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TERRY J. FLAKUS AND MARY V. FLAKUS, HUSBAND AND WIFE, APPELLEES, V. STEVEN L. SCHUG AND BARBARA SCHUG, HUSBAND AND WIFE, APPELLANTS.

329 N.W.2d 859

Filed February 11, 1983. No. 81-822.

1. **Evidence: Verdicts: Appeal and Error.** All conflicts in the evidence and questions of the credibility of witnesses are for the jury to resolve; a jury verdict may not be set aside unless it is clearly wrong.
2. **Trial: Directed Verdict.** When, upon a jury trial, a defendant at the conclusion of all the evidence moves for a directed verdict in his favor or for dismissal, such motion must be treated as an admission of the truth of all material and relevant evidence admitted favorable to plaintiffs, and plaintiffs are entitled to the benefit of all proper inferences which can reasonably be deduced therefrom.
3. **Contracts: Fraud.** The essential elements required to sustain an action for damages as the result of fraud are that a representation was made as a statement of fact, which was untrue and known to be untrue by the party making it, or else was made recklessly; that the misrepresentation was made with the intent to deceive and for the purpose of inducing the other party to act upon it; and that such party did, in fact, rely upon the misrepresentation and was induced thereby to act to his injury or damage.
4. _____: _____. A disclaimer clause is relevant in determining whether a claimant relied on the false representation disclaimed in the clause; however, the disclaimer is ineffective to preclude the trier of fact from considering whether fraud induced formation of the bargain.
5. **Vendor and Vendee: Fraud.** As between a vendor and a purchaser, where material facts and information are equally accessible to both, and nothing is said or done which tends to impose on the purchaser or mislead him, the failure of the vendor to disclose such facts does not amount to actionable fraud; however, where such facts are known to the vendor and he knows them to be not within the reach of the attention, observation, and judgment of a reasonably diligent purchaser, and they are such as would readily mislead the purchaser as to the true condition of the property, the vendor is bound to disclose such facts.
6. **Fraud.** One may make a misrepresentation by conduct as well as by spoken words.
7. **Contracts: Fraud: Damages.** Generally, where there has been a misrepresentation in the sale of real estate, the measure of damages is the cost of placing the property conveyed in the condition represented, not exceeding the difference in value of the property conveyed and the value of the property if it had been as represented.

8. **Verdicts: Appeal and Error.** When a party has sustained the burden and expense of trial and has succeeded in securing the decision of a jury on the facts in issue, he has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured.
9. **Appeal and Error.** Consideration of assignments of error in this court is limited to those discussed in the brief.

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

Denzel R. Busick of Luebs, Dowding, Beltzer, Leininger & Smith, for appellants.

William A. Francis of Cunningham, Blackburn, Vonseggern, Livingston, Francis & Riley, for appellees.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and MORAN, D.J.

CAPORALE, J.

The sellers of residential real estate, Mr. and Mrs. Steven L. Schug, defendants in the trial court, appeal from the $3,500 judgment entered pursuant to a jury verdict in favor of the purchasers and plaintiffs-appellees, Mr. and Mrs. Terry J. Flakus. We affirm.

The sellers contend, in summary, that the trial court erred in (1) failing to sustain their motions for directed verdict after the close of the evidence; (2) admitting certain evidence with respect to cause and damages; and (3) improperly charging the jury with respect to the elements of fraud and the measure of damages.

The purchasers' amended petition alleges that the sellers "fraudulantly [sic] represented to Plaintiffs that the lot and house in question was [sic] free from underground water problems and that they [sellers] had not experienced water problems in the basement of the home." The amended petition alleges the other elements of a cause of action for contractual or promissory fraud, and prays for damages. The sellers deny the operative allegations of

the purchasers' amended petition, and allege that the sale was based upon the purchasers' own investigation and not upon any representations made by the sellers.

A jury verdict may not be set aside unless it is clearly wrong, and all conflicts in the evidence and questions of the credibility of witnesses are for the jury to resolve. *Diesel Service, Inc. v. Accessory Sales, Inc.,* 210 Neb. 797, 317 N.W.2d 719 (1982); *Kniesche v. Thos,* 203 Neb. 852, 280 N.W.2d 907 (1979). Moreover, when, upon a jury trial, a defendant at the conclusion of all the evidence moves for a directed verdict in his favor or for dismissal, such motion must be treated as an admission of the truth of all material and relevant evidence admitted favorable to plaintiffs, and plaintiffs are entitled to the benefit of all proper inferences which can reasonably be deduced therefrom. *Popken v. Farmers Mutual Home Ins. Co.,* 180 Neb. 250, 142 N.W.2d 309 (1966). Tested in accordance with these rules, the salient facts are that the purchasers inspected the premises in question prior to executing an offer to purchase on June 10, 1979. During these inspections the purchaser Mr. Flakus observed a sump pump in the basement furnace and laundry room and a sand point well in a basement storage room. A sand point well is used both to lower the water table and as a source of water. However, the basement had been finished into a living area, and a sump hole located in a walk-in closet under the basement stairs and a sump hole in another closet had been concealed prior to the purchasers' inspections. The offer to purchase was accepted by the sellers on June 19, 1979, following which the purchasers moved into the home. They experienced damaging water in the basement in April of 1980 and again during a tornado in June of 1980. One of the concealed sump holes was discovered by the purchasers after the April occurrence and the other following the June occurrence.

The essential elements required to sustain an action for damages as the result of fraud are that a representation was made as a statement of fact, which was untrue and known to be untrue by the party making it, or else was made recklessly; that the misrepresentation was made with the intent to deceive and for the purpose of inducing the other party to act upon it; and that such party did, in fact, rely upon the misrepresentation and was induced thereby to act to his injury or damage. *Gitschel v. Sauer,* 212 Neb. 454, 323 N.W.2d 93 (1982); *Hauck v. Samus,* 212 Neb. 25, 321 N.W.2d 68 (1982); *Erftmier v. Eickhoff,* 210 Neb. 726, 316 N.W.2d 754 (1982); *Luscher v. Empkey,* 206 Neb. 572, 293 N.W.2d 866 (1980).

The contract executed by the parties contains a clause which provides: "This offer is based upon my personal inspection or investigation of the premises and not upon any representation or warranties of condition by the Seller or his agent." Based upon our language in *Camfield v. Olsen,* 183 Neb. 739, 164 N.W.2d 431 (1969), the sellers argue that in view of the disclaimer described above, the purchasers could not have justifiably relied upon any representation which the sellers may have made. The sellers are in error in this regard. *Camfield* was a suit to foreclose the buyers' equity of redemption under an installment sales contract for the purchase of a motel. In a cross-petition for damages the buyers alleged the contract had been induced by false representations. The agreement recited, among other things, the number of times the buyers had stayed at the motel; that the buyers had seen a newspaper article reporting a flooding of the motel; that the sellers had informed the buyers the motel had flooded on two previous occasions; and that the sellers had instructed the buyers on how they thought the motel could be cleaned if another flood should occur. The agreement also stated the buyers had personally and fully inspected the motel. It is

true that in discussing the elements of fraud we said a disclaimer clause is relevant in determining whether a claimant relied on a false representation disclaimed in the clause. We also said, however, that the disclaimer is ineffective to preclude the trier of fact from considering whether fraud induced formation of the bargain. We also made the same observations in the later case of *Abbott v. Abbott,* 188 Neb. 61, 195 N.W.2d 204 (1972).

A more recent case dealing with fraud with respect to the sale of real estate is *Hauck v. Samus, supra.* We ruled therein that the seller of real property is not guilty of fraud as the result of a failure to disclose material, latent defects which are unknown to him. However, where the evidence shows that he was aware of circumstances from which a reasonable inference could be drawn that he either knew or should have been aware of the fact that latent, defective conditions existed, then he is liable to the purchaser. See, also, *Gitschel v. Sauer, supra; Dargue v. Chaput,* 166 Neb. 69, 88 N.W.2d 148 (1958). The latter was an action to rescind a contract for the purchase of residential property because of fraud by misrepresentation and concealment of certain facts relating to the condition of the property. *Dargue* holds that as between a vendor and a purchaser, where material facts and information are equally accessible to both, and nothing is said or done which tends to impose on the purchaser or mislead him, the failure of the vendor to disclose such facts does not amount to actionable fraud; however, where such facts are known to the vendor and he knows them to be not within the reach of the attention, observation, and judgment of the purchaser, and they are such as would readily mislead a reasonably diligent purchaser as to the true condition of the property, the vendor is bound to disclose such facts. One may make a misrepresentation by conduct as well as by spoken words. See *Haarberg v. Schneider,* 174 Neb. 334, 117 N.W.2d 796 (1962), holding that the set-

ting back of an odometer, leaving the manufacturer's suggested retail list price attached to rear window, and inserting the word "new" in the invoice presented a jury question on the issue of fraud, notwithstanding that the seller did not say to the purchaser the car was new and made no statement as to the number of miles the car had been driven. Therefore, under the evidence in this case the jury could have found that the concealment of the two sump holes constituted a misrepresentation by conduct as to a material, latent defect known to the sellers.

The sellers argue, however, that the plaintiff did not plead a misrepresentation by conduct or concealment but, rather, pled oral misrepresentations. It appears the sellers read *Dargue* to make some distinction between the legal theories of misrepresentation by words and misrepresentation by concealment or conduct. Accordingly, the sellers urge the trial court erred in instructing the jury concerning fraudulent concealment. We disagree, since we neither understand *Dargue* to make such a distinction nor do we perceive any such distinction to exist.

The phrase "fraudulantly [sic] represented to Plaintiffs that the lot and house in question was [sic] free from underground water problems" in the purchasers' amended petition may well have been subject to a motion to make more definite and certain. However, no such motion was filed, and the language is sufficiently broad to admit evidence concerning concealment of the sump holes. In view of the fact that evidence concerning the concealed sump holes was properly admissible, there is evidence concerning the element of a reasonable reliance upon the misrepresentations by concealment or conduct sufficient to support the trial court's instruction concerning fraudulent concealment.

We now move on to a consideration of the proper measure of damages. Generally, where there has

been a misrepresentation in the sale of real estate, the measure of damages is the cost of repair, not exceeding the difference between the value of the property conveyed and the value of the property if it had been as represented. *Fink v. Denbeck,* 206 Neb. 462, 293 N.W.2d 398 (1980). The later case of *Bibow v. Gerrard,* 209 Neb. 10, 306 N.W.2d 148 (1981), does not refer to the need for comparing the cost of repair to the diminished value because the misrepresentation related only to the number of acres involved. Obviously, in such a situation there is no cost of repair. Indeed, perhaps a clearer statement of the rule is that where there has been a misrepresentation in the sale of real estate, the measure of damages is the cost of placing the property conveyed in the condition represented, not exceeding the difference in value of the property conveyed and the value of the property if it had been as represented. The trial court gave the following instruction: "The measure of damages is the difference in value between the property purchased if it had been as represented and its actual value." The instruction is, as claimed by the sellers, erroneous because it does not limit the recovery to the lesser of the diminished value or the cost of repair.

The question becomes, however, whether the error is prejudicial, for when a party has sustained the burden and expense of trial and has succeeded in securing the decision of a jury on the facts in issue, he has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured. *Sortino v. Paynter,* 206 Neb. 348, 292 N.W.2d 916 (1980). We must therefore look to the evidence in order to determine whether the error was prejudicial to the sellers.

The purchaser Mr. Flakus testified that in his opinion the property conveyed was worth $10,000 less than if it had been as represented. Mr. Woodrow Nelson, a construction supervisor and estimator with at least 3 years' experience in construction, in

essence testified that although he could not guarantee that installation of a drain tile system would solve the problem, such a system could be tried as a solution. The cost of installation would be $3,458. Although evidence concerning the cause of the need to replace certain items and the predamage value of such and other items is lacking, the record does, nonetheless, contain competent evidence as to the cost of $1,018 for repairing the water-damaged drywall and floor tile. It is clear, therefore, that the court's erroneous instruction on the measure of damages did not prejudice the sellers.

We note the sellers assert the trial court erred in allowing a "nonexpert to state an opinion as to the cause of the water Plaintiffs allegedly experienced . . . ." That claimed error, however, is not discussed in sellers' brief. Since consideration of assignments of error in this court is limited to those discussed in the briefs, we do not address the question. See, Neb. Ct. R. 9D(1)d (Rev. 1982); Neb. Rev. Stat. § 25-1919 (Reissue 1979); *Cockle v. Cockle,* 204 Neb. 88, 281 N.W.2d 392 (1979); *State v. Beckner,* 211 Neb. 442, 318 N.W.2d 889 (1982).

For the reasons discussed above, we conclude that each of the sellers' assignments of error is without merit and, accordingly, affirm the trial court's judgment on the verdict.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DAVID JOSEPH LAMB, APPELLANT.

330 N.W.2d 462

Filed February 11, 1983. No. 81-851.

1. **Miranda Rights.** Interrogation occurs when the subject is placed under a compulsion to speak.
2. **Miranda Rights: Confessions.** Generally, statements made in a conversation initiated by the accused are not the results of interrogation and are admissible.

3. **Motions to Suppress: Appeal and Error.** Factfindings by the trial court on a motion to suppress will not be overturned on appeal unless clearly wrong.
4. **Confessions.** Intoxication is not conclusive on the issue of the voluntariness of a statement.
5. **Confessions: Appeal and Error.** A determination by the trial court that a statement was made voluntarily will not be disturbed on appeal unless clearly wrong.
6. **Convictions: Appeal and Error.** A conviction will not be reversed because of the admission of evidence not prejudicial to the defendant.
7. **Confessions: Right to Counsel.** Spontaneous statements made by the defendant, even after counsel has been requested, if not induced by the police or if made during conversations not initiated by the officers, are not "interrogation." The defendant must be subjected to "interrogation" in order for the right to counsel to come into play.
8. **Right to Counsel: Waiver.** The failure of the police to notify counsel, even if aware of such representation, does not violate the defendant's sixth amendment rights to the presence of counsel when the right has been waived voluntarily.
9. **Jury Instructions.** It is the duty of the trial court to instruct the jury on the law of the case whether requested to do so or not. Failure to do so constitutes prejudicial error.
10. _____. Alleged errors in instructions which are not prejudicial to the complaining party are not grounds for reversal of a judgment otherwise correct.
11. **Homicide: Mental Competency.** In order to prove the requisite mental state for murder in the first degree, the State is required to show a condition of the mind which was manifested by intentionally doing a wrongful act without just cause or excuse and which is defined as any willful or corrupt intention of the mind.
12. **Criminal Law: Mental Competency.** The test of responsibility for crime is the defendant's capacity to understand the nature of the act alleged to be criminal and the ability to distinguish between right and wrong with respect to the act.
13. **Criminal Law: Insanity.** Insanity as a defense must be shown to exist at the time of the offense.
14. **Criminal Law: Mental Competency.** The fact that a defendant had some form of mental illness or defect does not by itself establish lack of responsibility.
15. **Appeal and Error.** Generally, consideration of a cause in this court is limited to errors assigned and discussed.
16. **Homicide: Photographs.** In a homicide case photographs of the victim are admissible, even if gruesome, if a proper foundation is laid and they are received for purposes of identification, to show the condition of the body, the nature and extent of the wounds, and to establish malice or intent.

17. **Jurors.** A juror who has indicated an inability to fairly and impartially determine guilt may be excused for cause.

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

Dennis R. Keefe, Lancaster County Public Defender, and Scott P. Helvie, for appellant.

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

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

BOSLAUGH, J.

The defendant appeals from his conviction for first degree murder and sentence to life imprisonment. The defendant has assigned as error the denial of his motion to suppress and the subsequent admission into evidence of the challenged testimony; the "death qualification" of the jury; the admission into evidence of a photograph of the victim; and the giving of an instruction on the defense of intoxication. The defendant has also assigned as error that the verdict was contrary to the evidence and the law and that the finding by the sentencing panel that an aggravating circumstance existed was erroneous.

On July 14, 1980, the defendant shot and killed his wife, Dell Lamb, at their trailer home in Lincoln, Nebraska. After shooting his wife the defendant shot and killed their two dogs. The defendant had been drinking and had purchased the rifle used in the shooting earlier that day. At about 5:22 in the evening, the defendant called the long-distance operator, who referred the call to the Lincoln police dispatcher. The defendant stated that he had shot and killed his wife. When the police arrived at the home, Mrs. Lamb was dead. The defendant was then taken into custody.

At the arraignment on the charge of first degree murder, the defendant stood mute and a plea of not guilty was entered. Later the plea was changed to

not guilty by reason of insanity, and then to not responsible by reason of insanity. After a lengthy trial the jury returned a verdict of guilty of first degree murder. Following conviction, a sentencing panel imposed a sentence of life imprisonment.

The assignment of error concerning the ruling on the pretrial motion to suppress is directed primarily at three statements made to the police by the defendant after his arrest. The first statement was made shortly after the defendant arrived at the police station. Defendant had been taken to the station in a police cruiser driven by Officer Shurtleff. During the ride the defendant made remarks about the temperature of the car and told Shurtleff that he "was sick of seeing his wife suffer." At the station the defendant was placed in a holding room until a detective could be found to interview him. While in this room, the defendant told Shurtleff that he had shot his wife and was going to shoot himself but decided to drink some whiskey first. A few moments later the defendant said to Shurtleff, "How would you like it?" Shurtleff replied, "What do you mean by that?" The defendant answered, "I have to do the cooking, washing, the laundry. And I got tired of it, and I got tired of seeing her suffer so I shot her." Shurtleff testified that he was concerned about whether the defendant was uncomfortable, ill, or angry at being placed in that particular holding room. At the time, no *Miranda* warnings had been given to the defendant and Shurtleff had not posed any other questions to the defendant.

The defendant contends that the statement made in response to the question "What do you mean by that?" should have been suppressed, as it was the result of an unconstitutional custodial interrogation. The defendant contends that before any custodial interrogation by police can take place, the rule of *Miranda v. Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), requires that the defendant be apprised of his right against self-incrimination and

of his right to the assistance of counsel. The defendant argues that interrogation occurs either through express questioning or its "functional equivalent," which is defined as police words or actions known by police to be reasonably likely to elicit an incriminating response. *Rhode Island v. Innis,* 446 U.S. 291, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980).

In ruling on the motion to suppress, the trial court found that the statement was not made as a result of interrogation, but rather as the result of a "neutral," "spontaneous" question, not designed to elicit a confession.

The issue presented is whether this question constituted interrogation within the purview of *Miranda* and *Innis.* This court has determined that interrogation occurs when the subject is placed under a compulsion to speak. *In re Interest of Durand,* 206 Neb. 415, 293 N.W.2d 383 (1980). Statements made in a conversation initiated by the accused or spontaneously volunteered by the accused are not the result of interrogation and are admissible. *State v. Pittman,* 210 Neb. 117, 313 N.W.2d 252 (1981); *State v. Red Feather,* 205 Neb. 734, 289 N.W.2d 768 (1980).

A number of cases have held that this type of question does not amount to interrogation. In *Leslie v. Wainwright,* 511 F. Supp. 753 (M.D. Fla. 1981), the court, in a footnote, stated that a police officer's excited utterance to defendant, "What did you say?" did not constitute improper interrogation. In *Com. v. Shepherd,* 269 Pa. Super. 291, 409 A.2d 894, 896 (1979), the court said: "Where there is no expectation of an admission and the police conduct is not an attempt to obtain an admission, there is no interrogation." In *State v. Link,* 289 N.W.2d 102 (Minn. 1979), it was held that questions which had "nothing to do with investigative criminal activity" were not proscribed by *Miranda.* In *United States v. Pauldino,* 487 F.2d 127 (10th Cir. 1973), *cert. denied* 415 U.S. 981, 94 S. Ct. 1572, 39 L. Ed. 2d 878 (1974),

defendant was arrested for auto theft. He volunteered that he had a bill of sale. When asked by police if he had it, defendant replied he did not. The police question was held not to be a violation of *Miranda,* as it was a course of inquiry related and responsive to a volunteered remark. In *Johnson v. State,* 269 Ind. 370, 377, 380 N.E.2d 1236, 1240 (1978), the court stated: "Not every statement uttered by a police officer which is punctuated with a question mark will necessarily constitute an interrogation. . . . Rather, it is necessary to view the statement in the context in which it was made." In the *Johnson* case the officer's remark "What happened?" was held to be more in the nature of a greeting intended for its calming effect than for obtaining an admission, and thus the responsive statement was a spontaneous, voluntary, and unsolicited remark. See, also, *United States v. Voice,* 627 F.2d 138 (8th Cir. 1980).

Factfindings by the trial court on a motion to suppress will not be overturned on appeal unless clearly wrong. A totality of the circumstances test is used. *State v. Strickland,* 209 Neb. 133, 306 N.W.2d 600 (1981); *State v. Sutton,* 207 Neb. 778, 301 N.W.2d 335 (1981). The record supports the trial court's conclusion that the question was a neutral and spontaneous one, not calculated to obtain a confession. Furthermore, the question did not place defendant under a compulsion to speak. The defendant had initiated the conversation, and the officer simply requested clarification. The finding of the trial court was not clearly wrong.

The second statement was made by the defendant to Lieutenant Wilkins, a police detective, on the evening of the day of the shooting. The defendant was given the *Miranda* warnings before the interview began. Detective Wilkins testified that the defendant, at that time, waived his rights freely and voluntarily. In the statement, the defendant admitted that he shot his wife and dogs. The defendant argues that the testimony of Lieutenant Wilkins

and the statement itself should have been suppressed under the rule expressed in *Blackburn v. Alabama,* 361 U.S. 199, 80 S. Ct. 274, 4 L. Ed. 2d 242 (1960), *Malloy v. Hogan,* 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964), and *Lego v. Twomey,* 404 U.S. 477, 92 S. Ct. 619, 30 L. Ed. 2d 618 (1972), because the defendant was in such a state of intoxication that he could not make a voluntary and intelligent waiver of his rights. A blood alcohol test taken approximately 10 minutes after the interview was completed revealed that the defendant's blood alcohol level was then .224 percent. The trial court found that the statements had been made freely, voluntarily, and intelligently.

Intoxication is not conclusive on the issue of voluntariness. In *State v. Laffoon,* 125 Ariz. 484, 487, 610 P.2d 1045, 1048 (1980), the Arizona Supreme Court stated: "The mere fact of intoxication does not render a statement inadmissible. The defendant must be so intoxicated that he is unable to understand the meaning of his statements. . . . If the trial judge is satisfied that under the totality of the circumstances the defendant was able to reason, comprehend, or resist, the statements are to be admitted." In *Mallott v. State,* 608 P.2d 737 (Alaska 1980), it was held that a blood alcohol reading of .31 did not render the defendant's statements inadmissible, as the investigator testified that defendant's responses to questioning were adequate. In *People v. Pawlicke,* 62 Ill. App. 3d 791, 796-97, 379 N.E.2d 798, 801 (1978), it was held that "The fact that the defendant may have consumed two bottles of strawberry wine . . . that she had taken four Librium tablets, that she felt depressed and was contemplating suicide; that her intelligence was 'dull'; and that her attention was focused on the deceased and her emotional relationship with the deceased does not require a conclusion that her subsequent statements were involuntary." See, also, *Rowe v. State,* 41 Md. App. 641, 398 A.2d 485 (1979), and *State v. Kelly,* 376

A.2d 840 (Me. 1977), wherein it was held that statements will be suppressed as involuntary only where it can be shown that defendant was not aware and able to comprehend and communicate with coherence and rationality. See, also, *State v. Rogers,* 208 Neb. 464, 303 N.W.2d 788 (1981).

A determination by the trial court that a statement was made voluntarily will not be disturbed on appeal unless clearly wrong. *State v. Sutton, supra; State v. McNitt,* 207 Neb. 296, 298 N.W.2d 465 (1980); *State v. Williams,* 205 Neb. 56, 287 N.W.2d 18 (1979), *cert. denied* 449 U.S. 891, 101 S. Ct. 255, 66 L. Ed. 2d 120 (1980). A totality of the circumstances test is used. *State v. Teater,* 209 Neb. 127, 306 N.W.2d 596 (1981).

Although there is some conflict in the evidence, the record supports the trial court's finding. Those who encountered defendant early in the day testified that he appeared to know what he was doing. Each police officer who came into contact with defendant following his arrest testified that he was capable of making voluntary and intelligent responses. Defendant answered the operator's questions coherently. His answers to the detective's questions were responsive.

It should be noted that the admission of the statements made to Shurtleff and Wilkins did not prejudice defendant. The defendant had made several voluntary and admissible confessions of guilt throughout the day. A conviction will not be reversed because of the admission of evidence not prejudicial to the defendant. *State v. Brehmer,* 211 Neb. 29, 317 N.W.2d 885 (1982); *State v. Packett,* 206 Neb. 548, 294 N.W.2d 605 (1980); *State v. Smith,* 209 Neb. 505, 308 N.W.2d 820 (1981).

The third statement was made by the defendant to Detectives Rowe and VanButsel about a week after the shooting. The defendant had requested a meeting with the officers. At the meeting the defendant requested that $30 he had on his person at the time

of his arrest be returned to him. No additional *Miranda* warnings were given during the meeting, but *Miranda* warnings had been given to the defendant on at least three separate prior occasions and each time the defendant had waived his rights.

Counsel had been appointed for the defendant at the time this meeting took place. The defendant argues that the information received by police as the result of this meeting should have been suppressed because the sixth amendment to the U.S. Constitution, as interpreted in *Massiah v. United States,* 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964), and *Brewer v. Williams,* 430 U.S. 387, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977), requires the presence of counsel at such an interrogation. It is the defendant's position that he should have had an opportunity to request counsel. The trial court ruled that the statements were volunteered by defendant and were not the result of questioning. The statement regarding the money was admitted as relevant to defendant's mental state and his memory of the events on the day of the shooting.

In order for the right to counsel to come into play, the defendant must be subjected to "interrogation." Spontaneous statements made by the defendant, even after counsel has been requested, if not induced by the police or if made during conversations not initiated by the officers, are not "interrogation." *State v. Pittman,* 210 Neb. 117, 313 N.W.2d 252 (1981). "When an accused initiates the conversation, his statements do not result from 'interrogation' and are admissible." *United States v. Perkins,* 608 F.2d 1064, 1068 (5th Cir. 1979). Further, the fact that the defendant initiated the conversation is a circumstance from which it can be inferred that the right to an attorney was waived. *Id.* The failure of the police to notify counsel, even if aware of such representation, does not violate the defendant's sixth amendment rights to the presence of counsel when the right has been waived voluntarily. *State v.*

Jackson, 205 Neb. 806, 290 N.W.2d 458 (1980).

Factfindings by the trial court on a motion to suppress will not be overturned on appeal unless clearly wrong. *State v. Strickland,* 209 Neb. 133, 306 N.W.2d 600 (1981). By requesting the meeting and initiating the conversation regarding the money, the defendant waived his right to counsel voluntarily. The record supports this finding.

The defendant next contends that it was erroneous for the trial court to instruct the jury on the defense of intoxication, over his objection. The defendant argues that this violated the attorney-client privilege and denied him due process of law.

It is the duty of the trial court to instruct the jury on the law of the case whether requested to do so or not. Failure to do so constitutes prejudicial error. *State v. Duis,* 207 Neb. 851, 301 N.W.2d 587 (1981); *Herman v. Midland Ag Service, Inc.,* 200 Neb. 356, 264 N.W.2d 161 (1978). See, also, *State v. Thomas,* 262 N.W.2d 607, 612 (Iowa 1978): "Even without a request, the court must instruct fully on all material issues, stating applicable legal principles supported by requisite evidence"; *State v. Miller,* 120 Ariz. 224, 226, 585 P.2d 244, 246 (1978): "In matters of a fundamental nature, the trial judge is required to instruct the jury on his own motion, even if not requested by the defense, and failure to instruct the jury on a matter vital to the rights of the defendant creates fundamental error"; *People v. Olguin,* 119 Cal. App. 3d 39, 173 Cal. Rptr. 663, 667 (1981): "Even in the absence of a request, the court is under an affirmative duty to give an instruction on defendant's theory of defense where ' ". . . it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense . . . ." ' . . . Moreover, . . . the trial court had a *sua sponte* duty to instruct on these principles pursuant to its obligation to instruct as to the general principles of law even where no such instruction is re-

quested." The defendant would have the trial court ignore this duty.

The factual foundation for the instruction on intoxication is amply supported by the record and, if believed by the jury, would have permitted a finding of guilt of a lesser-included offense. It had some bearing on the mental state of the defendant at the time of the shooting. The defendant has shown no prejudice resulting from the inclusion of this defense along with the insanity defense. Alleged errors in instructions which are not prejudicial to the complaining party are not grounds for reversal of a judgment otherwise correct. *Snyder v. Fort Kearney Hotel Co., Inc.,* 185 Neb. 476, 176 N.W.2d 686 (1970).

Defendant next contends that the verdict was not supported by the evidence and was contrary to law. A jury verdict of guilty will not be overturned on appeal unless it is so lacking in probative force that it can be said as a matter of law the evidence is insufficient to support it. *State v. Thaden,* 210 Neb. 622, 316 N.W.2d 317 (1982); *State v. True,* 210 Neb. 701, 316 N.W.2d 623 (1982).

The statute which was in effect at the time of the crime provided: "A person commits murder in the first degree if he kills another person (1) purposely and with deliberate and premeditated malice . . . ." Neb. Rev. Stat. § 28-303 (Reissue 1979).

There was no dispute about the fact of the killing. In order to prove the requisite mental state, the State was required to show a condition of the mind which was manifested by intentionally doing a wrongful act without just cause or excuse and which is defined as any willful or corrupt intention of the mind. *State v. Johnson,* 200 Neb. 760, 266 N.W.2d 193 (1978).

Defendant relied on the defense of not responsible by reason of insanity. " 'The test of responsibility for crime is the defendant's capacity to understand the nature of the act alleged to be criminal and the

ability to distinguish between right and wrong with respect to the act.' " *State v. Simants,* 197 Neb. 549, 570, 250 N.W.2d 881, 893 (1977), *cert. denied* 434 U.S. 878, 98 S. Ct. 231, 54 L. Ed. 2d 158, *rehearing denied* 434 U.S. 961, 98 S. Ct. 496, 54 L. Ed. 2d 322. Insanity as a defense must be shown to exist at the time of the offense. *State v. Newson,* 183 Neb. 750, 164 N.W.2d 211 (1969). See *State v. Bolton,* 210 Neb. 694, 316 N.W.2d 619 (1982). Defendant argues that his mental functions were impaired because of his long history of alcohol abuse, and his relationship with his wife had become a source of great depression for him because she was chronically ill and was becoming an increasing burden on him. He argues these things prevented him from forming the requisite mental state at the time of the killing.

The record amply supports the verdict of the jury. The defendant admitted that as early as 1975 he thought about shooting his wife and dogs. On the day of the shooting the defendant fabricated stories regarding the rifle he purchased. He told the clerk at the hardware store the rifle was for a nephew. Upon arriving home he told his wife he had found the gun. He stated to the police detective, "I will convict myself if I say that, but I will tell you anyway. I bought a rifle." The evidence shows the defendant was aware of the wrongful quality of his intended acts.

All of the stories given by the defendant regarding the incident were consistent. The police officers and the other witnesses who were in contact with defendant on that day testified that he seemed to know what he was doing. He recalled how much money he had at the time of his arrest. The record shows the defendant knew what he was doing and was able to recall his actions.

Although there were conflicts in the expert testimony, the evidence of the State was that the defendant was not "insane" at the time of the offense within the legal definition of that term. One of the wit-

nesses called by the defendant refused to give an opinion regarding the defendant's mental state at the time of the act. The witnesses generally did not find the defendant to be suffering from an extreme and debilitating form of mental illness. The fact that a defendant had some form of mental illness or defect does not by itself establish lack of responsibility. *State v. Simants, supra.*

The defendant next assigns as error the admission over objection of a photograph of the victim's head showing the bullet wounds and the resulting blood. The defendant objected to the exhibit on the basis of foundation and that its prejudicial effect outweighed its probative value.

This assignment of error was not discussed in the brief. Generally, consideration of a cause in this court is limited to errors assigned and discussed. *State v. Stranghoener,* 208 Neb. 598, 304 N.W.2d 679 (1981).

