in a workmen's compensation case must prove by a preponderance of the evidence that his disability is the result of an accident arising out of his employment. Riha v. St. Mary's Church & School, Inc. 539
18. The presence of a preexisting disease or condition enhances the degree of proof required to establish that the injury arose out of the employment. Riha v. St. Mary's Church & School, Inc. 539
19. Where the injury is not of an objective nature, a causal connection between the accident and the disability must be established by expert medical testimony. Riha v. St. Mary's Church & School, Inc. 539
20. The causation test of exertion "greater than nonemployment life" is applied by this court only in cases of heart attacks alleged to have been caused by the employment and not to other types of injury. Engel v. Nebraska Methodist Hospital 878
21. When a workmen's compensation claimant is alleged to have suffered a disability rising out of and in the course of his employment which consists of the aggravation of a preexisting condition, 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. Engel v. Nebraska Methodist Hospital 878