In a homicide case photographs of the victim are admissible, even if gruesome, if a proper foundation is laid and they are received for purposes of identification, to show the condition of the body, the nature and extent of the wounds, and to establish malice or intent. *State v. Rowe,* 210 Neb. 419, 315 N.W.2d 250 (1982). These requirements were met in this case.

Another error assigned but not discussed was the finding by the sentencing panel that "The murder was especially heinous, atrocious, cruel or manifested exceptional depravity by ordinary standards of morality and intelligence." See Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1979).

There was evidence that the defendant shot the victim twice in the head at close range while she was lying on a davenport. Although the wounds rendered the victim unconscious, she did not die immediately. The time of the shooting was not fixed precisely, but it may have been 1 or 2 hours before the telephone call at 5:22 p.m. As the sentencing panel found, "Defendant killed his wife without just

cause or excuse. The murder of Dell Lamb was planned, callous, cold-blooded and involved cruel disregard for human life. The killing was totally and senselessly bereft of any regard for human life. Under the circumstances of this murder, the murder was especially atrocious, cruel and manifested exceptional depravity by ordinary standards of morality and intelligence."

In any event, the finding that the aggravating circumstance existed was not prejudicial to the defendant. The finding would be of importance only if a death sentence had been imposed. Neb. Rev. Stat. §§ 29-2519 et seq. (Reissue 1979). The sentence of life imprisonment which was imposed in this case was fully justified by the record and was not an abuse of discretion.

The defendant's final assignment of error contends the trial court erred in permitting "death qualification" of the jury. Defendant's motion to prohibit asking the jury panel, on voir dire, questions relative to their feeling on the death penalty was overruled. The court stated, in overruling the motion, that such questions would be permitted within the scope of *Lockett v. Ohio,* 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978). Defendant had argued that such voir dire would result in a "prosecution prone" jury, as those who were strongly opposed to the death penalty would be excused from the jury through the State's use of its challenges. Defendant argued that such a jury would be more likely to convict.

In *Lockett, supra,* the prosecution asked the panel whether any of the jurors were so opposed to capital punishment that they could not make their determination of guilt based solely upon the evidence and the law. The court asked those who responded affirmatively whether their opposition to the death penalty was of such strength that it would prohibit them from taking the oath. Four veniremen responded affirmatively to both inquiries and were

excused. As in Nebraska, a jury in Ohio does not make the sentencing decision in capital cases.

The Court held such voir dire proper as "[e]ach of the excluded veniremen in this case made it 'unmistakably clear' that they could not be trusted to 'abide by existing law' and 'to follow conscientiously the instructions' of the trial judge. . . . They were thus properly excluded under *Witherspoon,* even assuming, *arguendo,* that *Witherspoon* provides a basis for attacking the conviction as well as the sentence in a capital case." 438 U.S. at 596.

In *Witherspoon v. Illinois,* 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968), *rehearing denied* 393 U.S. 898, 89 S. Ct. 67, 21 L. Ed. 2d 186, the Court held that without concrete evidence to support the "prosecution prone" theory, a *conviction* will not be overturned simply because of a "death-qualifying" voir dire. However, the Court held that where the sentencing function is entrusted to the jury, excluding all jurors opposed to the death penalty falls "woefully short of that impartiality to which the petitioner was entitled under the Sixth and Fourteenth Amendments." 391 U.S. at 518.

In *State v. Anderson and Hochstein,* 207 Neb. 51, 296 N.W.2d 440 (1980), *cert. denied* 450 U.S. 1025, 101 S. Ct. 1731, 68 L. Ed. 2d 219 (1981), this court dealt with the issue of "death qualification" of the jury. Relying upon the decision in *Witherspoon, supra,* we held that that decision does not preclude exclusion of a juror who has indicated an inability to fairly and impartially determine guilt. In *State v. Kirby,* 185 Neb. 240, 249, 175 N.W.2d 87, 93 (1970), this court stated, "One who cannot subordinate his personal views to what he perceives to be his duty to abide by his oath as a juror and to obey the law of the state must be excused for cause."

In the present case the court asked the jury panel: "This is a case of murder in the first degree. . . . And one of the possible penalties is the death penalty. The Judge makes the final decision in the

case in the event of conviction, and with the punishment you have absolutely nothing to do with it. The question is whether or not any of you have conscientious scruples against the death penalty." The record does not reflect any responses of the jury. The defendant does not contend that any juror was excluded as a result of this question.

The question asked by the trial court was of the type permitted in the cases cited, as it was directed at whether the jurors would be able to render a verdict upon an impartial consideration of the evidence and the law. The defendant has not demonstrated by concrete evidence that the jury was conviction prone. Additionally, the sentencing of the defendant did not rest with the jury.

As a final consideration, since defendant was not sentenced to death, he has not demonstrated prejudice either in regard to his conviction or his sentence. In the absence of prejudice, a conviction otherwise correct will not be overturned. *State v. Brehmer,* 211 Neb. 29, 317 N.W.2d 885 (1982); *State v. Packett,* 206 Neb. 548, 294 N.W.2d 605 (1980).

There being no error, the judgment is affirmed.

AFFIRMED.

CLINTON, J., not participating.

TERRY SMITH CARADORI, APPELLEE AND CROSS-APPELLANT, V. FRONTIER AIRLINES, INC., APPELLANT AND CROSS-APPELLEE.

329 N.W.2d 865

Filed February 11, 1983. No. 82-208.

1. **Workmen's Compensation: Appeal and Error.** It is well settled that findings of fact made by the Workmen's Compensation Court on rehearing have the same force and effect as a jury verdict in a civil case and, if supported by sufficient evidence, will not be disturbed on appeal unless clearly wrong.
2. **Workmen's Compensation: Proof.** The burden of proof is upon the plaintiff to prove an accident arising out of and in the course

of his employment and the disability resulting therefrom. Plaintiff must show a causal connection between the accident suffered by him and the alleged disability.

3. _____: _____. 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.

4. **Workmen's Compensation.** An award of compensation may not be based on possibilities or speculative evidence.

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

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

Spencer W. Dillon, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and COLWELL, D.J., Retired.

WHITE, J.

Appellee resided in Omaha, Nebraska, from January of 1978 until September of 1978. From September of 1978 until June of 1979 she resided in Denver, and in June of 1979 she returned to Omaha. On February 8, 1979, appellee was a flight attendant for Frontier Airlines, Inc., with her employment base of operations in Denver, Colorado. She was working on a Frontier Airlines flight from Denver to Kansas City, Missouri, when the plane suddenly veered and she fell off balance and received the back injury complained of. The appellee has a previous history of back injury, the most worthy of note being a 1978 incident. The Workmen's Compensation Court made an award and the employer appeals.

A number of issues are raised by appellant: (1) The scope of the jurisdiction of the Workmen's

Compensation Court under Neb. Rev. Stat. § 48-115(2)(b) (Reissue 1978); (2) If we find that the compensation court had jurisdiction, whether an action based on these same facts filed in another state requires the Nebraska action to be abated, or stayed; (3) Whether the acceptance of benefits under the Colorado workmen's compensation law precluded recovery under Nebraska law; and (4) Whether the compensation court erred in finding that Caradori's disability arose out of and in the course of her employment by Frontier Airlines, Inc.

In view of our decision in this case, we will discuss only the fourth assignment of error.

It is well settled that findings of fact made by the Workmen's Compensation Court on rehearing have the same force and effect as a jury verdict in a civil case and, if supported by sufficient evidence, will not be disturbed on appeal unless clearly wrong. *Renshaw v. Merrigol-Adler Bakery,* 212 Neb. 662, 325 N.W.2d 46 (1982).

Essentially, the question which arises in this case is the same one which has with increasing frequency arisen in other compensation court appeals, namely, whether there has been sufficient proof of medical causation to establish that the disability is the result of an accident arising out of as well as in the course of employment. The medical evidence establishes that Caradori suffers from the effects of a cervical sprain with attendant pain and suffers a disability which the compensation court determined to be 10 percent of the body as a whole.

The testimony offered by Caradori relating to causation is by Dr. Louis Tribulato, an orthopedist, as follows: "Q. Regarding the history that she gave you of the two injuries, do you feel that these, her current condition, could have been caused by those injuries? A. Yes. MR. ZINC: Obtain [sic] as no proper and sufficient foundation. Go ahead. BY MR. DILLON: Q. And would you state this

conclusion based upon your skill, training and experience and with reasonable medical certainty? A. Yes."

Dr. John Goldner, a neurologist, testified that, with reasonable medical certainty, a cervical nerve impingement *could* have been caused by the first or second accident.

None of the physicians, whether testifying for Frontier Airlines or Caradori, stated that, in their opinion, Caradori's disability *was* the result of an accident arising out of as well as in the course of employment.

This is a difficult case. Whether by accident or design, counsel omitted asking expert medical opinion on causation. We are not free to retry cases on appeal, or to speculate on the answers treating physicians might have given to questions not asked.

Neb. Rev. Stat. § 48-101 (Reissue 1978) provides in part that "When personal injury is caused to an employee *by accident* or occupational disease, arising out of and in the course of his or her employment, such employee shall receive compensation therefor . . . ." (Emphasis supplied.)

In *Smith v. Stevens,* 173 Neb. 723, 725-26, 114 N.W.2d 724, 726 (1962), this court stated that "The burden of proof is upon the plaintiff to prove an accident arising out of and in the course of his employment and the disability resulting therefrom. Plaintiff must show a causal connection between the accident suffered by him and the alleged disability." Although the *Smith* decision was rendered under a de novo review and not the present clearly erroneous standard, its logic remains applicable to the facts in the present case.

Also, in *Mack v. Dale Electronics, Inc.,* 209 Neb. 367, 370, 307 N.W.2d 814, 816 (1981), we said: " '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 profes-

sional 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."

An award of compensation may not be based on possibilities or speculative evidence. *Welke v. City of Ainsworth,* 179 Neb. 496, 138 N.W.2d 808 (1965). Thus, the mere possibility that a disability arose out of and in the course of employment does not satisfy the claimant's burden of proof.

The claimant, Caradori, having only proved that the disability could have been caused by an accident arising out of and in the course of employment has not sustained her burden of proof. The award must be reversed and the cause remanded with directions to dismiss the petition.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

JAMES D. HILL AND KENNETH L. IDEEN, IN PERSON AND FOR ALL PERSONS SIMILARLY SITUATED, APPELLANTS, V. CITY OF LINCOLN, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE.

330 N.W.2d 471

Filed February 18, 1983. No. 81-669.

1. **Statutes.** Legislative definitions of terms used to adequately express the purpose of a particular legislative act do not change the common meaning of words used in matters disconnected therewith, unless the same are adopted by reference.
2. _____. Where words of a statute are plain and unambiguous, no interpretation is needed to ascertain their meaning, and in the absence of anything to indicate the contrary, words will be given their ordinary meaning.
3. _____. A sensible construction will be placed upon a statute to effectuate the object of legislation, rather than a literal meaning that would have the effect of defeating the legislative intent.

4. _____. Whether words are ambiguous is a question of law for the court.
5. **Pensions: Words and Phrases.** The meaning of the words "salary," as used in Neb. Rev. Stat. § 15-1007.01 (Cum. Supp. 1982), and "regular pay," as employed in § 15-1001 (Cum. Supp. 1982), are the same and include only basic pay without consideration of extra compensation for overtime, college credits, holiday service, etc.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Reversed and remanded.

J. Murry Shaeffer of Shaeffer Law Offices, P.C., for appellants.

William F. Austin, City Attorney, and William G. Blake, for appellees.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

PER CURIAM.

The plaintiffs, James D. Hill and Kenneth L. Ideen, brought this class action on behalf of all presently employed Lincoln police officers and firefighters. In their petition they challenged the withholding of certain amounts from police officers' and firefighters' pay as contributions to their pension fund. The District Court found these deductions taken to be appropriate under the relevant statutes, and dismissed the amended petition. From this action the plaintiffs have appealed, contending generally that the trial court erred in finding that the word "salary" had no clear definition in public employee pension law and in determining that the city's interpretation of the word "salary" was a practical interpretation of the statute.

The facts are not in dispute. All police officers and firefighters are entitled to a basic pay based on job classification and experience, according to a "schedule of pay ranges" set by ordinance. This pay plan is based on a 40-hour week for police officers and a 56-hour week for firefighters. In addition, such employees are paid various amounts for

overtime, college credits, and holiday service, as the case may be.

The pension plan for cities of the primary class, which includes the City of Lincoln, was established in its present form in 1963. Neb. Rev. Stat. §§ 15-1001 et seq. (Reissue 1977). It provides that 7 percent of each employee's "salary" shall be contributed to the pension fund (§ 15-1007.01 (Cum. Supp. 1982)), and upon retirement or otherwise qualifying for pension benefits under the plan, each individual shall be paid benefits of 54 percent of the "regular pay" of such individual (§ 15-1001 (Cum. Supp. 1982)). The term "regular pay" is defined in § 15-1001.01(1) (Cum. Supp. 1982) as follows: "Regular pay shall mean the average pay of a firefighter or police officer for the three years preceding the date such firefighter or police officer elects to retire or his or her death, whichever is earlier."

According to the testimony of the retired finance director of the City of Lincoln, it had been the practice in administering the pension plan to deduct 7 percent of each officer's or firefighter's "total gross pay," including base pay, overtime pay, college pay, and all other supplements to base pay. In turn, benefits were computed on the basis of 54 percent of the yearly average of this same "total gross pay" over the last 3 years preceding retirement or death.

It is the contention of the plaintiffs that the statutory term "salary" means only "basic pay," whereas the term "regular pay" includes "basic pay" and also all extra compensation for overtime, holiday service, college credits, etc. In other words, they insist that deductions are to be based on the lesser pay and benefits on the greater. By this action the plaintiffs seek the return of any contributions taken in excess of 7 percent of regular, basic pay, i.e., those deductions taken from overtime pay, holiday pay, college pay, etc., for the 4-year period immediately preceding the filing of their petition. Any claim to deductions taken prior to that 4-year

period would be barred by the statute of limitations. Unfortunately, that date does not appear in the record presented to us and will have to be determined on remand of the case as hereinafter ordered.

The City of Lincoln has always taken the position that both terms mean the same, and it has consistently withheld contributions on the "total gross pay" and paid benefits on the same basis.

The District Court found that the term "salary" is unclear, or, in other words, ambiguous, and permitted parol evidence in an effort to construe the terms of the statute. Testifying in addition to the finance director and the two plaintiffs were an actuary dealing specifically in pension plans, the personnel administrator of the City of Lincoln, and a member of his department.

The two "experts," the actuary and the personnel administrator, testified generally that the word "salary" has no definite or static meaning when used in plans such as the one under consideration. In addition, the finance director, whose duty it was to administer the pension plan, interpreted the law to require that contributions and benefits both be made on "total gross pay."

The plaintiffs contend that in defining "salary" under §§ 15-1001 et seq., we are controlled by the definition of such word as contained in the pension plan for firefighters of cities of the *first class*, Neb. Rev. Stat. §§ 35-201 et seq. (Cum. Supp. 1982). Section 35-203.01 provides that such firefighters shall contribute an amount "equal to five per cent of his or her salary." Section 35-206 requires that "such pension shall be at least fifty per cent of the amount of salary such retiring firefighter is receiving at the time he or she goes upon such pension list." Finally, under the terms of § 35-201(5), "salary shall mean the base rate of pay, excluding overtime, callback pay, clothing allowances, and other such benefits." The plaintiffs thus argue that because "salary" is defined for cities of the first class as base pay only

for purposes of both contributions and benefits, cities of the primary class must follow the same definition where the word "salary" is used for the purpose of determining contributions. However, urge the plaintiffs, when it comes to benefits, the phrase "regular pay," because it is defined as "average pay . . . for . . . three years" means total gross pay, i.e., basic, overtime, holiday, college, etc.

We do not agree that we are so limited. Although the Legislature often feels compelled to define terms used to adequately express the purpose of a particular legislative act, such definitions do not change the common meaning of words used in matters disconnected therewith, unless the same are adopted by reference. *Moffitt v. State Automobile Ins. Ass'n*, 140 Neb. 578, 300 N.W. 837 (1941).

Of necessity, we must be guided by several well-defined rules in our examination and construction of this statutory scheme. Where words of a statute are plain and unambiguous, no interpretation is needed to ascertain their meaning, and in the absence of anything to indicate the contrary, words will be given their ordinary meaning. *County of Douglas v. Board of Regents,* 210 Neb. 573, 316 N.W.2d 62 (1982). A sensible construction will be placed upon a statute to effectuate the object of legislation, rather than a literal meaning that would have the effect of defeating the legislative intent. *PPG Industries Canada Ltd. v. Kreuscher,* 204 Neb. 220, 281 N.W.2d 762 (1979). Whether words are ambiguous is a question of law for the court. *R. A. Hanson Co. v. Aetna Ins. Co.,* 26 Wash. App. 290, 612 P.2d 456 (1980).

In *Halpin v. Nebraska State Patrolmen's Retirement System,* 211 Neb. 892, 320 N.W.2d 910 (1982), the meaning of the term "final average monthly salary" was at issue. However, that case was decided on other grounds and is of no help in solving the specific problem with which we are here presented.

The Random House Dictionary of the English Lan-

guage offers the following definitions of the key words involved: *salary* "a fixed compensation periodically paid to a person for regular work or services, esp. work other than that of a manual, mechanical, or menial kind . . . Syn. See pay"; *pay* ". . . 25. remuneration, emolument, fee, honorarium, income allowance. PAY, WAGE OR WAGES, SALARY, STIPEND, EARNINGS are terms for amounts of money or equivalent benefits, usually given at a *regular* rate or at *regular* intervals, in return for services" (emphasis supplied); *regular* "1. usual, normal, customary . . . 2. evenly or uniformly arranged . . . 3. characterized by fixed principle, uniform procedure, etc.: *regular income.*"

We conclude that the words are not ambiguous and that "salary," when used to determine the amount of contributions to be made by the employee, means regular, basic pay. By the same token, "regular pay," when used to ascertain the amount of benefits due, means regular, basic pay, modified only by the requirement that the figure shall be computed by a 3-year average, rather than employing the precise figure existing as of the date of computation of such benefits.

To include such items as overtime pay and holiday pay within the definition of "regular pay" would place the amount of an employee's retirement income as dependent upon the vagaries of the calendar or the occurrence of natural or manmade disasters. Additionally, it makes no sense at all to interpret this retirement program in such a way as to require contributions on the basis of a smaller figure and benefits on a larger one. As stated in *Policeman's and Fireman's Retirement Fund of City of Ashland v. Richardson,* 522 S.W.2d 452, 453 (Ky. App. 1975), "It is axiomatic that there is no such thing as 'free money.' " We cannot conclude that the Legislature intended such an absurd result as that contended for by the plaintiffs.

The judgment of the District Court is reversed and the cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

CLINTON, J., not participating.

WHITE, J., concurring.

Briefs were filed and this case was at issue prior to the announcement of our decision in *Halpin v. Nebraska State Patrolmen's Retirement System*, 211 Neb. 892, 320 N.W.2d 910 (1982). Also at issue in that case was the meaning of the term "final average monthly salary." We held in *Halpin* that the manner of computing the pension was a contractual right as to persons employed before 1979 and the right to the pension computation was protected against unconstitutional impairment.

We do not have before us, as we did in *Halpin,* evidence with respect to representations made to prospective firemen and policemen of the City of Lincoln as to future pension benefits after completion of a required period of service, nor do we have before us evidence that such manner of computation of pension benefits was relied on by such employees in the hiring process, or in the negotiating process incident to collective bargaining. What we have done in this case is to merely interpret words. We do not decide the issues raised in *Halpin.* Those issues remain for another day.

JEROME PAPROCKI, APPELLEE, V. ALFRED STOPAK AND DOUGLAS STOPAK, APPELLANTS.

330 N.W.2d 475

Filed February 18, 1983. No. 81-727.

1. **Motor Vehicles: Negligence.** The negligence of a family-purpose driver is not ordinarily imputed to the family-purpose owner in an action by the owner against a third party for the owner's own injuries or property damage.

2. _____: _____. The owner of a family-purpose car may not recover from the driver of another car when the negligence of the family-purpose driver is the sole proximate cause of the collision.

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

Stephen C. Hansen of Luckey, Sipple & Hansen, for appellants.

Thomas M. Maul of Albert, Leininger & Grant, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

MCCOWN, J.

This is an automobile accident case involving property damage only. The case was commenced in the small claims court by the plaintiff owner of a car driven by his daughter against the driver and the joint owner of another car to recover damages to plaintiff's car. The defendants filed a counterclaim and cross-petition against the plaintiff for damages to their car. The small claims court entered judgment for $407.50 for the plaintiff on his petition, and also entered judgment against the plaintiff and for the defendants on their counterclaim in the sum of $950.

The plaintiff appealed to the District Court. The District Court affirmed the judgment for the plaintiff against both defendants on plaintiff's petition but found that the family-purpose doctrine was incorrectly applied by the small claims court in allowing judgment for defendants on their cross-petition, and denied the cross-petition. The defendants have appealed.

On January 13, 1981, an automobile owned by plaintiff and driven by plaintiff's daughter was in collision with an automobile owned by defendants Alfred Stopak and Douglas Stopak and driven by Douglas Stopak. The evidence is undisputed that

the car owned by plaintiff was generally used by his daughter for school purposes and other purposes and was, in general, a family-purpose automobile. Except for the fact that defendants were father and son, there was no evidence that defendants' car was a family-purpose automobile. The evidence at the trial in the small claims court was in dispute as to the lane of traffic in which the accident occurred and, consequently, the negligence or comparative negligence of each driver was also at issue.

The small claims court entered judgment for the plaintiff and against both defendants on plaintiff's petition for $407.50 and for the defendants on their counterclaim in the sum of $950, but made no finding as to the negligence, comparative negligence, or lack of negligence of either driver.

On appeal, the District Court found that the small claims court incorrectly interpreted the family-purpose doctrine in allowing defendants to recover on their cross-petition against plaintiff, found against the defendants on their cross-petition, and affirmed the judgment for the plaintiff on his petition. The District Court also failed to make any finding as to the respective negligence, comparative negligence, or lack of negligence of either driver.

The basic problem in this case is that under the family-purpose doctrine, the negligence of the driver of the family-purpose car is imputed to the parent owner in actions by third parties to recover for personal injuries or property damage proximately caused by the negligent acts of the family-purpose driver. However, the negligence of the family-purpose driver is not ordinarily imputed to the family-purpose owner in an action by the owner against a third party for the owner's own injuries or property damage. See *Bartek v. Glasers Provisions Co., Inc.*, 160 Neb. 794, 71 N.W.2d 466 (1955).

The underlying purpose of the family-purpose doctrine is to provide financial responsibility for the negligent acts of family members which cause dam-

age to third parties. Such a purpose is not present when the owner of a family-purpose car sues to recover his own damages caused, or jointly caused, by the negligence of third parties. See 2 Harper & James, Law of Torts § 23.6 (1956).

The plaintiff tacitly agrees, and the defendants vigorously contend, that the family-purpose doctrine was applicable to impute any negligence of plaintiff's daughter to plaintiff in connection with the defendants' counterclaim or cross-petition. Plaintiff argues, however, that the District Court's denial of defendants' counterclaim should be affirmed on the ground that it constituted a finding that the negligence of the plaintiff's daughter was slight in comparison to the defendant driver's negligence, or that plaintiff's daughter was guilty of no negligence whatever.

It is virtually impossible to tell from the record what the specific findings of negligence were. Neither is there evidence to impute the negligence of the defendant driver to the other defendant owner under the family-purpose doctrine in entering judgment on plaintiff's petition. The owner of a family-purpose car may not recover from the driver of another car when the negligence of the family-purpose driver is the sole proximate cause of the collision. *Pearson v. Schuler,* 172 Neb. 353, 109 N.W.2d 537 (1961).

Where there is no determination as to negligence, comparative negligence, or lack of negligence of either of the drivers, and the imputations of negligence under the petition operate differently than under the cross-petition, there are no specific factual findings upon which it can be properly determined whether either judgment may be affirmed or reversed.

The judgment on plaintiff's petition and the judgment on defendants' counterclaim and cross-petition are both vacated and the cause remanded to the District Court for determination and findings as to the

negligence and comparative negligence of the drivers and the imputation of such negligence to any of the parties, both as to the petition and cross-petition, and the entry of appropriate judgment or judgments on those findings in accordance with this opinion.

REVERSED AND REMANDED.

BOSLAUGH and HASTINGS, JJ., dissent.
CLINTON, J., not participating.

CHARLIE NEKUDA, JR., ALSO KNOWN AS NEKUDA FARM SUPPLY, APPELLEE, V. DAVID J. VINCENT, APPELLANT.

330 N.W.2d 477

Filed February 18, 1983. No. 81-764.

1. **Contracts: Damages.** If a construction contract is substantially performed, the damage which the owner suffers because of defective workmanship or unsuitable materials used is measured by the reasonable cost of remedying the defects.
2. _____: _____. If 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 its value as constructed and what its value would have been if built according to the contract.

Appeal from the District Court for Custer County: JAMES R. KELLY, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Joseph E. Twidwell, for appellant.

Robert C. Guenzel of Crosby, Guenzel, Davis, Kessner & Kuester, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and MORAN, D.J.

PER CURIAM.

This case arises out of a controversy concerning a contract for the construction of a metal grain storage building.

On August 17, 1977, the plaintiff and the defendant entered into a written contract in which the plaintiff agreed to furnish the labor and materials required to construct a 60-foot by 140-foot Butler "Farmsted" building. The building was to be equipped for grain storage and constructed on the defendant's farm for a total contract price of $40,234.45. The defendant paid 15 percent down by check dated October 4, 1977, with the balance due on completion. The contract did not provide for any completion date.

The building had been substantially completed by December 20, 1977, and in January 1978 the defendant placed approximately 22,000 bushels of corn in the building. On December 30, 1977, the plaintiff requested payment of the balance of the contract price so that he could include the amount in his income for the calendar year. Pursuant to an agreement between the parties, the defendant delivered his check in the amount of $34,199.70. On January 2, 1978, the plaintiff deposited the same amount in the defendant's bank account, thus refunding the payment made on December 30, 1977.

The defendant complained about snow blowing into the building and later about water leaking into the building. The defendant did not store additional grain in the building and eventually removed the corn that had been placed in the building in January 1978. The plaintiff made several attempts to repair the building but the defendant was not satisfied.

On August 11, 1978, the plaintiff commenced this action to recover the balance due on the contract. The defendant's answer alleged the plaintiff had orally agreed to complete the building by October 10, 1977; that the defendant was required to store corn upon the ground because the building had not been completed by November 30, 1977, the date on which the defendant completed his harvest; and that the building was defective and not suitable for grain storage and was of no use to the defendant. The defendant counterclaimed for loss of rental on the

building; damage to grain; expense of moving and drying grain, including equipment purchased to salvage the grain; insurance purchased on the building; loss of profits; and the downpayment.

The trial court found generally for the plaintiff; that the plaintiff had substantially completed the contract; that the tender of a check for the balance due on the contract by the defendant was "an agreement by the Defendant that the contract had been substantially performed"; and that the plaintiff was entitled to recover $34,199.70, with interest and costs, from the defendant.

Both parties filed motions for new trial, which were overruled. The defendant has appealed.

The assignments of error in substance allege that the evidence does not support the judgment and there was a breach of a warranty of merchantability in regard to the materials supplied under the contract.

As we view the record, the Uniform Commercial Code has no application in this case. The parties contracted for the construction of a building upon the defendant's land. The plaintiff was obligated to furnish labor and materials. The contract was not a contract for the sale of "goods." In any event, the defendant's complaints relate not to the materials supplied but to the manner in which the building was assembled and to the delay in completion of the work.

The evidence does support a finding of substantial performance but not upon the basis of the check delivered to the plaintiff by the defendant on December 30, 1977. The evidence is undisputed that the payment was for the convenience of the plaintiff and was not intended to be a payment of the balance due on the contract. In accordance with the understanding between the parties, the payment was refunded to the defendant by the plaintiff on January 2, 1978.

The defendant intended to pay for the building by obtaining a loan through the ASCS. The building

was inspected by the county executive director for the ASCS on February 9, 1978, and approved. The loan was approved and the proceeds disbursed to the defendant shortly thereafter.

The defendant's principal complaint relates to his claim of snow blowing into the building and water leaking into the building. The evidence is that the snow entered the building because of an open space under the eaves of the building. Apparently, this was a part of the design of the building for the purpose of ventilation. After the defendant complained about this feature the plaintiff closed the openings.

The evidence indicates that water entered the building because the caulking between some panels was defective or not properly installed, and some bolts or screws were improperly installed. The evidence does not disclose what would be required to remedy this defect, although it does disclose that the defect may be corrected.

If a construction contract is substantially performed, the damage which the owner suffers because of defective workmanship or unsuitable materials used is measured by the reasonable cost of remedying the defects. *Jones v. Elliott,* 172 Neb. 96, 108 N.W.2d 742 (1961). However, if 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 its value as constructed and what its value would have been if built according to the contract. *Id.*

The finding that there had been substantial performance of the contract by the plaintiff is sustained by the record. The evidence, however, does establish that the defendant is entitled to damages resulting from defective caulking and defective installation of bolts and screws. He is not entitled to consequential damages in view of the general finding by the trial court for the plaintiff which finds support in the record.

The cause is remanded to the District Court for

further proceedings to ascertain the damages due the defendant for defective caulking and defective installation of bolts and screws in the building.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

CAPORALE, J., dissenting in part.

I must, for the reasons stated in *LeRoy Weyant & Sons, Inc. v. Harvey,* 212 Neb. 65, 321 N.W.2d 429 (1982), dissent from that portion of the majority opinion which remands the counterclaim for further proceedings. The majority opinion herein correctly states the rule as to the defendant-counterclaimant's measure of damages. It fails to make clear, however, that Mr. Vincent's theory of damages was that the building should be dismantled and removed. Accordingly, none of his evidence was directed to the proper measure of recovery.

Mr. Vincent's expert testified the building can be "rehabilitated" and outlined ways in which that might be done, but there is no evidence concerning the cost of doing so. We have held that one seeking to recover in a breach of contract action must not only show his right to recover but must also show the elements and facts which comprise the measure of his recovery. *Midlands Transp. Co. v. Apple Lines, Inc.,* 188 Neb. 435, 197 N.W.2d 646 (1972). It is true that in *Smith v. Erftmier*, 210 Neb. 486, 315 N.W.2d 445 (1982), a case involving an improperly constructed grain bin, we allowed the owner to recover damages in the absence of evidence concerning the difference in the value of the bin as constructed compared to its value had it been properly constructed. The distinction is that in *Smith v. Erftmier* the owner did adduce evidence of the cost of repair. It was the builder who claimed the building could not be repaired and who failed to offer evidence to support his claim in that regard. More recently, in *"L" Investments, Ltd. v. Lynch,* 212 Neb. 319, 322 N.W.2d 651 (1982), a case involving negligent

damage to an improvement on realty, we placed upon the party seeking recovery the burden of proving the cost of repair, and upon the party against whom recovery is sought, the burden, if he so believes, of proving that such cost exceeds the market value of the property before the damage. One seeking to recover damages because of an improperly constructed building, therefore, has the burden of proving the cost of making it conform to the state in which it should have been constructed; the party against whom recovery is sought, if he so believes, has the burden to establish that such cost exceeds the difference in value between the building as constructed compared to its value if it were to have been constructed properly. Mr. Vincent's failure to prove the cost of repair is fatal; his counterclaim should be dismissed.

WHITE, J., and MORAN, D.J., join in this dissent.

IN RE FREEHOLDER PETITION.
RONALD L. JANZEN ET AL., APPELLEES, V. DEAN G. NORQUEST ET AL., APPELLANTS.

330 N.W.2d 481

Filed February 18, 1983. No. 81-883.

1. **Schools and School Districts: Appeal and Error.** The action of the board under Neb. Rev. Stat. § 79-403 (Reissue 1981) is an exercise of a quasi-judicial power, equitable in character, and upon appeal from the District Court to this court the cause is triable de novo as in any other equitable action.
2. **Schools and School Districts.** A freeholder petition must be supported by an adequate showing that the purposed transfer of land is justified in relation to the controlling educational factors regarding the convenience, necessity, or welfare of the pupil or pupils involved. Such a showing must include a demonstration of significant differences in the class, accreditation, leadership, management, curricula, and/or efficiency of the schools involved.
3. **Witnesses: Rules of Evidence.** A parent as an informed and concerned lay person is competent to testify as to his or her opinion on "best educative interest." The parents were not testifying as

experts, and the evidence was clearly admissible under Neb. Rev. Stat. § 27-701 (Reissue 1979).

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

John F. Recknor of Barlow, Johnson, DeMars & Flodman, for appellants.

John R. Brogan of Brogan, McCluskey & Wolstenholm, for appellees.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and MORAN, D.J.

WHITE, J.

This is an appeal from a District Court judgment reversing a decision of a freeholder board which denied transfer of petitioners' land from school district No. 83 of York and Fillmore Counties (hereafter McCool Junction School District) to school district No. 95 of York, Fillmore, and Hamilton Counties (hereafter Henderson School District). This matter arose under Neb. Rev. Stat. § 79-403 (Reissue 1981) before it was amended. The District Court held that the best educative interest of Andrew Scott Janzen, son of the petitioners, would be served if the transfer was granted.

The appellants-objectors, residents of McCool Junction School District, urge as error in this court (1) the finding of the District Court that petitioners had sustained the burden of proof that the transfer was in the best educative interest of Andrew Scott Janzen; (2) the ruling of the District Court that expert testimony is not required to demonstrate best educative interest; and (3) the ruling of the District Court which allowed the parents of Andrew Scott Janzen to testify as to the best educative interest of their son.

The review of a decision of the District Court granting or denying a freehold transfer is de novo in this court, and this court will come to an independent conclusion, having due regard to the superior po-

sition of the trier of facts who had an opportunity to see and hear the witnesses and to form a judgment on their credibility. *Klecan v. Schmal,* 196 Neb. 100, 241 N.W.2d 529 (1976).

The sole issue in freehold transfer cases is the best educative interest of the child. "Whether or not the transfer of land requested is to the advantage or the disadvantage of the school districts involved is not the deciding issue." *Friesen v. Clark,* 192 Neb. 227, 233, 220 N.W.2d 12, 16 (1974).

In *Friesen* we stated that a freeholder petition "must be supported by an adequate showing that the purposed transfer of land is justified in relation to the controlling educational factors regarding the convenience, necessity, or welfare of the pupil or pupils involved. Such a showing must include a demonstration of significant differences in the class, accreditation, leadership, management, curricula, and/or efficiency of the schools involved." *Id.* at 231, 220 N.W.2d at 15. In *Friesen* the transfer involved the identical districts here involved. Indeed, the evidence presented in this case is strikingly similar to that presented in that case.

Ronald L. and Joyce E. Janzen, the petitioners and appellees, owned land in the McCool Junction School District and applied to the board for transfer to the Henderson School District. Their son, Andrew, was a kindergartner at time of trial. The petitioners, in addition to their own testimony, offered the evidence of Ronald Pauls, elementary school principal at Henderson, and Allen Friesen, superintendent of schools at Henderson. Norman Bonde, superintendent of schools at McCool Junction, was the only witness for appellants.

Mr. Pauls testified that he had been the elementary school principal at Henderson for 13 years; that he had a bachelor of arts degree in elementary education, a master of education degree, and a specialist degree in educational administration, and that the curriculum for a child from kindergarten

through the sixth grade consisted of reading, mathematics, science, social studies, health, handwriting, and spelling. The elementary faculty included two teachers with master's degrees and two with at least 36 hours of graduate work. Teaching equipment included instructional television sets, projectors and viewers, record players, and a computer. The student-teacher ratio was approximately 15 to 1; in addition to a regular classroom teacher for each grade, the elementary staff consisted of an elementary music teacher, an instrumental music teacher, an art teacher, a resource teacher, and teacher aides.

Allen Friesen testified that Henderson was a Class III district; that the enrollment was 190 in the elementary school and 150 in the secondary school; and that the schools were located on a 12-acre tract not intersected by streets. He further testified that of the 32 teachers on the staff, all had at least a bachelor's degree, 14 had master's degrees, and 3 had at least 36 hours above the bachelor's degree requirements. The elementary and secondary principals had no classroom responsibilities. All teachers participated in a continuing in-service program to improve skills. The main building at Henderson had been built in 1953, with additions in 1959 and 1974. The Henderson School District offered a vocational agriculture program, a science laboratory, a physics and chemistry laboratory, and a biology laboratory. Henderson School District also offered a shop program, a full mathematics program, and a 3-year program in German.

Ronald L. Janzen testified that from their farm home it was approximately 6 miles to the Henderson school and 8 miles to the McCool Junction school. Mr. Janzen also testified that he had taken the vocational agriculture course at Henderson and felt that his son should take the course. Both Ronald and Joyce Janzen testified that, in their opinion, the best

educative interest of their son would be served by the transfer.

Norman Bonde, superintendent of schools at McCool Junction, testified for the appellants. He testified that he had a master's degree and a specialist in administration from Kearney State College; that no foreign language was offered at the McCool Junction school; that three members of the faculty were not endorsed in certain of the classes they were teaching, including chemistry and physics, eighth and ninth grade science, and seventh and eighth grade English; that the driver's education teacher had a provisional endorsement; and that vocational education courses are not offered at McCool Junction and had not been offered in the past.

The appellants do not attempt to distinguish the facts of this case from *Friesen v. Clark, supra.* In that case we granted a freehold transfer from McCool Junction to Henderson. We noted there the argument that while vocational agriculture was not then offered it might well be offered in the future. Nine years later the same argument is offered here. The argument did not convince the court then; it does not do so now. On the facts as proven, the District Court was correct.

Under our de novo review, we agree with the conclusion reached by the trial court.

However, we must deal with the assignments of error relating to the quality of proof in determining "best educative interest." Without citing other than the most general authority, appellants assert that "best educative interest" must be relegated to the experts, that no determination can be made without a complete testing procedure of the student, and only after that testing is complete may an appropriate interpreter of that testing state an opinion of "best educative interest." This view is not supported by our cases and we decline to adopt it. While such evidence, if offered, would appear to be

relevant, its absence will not doom the petition to failure.

Nor are we convinced that a parent as an informed and concerned lay person is not competent to testify as to his or her opinion on "best educative interest." The parents were not testifying as experts, and the evidence was clearly admissible under Neb. Rev. Stat. § 27-701 (Reissue 1979) as that "rationally based on the perception of the witness and . . . helpful to a clear understanding of his testimony or the determination of a fact in issue."

The decision of the trial court is correct and is affirmed.

AFFIRMED.

STEWART W. KLEEB, APPELLEE AND CROSS-APPELLANT, V. ALLENE D. KLEEB, WILMA A. ASKEY, ARDEN L. ASKEY, VELMA JEZBERA, and FRANK JEZBERA, APPELLEES, KENNETH LAURITZEN, APPELLANT AND CROSS-APPELLEE.

330 N.W.2d 484

Filed February 18, 1983. No. 82-385.

Supersedeas Bonds. As a rule, a supersedeas or stay does not reverse, annul, or undo what has already been done, or impair the force or pass on the merits of the judgment, order, or decision of the trial court; and the judgment, order, or decree is not vacated or annulled, nor is its validity or effect impaired thereby.

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

Jim R. Titus of Peterson, Bowman & Johanns, for appellant.

Ronald D. Svoboda and David V. Chebatoris of Clements, Svoboda & Chebatoris, for appellee Stewart Kleeb.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and MORAN, D.J.

KRIVOSHA, C.J.

This is the second appearance of this case before this court. Originally, this case was before us concerning the question of whether a partition action was properly conducted. The facts of the case are reported in our earlier opinion and may be found at 210 Neb. 637, 316 N.W.2d 583 (1982). This appeal concerns itself with the question as to who should be entitled to the landlord's share of the crops earned for the years 1980 and 1981 while the case was on appeal. Having now reviewed the record, we believe that the trial court should not have awarded the crops to the original owners and we therefore reverse the judgment.

On June 6, 1980, the trial court confirmed the judicial sale in question and ordered the property conveyed to the purchaser, Kenneth P. Lauritzen (purchaser). Owners Wilma E. Askey and Arden L. Askey (Askeys) filed a notice of appeal and what purports to be a supersedeas bond. Additional owners, Stewart W. Kleeb, Allene D. Kleeb, Velma Jezbera, and Frank Jezbera, did not join in the appeal, but all, including the Askeys, will be referred to herein as "original owners."

During the pendency of the appeal the referee properly leased the real estate for farming on a sharecrop arrangement, resulting in net rental income from the property for the years 1980 and 1981. Following our affirmance in the first case on February 26, 1982, the trial court entered an order which provided in part that the original owners were to pay the real estate taxes for the years 1980 and 1981 and were therefore to receive the landlord's share of the crops for the years 1980 and 1981. The trial court also ordered that the interest earned on the downpayment held by the referee during the time of appeal should be paid to the purchaser. Because the question of interest on the unpaid balance was not presented to the trial court, it made no finding in that regard. Lauritzen assigns as error the

trial court's awarding of the landlord's share of the crops to the original owners. Although the original owners did not initially seek interest on the unpaid balance, appellee Stewart Kleeb now asserts for the first time in this court, by way of cross-appeal, that they should be entitled to interest on the unpaid balance of the purchase price.

In order to determine whether the action of the trial court was correct, we must resolve two questions. The first question is, What was the status of the case just before the appeal was taken? The second question is, What was the effect of the filing of the supersedeas bond by the Askeys?

With regard to the first question, the answer is relatively simple. Absent the filing of a notice of appeal, the purchaser in this case would have been entitled to the crops for the years 1980 and 1981 and would have been obligated to pay the expenses, including the real estate taxes. The sale bill contracted for that result. In advertising the sale, the referee provided in part as follows: "POSSESSION: Buyer takes full possession of mineral rights and buyer takes owner's interest in 1980 crops at the time balance is paid. Seller to pay 1979 ($1,214.03) and all prior real estate taxes. Purchaser pays 1980 taxes." Regardless of what the law may be as to the appropriate division between buyer and seller at a judicial sale where nothing is said, the parties in this case contracted, as they were entitled to do, as to how the crops and expenses were to be handled. In judicial sales the court is the vendor, *State Bank of Nebraska v. Green,* 8 Neb. 297, 1 N.W. 210 (1879), and generally may set such terms not otherwise unlawful. Without regard to when the sale was to take place or the confirmation obtained or the deed conveyed, the purchaser was to pay the taxes for the year 1980 and, presumably then, for all subsequent years, and was likewise to receive the crops for the year 1980 and, presumably, all subsequent years. Absent the filing of a notice of appeal and, more

importantly, absent the giving of a purported supersedeas bond, there would be no question as to how this case should be resolved.

What then was the effect of the giving of the supersedeas bond by the Askeys? Did the giving of the bond in effect set aside the judgment entered by the trial court on June 6, 1980, or did it merely suspend the enforcement of the judgment until we affirmed the trial court's action on February 26, 1982?

On June 6, 1980, after notice and hearing, the trial court specifically confirmed the sale to the purchaser and ordered the referee to convey said premises to the purchaser by deed. On June 6, 1980, the purchaser became the equitable owner of the property, *Lamb v. Sherman,* 19 Neb. 681, 28 N.W. 319 (1886); *Yeazel v. White,* 40 Neb. 432, 58 N.W. 1020 (1894), and, pursuant to the court's order and the previous representation made by the referee in the sale notice, became entitled to the 1980 crops and was obligated to pay the 1980 taxes. We think it clear from both a reading of the statute providing for the giving of a supersedeas bond, Neb. Rev. Stat. § 25-1916 (Reissue 1979), and our previous holdings that the giving of the supersedeas bond does not set aside a previous order of the court but merely suspends its enforcement.

In *Guaranty Fund Commission v. Teichmeier,* 119 Neb. 387, 391, 229 N.W. 121, 123 (1930), we noted: "The general rule is that the effect of a supersedeas bond is to suspend proceedings and preserve the *status quo* pending the determination of the appeal. It suspends all further proceedings on the judgment or decree appealed from, but does not, like a reversal of the judgment by this court, annul the judgment itself." And in 4A C.J.S. *Appeal and Error* § 662 at 497 (1957), the author notes: "As a rule, a supersedeas or stay does not reverse, annul, or undo what has already been done, or impair the force, or pass on the merits, of the judgment, order, or decision of the trial court; and in most jurisdictions the

judgment, order, or decree is not vacated or annulled, nor is its validity or effect impaired thereby." We are such a jurisdiction. To hold otherwise would be to totally ignore the function of a supersedeas bond. Were we to take the position urged upon us by the appellee Stewart Kleeb, one could appeal such a case, file a supersedeas bond and, after the crops had been raised and harvested, dismiss the appeal without liability and contrary to the clear language of the sale bill. The filing of the supersedeas bond in this case did not reverse the order of the trial court entered on June 6, 1980, nor did it affect the commitment made by the parties in the sale bill. As a matter of fact, our opinion filed in this case on February 26, 1982, did not confirm the sale, as urged by appellee Stewart Kleeb, but, rather, affirmed "the order of the District Court confirming the sale to appellee Lauritzen and ordering the referee to convey the premises to him . . . ." All that our decision did was to affirm what the trial court had already done and remove the stay which was preventing the referee from acting in accordance with the previous order of the trial court. The trial court therefore should have directed that the landlord's share of the crops earned for the years 1980 and 1981 be paid to the purchaser and that the purchaser likewise be obligated to pay the landlord's share of the expenses, including the payment of real estate taxes incurred for the years 1980 and 1981. For the same reasons, it follows that the interest earned on the downpayment must be paid to the referee for distribution to the original owners.

That leaves us with the final question of whether the purchaser herein should be required to pay interest on the balance of the purchase price from the date of confirmation to the present. Unfortunately, the original owners did not raise that issue before the trial court and did not afford the trial court the opportunity to pass upon it. More importantly, how-

ever, the parties offered no evidence on this question. The general rule in regard to this matter is fairly clear, as expressed by our decision in the case of *McCleneghan v. Powell,* 105 Neb. 306, 312, 180 N.W. 576, 579 (1920), wherein we said: "Equity will not permit a vendee to enjoy the rentals that are derived from land for which he has not paid and at the same time permit him to escape the payment of interest to the vendor on the unpaid purchase price unless a tender has been made of such purchase price and kept good." The only evidence concerning the tender is a stipulation entered into by all the parties to the effect that at all times relevant the purchaser was "ready and willing and able to pay the full amount of the purchase price." Obviously, his inability to pay was due to the fact that the Askeys had filed a supersedeas bond preventing the referee from executing and conveying a deed to Lauritzen, thereby requiring Lauritzen to make payment. The very terms of the sale gave to Lauritzen a choice of paying upon confirmation *or* when merchantable abstract and deed *were delivered.* The purchase price was not due and payable until the deed was delivered and that did not happen until after the mandate was issued by this court.

Appellee Stewart Kleeb argues that, this being an equitable action, we have reasonable discretion to allow or withhold interest as is reasonable and just under the circumstances. See *Patterson v. Spelts Lumber Co.,* 166 Neb. 692, 90 N.W.2d 283 (1958). The difficulty with that argument is that had the Askeys not superseded the judgment and prevented the payment of the balance, payment would have been forthcoming upon delivery of the deed. It was the Askeys' act which authorized Lauritzen to withhold payment. Likewise, we are totally without any evidence to determine whether purchaser was obligated to make any payments to anyone else during this time in order to keep the proceeds on reserve for payment when needed or whether he gained any

benefit by reason of the delay. One may surmise as to the facts, but it is difficult, if not impossible, to do equity absent evidence and based solely on surmise. We therefore find that the judgment of the trial court directing that the landlord's share of the crops for the years 1980 and 1981 be paid to the original owners, subject to their paying the real estate taxes for those years, should be reversed, and the proceeds instead should be ordered paid to the purchaser, subject to his paying the real estate taxes for the years in question. We likewise reverse that portion of the trial court's order directing that the interest on the downpayment be paid to the purchaser and direct that the interest be paid instead to the referee for distribution to the original owners. We make no order regarding the request that the purchaser be ordered to pay interest on the unpaid balance.

The judgment of the trial court is reversed and the cause remanded with directions to enter judgment in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

WHITE, J., concurs in the result.

BOSLAUGH, J., dissenting.

The order of the trial court, while perhaps erroneous, was at least equitable. The majority opinion fails to do equity between the parties because it awards both the use of the unpaid purchase price and the income from the land to the purchaser.

From the time when a contract of sale of land should be performed the land is, in equity, the property of the vendee held by the vendor in trust for him, and the purchase price is the property of the vendor held in trust for him by the vendee. Upon specific performance the vendor is liable to account for the rents and profits and the vendee for the interest on the purchase price. *Russell v. Western Nebraska Rest Home, Inc.,* 180 Neb. 728, 144 N.W.2d 728 (1966).

In *McCleneghan v. Powell,* 105 Neb. 306, 180 N.W. 576 (1920), cited in the majority opinion, the vendor

recovered interest on the unpaid balance of the purchase price. That case does not support the result reached by the court in this case. Under the rule of the *McCleneghan* case, the purchaser in this case should be required to account to the owners for interest on the unpaid balance of the purchase price.

In the *McCleneghan* case we held that the vendor was entitled to interest on the unpaid balance of the purchase price because *the evidence of the vendee* failed to show that the vendee had either borrowed the money or held it unused for the benefit of the vendor. Because the evidence did not show that McCleneghan "had either borrowed or exclusively appropriated $20,000 and that the money was held continuously from March 1, 1918, unused and in readiness to be paid to the defendants Powell upon fulfilment of their part of the contract," the defendants Powell were entitled to interest at the lawful rate from March 1, 1918, until the date the money was paid into court. *Id.* at 312, 180 N.W. at 579.

A mere tender or offer to perform is not enough to excuse the vendee from accounting for interest on the unpaid balance of the purchase price during the delay in performance. The evidence must show that the money was "appropriated" to the contract and "no benefit has accrued" to the vendee from the unpaid money before the vendee can avoid accounting to the vendor for interest on the purchase price.

In this case the evidence falls far short of satisfying the rule of the *McCleneghan* case. The parties merely stipulated that the vendee "was ready and willing and able to pay the full amount of the purchase price." There is no showing that the vendee had borrowed the money and was paying interest on it, or had "appropriated" the money and derived no benefit from it.

If the income from the property is to be awarded to the purchaser, he should be required to account for interest on the unpaid balance of the purchase price.

McCown and Hastings, JJ., join in this dissent.

LORETTA L. ROTH AND JANE MONTGOMERY, APPELLEES, v. SCHOOL DISTRICT OF SCOTTSBLUFF, IN THE COUNTY OF SCOTTS BLUFF, IN THE STATE OF NEBRASKA, A POLITICAL SUBDIVISION, APPELLANT.

330 N.W.2d 488

Filed February 25, 1983. No. 81-702.

1. **Teacher Contracts.** A probationary teacher is entitled to none of the termination or rehiring benefits allowed under Neb. Rev. Stat. §§ 79-1254 et seq. (Reissue 1981), including the preferred rights to reemployment under § 79-1254.07.
2. **Constitutional Law: Statutes.** The constitutional requirement that statutory language must be reasonably certain or be held void for vagueness is satisfied by the use of ordinary terms which find adequate interpretation in common usage and understanding.
3. **Teacher Contracts: Words and Phrases.** "Reduction in force," within the meaning of Neb. Rev. Stat. § 79-1254.07 (Reissue 1981), has a clear meaning in common usage and means terminating a teacher "due to a surplus of staff."
4. **Teacher Contracts: Waiver.** The question of whether a person has waived a right to recall under Neb. Rev. Stat. § 79-1254.07 (Reissue 1981) is one of fact.
5. **Declaratory Judgments: Appeal and Error.** The determination of factual issues in a declaratory judgment action, which would otherwise be an action at law, will be treated in the same manner as if a jury had been waived, and hence a trial court's findings have the effect of a jury verdict and will not be set aside unless clearly wrong.
6. **Teacher Contracts: Damages: Appeal and Error.** The computing of damages and the finding that a teacher has properly mitigated damages under Neb. Rev. Stat. § 79-1254.07 (Reissue 1981) are factual issues, and the findings of the trial court in this regard will not be set aside unless clearly wrong.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Affirmed in part, and in part reversed and remanded with directions to dismiss.

True R. Ferguson of Atkins, Ferguson, Hahn, Zimmerman & Carney, for appellant.

Mark D. McGuire of Crosby, Guenzel, Davis, Kessner & Kuester, for appellees.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

PER CURIAM.

The School District of Scottsbluff appeals a declaratory judgment action in which the District Court found plaintiffs, Loretta Roth and Jane Montgomery, were entitled to and deprived of preferred rights of reemployment under Neb. Rev. Stat. § 79-1254.07 (Reissue 1981), and awarded damages accordingly. On appeal, the School District of Scottsbluff contends the trial court erred in (1) allowing Montgomery preferred rights to reemployment under § 79-1254.07, (2) concluding § 79-1254.07 was constitutional, (3) finding Roth had not waived her right to reemployment, and (4) computing damages and finding plaintiffs properly mitigated damages. We reverse in respect to Montgomery and affirm in respect to Roth.

Roth and Montgomery were teachers for school district No. 67 when that district, in March 1979, adopted a plan to merge with the Scottsbluff School District. As a result of the merger, Scottsbluff School District assumed all rights and obligations of school district No. 67. Montgomery was a probationary teacher in her first year of teaching for school district No. 67 and Roth was a tenured teacher. In April 1979 Montgomery received notice that her contract would be terminated at the close of the contract period. Roth received notice that the merger would cause a reduction in staff and, consequently, her contract would be terminated at year-end. The school district No. 67 board affirmed both terminations after a board hearing.

In anticipation of the merger, plaintiffs interviewed with the Scottsbluff School District for teaching positions. After the interviews the Scottsbluff School District contacted neither plaintiff concerning reemployment and hired new teachers from 1979 to 1981 to satisfy positions for which Montgomery and Roth were qualified. Montgomery found a part-time teaching job for 1980-1981. Roth taught at Wheatland School District from 1979 to

1980 and at Berean Christian School from 1980 to 1981, with both positions paying less than if she had taught in the Scottsbluff School District.

Plaintiffs filed a declaratory judgment action on July 30, 1979, asking for damages based on their preferred right to reemployment under § 79-1254.07. At trial, the court found that both Montgomery, a probationary teacher, and Roth, a tenured teacher, were terminated due to a reduction in force and, consequently, had preferred rights to reemployment which the School District of Scottsbluff failed to respect.

In its first assignment of error Scottsbluff School District argues that a probationary teacher is not entitled to preferred rights to reemployment allowed under § 79-1254.07. Section 79-1254.07 states that "Any employee whose contract shall be terminated because of reduction in force . . . shall have preferred rights to reemployment for a period of twenty-four months commencing at the end of the contract year and the employee shall be recalled on the basis of length of service to the school to any position for which he or she is qualified by endorsement or college preparation to teach."

We have said that the purpose of the tenured teacher act, Neb. Rev. Stat. §§ 79-1248 to 79-1254.08 (Reissue 1981), " 'is to guarantee a tenured teacher continued employment except for two justifiable circumstances: (1) Discharge for cause; and (2) reduction in the teaching force.' " *Moser v. Board of Education,* 204 Neb. 561, 563, 283 N.W.2d 391, 393 (1979). In *Meyer v. Board of Education,* 208 Neb. 302, 303 N.W.2d 291 (1981), we stated that § 79-1254 provides proper procedures for termination of tenured teachers, but does not protect probationary teachers who may be terminated for any or no reason. "Probationary teachers are exempted from every provision outlined in § 79-1254 . . . ." *Id.* at 305, 303 N.W.2d at 293. Thus, based on *Meyer,* we find that a probationary teacher is entitled to none of

the termination or rehiring benefits allowed under §§ 79-1254 et seq., including the preferred rights to reemployment under § 79-1254.07. Consequently, the trial court erred in awarding Montgomery damages based on her preferred rights to reemployment, for as a probationary teacher, even one terminated due to a reduction in force, she has no reemployment rights under § 79-1254.07. Conversely, because Roth is a tenured teacher terminated due to a reduction in force, she has preferred rights to reemployment under § 79-1254.07.

In attacking Roth's award, the School District of Scottsbluff contends § 79-1254.07 is unconstitutional because the phrases "reduction in force," "waive recall," and "leave of absence," found in § 79-1254.07, are too vague to give one notice. We will not consider the phrase "leave of absence," as it is only a hypothetical problem in the present case. See *Horn v. Burns and Roe,* 536 F.2d 251 (8th Cir. 1976). The constitutional requirement that statutory language must be reasonably certain or be held void for vagueness is satisfied by the use of ordinary terms which find adequate interpretation in common usage and understanding. *State v. Metteer,* 203 Neb. 515, 279 N.W.2d 374 (1979). Based on this standard we find the statute adequately certain. "Reduction in force" has a clear meaning in common usage, and this court has further clarified its meaning by stating that reduction in force involves terminating a teacher "due to a surplus of staff." *Moser v. Board of Education, supra* at 564-65, 283 N.W.2d at 393. Similarly, "waive recall" is a phrase of common understanding, meaning relinquishing the right to be called back. See Webster's Third New International Dictionary, Unabridged (1968).

Next, the School District of Scottsbluff contends that the trial court erred in not finding that Roth waived her right to recall. Section 79-1254.07 states that "An employee under contract to another educational institution may waive recall . . . ."

Thus, the question is whether Roth voluntarily and intentionally relinquished her right to recall. See *Pester v. American Family Mut. Ins. Co.,* 186 Neb. 793, 186 N.W.2d 711 (1971). The waiver question is one of fact for the jury. 28 Am. Jur. 2d *Estoppel and Waiver* § 174 (1966); *Williams v. Stroh Plumbing & Electric, Inc.,* 250 Iowa 599, 94 N.W.2d 750 (1959). The determination of factual issues in a declaratory judgment action, which would otherwise be an action at law, will be treated in the same manner as if a jury had been waived. Hence, a trial court's findings have the effect of a jury verdict and will not be set aside unless clearly wrong. *MFA Ins. Companies v. Mendenhall,* 205 Neb. 430, 288 N.W.2d 270 (1980); *Larutan Corp. v. Magnolia Homes Manuf. Co.,* 190 Neb. 425, 209 N.W.2d 177 (1973).

We find the record supports the court's refusal to find Roth waived her right of recall. Indeed, her interviewing with the School District of Scottsbluff, her attorney's letters to the district concerning her rehiring, and her filing of this suit suggest a strong intent to maintain, rather than waive, her right of recall.

Finally, the School District of Scottsbluff argues that the trial court erred in computing damages and in finding Roth properly mitigated damages. Both of these are factual issues and the findings of the trial court will not be set aside unless clearly wrong. *MFA Ins. Companies v. Mendenhall, supra; Larutan Corp. v. Magnolia Homes Manuf. Co., supra.* We find that a reading of the record supports the trial court's findings on Roth's damages and her proper mitigation of damages.

The judgment of the District Court in favor of Montgomery is reversed and the cause remanded with directions to dismiss her action, and the judgment in favor of Roth is affirmed.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

CLINTON, J., not participating.

IN RE ESTATE OF JEAN F. MCCARTNEY, DECEASED. KIRK MCCARTNEY, PERSONAL REPRESENTATIVE OF THE ESTATE OF JEAN F. MCCARTNEY, DECEASED, APPELLANT, V. SHIRLI FRANK MCCARTNEY, APPELLEE.

330 N.W.2d 723

Filed February 25, 1983. No. 81-779.

1. **Marriage: Proof.** Marriage is a fact which may be proved by direct or circumstantial evidence, or by documentary or parol evidence. The weight and sufficiency of the evidence to prove marriage is governed by the general rules of evidence.
2. _____: _____. The general rule is that the burden of proof of marriage is upon the party who pleads it.
3. _____: _____. Where the issue is whether a marriage was ever contracted, the burden of proof is on the party asserting its existence.
4. _____: _____. Common-law marriages are not recognized in Nebraska. Cohabitation without a ceremonial marriage is meretricious and is not evidence of marital status in this state.
5. _____: _____. In order to prove a marriage there must be proof that a ceremonial marriage took place.
6. **Evidence: Witnesses.** Uncontroverted testimony need not be accepted as absolute verity, especially when that testimony is opposed to common knowledge or human experience, or is inherently improbable, unreasonable, or unworthy of belief.
7. _____: _____. The trier of fact has a right to test the credibility of a witness by his self-interest and to weigh undisputed testimony against facts and circumstances in evidence from which a conclusion can be drawn that the testimony is not true.

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

Ray C. Simmons of Ray C. Simmons, P.C., for appellant.

Levy & Lazer, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and MORAN, D.J.

BOSLAUGH, J.

Jean F. McCartney died testate on June 1, 1980, a resident of Dodge County, Nebraska. His will, dated June 3, 1977, which devised his entire estate to his

children, Kirk McCartney and Susan Frye, was admitted to probate on August 15, 1980.

On October 10, 1980, Shirli Frank McCartney filed a petition for formal determination of heirship in the county court. The petition alleged that she was married to the deceased at the time of his death and entitled to a statutory share of his estate as an omitted spouse.

Both the petitioner and the deceased had been previously married and divorced. The deceased and his first wife, Lois, were divorced on April 6, 1977. The petitioner claims her marriage to the deceased took place in December 1977.

The county court found that the petitioner, Shirli Frank McCartney, had failed to prove a valid marriage. Upon appeal to the District Court that court found that a marriage had been shown and the personal representative had failed to prove that it was invalid. The personal representative has appealed to this court.

The issue presented by the appeal is whether the petitioner and the deceased were married at the time of his death. Marriage is a fact which may be proved by direct or circumstantial evidence, or by documentary or parol evidence. The weight and sufficiency of the evidence to prove marriage is governed by the general rules of evidence. *Bourelle v. Soo-Crete, Inc.,* 165 Neb. 731, 87 N.W.2d 371 (1958).

The general rule is that the burden of proof of marriage is upon the party who pleads it. *Morris v. Equitable Life Assurance Society,* 109 Neb. 348, 191 N.W. 190 (1922). The rule is stated in 52 Am. Jur. 2d *Marriage* § 129 (1970) as follows: "While the distinction is not always clear in many cases, the question of burden of proof in marriage law depends on whether the issue is seen as the existence of a disputed marriage—that is, whether there was ever a genuine attempt to form a marital union—or as the validity of a marriage shown or conceded to have come into existence. Where the issue is whether a

marriage was ever contracted, the view generally taken is that the burden of proof is on the party asserting its existence, especially if the claim is for a common-law marriage.

"On the other hand, where the issue is whether a marriage shown to exist is valid, the general rule is that the person attacking its validity has the burden of proving invalidity. This rule applies to common-law as well as to ceremonial marriages." Under the circumstances in this case the burden of proof was on the petitioner to prove the marriage.

The personal representative urges that the review in this court is de novo. Prior to the repeal of Neb. Rev. Stat. § 30-1606 (Reissue 1979), appeals of this nature were determined de novo in this court. Section 30-1606 was repealed effective August 30, 1981. See Neb. Rev. Stat. § 30-1601 (Cum. Supp. 1982). The review in the District Court is now for "error appearing on the record." Neb. Rev. Stat. § 24-541.06 (Cum. Supp. 1982).

The case was tried in the District Court on July 13, 1981, and decided September 22, 1981. We have concluded that we need not determine which standard of review is applicable to this case because we reach the same result under either standard.

At the hearing in the county court the petitioner testified that she and Jean F. McCartney were married in a civil ceremony somewhere in Arkansas on December 27, 1977. She testified that she and Jean had left the Omaha area on that date in his car. She was feeling very sleepy and slept during most of the long ride. She testified that they stopped and parked in front of a private residence and she noticed a car that had rolled down an embankment. Before getting out of the car Jean asked her to marry him. They went up to a house and were admitted by an older man. An older woman was also present. A ceremony consisting only of the marriage vows was then performed by the man. Following the ceremony Shirli and Jean signed a "cer-

tificate of marriage," but the document was folded by Jean so that she could see very little of it. They got back in the car and returned to Omaha. Shirli testified that she and Jean had discussed marriage on several occasions, but she did not know in advance that the wedding was to take place.

Shirli's testimony concerning the details of the marriage was extremely vague. Her testimony in an earlier deposition, although somewhat similar, differed in regard to several important details from that given at the hearing.

At the time of the deposition she did not know where the ceremony had taken place. Before the hearing in the county court she consulted a psychiatrist and submitted to hypnosis. She claims that as a result of the hypnotic sessions she was able to recall that the ceremony took place in Arkansas. There is some evidence that Shirli had previously named other states as being the one in which the marriage was performed.

The requirements for a valid marriage in Arkansas are similar to those in Nebraska. Common-law marriages are not recognized and only ceremonial marriages are valid. *Furth v. Furth,* 97 Ark. 272, 133 S.W. 1037 (1911); *Spicer v. Spicer,* 239 Ark. 1013, 397 S.W.2d 129 (1965). There are statutory requirements for a license and blood tests before a marriage may be solemnized. Ark. Stat. Ann. §§ 55-201 et seq. (Repl. 1971).

All arrangements for the wedding had been made by Jean. Shirli had not taken a blood test specifically for the ceremony. She saw the marriage certificate only once after the ceremony and never saw it folded out to its full length. According to Shirli, Jean said that he wanted to keep the location of their marriage a secret so that she would not be able to divorce him.

After their return to Nebraska they did not live together for about 8 months. Shirli continued to live in Omaha while Jean resided at his "ranch" in

Fremont. Shirli testified that she continued to live in Omaha because her son was to graduate from high school and she did not want him to change schools. Shirli and her children moved to Fremont in August 1978.

They told no one of the marriage until February 1978. At that time they told some of their children and some of their friends. Thereafter, Jean McCartney introduced Shirli as his wife to friends and business acquaintances. He told a few of his friends that he and Shirli had been married in Arkansas.

Jean filed his 1978 income tax return as married, filing separately. Jean designated Shirli McCartney, his wife, as the beneficiary for his accumulated sick leave. He changed his life insurance policy beneficiaries to Shirli McCartney, his wife. He listed Shirli as his wife on his medical records and named her as joint tenant on his bank records. Jean McCartney's name appeared on the school records of Shirli's children.

The record shows that after February 1978 the deceased and the petitioner conducted their lives as if they were married. However, evidence that would be sufficient to establish a common-law marriage is not sufficient to establish a marriage under our present law. In *Ropken v. Ropken,* 169 Neb. 352, 354, 99 N.W.2d 480, 483 (1959), this court stated: "Common-law marriages are not recognized in Nebraska by legislative enactment. . . . Cohabitation in Nebraska without a ceremonial marriage is meretricious. It is not evidence of a marital status in this state." In order to prove a marriage the petitioner was required to establish that a ceremonial marriage had taken place.

There is no evidence of a ceremonial marriage except the testimony of the petitioner. Her description of the wedding and what took place on the hurried trip to Arkansas is so vague and indefinite that it is inherently improbable. She remembers

almost no details of the trip, claiming that she was asleep most of the time.

It does not seem reasonably likely that a mature woman would forget the most important details (i.e., time, date, and place) of her wedding ceremony. Nor does it seem likely that anyone not affected by drugs, alcohol, or severe illness could travel that great a distance without remembering many details of the trip or its ultimate destination. See *Taylor v. Taylor,* 230 S.E.2d 924 (W. Va. 1976), in which plaintiff's proof of a marriage ceremony was held to be so incredible that it precluded a finding that a ceremony had taken place.

The lack of any documentary corroboration of her testimony concerning the ceremony is significant. No one has been able to discover any official record of the marriage. Although she claims that she saw the marriage certificate on one occasion in Nebraska, it was not found among the papers and personal effects of the deceased, and was not produced at the hearing.

The hypnotic sessions and the testimony of the psychiatrist cast doubt on her testimony. The psychiatrist called by the petitioner testified that Shirli was "highly influenceable in emotional situations"; that she suffered from a hysterical neurosis characterized by disassociative and conversion phenomenon with amnesia and loss of memory when emotionally stressed; that she tended to go into trances spontaneously; and that she was "highly suggestible and influenceable." On cross-examination this witness admitted that it was possible that Shirli had imagined that the marriage ceremony had taken place.

Although some witnesses testified that the deceased had told them that he and the petitioner had been married in Arkansas, there was other testimony that the deceased had said that he had not married Shirli and would not marry her. Jack McCartney, a brother of the deceased, testified that on

two occasions, once before the alleged date of the marriage and again after that date, the deceased told him he had not married Shirli and did not intend to marry her. Further, there was evidence that the deceased was sometimes untruthful.

The petitioner relies heavily on *Allen v. Allen,* 121 Neb. 635, 237 N.W. 662 (1931), in which this court found upon disputed facts there had been a valid marriage. There are significant differences between the cases.

In the *Allen* case the plaintiff's evidence established that the ceremony had been performed by a Reverend Wilson, an Adventist minister, on September 28, 1923, at Denver, Colorado, where both parties resided. The plaintiff in the *Allen* case had received a certificate of marriage from the officiating clergyman.

The trier of fact was not required to accept the testimony of the petitioner that a ceremonial marriage was performed someplace in Arkansas on December 27, 1977. Uncontroverted testimony need not be accepted as absolute verity, especially when that testimony is opposed to common knowledge or human experience, or is inherently improbable, unreasonable, or unworthy of belief. *Baliulis v. Campbell Soup Company,* 204 Neb. 739, 285 N.W.2d 227 (1979); *Marston v. Drobny,* 166 Neb. 747, 90 N.W.2d 408 (1958); *Sack v. Siekman,* 147 Neb. 416, 23 N.W.2d 706 (1946). The trier of fact has a right to test the credibility of a witness by his self-interest and to weigh undisputed testimony against facts and circumstances in evidence from which a conclusion can be drawn that the testimony is not true. *Riley v. City of Lincoln,* 204 Neb. 386, 282 N.W.2d 586 (1979).

While a rebuttable presumption of a valid marriage may arise upon proof of a ceremonial marriage, we do not reach that question in this case. As we view the record, and as the county court found, the petitioner failed to establish by a preponderance of the evidence that a ceremonial marriage took place.

The judgment of the District Court is reversed and the cause remanded for further proceedings in conformity with this opinion.

REVERSED AND REMANDED.

CAROL A. LORD, APPELLEE, V. PHILLIP L. LORD, APPELLANT.

330 N.W.2d 492

Filed February 25, 1983. No. 81-823.

1. **Property Division.** The rules for determining the division of property in an action for dissolution provide no mathematical formula by which such awards can be precisely determined. Such awards are determined by the facts in each case.
2. _____. How property owned at marriage and acquired by gift or inheritance will be considered in determining division of property or award of alimony depends upon the facts of the particular case and the equities involved.
3. **Appeal and Error.** Failure to file a cross-appeal precludes consideration in this court of errors claimed by appellee against appellant.

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

Tedd C. Huston and Steven A. Goeden, for appellant.

John O. Sennett of Black & Sennett, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and MORAN, D.J.

MORAN, D.J.

Respondent, Phillip Lord (Phillip), appeals from the amended decree of dissolution which dissolved the marriage, assigned property, allocated debts, and determined child custody and support in an action brought by the petitioner, Carol Lord (Carol). We affirm.

The parties were married on April 22, 1976. They are the parents of two children, born May 2, 1977,

and October 16, 1979. The primary asset of the marital property is their residence. The house was moved onto an acreage, which Carol's father conveyed to her as a gift after the marriage, and was remodeled extensively. The parents paid for some of the improvements. Carol's father, together with members of his family, Phillip's father, and the parties, did considerable labor on the residence. At the trial an attempt was made to value the work done by family members and to set it off from the marital estate as gifts to the party related to the donor. The record does not disclose that the trial judge dealt with the work as gifts, and we do not. The house, exclusive of the land, was appraised at $42,665 and $43,505. Either figure exceeds the value of the equity of the parties in the marital property.

Shortly before she filed the action, Carol transferred 12 cows and 8 heifer calves to her parents, which she claimed was in satisfaction of advancements made by her parents for her college expenses and other debts such as feed bills and pasture rent. These animals consisted of livestock owned by Carol at the marriage and their offspring. Her parents kept and cared for the animals without cost to Carol. Shortly after the marriage, Phillip replaced a calf which had died by purchasing one for $75.

Phillip was employed as a repairman and during the year preceding trial earned $10,800. Carol is a registered nurse and was employed on a part-time basis. At the time of the trial she earned approximately $200 per month.

The amended decree assigned the house, most of the contents, and the land to Carol, together with the automobile she owned before the marriage. The court assigned to Phillip the parties' pickup, the cash value of life insurance policies, and the value of his pension account with his employer. Debts were allocated between the parties, and Carol was ordered to pay Phillip $14,223 in 10 annual installments of $1,422.30, with interest on the unpaid balance at

the current legal rate. Child support due from Phillip to Carol, who was awarded custody of the children, was fixed at $100 per month for each child, and each party was ordered to pay his own attorney fees. The trial court found that the transfer of livestock was in consideration of a debt Carol owed her father.

We determine that after setting off to Carol the land and other improvements paid for by her parents, Carol received, under the amended decree, approximately 69 percent of the marital estate.

Phillip's assignments of error are that Carol was awarded a disproportionate share of the marital property and that the court improperly determined that the transfer of cattle was in consideration of a preexisting debt.

The rules for determining the division of property in an action for dissolution of marriage provide no mathematical formula by which such awards can be precisely determined. Such awards are to be determined by the facts in each case. *Burton v. Burton,* 205 Neb. 865, 290 N.W.2d 658 (1980). Statutory guidelines are found in Neb. Rev. Stat. § 42-365 (Cum. Supp. 1982). How property owned at marriage and acquired by gift or inheritance will be considered in determining division of property or award of alimony must depend upon the facts of the particular case and the equities involved. *Van Newkirk v. Van Newkirk,* 212 Neb. 730, 325 N.W.2d 832 (1982).

Applying these rules to the facts of this case, we find there was no abuse of discretion by the trial court. Of considerable significance here is Carol's duty to provide suitable housing and care for the children.

While we do not agree that the transfer of cattle was in satisfaction of a preexisting debt, it is of no consequence. Phillip's contribution to the herd consisted of the purchase of a calf for $75. The cattle were kept as a part of Carol's father's herd. Neither of the parties cared for or fed them except in-

cidentally as a part of the work they performed from time to time on the ranch. They should be treated as Carol's and are not a part of the marital estate. An adjustment for Phillip's purchasing the calf would be trifling and is not warranted.

In her brief, Carol complains of improper division of personal property, inadequacy of child support, and the interest requirement on the money judgment. However, she did not cross-appeal and assign these determinations as error. Hence, these claims will not be considered. *Peterson v. Strayer,* 121 Neb. 866, 239 N.W. 213 (1931).

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LARRY S. COFFMAN, APPELLANT.

330 N.W.2d 727

Filed February 25, 1983. No. 82-142.

1. **Statutes.** A sensible construction will be placed upon a statute to effectuate the object of the legislative intent rather than a literal meaning which would have the effect of defeating such intent.
2. **Escape.** For the purpose of determining whether one has escaped, work release is but temporary leave within the meaning of Neb. Rev. Stat. § 28-912(1) (Reissue 1979).
3. _____. While on work release, under the provisions of Neb. Rev. Stat. §§ 83-183 and 83-184 (Reissue 1981), a prisoner remains subject to the supervision, control, and custody of the Nebraska Penal and Correctional Complex.

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

Thomas M. Kenney, Douglas County Public Defender, for appellant.

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

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and WARREN, D.J.

CAPORALE, J.

Defendant-appellant, Larry S. Coffman, appeals from a conviction on the charge of escape. We affirm.

On April 2, 1981, the defendant was assigned on work release to the Omaha Post Care Center while a prisoner at the Nebraska Penal and Correctional Complex. On April 26, 1981, he failed to return to the Omaha Post Care Center. He was later arrested and charged with escape under the provisions of Neb. Rev. Stat. § 28-912 (Reissue 1979). That statute in pertinent part provides: "(1) A person commits escape if he unlawfully removes himself from official detention or fails to return to official detention following temporary leave granted for a specific purpose or limited period. Official detention shall mean arrest, detention in or transportation to any facility for custody of persons under charge or conviction of crime or contempt or for persons alleged or found to be delinquent, detention for extradition or deportation, or any other detention for law enforcement purposes; but official detention does not include supervision of probation or parole or constraint incidental to release on bail."

Defendant argues that as work release is a form of parole, there was insufficient evidence to convict him of escape under the statute cited above. In taking that position he relies upon a series of Attorney General's opinions which advise that for the purpose of determining who has power to grant work release, it is a form of parole. First, it is to be noted that although an Attorney General's opinion is entitled to substantial weight and is to be respectfully considered, it nonetheless has no controlling authority on the state of the law discussed in it, and standing alone is not to be regarded as legal precedent or authority of such character as is a judicial decision. An Attorney General's opinion is, simply, not a judicial utterance. *Follmer v. State,* 94 Neb. 217, 142 N.W. 908 (1913); *Mogis v. Lyman-Richey*

Sand & Gravel Corp., 189 F.2d 130 (8th Cir. 1951), *rehearing denied* 190 F.2d 202, *cert. denied* 342 U.S. 877, 72 S. Ct. 168, 96 L. Ed. 659; 7 Am. Jur. 2d *Attorney General* § 11 (1980).

The question is one of statutory construction. As reiterated in a recent case dealing with escape, *State v. Farr,* 209 Neb. 163, 306 N.W.2d 854 (1981), we must, in construing a statute, keep certain rules in mind. The first of these is that a sensible construction will be placed upon a statute to effectuate the object of the legislative intent rather than a literal meaning which would have the effect of defeating such intent. See, also, *Hill v. City of Lincoln, ante* p. 517, 330 N.W.2d 471 (1983). Further, 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. If possible, a court will try to avoid a construction which leads to absurd, unjust, or unconscionable results. A statute should be construed in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose to be served. *State v. Farr, supra.*

The construction urged by defendant metamorphoses from the merely absurd to the outrageously farcical. Whatever work release may be for the purpose of determining who is empowered to grant it, there can be, and is, no question that for the purpose of determining whether one has escaped it is but "temporary leave."

While on work release a prisoner remains subject to the supervision, control, and custody of the Penal and Correctional Complex. Neb. Rev. Stat. § 83-184 (Reissue 1981) in pertinent part provides: "(1) When the conduct, behavior, mental attitude and conditions indicate that a person committed to the department and the general society of the state will be benefited, and there is reason to believe that the best interests of the people of the state and the person committed to the department will be served

thereby, in that order, and upon the recommendation of the Board of Parole in the case of each committed offender, the Director of Correctional Services may authorize such person, under prescribed conditions, to:

. . . .

"(b) Work at paid employment or participate in a training program in the community on a voluntary basis . . . ." Neb. Rev. Stat. § 83-183(2) (Reissue 1981) provides: "The Director of Correctional Services shall make rules and regulations governing the hours, conditions of labor, and the rates of compensation of persons committed to the department. In determining the rates of compensation, such regulations may take into consideration the quantity and quality of the work performed by such person, whether or not such work was performed during regular working hours, the skill required for its performance, as well as the economic value of similar work outside of correctional facilities." See, also, *State v. Mayes,* 190 Neb. 837, 212 N.W.2d 623 (1973), which holds that the failure to return to a treating facility after temporary leave constitutes an escape from custody.

Defendant was on temporary leave and subject to the control and custody of the penal complex. When he did not return to the Omaha Post Care Center he had obviously escaped. Defendant's argument may be cunning, but it is so devoid of substance as to render this appeal wholly frivolous.

The judgment of the trial court is correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GRETCHEN HILPERT, ALSO KNOWN AS LETA G. TYLER, APPELLANT.

330 N.W.2d 729

Filed February 25, 1983. No. 82-224.

1. **Directed Verdict: Waiver.** Following a motion for a directed verdict at the close of the evidence of the State, the introduction of evidence thereafter by the defendant waives any error in the ruling or failure of ruling on the motion, although the defendant is not prevented from questioning the sufficiency of the evidence in the entire record to sustain a conviction.
2. **Witnesses: Self-Incrimination: Waiver.** The general rule is that a defendant's testimony at a former trial is admissible in evidence against him in later proceedings. A defendant who chooses to testify waives his privilege against compulsory self-incrimination with respect to the testimony he gives.
3. **Criminal Law: Evidence: Joinder.** Evidence offered by one defendant in a joint trial, if competent, is evidence against other persons charged in the same information.
4. **Witnesses: Joinder.** Where one of several defendants on trial together voluntarily becomes a witness, he is a witness for all purposes. If he knows facts injurious to a codefendant, they may be brought out either by his own counsel or by the State.
5. **Criminal Law: Jurisdiction.** Where the requisite elements of a crime are committed in different jurisdictions, if an essential element of the crime is committed in this state, jurisdiction to prosecute is present.
6. **Verdicts: Appeal and Error.** This court will not interfere on appeal with a finding of guilt based upon evidence unless it is so lacking in probative force that we can say as a matter of law that it is insufficient to support such finding beyond a reasonable doubt.
7. **Sentences: Appeal and Error.** A sentence imposed within the limits of the statute will not be disturbed on appeal absent an abuse of discretion.

Appeal from the District Court for Box Butte County: ROBERT O. HIPPE, Judge. Affirmed.

Dean S. Forney, Box Butte County Public Defender, for appellant.

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

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

HASTINGS, J.

The defendant, Gretchen Hilpert, and her husband, John B. Hilpert, were charged in separate informations with the crime of theft by deception, a violation of Neb. Rev. Stat. § 28-512(1) (Reissue 1979). Following a stipulated consolidated trial to the court alone, she was convicted and sentenced to a term of imprisonment of 18 months to 2 years. The errors which she has assigned on appeal, listed in the order in which they will be discussed, are essentially as follows: The court erred in that (1) it considered evidence against her which was not introduced as a part of the State's case in chief, nor by her on defense; (2) the evidence was insufficient to establish beyond a reasonable doubt that the crime charged was committed in Nebraska, in that the intent to deprive, an essential element of the crime, did not occur within the State of Nebraska; (3) the evidence was insufficient generally to establish beyond a reasonable doubt that the defendant committed the crime charged; and (4) the sentence was excessive.

This prosecution arose out of a substantial shortage of funds which developed in a certain guardianship estate wherein John B. Hilpert was the guardian and attorney and the defendant, as John's secretary, apparently actually administered the estate.

At the beginning of the trial, the following colloquy occurred between the court and counsel: "THE COURT: . . . Both of these [cases] have been consolidated for purposes of trial and in both trial by jury has been waived and they are being tried before the Court. . . . MR. MARGHEIM [counsel for John B. Hilpert]: Your honor, we have one procedural matter to ask the Court. THE COURT: Surely. MR. MARGHEIM: We are asking for advice on this. These two cases are consolidated for purposes of trial but presume that that still leaves each defendant with the right to present their individual defenses, possibly conflictive de-

fendants [sic], and each individual defendant to testify or not testify? THE COURT: Yes, that will be all right. MR. MARGHEIM: Okay." The record further reflects that Mr. Forney was present representing the defendant Gretchen, and voiced no objection to those statements. The State then presented its case in chief and rested. John B. Hilpert testified in his own behalf and called as a witness the defendant Gretchen, who also testified. No objection to nor request for limitation of applicability of the testimony of either of these witnesses was voiced by the defendant Gretchen. Following John B. Hilpert's rest, counsel for the defendant Gretchen announced that no evidence would be offered in her behalf.

The State's case in chief consisted of testimony by Samuel L. O'Brien, a former county judge of Box Butte County; Lane Nansel, vice president and cashier of the Guardian State Bank, Alliance; L. Leroy Schommer, also a vice president of that bank; Albert T. Reddish, an Alliance attorney; and Lois Pedersen, vice president of the Alliance National Bank; and a great deal of documentary evidence.

Mr. O'Brien identified in person both the defendant and John B. Hilpert. He also testified that John was appointed guardian of the particular estate, that he signed various documents, and that the defendant worked for John as a secretary from the mid-1960s to 1972.

The various annual reports covering the period from September 17, 1971, to September 15, 1979, purportedly made out by the guardian, John B. Hilpert, were examined by the witness Lane Nansel. Each of those reports contained what appeared to be the signature of Lane R. Nansel, as vice president of the bank, certifying the accuracy of the amounts claimed on the report to be on deposit in the bank. However, he testified that with the exception of the one for the year September 17, 1971, to September 16, 1972, none of his signatures were genuine. As

examples of discrepancies in the reports, the witness pointed to his purported certification for the year ending on September 15, 1979, which showed $34,000 in certificates of deposit with his bank, whereas in fact there was but $7,500, and for the year ending on September 16, 1973, an alleged balance of $10,000 in savings certificates, as compared to an actual balance of $5,500. The report for that same year disclosed that the guardian had written a check to the Guardian State Bank in the amount of $5,000 for a certificate of deposit, whereas Mr. Nansel testified that no such certificate was purchased during that time period. Similar instances of false information were detailed by this witness as to many of the other reports.

Mr. Nansel also testified that as of September 24, 1979, there was a total of $8,000 in certificates of deposit in the guardianship account, and that two certificates in the total sum of $5,500 were cashed on April 24, 1980, leaving a June 24, 1980, balance in certificates of deposit of $2,500. He also stated that during the period April 24, 1972, to June 24, 1980, there never was a balance in time certificates for the guardianship of more than $8,000. However, the report for the year ending September 15, 1977, showed a balance of $24,000; for September 15, 1978, a balance of $29,000; and for September 15, 1979, a balance of $34,000.

Exhibit 10 is a photocopy of one Guardian State Bank cashier's check in the amount of $5,489, dated April 24, 1980, payable to the guardianship account in the Alliance National Bank, stamped endorsed for credit to that account, and a draft dated August 7, 1980, in the amount of $2,461.35, drawn on the Colorado National Bank of Denver with the Guardian State Bank as payor, "John B. Hilpert Guardian of Harold E. Uhrich" as payee, with a hand-printed endorsement as follows:

"John B. Hilpert, Guardian
of Harold E. Uhrich
For Deposit Only
Gretchen Hilpert
02-244578
/s/ Gretchen Hilpert."

The $5,489 figure represented the $5,500 of certificates cashed in April, and the $2,461.35 figure represented the balance of the certificates then remaining. These transactions were initiated by way of letters from John B. Hilpert. However, according to a handwriting expert, John B. Hilpert's signature on one of the letters requesting the bank to cash the certificates of deposit was actually written by the defendant. With the payment of $2,461.35, according to Mr. Nansel, any balance which the guardianship had with his bank was "wiped out."

The witness Lois Pedersen of the Alliance National Bank testified that there was a total of approximately 25 checks written on the guardianship account naming defendant as payee, signed by John B. Hilpert, and endorsed by the defendant. The checks were in varying amounts, ranging from $100 to $5,000, totaling something in excess of $14,000, and covered the period from March 10, 1979, to July 31, 1980. The signatures of both parties were verified by a handwriting expert. Ms. Pedersen also testified that the $5,489 cashier's check previously mentioned was deposited in her bank and that shortly thereafter a check in the amount of $5,000, signed by John B. Hilpert, made out to the defendant and endorsed by the defendant to her account, was paid.

L. Leroy Schommer, formerly an employee of the Alliance National Bank, also testified that as to several of the certifications of balance on deposit contained in the guardian's annual reports, the signatures purporting to be his were not in fact genuine.

The witness Albert T. Reddish testified to his acquaintanceship with John B. Hilpert and the defend-

ant, that John practiced law in Alliance, and that the defendant worked as John's secretary. He described conferences with the family of the ward requesting a change in the guardian and correspondence with John B. Hilpert and the defendant, who were then in California, to accomplish this change. In spite of his various requests he never did receive an accounting from John B. Hilpert. According to Mr. Reddish's comparison of the guardian's reports and the bank statements, there was a discrepancy between the two of something over $45,000. Following a hearing in county court, he reported that the county judge suspended Mr. Hilpert's authority as guardian and assessed a surcharge against him of $70,174.41.

Following the State's rest, both the defendant and John B. Hilpert moved to dismiss the information, ruling upon which was reserved by the court. It is not necessary for us to review the propriety of such action by the trial judge for two reasons: The defendant does not assign such action as error, nor does she argue it in her brief; secondly, in *Henggler v. State,* 173 Neb. 171, 112 N.W.2d 762 (1962), we held that following a motion for a directed verdict at the close of the evidence of the State, the introduction of evidence thereafter by the defendant waives any error in the ruling or failure of ruling on the motion, although the defendant is not prevented from questioning the sufficiency of the evidence in the entire record to sustain a conviction.

John B. Hilpert offered testimony in his own behalf. He explained how he turned the accounting of his activities as guardian over to the defendant. Initially, he would have the defendant make out the various checks in payment of the bills of the guardianship, and then he would sign them. He then told how, a few months after he took over this guardianship in 1965, he would sign checks in blank and turn them over to the defendant. He agreed that he did not set up any controls whereby he could

verify her actions. He then described how, in April of 1972, he was told by the defendant that the guardianship was short some $5,000 and intimated that it was his fault because of having turned signed blank checks over to her. It was then that they cashed a number of the guardianship's savings bonds to be placed in the checking account. According to John B. Hilpert's testimony, the defendant expressed regret over what she had done; but in spite of all this, Hilpert continued to rely upon the defendant to do all the bookwork, continued to allow her to manage the money by furnishing her with signed blank checks, continued to sign the annual reports prepared by the defendant without examining them, and at no time made any examination to determine how much money was left in the guardianship account or to verify what the defendant had told him as to what was missing. He made no check of bank statements, deposit slips, or anything of that nature. According to his testimony, it was not until sometime in the summer of 1980, during a casual conversation when they were living in Sacramento, that he discovered that the actual shortage was then about $50,000. He admitted that sometime in July of 1980 he made the decision not to file an accounting with the court.

The defendant was then called as a witness by John B. Hilpert, and when asked about the shortage in the guardianship account, she explained that "I comingled [sic] the money." She admitted that she changed the figures on the 1971-72 guardian's report after the bank officials had signed the certification. The defendant admitted that she used some of the money which caused the shortages for her own use. She said that all of the checks which were made out to her had been signed by John B. Hilpert in blank, that she would deposit them to her account as needed, and that she knew that what she was doing was illegal. She said that she never told John B. Hilpert about putting guardianship money in her ac-

count. She also said that she was sure that at one time, at least, she had promised John B. Hilpert that she would not misappropriate any more money.

Following the defendant's testimony, John B. Hilpert's counsel announced that he would rest his case. The following colloquy then occurred between the court and counsel: "THE COURT: The defendant Gretchen Hilpert really, technically, didn't offer testimony, isn't that right, she was testifying for defendant John Hilpert? MR. FORNEY: That's right, Your Honor. THE COURT: Do you have any evidence, Mr. Forney? MR. FORNEY: No, Your Honor, we have no evidence on behalf of Leta Hilpert in her case. THE COURT: Then does the state offer rebuttal of John Hilpert? MR. PAYNE: We have none." Both John B. Hilpert and the defendant, through counsel, renewed the "motion made at the close of the state's evidence," in answer to which the court indicated that he would have the same ruling.

In her first assignment of error, the defendant insists that because of the closing comments set forth above, as well as the opening stipulation, neither her own testimony nor that of John B. Hilpert is available as evidence in her case. We disagree. There is obviously no constitutional barrier to the utilization of this testimony as violating the right to cross-examination or against self-incrimination. "The general rule is that a defendant's testimony at a former trial is admissible in evidence against him in later proceedings. . . . 'A defendant who chooses to testify waives his privilege against compulsory self-incrimination with respect to the testimony he gives . . . .' " *State v. Robinson,* 202 Neb. 210, 215, 274 N.W.2d 553, 556 (1979).

Nor was it necessary for the State to specifically cause such evidence to be introduced in the defendant's case. By the very nature of a common or consolidated trial, all evidence received is equally binding on all defendants unless otherwise re-

stricted. Evidence offered by one defendant in a joint trial, if competent, is evidence against other persons charged in the same indictment. *State v. Linden,* 171 Wash. 92, 17 P.2d 635 (1932). " 'Where one of several defendants on trial together voluntarily becomes a witness, he is a witness for all purposes. If he knows facts injurious to a co-defendant, they may be brought out either by his own counsel or by the State. . . .' " *Stanley v. State,* 189 Tenn. 110, 122, 222 S.W.2d 384, 389 (1949). " 'Evidence given by a defendant on his own behalf, upon his trial for a criminal charge is competent, and proper for the consideration of the jury, both for and against a co-defendant jointly upon trial.' [Citation omitted.]" *Kennon v. State,* 181 Tenn. 415, 423, 181 S.W.2d 364, 367 (1944).

If the testimony offered by John B. Hilpert in some way was not relevant or competent as to defendant, or if she did not wish to waive her fifth amendment right against incrimination, she should have raised the proper objections at the time. However, "[t]he fact that one defendant wishes to use the other as a witness does not of itself entitle him to a separate trial." *State v. Pelton,* 197 Neb. 412, 419, 249 N.W.2d 484, 488-89 (1977).

The defendant's next assignment of error relates to her claim that the State of Nebraska had no jurisdiction over her for this alleged crime because it was not committed in Nebraska. The crime charged was "theft by deception." There are two elements which must necessarily be present before such crime is committed: (1) The obtaining of the property of another by deception, and (2) With the intent to deprive the owner thereof. Neb. Rev. Stat. §§ 28-511, 28-512 (Reissue 1979). The defendant refers to the trial court's memorandum opinion in which it is suggested that the element of intent was formed in the mind of the defendant while in California. Therefore, she suggests, since all of the ele-

ments of the crime did not occur in Nebraska, Nebraska does not have jurisdiction.

She relies particularly on the case of *State v. Karsten,* 194 Neb. 227, 231 N.W.2d 335 (1975), for the proposition that penal statutes are essentially local in nature and that Nebraska may not prosecute individuals for alleged crimes committed outside the state. However, that case involved a prosecution for a conspiracy to commit an assault in Colorado. No battery was ever committed. We simply held in that case that Nebraska had no jurisdiction because no Nebraska law was violated. "However, the Nebraska assault statute has no force in Colorado where the assault which was the subject of the conspiracy in this case was to have taken place. It was error for the District Court to submit the case to the jury upon the theory that Nebraska law was applicable to an act which was to be performed in Colorado." *Id.* at 229, 231 N.W.2d at 337. Simply stated, the decision holds that, on the facts presented, it was not a violation of Nebraska law for the defendant to conspire to break the law of another state.

Forney v. State, 123 Neb. 179, 242 N.W. 441 (1932), and *State v. Hyslop,* 131 Neb. 681, 269 N.W. 512 (1936), also relied upon by the defendant, are also distinguishable. In the present case we are not confronted with the situation where the act constituting the crime occurred outside the state. The property was taken within this state upon presentation of the checks for payment to a bank located in this state under the terms of a guardianship established by the courts of this state.

We are therefore faced with the question of whether or not all of the elements of an offense must occur within the state, as contended for by the defendant. We are unable to find any Nebraska authority on this point. Turning to other jurisdictions, we observe two well-defined rules of law applicable to jurisdictional questions arising in embezzlement cases. The clearest statement of these rules has

been made by the Arizona Supreme Court. One such rule is demonstrated in *State v. Scofield,* 7 Ariz. App. 307, 438 P.2d 776 (1968). In that case the defendant leased a car in Arizona, crossed the state line, and after leaving the State of Arizona, decided to convert the automobile to his own use. In holding that the crime occurred in Arizona, the court said: "Generally, the State of Arizona has no jurisdiction over offenses committed outside of its territorial limits. 21 Am.Jur.2d Criminal Law § 383, at 403-04; 22 C.J.S. Criminal Law § 133, at p. 353; and see State v. Jacobs, 93 Ariz. 336, 380 P.2d 998 (1963). However, it is also generally accepted that if the requisite elements of the crime are committed in different jurisdiction [sic], any state in which an essential part of the crime is committed, may take jurisdiction, 21 Am.Jur.2d Criminal Law § 385, at 404, and this is particularly true as to the state in which the crime is consummated. 22 C.J.S. Criminal Law § 133b, at p. 355. See Commonwealth v. Thomas, 410 Pa. 160, 189 A.2d 255, 5 A.L.R.3d 879 (1963), and cases cited therein." *Id.* at 315, 438 P.2d at 784. This position is also taken by Nevada. See *Sheriff v. Thompson,* 85 Nev. 211, 452 P.2d 911 (1969).

The other rule, perhaps more nearly in point as far as the facts of the present case are concerned, is found in *State v. Roderick,* 9 Ariz. App. 19, 448 P.2d 891 (1968). The rule there applies to a defendant who embezzles funds from an account entrusted to him or her, with the intent to do so being formed in a state different from that in which the funds are located. The Arizona court said: "The defendant contends that the State of Arizona had no jurisdiction since the offense was committed outside of its territorial limits. We have recently held, however, that if the requisite elements of a crime are committed in different jurisdictions, any state in which an essential part of the crime is committed may take jurisdiction. State v. Scofield, 7 Ariz.App. 307, 438 P.2d 776 (1968); see also, A.R.S. § 13-112. If, as we

shall subsequently discuss, the defendant committed theft by embezzlement, then the state in which he had a duty to account, namely Arizona, had jurisdiction. State v. Hoffman, 171 Kan. 116, 229 P.2d 768 (1951); Williams v. State of Oklahoma, 365 P.2d 569 (Okl.Cr.App., 1961); State v. Douglas, 70 S.D. 203, 16 N.W.2d 489 (1944); 22 C.J.S. Criminal Law § 185(11)." *Id.* at 21, 448 P.2d at 893.

In line with the foregoing authorities, we hold that where the requisite elements of a crime are committed in different jurisdictions, if an essential element of the crime is committed in this state, jurisdiction to prosecute is present. In this case, by taking funds from a guardianship account created by the courts of this state and to which courts the defendant and John B. Hilpert had a duty to account, and which funds were taken out of a bank account in this state by means of written orders drawn and constructively presented for payment by the defendant, we conclude that one or more of the essential elements of the crime have been committed within this state so as to confer jurisdiction.

From a review of the essential facts detailed above, it should be apparent that there was substantial evidence to support a conviction of the defendant. This court will not interfere on appeal with a finding of guilt based upon evidence unless it is so lacking in probative force that we can say as a matter of law that it is insufficient to support such finding beyond a reasonable doubt. *State v. Olson*, 200 Neb. 341, 263 N.W.2d 485 (1978).

Finally, we consider the defendant's claim that the sentence imposed upon her was excessive. The defendant was charged and found guilty of theft of property in the "value of more than $1,000." This is a Class III felony as provided for in Neb. Rev. Stat. § 28-518 (Reissue 1979), which provides for a possible maximum term of imprisonment of 20 years. We have said on numerous occasions that a sentence imposed within the limits of the statute will not be

disturbed on appeal absent an abuse of discretion. *State v. Kelly,* 207 Neb. 295, 298 N.W.2d 370 (1980).

This case involved a series of thefts over a prolonged period of time by one in a position of trust and who showed little if any true remorse. The trial judge conducted a detailed sentencing hearing in which counsel for the defendant, as well as for John B. Hilpert, was permitted to address the court in detail. The judge reviewed the criteria for sentencing and probation, and rejected the latter. The record appears to support a thorough and mature consideration of all the circumstances of the case. There was no abuse of discretion.

The judgment and sentence of the District Court are affirmed.

AFFIRMED.

CLINTON, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. JOHN B. HILPERT, APPELLANT.

330 N.W.2d 736

Filed February 25, 1983. No. 82-206.

1. **Aiding and Abetting.** Where a defendant has knowledge that another is violating the law, or possesses information sufficient to place a reasonable person on inquiry as to the possibility that such violations are taking place, yet continues to furnish essential materials for the purpose of continuing such violations, he may be guilty of aiding and abetting such criminal activity.
2. _____. The evidence is sufficient to convict a person as an aider and abettor if it shows that the crime was committed by someone and that the defendant incited or instigated, i.e., aided and abetted in, its commission. Such evidence may be circumstantial only, but if the facts which such evidence tends to establish may be accounted for upon no rational theory which does not include the guilt of the accused, it is sufficient to sustain a conviction.

Appeal from the District Court for Box Butte County: ROBERT O. HIPPE, Judge. Affirmed.

Laurice M. Margheim of Bayer & Margheim, for appellant.

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

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

HASTINGS, J.

This case was consolidated for trial in the District Court and argued here with *State v. Hilpert,* which appears *ante* p. 564, 330 N.W.2d 279 (1983). That opinion contains a complete recitation of the essential facts, which will not be repeated here. Also, it disposed of all assignments of error raised here, with one exception, i.e., that the District Court erred in finding that the intent to deprive, an essential element of the crime of theft by deception, could be inferred from evidence of breaches of a fiduciary relationship. The trial judge, in his memorandum opinion, did make such a statement. However, the essential inquiry which we must make is whether or not the defendant was guilty, beyond a reasonable doubt, of committing the acts necessary to establish his guilt.

As stated in our previous opinion, the defendant had known as early as April of 1972 that Gretchen Hilpert had been converting to her own use assets of the guardianship estate of which he was the guardian. It was clear that this had been accomplished only because the defendant had, without restriction, given her checks on the account, which he had signed in blank. Nevertheless, he continued this same practice throughout the ensuing years and into 1980. At no time did he ever make any investigation of his own to determine the actual amount of the shortage—he made no examination of the annual reports which he had signed in the past or which he approved in the future; he made no comparisons with the bank statement so as to verify deposits,

withdrawals, and balances; and he made no inquiry to ascertain the use to which Gretchen was putting the blank checks, although he knew from past experience that she had been using them for her own account. He was aware of the fact that after leaving Nebraska for California in 1973, both his and Gretchen's employment was sporadic at best. He testified that he observed the August 7, 1980, draft in the amount of $2,461.35 in their possession which, it develops later, was endorsed by Gretchen to herself and deposited in her account. He admitted that he did not tell her what to do with the draft, did not know that she was going to deposit it in her account, and believed that she would return it to the guardianship account, even though he was fully aware of the fact that she had twice before confessed to misappropriation of guardianship funds. When asked whether, after becoming aware of the initial shortage, he ever thought about contacting the bonding company, he replied, "They would be the last people I would contact."

For the defendant to claim he did not know that by continuing his practices of the past, specifically the handing over to Gretchen of signed blank checks without supervision, she would continue to steal from the guardianship account is simply utterly fantastic and incredible.

In *United States v. Wilson,* 59 F.2d 97, 98 (W.D. Wash. 1932), the court said: "Where a defendant has knowledge that another is promoting a violation of the prohibition law and in need of materials for furthering the enterprise, and such defendant, with such knowledge, furnishes the necessary materials for the purpose of forwarding the unlawful purpose, making it possible to accomplish the unlawful act, he is guilty. . . .

"In the instant case the defendant had, no doubt, knowledge of the sale and the purpose for which used, or at least *such as to put a reasonable person on inquiry.*" (Emphasis supplied). To the same

effect is *Pattis v. United States,* 17 F.2d 562, 566 (9th Cir. 1927), where the court said: "The court clearly instructed the jury that, if defendant had knowledge that Jensen and Clark were in a conspiracy to violate the National Prohibition Act, as charged in the indictment, and that they were purchasing material for that purpose pursuant to such conspiracy, and defendant, with such knowledge, assisted and aided Jensen and Clark by selling and delivering the materials to be used, thus making it possible to carry out the unlawful object of the conspiracy, defendant was a coconspirator. This is a correct statement of the law and supported the verdict upon either or both counts."

The evidence is sufficient to convict a person as an aider and abettor if it shows that the crime was committed by someone and that the defendant incited or instigated, i.e., aided and abetted in, its commission. Such evidence may be circumstantial only, but if the facts which such evidence tends to establish may be accounted for upon no rational theory which does not include the guilt of the accused, it is sufficient to sustain the conviction. *State v. Davis,* 185 Neb. 433, 176 N.W.2d 657 (1970).

The evidence in this case was sufficient to sustain a finding beyond a reasonable doubt that the defendant was guilty as an aider and abettor of the crime of theft by deception.

As to the claim of excessiveness of the sentence, which was for a term of 18 months to 2 years, we believe that our comments in *State v. Hilpert, supra,* are equally applicable here.

The judgment and sentence of the District Court are affirmed.

AFFIRMED.

CLINTON, J., not participating.

WAYNE E. SHANKS, APPELLANT, V. THE CITY OF SOUTH SIOUX CITY, NEBRASKA, APPELLEE.

330 N.W.2d 494

Filed February 25, 1983. No. 82-359.

Special Assessments: Proof. The general rule is that payments are presumed to be voluntary, and the party seeking to recover a payment has the burden to prove that it was involuntary.

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

Leamer & Rager, for appellant.

Wayne E. Boyd, City Attorney, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ.

PER CURIAM.

This is an appeal from the denial of a claim by a city council. The record indicates that the case was tried on a stipulation of facts, but no bill of exceptions has been filed in this court. It is the responsibility of the appellant to see that the bill of exceptions is filed in this court. Neb. Ct. R. 5C(5) (Rev. 1982).

The claim appears to have arisen out of the payment of a paving assessment on Lot 2, Block 40, of the town of Covington, now annexed to South Sioux City, Nebraska; property which was owned by Wayne E. Shanks. Dakota County, Nebraska, had commenced a tax foreclosure action against the property and the lien of the special assessment was foreclosed in the proceeding. The property was sold for less than the costs of the action to Norris Leamer and later conveyed by Leamer to Shanks.

On September 17, 1980, Darlene E. Shanks, the wife of Wayne E. Shanks, authorized Equitable Federal Savings and Loan Association of Fremont, Nebraska, to pay the assessment from proceeds of a mortgage on the property. The foreclosure sale was confirmed on October 7, 1980. The assessment was

paid to the City of South Sioux City, Nebraska, on October 20, 1980, by the savings and loan association.

The trial court found that the payment was voluntary, had been made by the agent of the claimant at his request and with full knowledge of the facts, and could not be recovered.

The general rule is that payments are presumed to be voluntary, and the party seeking to recover a payment has the burden to prove that it was involuntary. *Hersch Buildings, Inc. v. Steinbrecher,* 198 Neb. 486, 253 N.W.2d 310 (1977). See, also, 70 Am. Jur. 2d *Special or Local Assessments* § 210 (1973).

In the absence of a proper bill of exceptions, the only issue on appeal is whether the pleadings are sufficient to support the judgment. *Nimmer v. Nimmer*, 203 Neb. 503, 279 N.W.2d 156 (1979).

While the "pleadings" are somewhat irregular, they are sufficient to support the judgment. The judgment is therefore affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. SCOTT E. SPRAGUE, APPELLEE.

330 N.W.2d 739

Filed February 25, 1983. No. 82-369.

1. **Statutes.** One to whose conduct a statute clearly applies may not successfully challenge it for vagueness.
2. **Constitutional Law: Statutes.** A person to whom a statute may be constitutionally applied will not be heard to challenge the statute on the ground that it might conceivably be applied unconstitutionally to others in situations not before the court.
3. **Statutes.** The test for determining whether a statute is vague is whether it forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.
4. _____. A statute will not be deemed vague if it uses ordinary terms which find adequate interpretation in common usage and understanding.

5. _____. In determining whether a statute is vague and therefore does not give a defendant adequate notice that his conduct is proscribed, the statute must be examined in light of the conduct with which the defendant is charged.
6. **Prosecutorial Discretion: Constitutional Law: Discrimination.** The general rule regarding prosecutorial discretion in law enforcement is that, unless there is proof that a particular prosecution was motivated by an unjustifiable standard based, for example, on race or religion, the use of such discretion does not violate constitutional protections.
7. **Constitutional Law: Statutes: Administrative Law.** The Legislature may authorize an agency to make rules and regulations for the operation and enforcement of a law, such to be limited to rules within the express legislative purpose of the act and to be administered in accordance with standards expressed in the act.
8. _____: _____: _____. No unconstitutional delegation of authority occurs when the Legislature defines a crime and sets a penalty therefor, but delegates the implementation of details to an administrative agency.
9. _____: _____: _____. The manner and method of enforcing a law may be delegated, since of necessity this must be left to the reasonable discretion of administrative officers.
10. **Constitutional Law: Statutes: Discrimination.** That a statute may discriminate in favor of a certain class does not render it arbitrary if the discrimination is founded upon a reasonable distinction or difference in state policy.
11. _____: _____: _____. It has long been settled that a classification, though discriminatory, is not arbitrary nor violative of the equal protection clause of the fourteenth amendment if any state of facts reasonably can be conceived that would sustain it.

Appeal from the District Court for Brown County: HENRY F. REIMER, Judge. Exceptions sustained.

Paul L. Douglas, Attorney General, and G. Roderic Anderson, for appellant.

Cassel & Cassel, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and WARREN, D.J.

BOSLAUGH, J.

This is a proceeding in error under Neb. Rev. Stat. § 29-2315.01 (Reissue 1979) to review an order of the District Court affirming the judgment of the county court which dismissed the complaint against the defendant.

The complaint, filed April 23, 1980, charged that the defendant had violated Neb. Rev. Stat. § 37-1111 (Reissue 1978), which prohibits the operator of a motor vehicle from entering a permit area without a valid motor vehicle entry permit permanently affixed to the vehicle. The county court found that the statute was unconstitutionally vague and indefinite and dismissed the complaint.

There is no dispute concerning the facts. The record shows, and the county court found, that the defendant drove his motor vehicle into the Long Pine State Recreation Area on April 20, 1980, without having a motor vehicle park entry permit affixed to the vehicle.

There is only one entrance to Long Pine State Recreation Area. The area had been designated as a permit area, and at the entrance there was an unobstructed sign 14 inches by 18 inches, posted 4 feet above the ground, which read:

NEBRASKA
STATE PARK
PERMIT

VALID
VEHICLE
ENTRY PERMIT
REQUIRED TO
ENTER
THIS PARK AREA

APRIL 1st. OCT. 31st.

The defendant saw and read the sign and knew that a permit was required and that a permit was not affixed to his vehicle. The defendant had parked his vehicle in the restricted area and was picnicking with his family when he was approached by a State Game and Parks Commission conservation officer. After the officer ascertained that the defendant did not have a permit, he issued a citation to the defendant. The defendant attempted to buy a permit from

the officer, but he refused to sell one to the defendant because that was contrary to the established policy of the commission.

The park entry permit system was established in 1977. In 1978, the first year the permits were required, an officer, upon finding a violator, was instructed to warn the offender and advise him to leave or to sell him a permit. In 1979 citations were given to those who refused to leave after a warning. In 1980 and 1981 no permits were sold by the officers to offenders, and the law was strictly enforced. Citations would not be issued to someone who drove through the park without stopping or who was looking for the office.

The law applies only to motor vehicles and motorcycles. Persons who walk or ride a bike into the park do not need to purchase a permit.

The following statutory provisions are involved in this appeal.

Section 37-1111 provides: "It shall be unlawful for any motor vehicle to enter a permit area unless such motor vehicle has permanently affixed thereto a valid permit, except as provided by sections 37-1101 to 37-1114. Any operator of a motor vehicle which enters a permit area without a valid permit, unless in direct and continuous travel to the commission office at such area for the purpose of procuring such permit or as otherwise excepted under section 37-1103, shall be guilty of a misdemeanor and shall, upon conviction thereof, be punished by a fine of not less than fifteen dollars."

Neb. Rev. Stat. § 37-1102(3) (Reissue 1978) defines "permit areas" as follows: "Permit areas shall mean those areas, or portions of areas, of the Nebraska state park system which are defined in subdivisions (2), (3), (4), and (5) of section 81-815.22, and which are designated as provided in sections 81-815.23 and 81-815.24, for which entry permits shall be required by the commission as provided in sections 37-1101 to 37-1114."

The implementing regulation defines "permit area" as follows:

"5-(1)(1)i Definitions

. . . .

"Permit Area: Those areas of the Nebraska State Park System designated by the Game and Parks Commission for which entry permits shall be required.

"5-(1)(1)ii Operation

"Designated permit areas or portions thereof requiring a valid motor vehicle entry permit shall be defined as follows unless otherwise posted: All State Parks, all State Recreation Areas except Brownville and the Ak-Sar-Ben Aquarium parking facility at Schramm Park State Recreation Area and the motorcycle trails portion of Fremont Lakes State Recreation Area, and Mormon Island and Windmill State Wayside Areas as defined in Section 81-815.22, Revised Statutes of Nebraska. Those sites within such areas designated as concession and/or seasonal cabin areas shall be classified as exempt from the entry permit requirement. Unless otherwise posted, all remaining State Wayside Areas and all State Historical Parks shall be classified as nonpermit areas and exempt from the entry permit requirement."

The county court found that the statutory definition of "permit areas," as implemented by the regulations and warning signs posted at the entrances to the permit areas, was unconstitutionally vague and indefinite because motorists were not advised as to the enforcement policies adopted by the commission and there was an improper delegation of discretion in contravention of Neb. Rev. Stat. §§ 84-901 et seq. (Reissue 1981). The defendant argues that the delegation of authority to the State Game and Parks Commission to designate the permit areas is unconstitutional and the system of requiring permits only for motor vehicles makes an unreasonable classification.

The State argues that the statutory definition of "permit areas" is not vague; that the State has no duty to advise by sign of the consequences of failing to obey the law; and that no improper delegation of authority occurred as a result of the statutory scheme.

The State contends that the defendant has no standing to raise a vagueness challenge to § 37-1111. The record shows, and the county court found, that the defendant knew by reading the sign that a permit was required but entered the park anyway. The State argues that one who is on notice that his conduct is proscribed can not challenge for vagueness the law which proscribes it.

In *State v. Shiffbauer,* 197 Neb. 805, 251 N.W.2d 359 (1977), we refused to decide a vagueness challenge, stating, " 'One to whose conduct a statute clearly applies may not successfully challenge it for vagueness.' " *Id.* at 809, 251 N.W.2d at 362.

In *Shiffbauer, supra,* we quoted from *Parker v. Levy,* 417 U.S. 733, 94 S. Ct. 2547, 41 L. Ed. 2d 439 (1974). In the *Parker* case the Court reversed a circuit court of appeals decision which gave the defendant Levy standing to challenge a law for vagueness. Levy based his challenge on the law's hypothetical application to others, "a blending of the doctrine of vagueness with the doctrine of overbreadth." *Id.* at 756. In denying Levy standing for such a challenge the Court stated that one who receives fair warning that his conduct is criminal from the statute in question is not entitled to attack it for vagueness because it does not give fair warning with respect to other conduct which it proscribes.

In *State v. Greaser,* 207 Neb. 668, 300 N.W.2d 197 (1981), we said of the defendant's overbreadth challenge: "A person to whom a statute may be constitutionally applied will not be heard to challenge the statute on the ground that it might conceivably be applied unconstitutionally to others in situations not before the court." *Id.* at 669-70, 300 N.W.2d at 198.

See, also, *State v. Brown,* 191 Neb. 61, 213 N.W.2d 712 (1974).

Since the defendant was on notice that his conduct was prohibited, under the rules cited above, he has no standing to make such a challenge. Implicit in his argument is that the statute must be deemed vague because others may not be put on notice by the statute. This argument also fails because he has no standing to challenge the statute on the basis of overbreadth. See, also, *Broadrick v. Oklahoma,* 413 U.S. 601, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973).

If we assumed that Sprague had standing to raise a vagueness challenge, we would conclude that the statutory term "permit area" is not impermissibly vague.

The test for determining whether a statute is vague is whether it forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. *State ex rel. Douglas v. Herrington,* 206 Neb. 516, 294 N.W.2d 330 (1980); *Rose v. Locke,* 423 U.S. 48, 96 S. Ct. 243, 46 L. Ed. 2d 185 (1975). A statute will not be deemed vague if it uses ordinary terms which find adequate interpretation in common usage and understanding. *State v. Metteer,* 203 Neb. 515, 279 N.W.2d 374 (1979). In determining whether a statute is vague and therefore does not give a defendant adequate notice that his conduct is proscribed, the statute must be examined in light of the conduct with which the defendant is charged. *State v. A. H.,* 198 Neb. 444, 253 N.W.2d 283 (1977).

The defendant argues that the term "permit area," defined as an area which requires a permit for entry, is unconstitutionally vague because the definition is circular. This does not render the statute vague. The prohibition against vagueness does not invalidate a statute simply because it could have been drafted with greater precision. The test is whether the defendant could reasonably understand

that his conduct was proscribed by the statute. *Rose v. Locke, supra.*

It is clear that the defendant could understand from the statute that entering a designated park by vehicle without a permit was prohibited. Further, the defendant did so understand after reading the sign. It is likewise evident that the term "permit area" can be easily understood by resort to its definition in common usage. A permit is "any document which grants a person the right to do something" (Black's Law Dictionary 1026 (5th ed. 1979)); in this case, the right to enter a park area designated as one requiring such a permit. When judged by the applicable criteria, the term "permit area" is not impermissibly vague.

The State next argues that the finding that the State was required to give notice of certain facts relating to enforcement policies in the roadway sign was erroneous. Specifically, the county court found that the sign did not give notice of the fact that an entry permit could not be purchased after entry; that compliance was not required of vehicles which entered but did not stop; that citations would be issued to persons who entered the park by vehicle and used its facilities without a permit; that conservation officers would not aid violators in complying with the law; and that by informal policy a conservation officer could exercise discretion in issuing citations.

The county court held that the failure to give notice of these facts either in the statute, the regulations, or the sign rendered the statute unconstitutionally vague, as it did not give the violator adequate notice of what was prohibited and the informal enforcement policy was an improper delegation of authority in contravention of §§ 84-901 et seq.

The State has no obligation to give notice of these facts by statute, regulation, or sign. Due process requires that a statute put men of reasonable intelligence on notice of what it forbids or requires. *Rose*

v. Locke, supra. Section 37-1111 provides such notice, and includes notice of the fact that a motorist "in direct and continuous travel to the commission office" to secure a permit will not be deemed in violation of the statute.

Due process does not require that notice be given, whether by statute, regulation, or sign, of an agency's enforcement policy. The general rule regarding prosecutorial discretion in law enforcement is that, unless there is proof that a particular prosecution was motivated by an unjustifiable standard based, for example, on race or religion, the use of such discretion does not violate constitutional protections. *State v. Bartlett,* 210 Neb. 886, 317 N.W.2d 102 (1982); *State v. Long,* 206 Neb. 446, 293 N.W.2d 391 (1980); *State v. Bird Head,* 204 Neb. 807, 285 N.W.2d 698 (1979). It follows that there is no constitutional right to notice that such discretion may be exercised.

Neb. Rev. Stat. § 37-1110 (Reissue 1978) requires in part: "The commission shall post signs at all entrances to permit areas and the text of such signs shall clearly convey the fact that motor vehicles using the area are required to display a permit." This statutory requirement was complied with. As noted before, due process does not require any notice other than that the statute must inform adequately of what is forbidden or required. Once this requirement is met, and in the absence of a statutory notice provision, the law presumes that an actor who has reached the age of accountability knows the law. *Satterfield v. State,* 172 Neb. 275, 109 N.W.2d 415 (1961). See, also, *State v. Montoya,* 91 N.M. 262, 572 P.2d 1270 (1977). The constitutional and statutory notice provisions having been met, Sprague is presumed to know the law and can not be heard to argue that the sign did not adequately inform him of the statute's provisions.

The failure to detail enforcement procedures in the statute and regulations was not an improper

delegation of discretion in contravention of §§ 84-901 et seq. Article 9 of Chapter 84, entitled "Rules of Administrative Agencies," relates to the adoption of rules and the procedure in contested cases. As noted earlier, permitting discretion in enforcement by itself does not violate constitutional rights, nor does the absence of notice of such an enforcement policy render the statutory scheme impermissibly vague.

The discretion exercised by the commission in enforcement of § 37-1111 by conservation officers did not exceed the statutory authority of the agency. The general rule is that the Legislature may not delegate legislative authority to an administrative agency. The Legislature may authorize an agency to make rules and regulations for the operation and enforcement of a law, such to be limited to rules within the express legislative purpose of the act and to be administered in accordance with standards expressed in the act. *Gillette Dairy, Inc. v. Nebraska Dairy Products Board,* 192 Neb. 89, 219 N.W.2d 214 (1974). No unconstitutional delegation of authority occurs when the Legislature defines a crime and sets a penalty therefor, but delegates the implementation of details to an administrative agency. *State v. Cutright,* 193 Neb. 303, 226 N.W.2d 771 (1975). Nor is it unconstitutional for the manner and method of enforcing a law to be delegated, since of necessity this must be left to the reasonable discretion of administrative officers. *School District No. 39 v. Decker,* 159 Neb. 693, 68 N.W.2d 354 (1955).

In the present case, the purpose of the act is clearly spelled out in Neb. Rev. Stat. § 37-1101 (Reissue 1978): "For the purpose of supplying additional revenue to better accommodate the increasing public use of the Nebraska state park system by providing improved operation and maintenance, the Game and Parks Commission shall require an entry permit to be affixed to motor vehicles which enter areas of the Nebraska state park system which are

designated as permit areas by the commission as provided by sections 37-1101 to 37-1114."

Neb. Rev. Stat. § 37-1112(1) (Reissue 1978) makes a proper delegation of authority to the agency: "The commission may adopt or enact such rules and regulations as are necessary to administer the entry permit program and to carry out the purposes and intents of sections 37-1101 to 37-1114."

The agency, by instituting a policy of enforcement which included warnings and sales by officers in the initial years, and strict enforcement with no permit sales by officers to violators in the later years, carried out the enforcement responsibilities of the agency within the enunciated policy and was within the proper discretion of the agency. No improper delegation has been made.

The defendant contends that because permits are required of only those who enter permit areas by motor vehicle, only drivers are singled out for different treatment not based upon a rational classification. The defendant argues that the fee charged the drivers does not bear substantial relationship to the object of the legislation, i.e., to raise revenue for park maintenance.

In *Ralston v. County of Dawson,* 200 Neb. 678, 681, 264 N.W.2d 868, 870 (1978), we said, " ' "That a statute may discriminate in favor of a certain class does not render it arbitrary if the discrimination is founded upon a reasonable distinction, or difference in state policy. * * * Similarly, it has long been settled that a classification, though discriminatory, is not arbitrary nor violative of the Equal Protection Clause of the Fourteenth Amendment if any state of facts reasonably can be conceived that would sustain it.". . .' "

The legislative purpose in passing the permit law was to generate revenue for the maintenance and improvement of the Nebraska state park system. § 37-1101. The imposition of the fee on motor vehicles bears a rational relationship to this purpose.

The record indicates most users of the park system enter by motor vehicle and the presence of the vehicles and those who enter in them generate a great portion of the need for improvements and facility maintenance.

We conclude that the judgment of the District Court and the order of the county court were erroneous and the exceptions must be sustained.

EXCEPTIONS SUSTAINED.

STATE OF NEBRASKA, APPELLEE, V. RENEE F. ISHERWOOD, APPELLANT.

330 N.W.2d 495

Filed February 25, 1983. No. 82-375.

1. **Homicide: Sentences.** The effect of a sentence to life imprisonment for second degree murder is an indeterminate sentence of 10 years to life.
2. **Sentences: Appeal and Error.** A sentence within statutory limits will not be disturbed on appeal in the absence of evidence showing an abuse of discretion by the trial court.

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

Berry, Anderson, Creager & Wittstruck, for appellant.

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

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and MORAN, D.J.

MORAN, D.J.

Defendant, Renee F. Isherwood, was charged with first degree murder. She pleaded guilty to an amended information charging her with second degree murder, and was sentenced to life imprisonment with credit for time in jail awaiting disposition of the case. She appeals, contending that the sentence was excessive. We affirm.

The record and presentence report disclosed that the defendant is a high school graduate who had been an honor student until her senior year. She was 18 years old at the time of the offense and was living with her 28-year-old boyfriend. They were planning to marry when his divorce became final. Her boyfriend was employed and the defendant was caring for his 4-year-old son, who was the victim. The boy had misbehaved and defendant began spanking him, progressed to striking and beating him, and finally strangled the child to death either with her hands or a television cord, or both. There was evidence that the defendant attempted to cover up the crime when she called the police immediately after the event.

Defendant's claim that there was an abuse of discretion centers upon an unblemished prior record and psychiatric testimony indicating that she was suffering from continuing personality problems and depression. She was hospitalized for depression for 3 days approximately 6 months before the crime. Short-term psychiatric therapy was recommended, but the defendant did not undergo therapy. The presentence report discloses that the defendant did not want to care for the child, but her boyfriend demanded she care for the boy as a condition of continuing their relationship. This arrangement caused the defendant considerable stress.

There was considerable disagreement as to the nature of the defendant's mental difficulties. Experts testified for the State and the defense at the hearing conducted under Neb. Rev. Stat. § 29-2027 (Reissue 1979) to determine the degree of the homicide. Experts also submitted their depositions and written reports, which were made a part of the presentence report. The trial judge obviously chose to believe the witnesses for the State, as he had a right to do. Their findings may be summarized as disclosing that the defendant had no ongoing psychosis or neurosis and used passive-aggressive and passive-

dependent types of tactics in relating to others and in carrying out her day-to-day activities. Psychiatric help was believed to be in order.

It is important to note that under our decisions the effect of the sentence imposed is an indeterminate sentence of 10 years to life. *State v. Moore,* 209 Neb. 88, 306 N.W.2d 183 (1981); *State v. McNichols,* 210 Neb. 875, 317 N.W.2d 95 (1982).

A sentence within statutory limits will not be disturbed on appeal in the absence of evidence showing an abuse of discretion by the trial court. *State v. McNichols, supra.*

In this case the evidence would have supported a conviction of first degree murder. The victim was a defenseless child. The injuries inflicted causing death were the result of a brutal, sustained attack. In imposing sentence the trial judge observed that he had considered the mitigating circumstances, that the defendant had underlying problems which needed to be taken care of, and that any other sentence would depreciate the seriousness of the offense to the defendant and to others. We conclude there was no abuse of discretion resulting in an excessive sentence.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GLEN A. FORD, APPELLANT.

330 N.W.2d 497

Filed February 25, 1983. No. 82-408.

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

Thomas M. Kenney, Douglas County Public Defender, for appellant.

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

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and WARREN, D.J.

CAPORALE, J.

This case is controlled by our opinion in *State v. Coffman, ante* p. 560, 330 N.W.2d 727 (1983). Defendant-appellant, Glen A. Ford, while a prisoner at the Nebraska Penal and Correctional Complex, was assigned on work release to the Omaha Post Care Center on September 23, 1981. On November 16, 1981, the defendant failed to return to the Omaha Post Care Center and was thereafter arrested, charged, and convicted of escape pursuant to Neb. Rev. Stat. § 28-912 (Reissue 1979).

The judgment of the trial court is correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DAVID E. STAFFORD, APPELLANT.

330 N.W.2d 739

Filed February 25, 1983. No. 82-556.

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

Thomas M. Kenney, Douglas County Public Defender, for appellant.

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

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and WARREN, D.J.

CAPORALE, J.

This case is controlled by our opinion in *State v. Coffman, ante* p. 560, 330 N.W.2d 727 (1983). Defendant-appellant, David E. Stafford, while a prisoner at the Nebraska Penal and Correctional

Complex, was assigned on work release to the Omaha Post Care Center on September 16, 1981. On December 23, 1981, the defendant failed to return to the Omaha Post Care Center and was thereafter arrested, charged, and convicted of escape pursuant to Neb. Rev. Stat. § 28-912 (Reissue 1979).

The judgment of the trial court is correct and is affirmed.

AFFIRMED.

COMMERCE SAVINGS LINCOLN, INC., A CORPORATION, APPELLEE, V. HUGH P. ROBINSON ET AL., APPELLEES, PAMELA MCNALLY AND STATE OF NEBRASKA, INTERVENORS-APPELLANTS.

331 N.W.2d 495

Filed March 4, 1983. No. 44459.

1. **Mortgages.** A purchase-money mortgage generally takes precedence over all existing and subsequent claims and liens against the mortgagor as to the property sold.
2. _____. A purchase-money mortgage is given for the unpaid purchase money on a sale of land as part of the same transaction as the deed, and its funds are actually used to buy the land.
3. _____. A purchase-money mortgage given to secure a particular debt remains valid in equity for that purchase, whatever form the debt might assume, if it can be traced. The lien of a purchase-money mortgage having attached, it will not be displaced by a change in the form of the security.
4. _____. An additional debt will discontinue the old mortgage only if the parties intended that it do so.
5. _____. As a general rule, the cancellation of a mortgage on the record is not conclusive as to its discharge, or as to the payment of the indebtedness secured thereby. The parties' intention controls and can be shown by extrinsic evidence.

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

Richard A. Vestecka of Vestecka, Gorham & Tegtmeier, for appellant Pamela McNally.

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

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

WHITE, J.

This is an action by appellee Commerce Savings Lincoln, Inc., to foreclose a mortgage on two tracts of urban real estate in the city of Lincoln, Lancaster County, Nebraska. Petitioners in intervention and appellants, Pamela McNally and the State of Nebraska, were permitted to intervene and urge the priority of a child support lien over the mortgage on one of the tracts. The trial court determined that the mortgage lien was a substitute purchase-money mortgage and therefore was entitled to priority over the child support lien, and ordered foreclosure. Pamela McNally, the holder of the child support judgment, and her assignee, the State of Nebraska, Department of Welfare, appeal. We affirm.

An understanding of the facts in this case is necessary. Pamela McNally and Marc McNally were divorced in November 1974 and the divorce decree ordered that Marc McNally pay child support and alimony. The evidence presented indicated that Marc failed to make a number of these payments and the same became a judgment lien attaching to any property owned by Marc McNally or any property which might subsequently be acquired by him. *McCord v. McCord,* 128 Neb. 230, 258 N.W. 474 (1935). Marc remarried shortly thereafter and on January 26, 1978, purchased the property at issue at 2504 T Street, Lincoln, Nebraska, from the Whitemans, sellers. The deed was kept in escrow until after the McNallys executed a mortgage to Mutual Savings Company. (Mutual Savings, the predecessor, has been succeeded by and is now known as Commerce Savings Lincoln, Inc., the appellee herein.)

On March 29, 1978, Marc McNally and his new wife, Deanna, signed a note to Mutual Savings for $22,250 and executed a mortgage to secure the note. The note stated that the funds were advanced to pur-

chase the T Street property. The deed conveying from the Whitemans to Marc and Deanna McNally and the mortgage given by the McNallys to Mutual Savings were both recorded on April 6, 1978.

On August 9, 1978, Marc and Deanna McNally conveyed the T Street property, which was still subject to the $22,250 mortgage, to Hugh P. Robinson and Penny L. Robinson, defendants and appellees herein. A month later, September 8, 1978, after buying the T Street property and assuming the existing McNally mortgage, the Robinsons executed a new blanket mortgage to Mutual Savings to consolidate in one note and mortgage their total obligation to Mutual Savings. The blanket note and mortgage were for $69,000 and covered a lot in Boulevard Heights, Lincoln, in addition to the T Street property. Mutual Savings had a preexisting mortgage on both tracts.

On September 11, 1978, Mutual Savings executed a release of the McNally mortgage on the T Street property, and on September 12, 1978, both the new blanket mortgage with the Robinsons and the release of the McNally mortgage were filed. No additional consideration was advanced by Mutual Savings to the Robinsons over the amount previously secured by mortgage on both tracts.

The Robinsons later became in default on the note and blanket mortgage and this foreclosure action was initiated. Among the named defendants were both the Robinsons and the McNallys. Pamela McNally intervened in the action, alleging a priority based upon her child support lien, and sought to obtain priority over the Commerce Savings (formerly Mutual Savings) mortgage.

It is the effect of the execution of the second mortgage by the Robinsons to Mutual Savings and the release of the McNally mortgage on the T Street property which gives rise to the controversy in question. A number of errors are assigned in the trial court's determination, the principal one being that the trial

court erred in not finding that the release of the T Street mortgage moved the preexisting judgment lien of Pamela McNally into a position of priority over the subsequent $69,000 blanket mortgage from the Robinsons to Mutual Savings. The appellants contest the finding that the mortgage given by Marc McNally and wife to Mutual Savings was, in fact, a purchase-money mortgage and, as such, entitled to priority over a judgment. *Omaha Loan & Bldg. Assn. v. Turk,* 146 Neb. 859, 21 N.W.2d 865 (1946); 59 C.J.S. *Mortgages* § 231 (1949). Appellants assert that the Robinson blanket mortgage was not a purchase-money mortgage because the recorded release extinguished both the McNally mortgage and its previous purchase-money status. Thus, appellants are arguing that a release of the previous mortgage and the execution of a new mortgage on a different or additional debt will discontinue the prior mortgage.

Commerce Savings maintains that the original mortgage to the McNallys was a purchase-money mortgage and that the new mortgage only continued the prior mortgage and its purchase-money status.

A purchase-money mortgage generally takes precedence over all existing and subsequent claims and liens against the mortgagor as to the property sold. *Omaha Loan & Bldg. Assn. v. Turk, supra.*

A purchase-money mortgage is given for the unpaid purchase money on a sale of land as part of the same transaction as the deed, and its funds are actually used to buy the land. 59 C.J.S. *Mortgages, supra.* It is clear that the McNallys originally had a purchase-money mortgage. First, the bank gave the mortgage so the McNallys could buy the T Street property. The note accompanying the mortgage stated that the funds were advanced for the purpose of purchasing the T Street property. Second, the mortgage appears to be part of the same transaction as the deed, considering that the deed was held in escrow and not filed until the mortgage had been

executed and filed. Finally, the funds were used to pay off the original sellers or the original sellers' obligation.

Since we find that the McNally mortgage was a purchase-money mortgage, this court applies the general rule, as it did in *Larson Cement Stone Co. v. Redlim Realty Co.,* 179 Neb. 134, 137 N.W.2d 241 (1965), that a release and a new mortgage will continue the original mortgage. In that case Meyer H. Feldman and Redlim Realty executed a note for $300,000 to the bank, secured by a real estate mortgage. Feldman sold his interest, and in order to release him from the original note, Redlim Realty signed a new note and mortgage for the same amount. The bank had released the original mortgage 1 day prior to the new mortgage being signed. Both the release and new mortgage were recorded on the same date. Intervening lienors argued that they had priority over the new mortgage as a result of the release. While not an issue, this court stated the effect of filing a release and accepting a subsequent mortgage: " ' "And where the holder of a senior mortgage discharges it [the mortgage] of record, and contemporaneously therewith takes a new mortgage, he will not, in the absence of paramount equities, be held to have subordinated his security to an intervening lien unless the circumstances of the transaction indicate this to have been his intention, or such intention upon his part is shown by extrinsic evidence." ' " *Larson Cement Stone Co. v. Redlim Realty Co., supra* at 137, 137 N.W.2d at 244, quoting *Hadley v. Schow,* 146 Neb. 163, 18 N.W.2d 923 (1945).

In *Troyer v. Mundy,* 60 F.2d 818 (8th Cir. 1932), the father sold land to his son-in-law and took back a purchase-money mortgage for $11,000. When the father died the wife of the son-in-law received $6,800 of the mortgage and the father's other daughter received $3,700. To divide the estate, the sisters released the original $11,000 mortgage and took back

two mortgages of equal priority, one for $6,800 and one for $3,700. Thereafter, a third party was willing to advance $3,700 for the one sister's mortgage if he could have a first mortgage. The sisters filed releases and the son-in-law renewed the mortgages, executing a first mortgage to the third party for $3,700 and a second mortgage to his wife for $8,500, which was the amount then due. The son-in-law subsequently was declared bankrupt and the trustee in bankruptcy argued that he had priority because the wife was not entitled to the protection of a purchase-money mortgage.

The *Troyer* court found: "Being a purchase-money mortgage, given to secure a particular debt, it remained valid in equity for that purpose, whatever form the debt might assume, if it could be traced. . . . The lien of a purchase-money mortgage having attached, it was not displaced by any change in the form of the security. Defendant has clearly traced her debt and mortgage to the original purchase-money mortgage, and in equity her purchase-money mortgage interest should be sustained. . . . The subsequent dealings with the original mortgage have not changed the inherent nature of the mortgages taken in its place. They are to be regarded as purchase-money mortgages." *Troyer, supra* at 821.

The present case satisfies the elements necessary for the second mortgage to assume the status of the first. The parties intended the second mortgage to be a continuation of the first one. The real estate broker in charge of the transaction, William King, testified that both he and the loan officer intended that the new mortgage would keep the original mortgage on record. The release and the new mortgage were part of the same transaction. The substitute mortgage was executed September 8, 1978, the release September 11, 1978, and both were filed on September 12, 1978.

The rule that a release and new mortgage con-

tinue the original mortgage applies especially where the transaction "is done in good faith, in ignorance of the intervening lien, and without any intention to release the lien of the mortgage . . . ." 59 C.J.S. *Mortgages* § 281 (1949). King testified that Mutual Savings inadvertently released the mortgage and did not intend to release it. There is also no evidence that Mutual Savings knew of the child support judgment lien. Further, where the interest arose prior to the original mortgage, as did this lien, no reliance existed, and consequently the original mortgage will continue despite the accident or mistake. 59 C.J.S. *Mortgages* § 282 (1949).

The appellants argue that the recorded release is controlling. The cases cited by the appellants do not involve the release and renewal of a mortgage but only a legal effect of filing a release. Nebraska case law states that not the recorded release but rather the intent of the parties controls. *Larson Cement Stone Co. v. Redlim Realty Co.,* 179 Neb. 134, 137 N.W.2d 241 (1965).

Appellants also argue that since there was an additional debt, the rule of *Larson Cement* should not apply. However, an additional debt will discontinue the old mortgage only if the parties intended that. Most illustrative of this point is *United States v. Grover,* 227 F. 181, 184 (N.D. Cal. 1915), where the court stated: "Nor does the including in the new mortgage of an additional indebtedness not covered by the first discharge the lien of the old mortgage, so far as the indebtedness secured thereby remains unpaid, unless such be the purpose of the parties."

The change in the instant case of the interest rate did not change the intentions of the parties. Also, the difference in parties was irrelevant because the subsequent mortgagees were successors in interest and privies in estate with Mutual Savings, who held the mortgage originally.

Appellants also argue that the purchase-money mortgage should attach only to the amount of money

paid to others and not to the amount paid to Marc and Deanna McNally at the time of the original purchase. The evidence is to the contrary. The real estate agent who handled the original transaction where the McNallys acquired title to the property indicated that the money was immediately paid to the Whitemans for their equity in the property over and above the debts owed to others. There was no evidence that the McNallys received any money personally from the mortgage proceeds.

Appellants further assert that the receipt of the evidence with respect to the release, in the form of extrinsic evidence, violates the parol evidence rule. However, in *Larson Cement, supra*, we treated the release as a receipt and stated that, as a general rule, the cancellation of a mortgage on the record is not conclusive as to its discharge, or as to the payment of the indebtedness secured thereby. The parties' intention controls and can be shown by extrinsic evidence. See, also, *Peoples Bank v. Trowbridge,* 123 Neb. 312, 242 N.W. 647 (1932).

The evidence introduced in this case convinced the trial court and this court de novo that it was not the intention of Mutual Savings Company and its successor, Commerce Savings Lincoln, Inc., to release the T Street property from the effects of the mortgage, and the filing of the release was inadvertent. We are convinced that under our cases, notwithstanding the inadvertent filing of the release, the new mortgage continues the prior mortgage and its purchase-money mortgage status, provided the new mortgage is traceable to the original transaction, no intervening equity prohibits the priority of the original purchase-money mortgage, and the intentions of the parties do not indicate otherwise.

Other errors are assigned relating to whether or not Commerce Savings properly pleaded the priority of its purchase-money mortgage status. We will not comment further, other than merely observing that Commerce Savings put in issue by its petition

whether or not the lien it held was the first lien on the subject property. In doing so it placed in issue, for all practical purposes, any status that it may have had concerning the priority of its lien to all other liens. There are other errors assigned but the same are not meritorious and will not be discussed further.

On review de novo, we agree with the judgment of the trial court and it is hereby affirmed.

AFFIRMED.

CLINTON, J., not participating.

NEAL HOLMER, APPELLANT, V. COUNTY OF DOUGLAS, DOUGLAS COUNTY WELFARE ADMINISTRATION, AND STATE OF NEBRASKA, DEPARTMENT OF PUBLIC WELFARE, APPELLEES.

330 N.W.2d 746

Filed March 4, 1983. No. 81-736.

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

Mark A. Klinker, for appellant.

John J. Reefe, Jr., for appellees Douglas County and Douglas County Welfare Administration.

Paul L. Douglas, Attorney General, and Royce N. Harper, for appellee State Department of Public Welfare.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

PER CURIAM.

This is an appeal by a merit system employee from an order discharging him from his employment by the Douglas County Welfare Administration for cause.

Upon review de novo we find no prejudicial error

in the record. The judgment of the District Court is therefore affirmed.

AFFIRMED.

CLINTON, J., not participating.

JIM SNYDER, DOING BUSINESS AS JIM SNYDER DRILLING COMPANY, APPELLEE, V. DALE NELSON, APPELLANT.

331 N.W.2d 252

Filed March 4, 1983. No. 81-746.

1. **Summary Judgment.** Summary judgment may be properly granted where there exists no genuine issue as to any material fact in the case, the ultimate inferences to be drawn from those facts are clear, and the moving party is entitled to judgment as a matter of law.
2. **Records: Appeal and Error.** Assignments of error requiring an examination of the evidence are not available on appeal in the absence of a bill of exceptions, the bill of exceptions being the only vehicle for bringing evidence to this court. This remains so even though certain evidence has been physically filed in the office of the clerk of the trial court.
3. _____: _____. Where there is no bill of exceptions, we are limited to an examination of the pleadings; if they are sufficient to support the judgment, we will not reverse the trial court.
4. _____: _____. Where there is no bill of exceptions, it will be presumed on appeal that the evidence supports the trial court's judgment.
5. **Foreign Judgments.** Where the party against whom registration of a foreign judgment is sought appears in the proceeding, evidence has been taken, and there is no bill of exceptions, strict compliance with the statutory requirements relative to authentication as to subsequent entries affecting the judgment is not required.

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

John D. Sykora, for appellant.

John B. Ashford of Bradford, Coenen & Ashford, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ.

CAPORALE, J.

Dale Nelson, defendant below, appeals from the granting of summary judgment to plaintiff-appellee, Jim Snyder, doing business as Jim Snyder Drilling Company, registering the latter's Colorado judgment in the principal sum of $20,934.64. We affirm.

The appellant Nelson contends the Nebraska trial court erred, first, in finding that the Colorado court had personal jurisdiction over his person and, second, in determining there were no disputed material facts such as would preclude decision of the case as a matter of law.

Summary judgment may be properly granted where there exists no genuine issue as to any material fact in the case, the ultimate inferences to be drawn from those facts are clear, and the moving party is entitled to judgment as a matter of law. *First National Bank v. Rose, post* p. 611, 330 N.W.2d 894 (1983); *Mutual Benefit Life Ins. Co. v. Chisholm, ante* p. 301, 329 N.W.2d 103 (1983); *Stolte v. Blackstone, ante* p. 113, 328 N.W.2d 462 (1982); *Oehlrich v. Gateway Realty of Columbus, Inc.,* 209 Neb. 417, 308 N.W.2d 327 (1981); *Metro. Tech. Community College v. South Omaha Industrial Park,* 207 Neb. 472, 299 N.W.2d 535 (1980). It is in accordance with the foregoing rule that we must test this case.

Although it is appellant's responsibility to see that a bill of exceptions is filed in this court (see Neb. Ct. R. 5C(5) (Rev. 1982)), Mr. Nelson, for whatever reason, has elected to not so favor us. There is, consequently, no evidence for us to review. It appears we most recently addressed this problem with respect to motions for summary judgment in *DeCosta Sporting Goods, Inc. v. Kirkland,* 210 Neb. 815, 816, 316 N.W.2d 772, 774 (1982), wherein we stated: "In order to receive consideration on appeal, any affidavits used on a motion for summary judgment must have been offered in evidence in the trial court and preserved in and made a part of the bill of exceptions. . . . Included within the transcript is an

affidavit . . . and a copy of a petition . . . . However, neither of these items was received in evidence . . . they do not form a part of the bill of exceptions, and under the rule cited above may not be considered on appeal." It has long been the rule that assignments of error requiring an examination of the evidence are not available on appeal in the absence of a bill of exceptions, the bill of exceptions being the only vehicle for bringing evidence to this court. This remains so even though certain evidence has been physically filed in the office of the clerk of the trial court. *Hanson v. Hanson,* 198 Neb. 675, 254 N.W.2d 699 (1977); *Hubbell v. Farmers Ins. Group,* 200 Neb. 472, 263 N.W.2d 863 (1978); *Bulger v. McCourt,* 179 Neb. 316, 138 N.W.2d 18 (1965). See, also, Neb. Ct. R. 5A(2) (Rev. 1982), formerly rule 7.d.2. (Rev. 1977).

We are limited, therefore, to an examination of the pleadings; if they are sufficient to support the judgment, we will not reverse the trial court. *Nimmer v. Nimmer,* 203 Neb. 503, 279 N.W.2d 156 (1979); *Hubbell v. Farmers Ins. Group, supra.* Moreover, where there is no bill of exceptions, it will be presumed on appeal that the evidence supports the trial court's judgment. *Tedco Development Corp. v. Overland Hills, Inc.,* 205 Neb. 194, 287 N.W.2d 49 (1980); *Schroeder v. Homestead Corp.,* 171 Neb. 792, 107 N.W.2d 750 (1961), *cert. denied* 368 U.S. 32, 82 S. Ct. 146, 7 L. Ed. 2d 90.

Appellee Snyder filed a petition pursuant to the Uniform Enforcement of Foreign Judgments Act, Neb. Rev. Stat. §§ 25-1587 et seq. (Reissue 1979). The petition, filed July 28, 1980, alleged the Colorado judgment, alleged the date of its entry, alleged the amount of the judgment, alleged that there were no subsequent entries affecting it, and prayed for its registration. In his answer appellant Nelson denied the operative allegations of the petition, including the allegation that there had been no subsequent entries affecting the judgment, and alleged a myriad

of defenses and purported defenses. He also counterclaimed, praying, among other things, for return of the interest he had paid on the underlying promissory note, in one cause of action, and for sundry damages, in the second cause of action. The judgment of the Nebraska trial court recites that the matter was heard "upon the Motion of the Plaintiff for summary judgment, the pleadings in the case, the evidence submitted in support of and in opposition of said motion for summary judgment and the Court being fully advised in the premises finds that a judgment was entered against Defendant and in favor of Plaintiff on April 18, 1980 by the District Court for the City and County of Denver, State of Colorado, in the amount of $20,934.64, with interest at the rate of 8% per annum from April 18, 1980, plus Plaintiff's costs incurred in said proceeding in the amount of $195.60 and the Court further finds that the Plaintiff is entitled to have said foreign judgment registered in the District Court of Saunders County, Nebraska."

In order to answer the question as to whether appellee Snyder's petition supports the Nebraska trial court's judgment of registration, we must look to the requirements found in § 25-1589. That statute provides: "A petition for registration shall set forth a copy of the judgment to be registered, the date of its entry and the record of any subsequent entries affecting it, such as levies of execution, payments in partial satisfaction, and the like, all authenticated in the manner authorized by the laws of the United States or of this state, and a prayer that the judgment be registered. The clerk of the registering court shall notify the clerk of the court which rendered the original judgment that petition for registration has been made, and shall request him to file this information with the judgment."

The certificates of the Colorado court authenticate the April 18, 1980, judgment as of May 13, 1980, and recite that the copy is a "true, complete and perfect

copy of [the] Judgment Order had and entered . . . as the same now remains on file and of record . . . ." The certificates make no statement with respect to "any subsequent entries affecting" the judgment, as required by the language of § 25-1589. Nor does the record before us establish that the clerk of the Nebraska District Court, Fifth Judicial District, Saunders County, fulfilled the requirements imposed upon her by the provisions of § 25-1589.

The pivotal issue, therefore, is whether the record as it stands before us, notwithstanding its failure to contain an authenticated statement as to subsequent events affecting the Colorado judgment and its failure to establish that the Nebraska trial court's clerk fulfilled her statutory duties, is sufficient to support the judgment of registration.

The briefs of counsel refer us to no case on this issue. However, *Holley v. Holley,* 264 Ark. 35, 568 S.W.2d 487 (1978), is apposite. The petition filed therein under the Uniform Enforcement of Foreign Judgments Act, as adopted by Arkansas, alleged that there had been no entries affecting the judgment sought to be registered, but the authenticating certificates were silent in that regard. Neither did the record before the appellate court reveal whether the clerk of the registering court requested from the court entering the judgment the information required by the Arkansas statute. The Arkansas Supreme Court concluded that the failure to strictly comply with the statutory requirements governing the contents of a petition for registration of a foreign judgment as to subsequent entries did not totally deprive the trial court of jurisdiction of the proceeding for registration where the party against whom registration was sought was personally served and responded. No contention was made in *Holley* that the failure of the record to reveal whether the clerk of the registering court had fulfilled his duties was jurisdictional, and the court therefore did not address that issue. It did observe, however, that if the

allegation of the petition with regard to subsequent entries was not correct, the action to register the judgment could have been used to disclose the truth of the matter. The Arkansas Supreme Court further reasoned that by filing a counterpetition seeking affirmative relief, the party against whom registration was sought had waived all objections to the Arkansas trial court's jurisdiction over the controversy between the parties. See, also, *Concannon v. Hampton,* 584 P.2d 218 (Okla. 1978), holding that authentication is evidentiary, not jurisdictional.

It seems to us the reasoning of the Arkansas court is sound. Admittedly, *Holley* is distinguishable from this case in that the effect of the failure of the registering court's clerk to comply with the statute was not at issue. Since we must determine the sufficiency of Mr. Snyder's petition to support the judgment, the question is at issue here. Further, in *Holley* the allegation that there had been no subsequent entries was not denied, whereas Mr. Nelson has denied that allegation. Nonetheless, the overriding rationale of *Holley,* it seems to us, is that where the party against whom registration is sought appears in the proceeding, strict compliance with the statutory requirements is not required. We conclude that rationale is sound, at least where evidence has been taken and there is no bill of exceptions. We so hold with respect to a silent record on the question of the clerk's diligence and the lack of authentication with respect to subsequent entries affecting the judgment.

The brief of appellant Nelson assures us that his "cross-petition" was dismissed by the trial court. That may be, but the judgment contained in the record before us makes no mention of Mr. Nelson's cross-petition; in fact it reflects that Mr. Snyder's demurrer to the second cause of action is still under advisement. In any event, those matters are not properly before us.

The judgment of the trial court registering Mr. Snyder's Colorado judgment is affirmed.

AFFIRMED.

FIRST NATIONAL BANK OF HAYES CENTER, APPELLANT, v. VINCENT W. ROSE AND LUCILE I. ROSE, HUSBAND AND WIFE, APPELLEES.

330 N.W.2d 894

Filed March 4, 1983. No. 81-772.

1. **Uniform Commercial Code: Security Interests.** When the collateral consists of goods purchased by the debtor, the sales article of the Uniform Commercial Code determines when the debtor has acquired rights in the collateral.
2. _____: _____. A land contract vendee has an equitable interest in the land.
3. **Summary Judgment.** Summary judgment should be granted where the pleadings, together with the depositions and affidavits received in evidence, show there is no genuine issue as to any material fact and establish that the movant is entitled to judgment as a matter of law.

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

Murphy, Pederson, Piccolo & Anderson, for appellant.

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

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and MORAN, D.J.

CAPORALE, J.

Plaintiff-appellant, First National Bank of Hayes Center (Bank), appeals from the denial of its motion for summary judgment and the granting of the motion for summary judgment filed by defendants-appellees, Vincent W. Rose and Lucile I. Rose, husband and wife. We reverse.

The plaintiff Bank urges the trial court erred in determining that its security interest did not attach to the items in question prior to the time they became fixtures and therefore did not defeat the Roses' claim to such items.

The Roses sold a 1,200-acre farm to Mr. and Mrs. Cary W. Leonard pursuant to a land contract dated April 23, 1976. The Leonards paid the Roses $80,000 toward the purchase price of $330,000. Subsequently, Mr. Leonard arranged with Sargent Irrigation Company for the drilling and installation of an irrigation well with pertinent equipment, including the items in question: a pump, bowl, well column, and gear head. On or about April 27, 1976, Mr. Leonard signed a promissory note, a financing statement, and a security agreement in favor of the Bank in exchange for a loan of $54,000. The financing statement and security agreement each covered, among other things, all farming and irrigation equipment. The financing statement was filed in the office of the Lincoln County clerk on April 29, 1976, but the security agreement was not filed in the office of the Lincoln County register of deeds until September 18, 1979. According to Mr. Rose, the well was drilled in April 1976 and the items in question were delivered to the farm and installed during the spring of 1977. Because the Leonards were unable to meet the payment schedule set forth in the land contract, they and the Roses, on or about July 21, 1978, entered into an agreement modifying the land contract. Under the terms of this modification agreement the Leonards paid $15,580 rather than the $23,420 due May 1, 1978; agreed that if the revised payment schedule was not met on November 1, 1978, the Roses were to keep all payments previously made to them; the quitclaim deed executed by the Leonards would be delivered by the escrow agent to the Roses; and the Leonards would vacate the property on or before March 1, 1979. The Leonards defaulted and the quitclaim deed was delivered to the Roses during the first part of November 1978; the Roses took possession of the land on which the well was located on or about March 1, 1979. An effort by Sargent Irrigation Company during the latter part of November 1978 to pull out the pipe was successfully

thwarted by Mr. Rose. Thereafter, the plaintiff Bank brought this action to replevin the items in question and to recover damages. Subsequently, the Bank moved for a summary judgment that it was entitled to possession of the items in question. That motion was overruled by the trial court. The Roses also filed a motion for summary judgment, the precise nature of which we cannot determine because, although the Bank's praecipe calls for such, it is not found in the transcript. However, the Roses' notice of hearing on a summary judgment motion and the judgment from which the plaintiff Bank appeals are contained in the transcript. That judgment dismisses all of the Bank's claims relevant to this appeal against the Roses.

The rights of the parties are controlled by the Uniform Commercial Code as adopted in Nebraska. The first question to be determined is when plaintiff Bank acquired a security interest in the items in question. Neb. U.C.C. § 9-204(1) (Reissue 1971), now found generally at Neb. U.C.C. § 9-203(1) (Reissue 1980), provided then as follows: "A security interest cannot attach until there is agreement (subsection (3) of section 1-201) that it attach and value is given and the debtor has rights in the collateral. It attaches as soon as all of the events in the preceding sentence have taken place unless explicit agreement postpones the time of attaching."

The agreement element was met by the execution of the security agreement on April 27, 1976. The value requirement was met by the plaintiff advancing to Mr. Leonard the amount of the loan. Therefore, the only element which remains for consideration is at what time the debtor Leonard acquired rights in the collateral, for that is the time which determines when plaintiff's security interest "attached," that is to say, came into existence. Although there is dictum in *Tillotson v. Stephens,* 195 Neb. 104, 237 N.W.2d 108 (1975), which may suggest otherwise, when the collateral consists of goods pur-

chased by the debtor, the sales article of the Uniform Commercial Code determines when the debtor has acquired rights in the collateral. *In re King-Porter Company,* 446 F.2d 722 (5th Cir. 1971). *Tillotson* was concerned not with the question of when a security interest attached but, rather, with the priority of claims as between parties to a conditional sales contract and a subsequent purchaser of realty for value.

Neb. U.C.C. § 2-401 (Reissue 1980) provides, as it did at the time in question: "Each provision of this article with regard to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies irrespective of title to the goods except where the provision refers to such title. . . .

"(1) Title to goods cannot pass under a contract for sale prior to their identification to the contract (Section 2-501), and unless otherwise explicitly agreed the buyer acquires by their identification a special property as limited by this act. Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest. Subject to these provisions and to the provisions of the article on Secured Transactions (Article 9), title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties.

"(2) Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place . . . ."

Since the items in question could not be affixed to the realty until after delivery, even if installation were to have taken place immediately thereafter, it necessarily follows that in this instance plaintiff's

security interest came into existence prior to the time the items were attached to the realty and thus became fixtures. See, also, *Wood Chevrolet Co. v. Bank of the Southeast,* 352 So. 2d 1350 (Ala. 1977), holding that delivery controlled when title passed to certain automobiles.

The foregoing conclusion makes necessary that we determine the priority between plaintiff's claim and the Roses' claim. Although a number of amendments became effective on July 19, 1980, at the time material herein Neb. U.C.C. § 9-313 (Reissue 1971) provided in pertinent part as follows:

"(2) A security interest which attaches to goods before they become fixtures takes priority as to the goods over the claims of all persons who have an interest in the real estate except as stated in subsection (4).

. . . .

"(4) The security interests described in subsections (2) and (3) do not take priority over (a) a subsequent purchaser for value of any interest in the real estate; or (b) a creditor with a lien on the real estate subsequently obtained by judicial proceedings; or (c) a creditor with a prior encumbrance of record on the real estate to the extent that he makes subsequent advances if the subsequent purchase is made, the lien by judicial proceedings is obtained, or the subsequent advance under the prior encumbrance is made or contracted for without knowledge of the security interest and before it is perfected. A purchaser of the real estate at a foreclosure sale other than an encumbrancer purchasing at his own foreclosure sale is a subsequent purchaser within this section." Accordingly, plaintiff's security interest takes priority over the claim of the Roses unless the Roses come within any one of the exceptions contained in § 9-313(4). They clearly obtained no subsequent lien by judicial proceedings. Nor did they make any subsequent advances; the evidence establishes that the Leonards made a payment to

the Roses in exchange for a modification of the land contract. The question then becomes solely whether the Roses are subsequent purchasers for a value. The delivery of the quitclaim deed to them did not create in them any interest in the realty which they did not already own. It merely terminated the equitable lien of the Leonards in the realty, who had in fact lost such by being in default. Delivery of the quitclaim deed simply fulfilled the bargained-for procedural shortcut to clear the Roses' title in and to the land. See *O'Hara Plumbing Co., Inc. v. Roschynialski,* 190 Neb. 246, 207 N.W.2d 380 (1973), holding that a land contract vendee has an equitable interest in the land. Unlike the purchaser at the foreclosure sale in *Tillotson v. Stephens,* 195 Neb. 104, 237 N.W.2d 108 (1975), the Roses were not subsequent purchasers for value; consequently, the security interest of the plaintiff Bank is superior to the claim of the Roses. See, also, § 9-313, Comment 3, which states: "Where a security interest in the goods as chattels has attached before affixation, subsection (2) gives the secured party priority over all prior claims based on an interest in the realty. If the secured party perfects his interest by filing, which he may do in advance of affixation, he takes priority over subsequent realty claims as well. So long as he fails to perfect his interest he may, however, be subordinated to the subsequent claimants described in subsections (4) (a), (b) and (c). The last sentence of subsection (4) on purchasers at foreclosure sales clarifies a point on which prior decisions have been in conflict."

Each party filed a motion for summary judgment. The pleadings, together with the depositions and affidavits received in evidence, show there is no genuine issue as to any material fact and establish that the plaintiff Bank, rather than the Roses, is entitled to judgment as a matter of law. Under such circumstances the plaintiff Bank's motion for partial summary judgment should have been sustained and

the motion of the Roses overruled. *Mutual Benefit Life Ins. Co. v. Chisholm, ante* p. 301, 329 N.W.2d 103 (1983); *Johnsen v. Harper, ante* p. 145, 328 N.W.2d 192 (1982).

The judgment of the lower court in favor of the defendants Rose dismissing the claim of the plaintiff Bank is reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

MAX L. BIEGERT AND THELMA BIEGERT, HUSBAND AND WIFE, AND BIEGERT BROTHERS FARMS, INC., A NEBRASKA CORPORATION, APPELLANTS, V. THELMA DUDGEON, NAOMI D. BETTY, AND WILLARD B. DUDGEON, APPELLEES.

330 N.W.2d 897

Filed March 4, 1983. No. 81-775.

1. **Easements.** A prescriptive right is not looked upon with favor and, generally, must be proved by clear, convincing, and satisfactory evidence.
2. **Easements: Proof.** The party claiming a prescriptive right to an easement must prove that his use and enjoyment was adverse, under a claim of right, continuous and uninterrupted, open and notorious, and exclusive for the full prescriptive period.

Appeal from the District Court for Fillmore County: ORVILLE L. COADY, Judge. Reversed and remanded with directions.

Daniel E. Bryan of Heinisch & Bryan, for appellants.

Koenig & Murray, for appellees.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and MORAN, D.J.

KRIVOSHA, C.J.

This is an action instituted by the appellants, Max Biegert, Thelma Biegert, and Biegert Brothers

Farms, Inc. (Biegerts), seeking to establish a prescriptive easement over a 30-foot strip of land owned by the appellees, Thelma Dudgeon, Naomi D. Betty, and Willard B. Dudgeon (Dudgeons), for the use of planting, harvesting, and caring for crops. Biegerts also sought an order requiring the Dudgeons to remove a fence constructed by the Dudgeons in such a manner as to prevent the Biegerts from coming upon the land over which the easement was being sought, and a permanent injunction to prevent future interference with the use of the land. The trial court sustained a motion to dismiss made by the Dudgeons and, following the overruling of a motion for new trial, the Biegerts appealed to this court. Their principal assignment of error is that the trial court erred in failing to find that they had established a prescriptive easement over the strip of land in question for use as a turnrow. We believe that the Biegerts are correct and therefore reverse the decision of the trial court.

The evidence discloses that the Biegerts and the Dudgeons are record owners of adjacent tracts of land once owned by the parties' grandparents and thereafter acquired by each of them. The Biegerts own and operate a farm on the north half of the northwest quarter of Section 28, Township 5 North, Range 3 West of the 6th P.M., Fillmore County, Nebraska. The Dudgeons are the owners of the south half of the northwest quarter of Section 28, Township 5 North, Range 3 West of the 6th P.M., Fillmore County, Nebraska. Prior to 1979 neither party knew where the exact boundary line was located between the north and south portions of the northwest quarter in question. The only visible division between the two tracts prior to this time was a well-defined drainage ditch approximately 20 feet in width. The ditch, which began at the west boundary line, ran in an east-west direction across approximately two-thirds of the quarter section, at which point it turned in a northeasterly direction. The division line which

extended to the eastern line of the northwest quarter from the point where the ditch turned to the northeast was a strip of land equal in width to the drainage ditch. Both the drainage ditch and the strip of land were used as turnrows.

The evidence is without dispute that the Biegerts and their tenants had used the ditch and strip of land as turnrows continuously since at least 1957, and well in excess of 10 years. The Biegerts or their tenants would plant crops to the northern edges of the ditch and strip of land and then turn their equipment in the ditch or on the strip of land.

On November 7, 1979, the Dudgeons had their farm surveyed and determined the exact location of the northern boundary. Based upon this survey, they erected a barbed wire fence on the boundary line between their farm and the land owned by the Biegerts. The fence was constructed on a line parallel to and approximately 10 feet north of the northern edge of the ditch and strip of land in question, thus preventing the Biegerts from using the ditch and adjacent strip of land as turnrows. The testimony of Dudgeons' tenant, Paul Row, established that the use of the area as turnrows by the Biegerts was of such a nature and frequency as to give notice to the Dudgeons. It was further undisputed that the drainage ditch and accompanying strip were used solely as turnrows since at least 1957 and were used by no one other than the Biegerts or their tenant for more than 10 years prior to 1970, when Row also began using the area to turn around. The evidence clearly established that, prior to the survey conducted in 1979, the true boundary line between the two tracts was unknown and that the Biegerts used the land in question under the belief that they were using their own land. One of the appellees, Naomi Betty, specifically testified that the Biegerts were never given permission to use the strip of land as a turnrow.

This being an equity action, it is the duty of this

court to try the issues of fact de novo on the record and to reach an independent conclusion thereon without reference to the findings made by the District Court. Neb. Rev. Stat. § 25-1925 (Reissue 1979); *Sturm v. Mau,* 209 Neb. 865, 312 N.W.2d 272 (1981); *Weiss v. Meyer,* 208 Neb. 429, 303 N.W.2d 765 (1981). The question therefore presented to this court is whether we can find from the evidence that the Biegerts have established their right to a prescriptive easement over the 30 feet in question. We are not unmindful of the fact that in reaching our conclusion we are bound by the rule that a prescriptive right is not looked upon with favor and, generally, must be proved by clear, convincing, and satisfactory evidence. *Hengen v. Hengen,* 211 Neb. 276, 318 N.W.2d 269 (1982); *Sturm v. Mau, supra.* Further, in order to establish a prescriptive easement, the individual making the claim must prove substantially the same elements as are required for one to establish a claim of right by adverse possession. That is, the party claiming a prescriptive right to an easement must prove that his use and enjoyment was adverse, under a claim of right, continuous and uninterrupted, open and notorious, and exclusive for the full prescriptive period. *Masid v. First State Bank, ante* p. 431, 329 N.W.2d 560 (1983); *Svoboda v. Johnson,* 204 Neb. 57, 281 N.W.2d 892 (1979).

We have previously held that a use is adverse and under a claim of right if the claimant proves uninterrupted and open use for the necessary period without evidence to explain how the use began. Once this presumption is established, it will prevail unless the owner of the subservient estate is able to show by a preponderance of the evidence that the use was by license, agreement, or permission. *Svoboda v. Johnson, supra; Fischer v. Grinsbergs,* 198 Neb. 329, 252 N.W.2d 619 (1977). This the Dudgeons were unable to do. The evidence further established that the use of the land by Biegerts was

continuous and uninterrupted for more than 10 years, having begun sometime in 1955. That it was not used each day is of no moment. We have previously addressed that issue in *Weiss v. Meyer,* 208 Neb. 429, 433, 303 N.W.2d 765, 768 (1981), when we said: "The law does not require that possession shall be evidenced by a complete enclosure, nor by persons remaining continuously upon the land and constantly from day to day performing acts of ownership thereon. It is sufficient if the land is used continuously for the purposes to which it may be in its nature adapted. [Citations omitted.]" As the evidence disclosed, the 30-foot area in question was used whenever it was necessary for the Biegerts to bring their equipment upon the land and to turn around.

Certainly, no one can argue from the evidence that the use was not open and notorious. It would be difficult to imagine how one would not observe the farm machinery being used on this land, and, as we have already noted, Dudgeons' tenant, Row, confirmed this fact. That the use was exclusive within the meaning of the law is likewise clear. The use of the ditch and adjoining strip was not dependent upon anyone else being present. In *Jurgensen v. Ainscow,* 155 Neb. 701, 710, 53 N.W.2d 196, 201 (1952), we said: "The term 'exclusive use,' however, does not mean that no one has used the driveway except the claimant of the easement. It simply means that his right to do so does not depend upon a similar right in others." And certainly the evidence established that the use was under a claim of right. Before the survey was taken there was a belief that the land in question was owned by the Biegerts. That they were mistaken in their belief is of no consequence. In *Weiss v. Meyer, supra* at 432-33, 303 N.W.2d at 768, we said: "The intent, even though mistaken, is sufficient as where the claimant occupies to the wrong line believing it to be the true line and even though he does not intend to claim more land than that

described in the deed. . . . It is the nature of the hostile possession that constitutes the warning [to the real owner], not the intent of the claimant when he takes possession."

In summary, then, the Biegerts have, by clear, convincing, and satisfactory evidence, established that their use and enjoyment of the property in question was adverse, under a claim of right, continuous and uninterrupted, open and notorious, and exclusive for the full prescriptive period. Having established all of the necessary elements of their cause of action by clear, convincing, and satisfactory evidence, they were entitled to have a prescriptive easement over the 30-foot area in question established in their name. The decision of the trial court must therefore be reversed and the cause remanded with directions to enter judgment in favor of the Biegerts and against the Dudgeons in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

MORAN, D.J., dissents.

CEDARS CORPORATION, APPELLANT, V. SUN VALLEY DEVELOPMENT COMPANY ET AL., APPELLEES.

330 N.W.2d 900

Filed March 4, 1983. No. 81-809.

1. **Judgments: Res Judicata.** Where cases are interwoven and interdependent and the controversy involved has already been considered and determined in a prior proceeding involving one of the parties now before the court, the court has a right to examine its own records and take judicial notice of its own proceedings and judgment in the prior action.
2. **Collateral Estoppel.** It is now generally held that collateral estoppel may be applied if the identical issue was decided in a prior action, there was a judgment on the merits which was final, the party against whom the rule is to be applied was a party or in privity with a party to the prior action, and there was an opportunity to fully and fairly litigate the issue in the prior action.

Appeal from the District Court for Douglas County: D. NICK CAPORALE, Judge. Affirmed.

John D. Sykora, for appellant.

Frederick S. Cassman of Abrahams, Kaslow & Cassman, for appellees.

KRIVOSHA, C.J., MCCOWN, and HASTINGS, JJ., and HOWARD, D.J., and COLWELL, D.J., Retired.

KRIVOSHA, C.J.

The appellant in this case, Cedars Corporation, apparently encouraged by the adage, "If at first you don't succeed, try, try again," has once again filed suit against the appellees, Sun Valley Development Company, Willard I. Friedman, and Valley Ho Corporation (hereinafter jointly referred to as Sun Valley), and Howard Kaplan, seeking to have set aside a certain assignment of an agreement to manage a joint venture and to obtain an accounting for alleged profits due to Cedars Corporation and withheld by Sun Valley. The trial court sustained Sun Valley's motion to dismiss. We affirm.

This is the fourth time that Cedars Corporation has, in one manner or another, sought to sue Sun Valley or its various stockholders for damages allegedly incurred by Cedars Corporation and its principal stockholder, Edward E. Milder. The first of such cases is reported in the case of *Cedars Corp. v. H. Krasne & Son, Inc.*, 189 Neb. 220, 202 N.W.2d 205 (1972) (*Cedars I*). In addition to *Cedars I* and the present action, two suits were filed in the District Court of Douglas County, Nebraska, and found as *Cedars Corporation v. Sun Valley Development Co.*, Doc. 658, No. 292, and *Cedars Corporation v. Sun Valley Development Co. et al.*, Doc. 745, No. 298. The present action filed by Cedars (*Cedars IV*) seeks to have set aside a certain assignment of an agreement for management of a joint venture. The management agreement was entered into by the various individuals to this lawsuit and thereafter assigned by the Friedmans to Valley Ho Corpo-

ration, a corporation owned and operated by the Friedmans. By the present action, Cedars maintains that the assignment was not executed on the date shown on the face of the assignment but, in fact, was executed 2 years later, in 1962. Paragraph 10 of the latest petition provides as follows: "That such assignment was never approved by, and constitutes a fraud upon, Plaintiff, as such has deprived it of revenues due it pursuant to the terms of the joint venture with respect to homes constructed on the tract referenced in ¶ 7."

Sun Valley and Kaplan filed a demurrer to the petition on two grounds. The first ground was that the assignment which Cedars sought to have declared void and which formed the basis of the action was executed, even by Cedars' claim, more than 19 years before the suit in question was commenced. For that reason Sun Valley maintained that the action was barred by the statute of limitations. The second ground for the demurrer was that the petition attempted to raise matters which had already been determined between the parties in *Cedars I* and was therefore res judicata. For reasons which are not set out, the trial court overruled the demurrer. Sun Valley then filed a document entitled "Motion to Dismiss." For reasons not explained, Kaplan was not a party to the motion. While entitled a motion to dismiss, it was in fact identical to the demurrer previously filed. Following a brief evidentiary hearing, at which time Sun Valley merely asked the court to take judicial notice of *Cedars I, II, and III,* the trial court sustained the motion and dismissed the action as to Sun Valley.

On appeal to this court Cedars now argues that, because there is no such pleading as a motion to dismiss, the trial court should not have sustained Sun Valley's motion and dismissed the action. Moreover, Cedars argues that there are fact questions which must be resolved before an order can be entered by the court. We do not agree. Regard-

less of what the document may have been entitled, it was in fact a demurrer and we treat it as such.

The sole basis for Cedars' action in this case, as framed by its petition, is that in 1962 the Friedmans assigned the Sun Valley Development Company joint venture management agreement to their corporation Valley Ho. No allegation is made in the petition that Cedars was unaware of that assignment or did not learn of it until some subsequent time. Therefore, on its face, it appears that the cause of action, if indeed it existed, accrued at the latest in 1962. Cedars was therefore required to commence this action for alleged fraud within 4 years after that date or be forever barred. See, Neb. Rev. Stat. § 25-207 (Reissue 1979); *Hollenbeck v. Guardian Nat. Life Ins. Co.,* 144 Neb. 684, 14 N.W.2d 330 (1944). If Cedars was to avoid the effect of the statute of limitations, it was incumbent upon Cedars to both plead and prove some exception which would have thereby tolled the statute of limitations until some later date. *Jones v. Johnson v. Pullen,* 207 Neb. 706, 300 N.W.2d 816 (1981); *Grand Island School Dist. #2 v. Celotex Corp.,* 203 Neb. 559, 279 N.W.2d 603 (1979). Sun Valley's first claim in both its demurrer and its motion to dismiss was correct and should have been sustained by the trial court.

A further and more serious defect in Cedars' petition is raised by the second paragraph contained in both Sun Valley's demurrer and in its motion to dismiss. It is clear that Cedars' claim for relief in the present action is founded upon some notion that the assignment was invalid and that Cedars is entitled to an accounting for profits derived as a result of the construction of homes upon certain land owned by the joint venture. That is precisely what we told Cedars it was not entitled to in *Cedars I, supra* at 227-32, 202 N.W.2d at 209-11, when we said, "Approximately 6 months after the management agreement was signed, the Friedmans assigned it to Valley Ho Corporation, which was owned and operated by

them. The management agreement contained a provision against assignment without written permission. No written permission was obtained. The evidence is conclusive, however, that Milder [Cedars] participated in the assignment; the parties were aware of it; and no objection was raised to it until more than 7 years later. We find the *parties* acquiesced in it and are now estopped to question the absence of written permission.

. . . .

"For more than 7 years Edward E. Milder, the sole owner of Cedars Corporation, the plaintiff, as the accountant for the Friedmans and their corporations, as well as the Sun Valley Development Company, prepared income tax returns for the Friedmans and had them pay the income tax on the house profits. He also prepared income tax returns for the joint venture and made the accountant statement expressing his opinion that all money and accounts were handled by proper accounting procedures. His explanation as to the consistency of his conduct with his present contention is not too convincing.

. . . .

". . . To avoid further litigation the books of the joint venture should be balanced and audited by a certified public accountant for the period of the joint venture to date, and a copy of this report furnished to each of the participants in the venture. This audit is to be only of the joint venture. *It does not include the construction and sale of houses which we have determined are no part of the joint venture.* It should include all other items incident to the development and sale of the land." (Emphasis supplied.)

In *Cedars I* we granted to each of the parties the right to obtain the audit which Cedars now seeks in this action, provided that if the audit was not furnished within 90 days after the issuance of the mandate, an action could be brought by any of the parties, including Cedars. That was on November 17, 1972. Even if the audit has not been provided as

required by us, the time for enforcing that order is now long since past. There is simply no question that the basis for Cedars' action in the instant case was disposed of by us in *Cedars I.* Cedars argues that this matter cannot be disposed of absent a trial and that the court cannot consider the previous cases, including *Cedars I.* "[W]here cases are interwoven and interdependent and the controversy involved has already been considered and determined in a prior proceeding involving one of the parties now before the court, the court has a right to examine its own records and take judicial notice of its own proceedings and judgment in the prior action." *Peterson v. The Nebraska Nat. Gas Co.,* 204 Neb. 136, 138, 281 N.W.2d 525, 527 (1979).

In *Borland v. Gillespie,* 206 Neb. 191, 198, 292 N.W.2d 26, 31 (1980), we said: " 'It is now generally held that collateral estoppel may be applied if the identical issue was decided in a prior action, there was a judgment on the merits which was final, the party against whom the rule is to be applied was a party or in privity with a party to the prior action, and there was an opportunity to fully and fairly litigate the issue in the prior action.' " See, also, *Reeves v. Watkins,* 208 Neb. 804, 305 N.W.2d 815 (1981). Whether the judgment in *Cedars I* constitutes res judicata in this action or is more properly characterized as collateral estoppel is of little moment. The result is the same. Cedars has had its day in court and cannot continue to maintain frivolous and vexatious suits by merely rearranging the parties or changing their names. The action of the trial court was correct and the judgment dismissing the action is affirmed.

AFFIRMED.

SILVERMAN & SILVERMAN, A PARTNERSHIP, APPELLANT, V. ARBOR STREET PARTNERSHIP, A PARTNERSHIP, APPELLEE.

330 N.W.2d 904

Filed March 4, 1983. No. 81-821.

1. **Contracts: Parol Evidence.** Parol evidence is not admissible to add to, contradict, or vary the terms of a written contract.
2. **Contracts: Evidence.** Where negotiations between the parties result in an agreement which is reduced to writing, the written agreement is the only competent evidence of the contract in the absence of fraud, mistake, or ambiguity.

Appeal from the District Court for Douglas County: KEITH HOWARD, Judge. Affirmed.

Bruce H. Brodkey of Garber & Batt, for appellant.

Jeffrey A. Silver, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ.

PER CURIAM.

This case arises out of a controversy concerning a lease of office space. The plaintiff is a partnership whose partners are engaged in the practice of law. The defendant is the owner of an office building at 2437 South 130th Circle, Omaha, Nebraska.

On February 25, 1980, the plaintiff entered into a written lease for office space in the defendant's building. The lease was the result of negotiations extending over a period of more than a month. The form of lease originally submitted to the plaintiff was unsatisfactory. The instrument finally executed was a form lease used by the defendant which was modified by a "rider" drafted by the plaintiff.

At the time the parties entered into the lease the office building was under construction. The space adjacent to the plaintiff's office was unfinished because the defendant had not yet secured a tenant for that space. The grounds surrounding the building had not been sodded or landscaped.

The plaintiff moved into the building shortly before May 1, 1980, the date upon which the term of the lease commenced. Instead of a hallway leading to the plaintiff's office, there was a large open space which was unfinished. A wall to complete the hallway was not constructed for approximately a year. Some sod was placed around the building about 6 months after the plaintiff moved in, but no landscaping was done. The areas which had not been sodded were allowed to grow up in weeds. The plaintiff also complained about the cleaning in and around the building and the maintenance of the parking lot.

This action was commenced September 5, 1980, to recover damages alleged to have resulted from the defendant's failure to perform the lease. The amended petition alleged that the "parties contemplated and agreed" to the construction and wallpapering of a hallway; that the parties had agreed that the premises would be attractively landscaped in the spring of 1980; that the defendant failed to clean and maintain the common areas and permitted the grounds to become overgrown with noxious weeds; and that the building and grounds had an unkempt and incomplete appearance. The plaintiff prayed for damages for the difference between the rent reserved in the lease and the actual fair rental value, loss of profits, and "extreme embarrassment and humiliation and mental anguish to the plaintiff together with the loss of goodwill in the community."

At the close of the plaintiff's evidence the trial court sustained the defendant's motion to dismiss. The plaintiff has appealed. The assignments of error relate to evidentiary rulings by the trial court and the sustaining of the motion to dismiss.

Although the lease and rider consist of some seven pages, the controversy centers around paragraph 1 of the rider, which provides as follows: "1. CONSTRUCTION. Lessor agrees to complete construc-

tion of the Building in which the leased premises are to be located at its cost and expense. All work other than that to be performed by Lessor shall be done by Lessee at Lessee's cost and expense, the same to include providing storage shelving, bookshelves, reception room counter, and any wall finish other than building standard paint. Lessor's work shall include installation of heating and air conditioning equipment of sufficient capacity to adequately heat and cool the leased space including a thermostat to be controlled by Lessee; the erection and finish with building standard paint all walls, with party walls to be sound proofed; all doors and door hardware; suspended ceilings; all supply and return registers with necessary duct work; lighting (to include at least three light fixtures in each of the offices marked 'attorney's offices' on Exhibit A, and such additional lighting fixtures as may be necessary to conform to recognized office lighting standards); baseboard strips on all walls; wall to wall carpet on all floors; window blinds and all electrical outlets, switches and covers, all as shown generally on Exhibit A. Lessor's work shall be completed by April 15, 1980, and Lessee shall have access to the leased premises without charge until the commencement of the lease term, other than proration of utilities as provided for herein."

The plaintiff argues that in paragraph 1 the defendant agreed to complete construction of the entire building by April 15, 1980. We do not agree.

Paragraph 1 relates, primarily, to the construction to be completed in the area of the building leased to the plaintiff, and allocates the cost as between the parties. The cost of construction of the building proper, as distinguished from fixtures (such as the shelving and reception room counter) was to be paid by the defendant. The installation of heating and air conditioning equipment, ductwork, lighting, carpeting, suspended ceilings, etc., in the plaintiff's offices was to be completed by April 15, 1980. This para-

graph did not provide as to *when* the construction of the rest of the building would be completed.

Paragraph 4 of the rider provides for payment by the lessee of its pro rata share of the cost of maintaining the common areas. Included as such expense is "planting, replanting and replacing flowers and landscaping." There is no provision in the lease as to when landscaping of the premises would be completed.

There was no provision in the lease as to when that part of the building not leased by the plaintiff and the landscaping of the grounds were to be completed, or that they would be completed at any time. To support the plaintiff's contention that the parties had agreed to a completion date for the rest of the building and the landscaping of the premises, the plaintiff attempted to introduce evidence as to conversations between the parties during the negotiations preceding the execution of the lease. Objections to this evidence upon the basis of the parol evidence rule were sustained and the testimony was not admitted.

The plaintiff contends that parol evidence was admissible to explain and aid in the construction of the agreement. That contention might have merit if some ambiguity existed as to when lessor was to perform the work lessee claims was to be done. However, the lease is completely silent as to such matters, and to permit the introduction of such evidence would be to expand the terms of the contract by parol evidence.

Parol evidence is not admissible to add to, contradict, or vary the terms of a written contract. *Rullman v. LaFrance, Walker, Jackley & Saville,* 206 Neb. 180, 292 N.W.2d 19 (1980). Where negotiations between the parties result in an agreement which is reduced to writing, the written agreement is the only competent evidence of the contract in the absence of fraud, mistake, or ambiguity. *Frank McGill, Inc. v. Nucor Corp.,* 195 Neb. 448, 238 N.W.2d 894 (1976).

We think there was no ambiguity in the lease concerning the matters which are in dispute between the parties. The defendant simply made no promise in the lease as to when the construction of the rest of the building and the landscaping of the grounds would be completed. The effect of admitting parol evidence concerning the prior negotiations would be to add terms to the lease.

The plaintiff argues that the agreement between the parties was only partially integrated. The agreement on its face appears to be fully integrated. The lease contained a provision concerning completion of construction of the building. The provision was that such construction shall be at the expense of the lessor. The inference is that if the parties had agreed upon a time for completion of the entire building, it would have been stated in the lease, just as the completion date for construction of the leased area was provided for in paragraph 1 of the rider. See *Traudt v. Nebraska P. P. Dist.,* 197 Neb. 765, 251 N.W.2d 148 (1977). We conclude that the lease was fully integrated and parol evidence was not admissible to supply terms omitted from the instrument.

The plaintiff also attempted to introduce testimony by a real estate broker and appraiser as to the meaning of the language in paragraph 1 of the rider. The construction of this paragraph presented a question of law, not fact, and the objections to this testimony were properly sustained.

The only evidence as to damages was testimony by the real estate broker and appraiser called by the plaintiff that in his opinion the fair rental value on March 25, 1981, of the space leased by the plaintiff was approximately $4.50 per square foot rather than $8 per square foot, the rent reserved in the lease. There was no evidence as to loss of profits or goodwill. Although the plaintiff may have suffered some embarrassment because of the appearance of the building and grounds, there was no evidence of "ex-

treme embarrassment," "humiliation," or "mental anguish" which could afford a basis for recovery.

As the trial court stated in its ruling on the motion to dismiss, there was some evidence of failure on the part of the defendant to fully perform the maintenance and cleaning obligations set out in the lease. There was no evidence which would provide a suitable basis upon which the jury could award damages for that breach.

We conclude that the motion to dismiss was properly sustained and the judgment should be affirmed.

AFFIRMED.

IN RE FREEHOLDER PETITION.
KAUFFMAN FARMS, INC., APPELLEE, V. EMERY KEITH HUTSELL ET AL., APPELLANTS.

330 N.W.2d 907

Filed March 4, 1983. No. 81-849.

1. **Schools and School Districts.** Best educative interest requires a showing that the convenience, necessity, or welfare of the student will be best served by the transfer, and may be demonstrated by proof of the accreditation of the respective schools, educational efficiency of the schools, and/or the leadership, management, and curricula of the schools involved.
2. **Witnesses: Rules of Evidence.** A parent, as an informed and concerned lay person, is competent to testify as to his or her opinion on best educative interest.

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

John F. Recknor of Barlow, Johnson, DeMars & Flodman, for appellants.

Carl D. Cohen, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and MORAN, D.J.

BOSLAUGH, J.

The appellants are taxpayers and electors in the

Marquette School District in Hamilton County, Nebraska. They appeal from the judgment of the District Court vacating the order of the freeholder board and granting the petition of Kauffman Farms, Inc., to transfer its property from the Marquette district to the Aurora School District under Neb. Rev. Stat. § 79-403 (Reissue 1981).

The record shows that the petitioner, a family farm corporation controlled by Clayton and Nancy Kauffman, owns land in both the Aurora and Marquette school districts. The family residence is located in the Marquette district and the three Kauffman children attended school in that district. The petitioner requested the freeholder board to transfer its land to the Aurora district, as such transfer was in the best educative interest of the Kauffman's youngest daughter, Susan.

The board denied the transfer and petitioner appealed to the District Court. That court found the action of the board arbitrary and capricious; that the transfer was in the best educative interest of Susan Kauffman; and ordered the land transferred.

On appeal to this court the appellants argue that the petitioner did not sustain its burden of proof on the issue of best educative interest. The appellants maintain that best educative interest requires proof by expert testimony, which was not produced by the petitioner.

The review of the decision of the District Court is de novo in this court. *In re Freeholder Petition, ante* p. 532, 330 N.W.2d 481 (1983); *Miller v. School Dist. No. 69,* 208 Neb. 290, 303 N.W.2d 483 (1981). This court has a duty to reach an independent conclusion without reference to the conclusion reached in the District Court.

The only issue tried by the District Court was whether the transfer was in the best educative interest of Susan Kauffman. "Best educative interest" requires a showing that the convenience, necessity, or welfare of the student will be best served by the

transfer, and may be demonstrated by proof of the accreditation of the respective schools, educational efficiency of the schools, and/or the leadership, management, and curricula of the schools involved. *Friesen v. Clark,* 192 Neb. 227, 220 N.W.2d 12 (1974).

Susan Kauffman attended school in the Marquette district until 1980, her junior year in high school. That year, her parents paid tuition to send her to school in the Aurora district. Her father cited concerns over the administration of the Marquette school and the quality of education provided there as the reasons for this change.

Dean Bergman, a management consultant for the Department of Education, and who had conducted a survey of the Marquette district in 1979-80 when the district was considering building a new facility, was called as a witness by the petitioner. He testified that the enrollment at Marquette was declining and the old building was in need of repair. At the completion of his study, he recommended to the Marquette board that, as an alternative to the new building, Marquette could either (1) affiliate with other neighboring districts, or (2) contract with other districts for specialized courses not offered by Marquette.

Bergman further testified that the Aurora school was accredited by the North Central association while Marquette was not; that in grades 9 to 12 the total instructional units offered by Aurora were 630.5 while Marquette offered only 385; that Aurora had 34 teachers in 1980-81 while Marquette had 16; and that Aurora has a full-time principal while Marquette has a part-time principal. Bergman testified that, in his opinion, the Aurora school offered "the potential opportunity for a better education."

A comparison of the courses taken by Susan Kauffman at Aurora and those offered at Marquette showed that four of her seven courses were not offered at Marquette. Of the three courses offered at both schools, the teachers at Aurora had master's

degrees and were endorsed in their subject areas while the teachers at Marquette had bachelor's degrees and were not all fully endorsed in their subject areas. Many of the courses available at Aurora are available at the Marquette school only by correspondence or extension.

Other testimony presented by the petitioner showed that the facilities and equipment provided by the Aurora school were either superior to or more available than those of the Marquette school. Counseling, particularly for the college-bound student, was more readily available to the student at Aurora. Susan Kauffman testified that she felt she was receiving a better education in the Aurora School District than she had at Marquette.

Clayton and Nancy Kauffman testified that, in their opinion, Susan's best educative interest was served by attending the Aurora school.

The appellants argue that the District Court erred in permitting Clayton and Nancy Kauffman to testify as parents to their opinion of what is in Susan's best educative interest, as such opinion can be rendered only by an expert. They raise a similar argument with respect to the opinion given by Susan Kauffman.

This issue was recently decided in *In re Freeholder Petition, supra.* In that case we held that "best educative interest" need not be relegated to the experts, although expert testimony would appear to be relevant to the issue. Further, we held that a parent, as an informed and concerned lay person, is competent to give an opinion when it is "rationally based on the perception of the witness and . . . helpful to a clear understanding of his testimony or the determination of a fact in issue." Neb. Rev. Stat. § 27-701 (Reissue 1979). This same rationale would permit Susan Kauffman, as a concerned and interested student, to testify as to her opinion of "best educative interest." The evidence was properly admitted.

There was evidence from which it could be inferred that the Marquette school had suffered from poor administration for some time. A superintendent had been convicted of embezzling a large sum of money from the district. Disciplinary policies were nonexistent or not enforced. In one incident a student had singed Susan's hair with a cigarette lighter. The teaching staff lacked support from the office of the superintendent and principal. Some of the students seemed to be aware of the lack of organization and took advantage of the teaching staff.

Upon de novo review, we conclude that the order of the District Court must be affirmed. The evidence shows that the best educative interest of Susan Kauffman would be served by the transfer.

The judgment of the District Court is affirmed.

AFFIRMED.

LARRY ANTHONY PIERSON, APPELLEE, V. ROSALIE JOAN PIERSON, APPELLANT.

330 N.W.2d 747

Filed March 4, 1983. No. 81-893.

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

Richard E. Mueting of Mueting, DeLay & Stoffer, for appellant.

Vince Kirby, for appellee.

KRIVOSHA, C.J., WHITE, and CAPORALE, JJ., and SPRAGUE, D.J., and COLWELL, D.J., Retired.

PER CURIAM.

The court, having considered the oral arguments and having reviewed the record de novo, finds that the decree of the trial court should be affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ERWIN CHARLES SIMANTS, APPELLANT.

330 N.W.2d 910

Filed March 4, 1983. No. 82-093.

1. **Constitutional Law: Equal Protection.** Equal protection does not require that all persons be treated identically. It only requires that a distinction drawn by the Legislature between individuals has some relevance to the purpose for which the classification is made.
2. **Constitutional Law: Equal Protection: Insanity.** There is a rational basis for treating mentally ill dangerous persons who have been acquitted of a crime by reason of insanity differently than other mentally ill dangerous persons who have not.
3. _____: _____: _____. Neb. Rev. Stat. §§ 29-3701 et seq. (Cum. Supp. 1982), insofar as they apply only to persons acquitted of crime by reason of insanity, are constitutional and do not violate the constitutional right of equal protection of the laws.
4. **Mental Health: Appeal and Error.** This court will not interfere on appeal with a final order made by the District Court in a mental health commitment proceeding unless the court can say as a matter of law that the order is not supported by clear and convincing proof.

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

P. Stephen Potter of Bacon & Potter, for appellant.

Paul L. Douglas, Attorney General, and Martel J. Bundy, for appellee.

Daniel J. Popeo, Paul D. Kamenar, and Nicholas E. Calio, for amicus curiae Washington Legal Foundation.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and MORAN, D.J.

MCCOWN, J.

This is an appeal from an order of the District Court following a hearing mandated under the provisions of Neb. Rev. Stat. §§ 29-3701 et seq. (Cum. Supp. 1982). The District Court found the defendant presently mentally ill and dangerous to others by reason of his mental illness and ordered his commit-

ment to the Lincoln Regional Center. The defendant has appealed.

On October 17, 1979, after trial, the defendant was adjudged not guilty by reason of insanity on six counts of murder in the first degree. On October 26, 1979, the defendant was committed by the Lincoln County Mental Health Board to the Lincoln Regional Center for care and treatment.

On July 8, 1981, pursuant to § 29-3705 the District Court for Lincoln County asserted jurisdiction over the defendant for the purpose of conducting an evidentiary hearing on the status of the defendant. On November 25, 1981, following an evidentiary hearing, the District Court found there was "clear and convincing" evidence that the defendant was then mentally ill and dangerous to others and that the defendant would be dangerous to others in the foreseeable future as demonstrated by the overt acts involved in the six murders committed on October 18, 1975.

The court ordered the defendant committed for treatment and returned to the Lincoln Regional Center. The court also ordered that the defendant receive appropriate psychiatric treatment for the mental illnesses of personality disorder (mixed type), drug and alcohol abuse, and pedophilia. The court ordered the defendant confined in the security unit and specified other conditions of confinement as required by statute. The court also ordered that the next annual review and evidentiary hearing provided for by § 29-3703 be set for November 23, 1982. The defendant has appealed.

On this appeal the defendant contends that the statutes under which he was committed are unconstitutional and in violation of his rights of equal protection because persons facing mental commitment under the provisions of §§ 29-3701 et seq. after a verdict of acquittal on grounds of insanity are treated differently than persons facing mental commitment under the Nebraska Mental Health Commitment

Act, Neb. Rev. Stat. §§ 83-1001 et seq. (Reissue 1981).

Even assuming that the two classifications of persons are similarly situated for purposes of constitutional equal protection, a mere difference in treatment between the two classes, standing alone, does not invalidate the statutes nor render them constitutionally defective. Equal protection does not require that all persons be treated identically. It only requires that a distinction drawn by the Legislature between individuals has some relevance to the purpose for which the classification is made. *Baxstrom v. Herold,* 383 U.S. 107, 86 S. Ct. 760, 15 L. Ed. 2d 620 (1965); *Powell v. State of Florida,* 579 F.2d 324 (5th Cir. 1978).

The purpose of §§ 29-3701 et seq. is to protect the public from mentally ill dangerous persons who have demonstrated their dangerous proclivities by committing criminal acts for which they are not punished because of insanity. Such past history of dangerous criminal behavior provides a rational basis for the classification.

Other courts have held that there is a rational basis for treating persons who have been acquitted of criminal charges on grounds of insanity differently than other mentally ill dangerous persons who have not, and upheld statutes similar to §§ 29-3701 et seq. See, *Benham v. Edwards,* 678 F.2d 511 (5th Cir. 1982); *United States v. Ecker,* 543 F.2d 178 (D.C. Cir. 1976); *Powell v. State of Florida, supra.*

There is a rational basis for treating mentally ill dangerous persons who have been acquitted of a crime by reason of insanity differently than other mentally ill dangerous persons who have not. Sections 29-3701 et seq., insofar as they apply only to persons acquitted of a crime by reason of insanity, are constitutional and do not violate the constitutional right of equal protection of the laws.

The defendant also contends that the court's findings that he was mentally ill and dangerous to himself or others by reason of mental illness as demon-

strated by an overt act or threat are not supported by the evidence. We disagree.

Evidence from the defendant's criminal trial was presented which established that the defendant had sexually assaulted a 10-year-old girl and then killed her along with five other members of her family.

Dr. Woytassek, the defendant's treating physician at the Lincoln Regional Center, testified that the defendant was suffering from mixed type personality disorder, drug and alcohol abuse, and pedophilia. He also gave his opinion that the defendant was a dangerous person based upon his previous drinking habits, his involvement with young girls, and his current lack of insight concerning his dangerous behavior and his refusal to admit that he had a serious problem. Dr. Woytassek also testified that defendant's mental condition had not materially changed since he was placed in the regional center.

Dr. Chesen, another witness for the State, testified that the defendant was very dangerous as a direct result of his mental condition and that his mental condition had not changed since Dr. Chesen's initial evaluation of him in 1976.

No witnesses, including the defendant's own experts, recommended that the defendant be released. In fact, one of the defendant's expert witnesses testified that there was a "very real risk" that the defendant could murder again if unconditionally released.

On the basis of this evidence the trial court found "clear and convincing" evidence that the defendant was mentally ill and dangerous. This court will not interfere on appeal with a final order made by the District Court in a mental health commitment proceeding unless the court can say as a matter of law that the order is not supported by clear and convincing proof. *State v. Mayfield,* 212 Neb. 724, 325 N.W.2d 162 (1982). In the present case it cannot be said as a matter of law that the order of the District

Court was not supported by clear and convincing proof.

The defendant's remaining assignments of error are without merit. The order of the District Court is affirmed.

AFFIRMED.

P. A. RUZICKA, DOING BUSINESS AS P & G BUILDERS, APPELLEE, V. MARTIN E. PETERSEN, JR., AND JANELLE L. PETERSEN, HUSBAND AND WIFE, APPELLANTS.

330 N.W.2d 913

Filed March 4, 1983. No. 82-108.

1. **Contracts: Words and Phrases.** The "estimated cost" of a building is its reasonable cost, erected in accordance with plans and specifications, and is not necessarily the amount agreed upon by the parties nor an offer to be accepted; it does not imply absolute calculation, but precludes accuracy.
2. **Contracts.** Where services are furnished to a party and knowingly accepted by him, the law implies a promise to pay their reasonable value.

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

Seb Caporale, for appellants.

Albert Lustgarten, for appellee.

KRIVOSHA, C.J., MCCOWN, and HASTINGS, JJ., and GRANT and HOWARD, D. JJ.

HOWARD, D.J.

Defendants appeal from a decree foreclosing plaintiff's mechanic's lien for labor in the construction of defendants' house, assigning as error only that a cost estimate submitted by plaintiff in the amount of $5,490 constituted a fixed contract price, which plaintiff had been paid, and that the court should not have allowed recovery on a quantum meruit basis in a larger amount. Defendants also seek reversal of the

trial court's dismissal of their counterclaim for an alleged mistaken overpayment to plaintiff. There is no claim or question regarding sufficiency or quality of the work.

The estimate is in typewritten form and reads: "Construction cost Estimate by P & G Builders for home of Mr. & Mrs. Martin Petersen. Frame and Finish as per plan all Cabinets, Vanities, Book Cases and Wet bars, Family room beams (no paneling). Cost estimate based on carpenter labor of $12.00 per hour. Total $5490.00." The underlining of the word "Estimate" is typewritten as an original part of the document.

The framing wall was completed about March 13, 1978. Plaintiff sent a bill to defendants, reciting "Framing labor on 12315 Seward St., 446½ hrs. @ $12.00. Framing labor due $5358.00." That amount was paid by defendants a few days later. The finish work was completed in July or August, and plaintiff mailed defendants a bill for $4,074, which is described, but which is not in evidence. Plaintiff met with defendants at their home on about August 7 and defendants paid $1,000, agreeing, according to plaintiff, to pay the remainder when they could. There is no evidence in the record that defendants complained of an overpayment of $868 (more than the $5,490 figure) before their counterclaim was filed. Mrs. Petersen testified that at the time they paid the $1,000, Mr. Petersen asked plaintiff, "Why did you go so far over your estimate or your bid?"

Defendants do not contend that the $1,000 payment was made in compromise or as an accord and satisfaction, but place their reliance on the contention that the $5,490 was a firm contract price and that the "overpayment" was a mistake, in that they thought a payment of $1,000 would bring the total of their payments to $5,490. Reviewing the case de novo on the record, we are not persuaded by defendants' version. By the same standard of review, we find the reasonable value of the work done to be the total of

the two bills, as contended for by plaintiff and disputed only by a witness who had done framing in the past but no cabinet work, and who had not been inside defendants' house. Regardless, however, of the construction which defendants appear to have placed upon the estimate, we must consider defendants' argument, actually straying from the assignments of error, that although plaintiff was entitled to recover for the reasonable value of the work done, his recovery could not exceed $5,490. Defendants cite *Denniston and Partridge Company v. Mingus,* 179 N.W.2d 748 (Iowa 1970), but in that case, in reviewing the trial court's finding that the parties had agreed plaintiff would build a crib and granary for "$5000, more or less," the Iowa Supreme Court held that the parties had an estimate, not a contract price, and the builder was entitled to recover on the theory of an implied contract for the fair and reasonable value of the work. The court pointed to the generally accepted definition of "estimated cost" of a building as its reasonable cost, erected in accordance with plans and specifications, and as not necessarily the amount agreed upon by the parties or as an offer to be accepted; that an estimate is the equivalent of "more or less"; that it does not pretend to be based on absolute calculations; and that the use of the term precludes accuracy. The court distinguished the case from the rule quoted in 17A C.J.S. *Contracts* § 363 at 368 (1963): "Where the contractor submits an estimate that the proposed work will cost not less than a certain sum and not more than another sum, whereupon he is directed to perform the work, no contract for a specific sum arises, and the contractor can recover the reasonable value of the services rendered, but not exceeding the larger sum." That is the holding of *Bates v. St. Anthony's Church,* 111 Neb. 426, 196 N.W. 638 (1923), which is also relied upon by defendants, who argue that "in the present case, there was no minimum in the estimate, just one figure that of

$5,490," and accordingly a maximum figure is thereby established. No authority for this proposition is stated, nor have we found any. There is authority to the contrary, as in *Vester J. Thompson, Jr., Inc. v. Citmoco,* 371 So. 2d 35 (Ala. Civ. App. 1977), where the contractor's estimate was $10,000 and the bill $15,420.79. The Alabama court quoted the *Denniston* case's definition of estimate, held that the contractor's recovery would not be limited to a $10,000 maximum, and distinguished the case from one in which a maximum amount had been quoted.

Where services are furnished to a party and knowingly accepted by him, the law implies a promise on his part to pay the reasonable value of the services. *Denton v. Nelson,* 205 Neb. 833, 290 N.W.2d 462 (1980).

The ultimate cost, compared with the estimate, was no doubt disappointingly high in the perspective of defendants, but we are cited to no authority and we are aware of no dominating principle which, on these facts and within reach of the assignments of error, require a result different from that decreed by the trial court.

AFFIRMED.

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

330 N.W.2d 747

Filed March 4, 1983. No. 82-143.

1. **Effectiveness of Counsel.** The two-part test to determine whether an attorney has effectively counseled a criminal defendant is that counsel must perform at least as well as one with ordinary criminal law skill and training in his or her region and must also conscientiously protect his client's interests.
2. **Effectiveness of Counsel: Proof.** A defendant challenging competency of counsel has the burden to establish it. In addition, defendant must show that he suffered prejudice in the defense of his case as a result of his attorney's actions or inactions.

3. **Effectiveness of Counsel.** Acquiring or permitting a single attorney to represent codefendants, often referred to as joint representation, is not per se violative of the constitutional guarantees of effective assistance of counsel.

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

John E. North, Jr., P.C., of Fromkin, Herzog, Jabenis & North, for appellant.

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

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and WARREN, D.J.

WARREN, D.J.

Defendant, Richard Pope, appeals from a judgment entered by the District Court of Douglas County, Nebraska, denying his request for post conviction relief, after an evidentiary hearing had been held. We affirm.

Pope was convicted in 1973, in a joint jury trial with his common-law wife, Evelyn Kilgore, of two counts of possession of a controlled substance with intent to deliver. The conviction was affirmed by this court in his direct appeal. *State v. Pope,* 192 Neb. 755, 224 N.W.2d 521 (1974).

The sole basis of Pope's request for an order vacating the judgment and conviction is the claim that he was denied the effective assistance of counsel in that (1) his counsel failed to suppress evidence seized by police in a warrantless search of the house where defendant was apprehended while frantically seeking to flush a considerable quantity of heroin and cocaine down the toilet; (2) his counsel failed to secure a severance of his trial and that of his codefendant, Evelyn Kilgore; (3) his trial counsel was unprepared; and (4) his counsel was prevented from providing effective assistance by a conflict of interest.

It is well established that one seeking post convic-

tion relief has the burden of establishing the basis for such relief and that the findings of the District Court in denying relief will not be disturbed on appeal unless they are clearly erroneous. *State v. Paulson,* 211 Neb. 711, 320 N.W.2d 115 (1982). The party challenging the adequacy of criminal trial representation has the burden of proof in showing incompetence, if any, therein. *State v. Hunt,* 212 Neb. 214, 322 N.W.2d 621 (1982).

Nebraska employs a two-part test for determining whether an attorney has effectively counseled a criminal defendant. First, counsel must perform at least as well as one with ordinary criminal law skill and training in his or her region. Counsel must also conscientiously protect his client's interests. In addition, defendant must show that he suffered prejudice in the defense of his case as a result of his attorney's actions or inactions. *State v. Journey,* 207 Neb. 717, 301 N.W.2d 82 (1981).

Defendant's first two claims of ineffective counsel are simply complaints that counsel was unable to convince the trial court and the Supreme Court that evidence should have been suppressed and that the codefendants should have had separate trials. Both issues were properly raised by counsel for defendant and fully argued. See *State v. Pope, supra.* Failure to prevail in either argument demonstrates the lack of merit in the positions taken by the defendant, rather than the ineffectiveness of counsel.

With reference to the defendant's third claim, we can simply state that the record shows convincingly that trial counsel Edward Fogarty and J. Bruce Teichman, who were retained by defendant to replace his previous attorneys 10 days before trial, were experienced trial attorneys who were sufficiently prepared to vigorously represent defendant and conscientiously protect his interests. Their failure to secure an acquittal of the defendant in the face of overwhelming evidence of guilt presented by

the State is not probative of inadequate preparation or ineffective counsel.

Lastly, defendant claims a conflict of interest because his attorneys, by his own choice, also represented his codefendant, Evelyn Kilgore. "Acquiring or permitting a single attorney to represent codefendants, often referred to as joint representation, is not per se violative of the constitutional guarantees of effective assistance of counsel. [Citation omitted.] It is necessary that the appellant show the conflict of interest actually existed." *State v. Kerns,* 203 Neb. 278, 282-83, 278 N.W.2d 348, 350-51 (1979).

Defendant claims that he and his codefendant Kilgore wanted to testify at the trial that the controlled substances were hers alone, thus absolving this defendant, but were prevented from doing so by his attorneys. He submits as proof an affidavit signed by Kilgore on August 27, 1978, nearly 5 years after the conviction of both defendants. "When a trial culminates in a verdict of guilty the temptation is great for a defendant, armed with hindsight, to claim that his lawyer's strategy in not permitting him to run the cross-examination gauntlet was motivated by a conflict of interest. We do not say that such belated assertions are to be ignored. Each case must, of course, be viewed on its own facts. However, in the absence of objective evidence of corroboratory circumstances, such post-trial claims must be viewed with some suspicion . . . ." *United States v. Wisniowski,* 478 F.2d 274, 284 (2d Cir. 1973). Here, the experienced trial judge viewed the decision to allow neither codefendant to testify as showing merely competent counsel exercising sound tactical judgment and nothing more. No conflict of interest is apparent from a careful reading of the record. We find no conflict of interest proven by the defendant and, thus, no prejudice caused by the joint representation.

The decision of the trial court in denying relief is affirmed.

AFFIRMED.

ROADRUNNER DEVELOPMENT, INC., ET AL., APPELLANTS, v. ARTHUR AND SHARON KAY SIMS ET AL., APPELLEES.

330 N.W.2d 915

Filed March 4, 1983. No. 82-204.

1. **Pleadings: Class Actions.** A petition which contains no facts from which it can be concluded that it is impracticable to bring all of the parties before the court fails to state a necessary predicate for a class action.
2. **Pleadings.** For purposes of determining the sufficiency of a petition to state a cause of action, we must accept as true all facts well pleaded, but we do not accept as true facts not well pleaded, nor do we accept as true conclusions of law or of the pleader.
3. **Restrictive Covenants.** In determining whether the character of a neighborhood has so changed that the existing restrictive covenants can no longer be enforced, the test ordinarily is whether the original purpose and intention of the parties creating the restrictions are no longer of substantial benefit to the residents. The question is not whether suitable persons will in the future purchase property in the addition, but whether the restrictions still preserve to the addition its character created by the covenants at issue.
4. **Laches: Demurrer.** Where laches of the plaintiff and the staleness of his claim are apparent from the petition, objection thereto may be taken by demurrer.
5. **Laches.** Laches does not grow out of the mere passage of time but is founded upon the inequity of enforcing a claim where there has been a change in the condition of the property or in the relations of the parties.
6. **Laches: Proof.** A plaintiff whose petition shows apparent laches on its face must generally plead and prove an excuse for the delay.

Appeal from the District Court for Hall County: RICHARD L. DEBACKER, Judge. Affirmed.

James H. Truell, for appellants.

James I. Shamberg of Cronin, Shamberg & Wolf, for appellees Rockwell.

Carl E. Willard, for appellees Hayes and Larkins.

KRIVOSHA, C.J., WHITE, and CAPORALE, JJ., and BUCKLEY, D.J., and COLWELL, D.J., Retired.

CAPORALE, J.

The trial court dismissed the last amended petition of the plaintiffs-appellants, Roadrunner Development, Inc. (Roadrunner), and John and Ruth Goding, husband and wife (Godings). The trial court had earlier sustained the demurrers of certain of the defendants-appellees, and plaintiffs elected to stand on the aforesaid petition. Plaintiffs appeal from the order of dismissal. We affirm.

Plaintiffs filed this declaratory judgment action to declare covenants restricting the use of certain described lands null and void, to set them aside, and to enjoin their enforcement. The relief is sought as to the named defendants-appellees "individually and as representatives of a class and all owners of lots in the subdivision."

According to the facts recited in the operative petition, in July of 1955 Godings agreed to purchase two lots in Roush Subdivision, Hall County, Nebraska. The purchase price was paid in monthly installments pursuant to a contract which specified certain use restrictions. These restrictions, among other things, required that the land be used only "for dwelling . . . . No dwelling shall be constructed on less than 8,000 sq. feet." In 1960 or 1966, it is not clear when since both dates are alleged, but in any event 2 days prior to the deed of conveyance delivered to the Godings pursuant to their contract, the owners of the subdivision executed and filed certain restrictive covenants which differ from those in the Godings' agreement and require that the property "be used for single family residential development of ranch style design only and requiring a minimum 50 foot front yard setback of any structure upon the lot. No multi-family, two-story or commercial establishments of any kind are to be erected." The petition states all subdivision lots "have been sub-

ject" to the last-described restrictions except for Block 4, which is owned by defendant-appellee Grand Island Tennis Club, Inc., and is used as a tennis establishment. Lots 5, 7, 8, and 9 in Block 2 have also allegedly never been subject to the last-described restrictions. In November of 1979 Roadrunner obtained title to 31 lots located in Blocks 1, 2, 5, and 6. None of the exempted lots in Block 2 were involved in the Roadrunner transaction. The petition further alleges that when the subdivision was dedicated and the restrictive covenants filed, the property within the subdivision was on the outskirts of the city of Grand Island and the property surrounding it was agricultural or single-family residential in nature. According to the petition, time, owing to the general growth of the city of Grand Island, has changed the uses to which property in "the neighborhood and in the vicinity" of plaintiffs' property is being put. Among other things, a mobile home court has been established to the south of the subdivision, traffic has increased, and the city of Grand Island has adopted a master plan calling for multifamily residential development in "the area of" Blocks 1, 2, 5, and 6 for the purposes of acting as a buffer between commercial and single-family residential development. Blocks 3 and 4 of the subdivision have been zoned as commercial property. Roadrunner concedes it seeks to enhance the value of the property it has purchased by changing the uses to which it may be put.

The defendants-appellees Randall D. and Donna L. Rockwell and Anita Elstermeier demurred on the grounds that the petition failed to state a cause of action and that there was a misjoinder of parties plaintiff. Defendants-appellees Reuben L. and Vivian Hayes, Iva M. Larkins, and Scott and Terri Bilslend elected to demur only on the ground that the petition failed to state a cause of action.

We turn our attention first to the purported class action nature of this action. Neb. Rev. Stat. § 25-319

(Reissue 1979) provides: "When the question is one of a common or general interest of many persons, or when the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all." Even if there were no due process concerns with respect to an effort to adjudicate the property rights of persons not served with process, an issue we need not now address and therefore do not now decide, the operative petition contains no facts from which it can be concluded that it is "impracticable" to bring all of the property owners in Roush Subdivision before the court. The petition therefore fails to state a cause as a class action against anyone. We must also determine, however, whether the action may proceed against the individual and named defendants. See *Blankenship v. Omaha P. P. Dist.*, 195 Neb. 170, 237 N.W.2d 86 (1976).

Neb. Rev. Stat. § 25-806 (Reissue 1979) provides that a defendant may demur to the petition when, inter alia, it appears on its face that "there is a defect of parties, plaintiff or defendant," or that "the petition does not state facts sufficient to constitute a cause of action."

The Roadrunner and the Godings transactions are not the same. Not only did they take place at different times and involve different lands, but the Godings' claimed right of action in part rests upon the variance between the restrictive covenants filed prior to the conveyance of title to them and those specified in their purchase agreement. Those facts are not available to the plaintiff Roadrunner. The fact that both Roadrunner and the Godings seek the same relief does not, in and of itself, entitle them to join in a single action. Those defendants who demurred on the ground there was a misjoinder of parties plaintiff were correct, and the trial court properly sustained those demurrers.

As to the defendants who did not demur on the misjoinder ground, we must determine whether the

petition states a cause of action on behalf of either Roadrunner or the Godings. For purposes of that examination we must accept as true all facts well pleaded, but we do not accept as true facts not well pleaded, nor do we accept as true conclusions of law or of the pleader. *Shelton v. Board of Regents,* 211 Neb. 820, 320 N.W.2d 748 (1982).

Plumb v. Ruffin, ante p. 335, 328 N.W.2d 792 (1983), teaches us that in determining whether the character of a neighborhood has so changed that the existing restrictive covenants can no longer be enforced, the test ordinarily is whether the original purpose and intention of the parties creating the restrictions are no longer of substantial benefit to the residents. The question is not whether suitable persons will in the future purchase property in the addition, but whether the restrictions still preserve to the addition its character created by the covenants at issue. In *Plumb* the defendant had attempted to show, as plaintiffs have alleged here, that the neighborhood surrounding the lots in question had changed to such an extent that the original purpose and intention of the parties in creating the restrictions could no longer be accomplished. There was evidence that some variance from the restricted single-family use of some lots had taken place and that there was commercial development, in accordance with the original plans, in areas immediately adjacent to defendant's lots. The remaining portions of the subdivision continued as residential property. In upholding the covenants, we noted the area had nonetheless developed as originally intended. Plaintiffs cite *Lund v. Orr,* 181 Neb. 361, 148 N.W.2d 309 (1967), which contains much of the same language as does *Plumb,* but held that, where 6 months later the purchaser's grantor sold all remaining land in the quarter section for the construction and development of a packing plant, the purchaser was no longer bound by covenants restricting his 1-acre tract to residential use. Plaintiffs also cite *Reed v. Williamson,* 164

Neb. 99, 82 N.W.2d 18 (1957), which upheld restrictive covenants for the stated period of their duration, thus preventing the drilling of oil and gas wells for that period. The test applied was part of the rule restated in *Plumb, supra.*

The question here, therefore, becomes whether plaintiffs have stated facts sufficient, if proved, to establish that, irrespective of whether suitable persons will in the future purchase property in Roush Subdivision, the character of the neighborhood has so changed that the original purpose and intention of the parties creating the restrictions are no longer of substantial benefit to the subdivision's residents and the character of the subdivision as a single-family residential area cannot be maintained. The facts well pleaded in these respects are that the use of certain lots within the subdivision is unrestricted and that the general plan of development of the area has been thwarted by growth and a change in the surrounding areas. As to the first complaint, there is nothing particularly inconsistent with the presence of a tennis club operation within a residential area, nor are there any allegations as to how Block 4 came to be devoted to such use. As to the other unrestricted lots, there is no allegation as to what, if any, use is being made of them. As to the second complaint, the fact that adjoining or surrounding property is used for business purposes does not, at least in and of itself, change the character of the specific subdivision so that the property therein may no longer be entitled to have the restriction enforced. There are no allegations in this petition that the Roush Subdivision per se has changed, only that certain parcels either surrounding it or in the same general vicinity as a whole have changed. The actions of the city through rezoning in master plan designations are irrelevant with respect to the enforcement of restrictive covenants. In such a situation the applicable restrictive covenant continues to override and supersede any less restrictive zoning

designations. See, *Staninger v. Jacksonville Expressway Authority,* 182 So. 2d 483 (Fla. App. 1966); *Morgan v. Matheson,* 362 Mich. 535, 107 N.W.2d 825 (1961); *Tower v. Mudd Realty Company,* 317 P.2d 753 (Okla. 1957); *Burgess v. Magarian,* 214 Iowa 694, 243 N.W. 356 (1932).

In short, there are no well-pleaded facts from which it can be concluded the restrictions do not still preserve the character of the property contained in Roush Subdivision as a single-family residential district and that the original purpose and intention of the parties creating the restrictions pursuant to the general scheme has been destroyed such that the changed condition means the restrictions are no longer of a substantial benefit to the residents of that subdivision. Indeed, a reading of the totality of the allegations contained in plaintiffs' petition suggests that Roush Subdivision itself has been largely untouched by any substantial changes. It cannot be said from the allegations in this petition that there has been any change which would even begin to represent a change of such magnitude that the original plan, purpose, and scheme had been so destroyed as to render the benefits of the restrictive covenants inoperable. The trial court was therefore correct in sustaining the demurrers grounded on the failure of the petition to state a cause of action by Roadrunner.

The same must be said as to the Godings. As pointed out earlier, their installment sales contract contemplating certain restrictions was executed in July of 1955; in 1960 or 1966 different restrictions were filed and 2 days later title was conveyed to the Godings; it was not until March 1981, or at least 15 years after the conveyance to the Godings, that the operative petition was filed. This jurisdiction is committed to the doctrine that where laches of the plaintiff and the staleness of his claim are apparent from the petition, objection thereto may be taken by demurrer. *Kozina v. Watkins Lumber Co.,*

146 Neb. 594, 20 N.W.2d 606 (1945); *Bend v. Marsh,* 145 Neb. 780, 18 N.W.2d 106 (1945). Laches does not, however, grow out of the mere passage of time but is founded upon the inequity of enforcing a claim where there has been a change in the condition of the property or in the relations of the parties. *Kozina v. Watkins Lumber Co., supra; Bend v. Marsh, supra.* The gravamen of the Godings' claim is that the land conveyed to them is different in quality than that which they contracted to purchase. Accepting, as we here must, the truth of the factual allegations leading to that conclusion, the Godings would appear, at first blush, to have stated a cause of action. See *Grand Island Hotel Corp. v. Second Island Development Co.,* 191 Neb. 98, 214 N.W.2d 253 (1974), holding that the covenants of warranty and title contained in a deed were breached by the existence of a paramount leasehold interest in a third party. Had the Godings elected to bring an action for damages, they would have had, at the latest, 5 years from the date of the conveyance to them. This jurisdiction is also committed to the rule that a plaintiff whose petition shows apparent laches on its face must generally plead and prove an excuse for the delay. *Baxter v. National Mtg. Loan Co.,* 128 Neb. 537, 259 N.W. 630 (1935). No such excuse has been pled by the Godings.

The trial court, therefore, also correctly sustained those demurrers resting on the sole ground that the operative petition failed to state a cause of action as to each defendant.

AFFIRMED.

KENNETH KABA, APPELLANT, V. CHARLES R. FOX, APPELLEE.

330 N.W.2d 749

Filed March 4, 1983. No. 82-236.

1. **Criminal Law: Constitutional Law: Appeal and Error.** Delaying

the right of appeal beyond a commitment for evaluation under Neb. Rev. Stat. § 83-1,105(3) (Reissue 1981) and until a final sentence is pronounced does not violate article I, § 23, of the Nebraska Constitution, which grants to everyone in a felony case the right to appeal to the Supreme Court.

2. **Criminal Law: Constitutional Law: Speedy Trial.** A delay in sentencing of 90 days pending a court-imposed evaluation under Neb. Rev. Stat. § 83-1,105(3) (Reissue 1981) is not such a delay as to be violative of the sixth amendment right to a speedy trial.

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

Forrest F. Peetz of Peetz & Peetz, for appellant.

B. W. Strope, Holt County Attorney, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, HASTINGS, and CAPORALE, JJ., and BRODKEY, J., Retired, and RONIN, D.J., Retired.

HASTINGS, J.

This is the second appearance of this case. In a previous proceeding, *State v. Kaba,* found at 210 Neb. 503, 315 N.W.2d 456 (1982), the defendant, following a conviction of two felonies, appealed from an order of the District Court committing him to the Department of Correctional Services for an evaluation under Neb. Rev. Stat. § 83-1,105(3) (Reissue 1981). We held that because no sentence had been pronounced, the judgment was not final and therefore not appealable, and since the defendant did not challenge the constitutionality of § 83-1,105(3), we dismissed the appeal.

In this case Kenneth Kaba, the defendant in the previous appeal, brought a habeas corpus action against the sheriff to whom the District Court had remanded Kaba for the purpose of carrying out its previous commitment order. The court denied the application for the writ. Kaba appeals, assigning as error the failure of the District Court to grant the writ and the failure to find that § 83-1,105(3) is unconstitutional. We affirm.

A statute similar to § 83-1,105(3) is Cal. Penal Code

§ 1203.03(a) (West 1982), which provides: "In any case in which a defendant is convicted of an offense punishable by imprisonment in the state prison, the court, if it concludes that a just disposition of the case requires such diagnosis and treatment services as can be provided at a diagnostic facility of the Department of Corrections, may order that defendant be placed temporarily in such facility for a period not to exceed 90 days, with the further provision in such order that the Director of the Department of Corrections report to the court his diagnosis and recommendations concerning the defendant within the 90-day period." Compare that with § 83-1,105(3), which states: "Where the court is of the opinion that imprisonment may be appropriate but desires more detailed information as a basis for determining the sentence to be imposed than has been provided by the presentence report, [the court may] commit an offender to the Department of Correctional Services for a period not exceeding ninety days. . . ."

In *People v. Beckett,* 262 Cal. App. 2d 145, 68 Cal. Rptr. 464 (1968), the defendant pleaded guilty to three counts of forgery and was committed to the Director of Corrections for observation under § 1203.03. She appealed. The California Court of Appeals, Second District, held that her commitment for observation was not "a special proceeding and appealable as a final judgment." *Id.* at 146, 68 Cal. Rptr. at 465. See Neb. Rev. Stat. § 25-1902 (Reissue 1979). The California court went on to say that "A commitment under section 1203.03 of the Penal Code is an integral part of the criminal probation and sentencing process. If the Legislature had decided that an order for commitment under that section be separately appealable, it would have so provided in the Penal Code. It did not do so." *Id.* at 146, 68 Cal. Rptr. at 465. We agree with that reasoning.

Kaba cites *State v. Kelley,* 198 Neb. 805, 255 N.W.2d 840 (1977), for the proposition that article I, § 23,

of the Nebraska Constitution provides that "In all cases of felony the defendant shall have the right of appeal to the Supreme Court . . . ." However, § 25-1902 explains that a final order which may be appealed is one "affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding . . . ." The fact of the matter is that every defendant, including Kaba, is entitled to an appeal. He may exercise such right when a final order, i.e., a sentence, is imposed. No such final order has as yet been entered. *State v. Kaba, supra; People v. Beckett, supra.*

The petitioner also insists that by delaying sentencing pending an evaluation as permitted by § 83-1,105(3) a defendant is denied his right to a speedy trial as provided by the sixth amendment to the U.S. Constitution, and by Article I, § 11, of the Nebraska Constitution. In *Brooks v. United States,* 423 F.2d 1149 (8th Cir. 1970), the defendant pleaded guilty to a felony on October 19, 1962. Sentencing was scheduled for January 23, 1963. In the meantime, the defendant was arrested and confined in jail as a result of a state murder charge. He was found guilty on the latter charge and sentenced to life imprisonment. On September 6, 1963, the defendant appeared in federal court and was sentenced on the original federal charges. At 1152 n. 3 the court observed that a 90-day interval for the court to conduct a presentence investigation is reasonable on its face. In affirming the dismissal of petitioner's motion to vacate the federal court sentence, the court stated: "In the instant case, the actual delay in the sentencing for the federal charges was from January 23, 1963, (the date originally set) to September 6, 1963, that is, approximately seven and one-half months. Even if one were to consider the delay to extend from October 19, 1962, to the date of actual sentence, a little over ten months, this interval of

time is much less than that found in many cases which have turned away similar Sixth Amendment claims. We are again reminded that the essential ingredient of the Sixth Amendment right to a speedy trial is 'orderly expedition and not mere speed.' " *Id.* at 1152.

A delay in sentencing of 90 days pending a court-imposed evaluation is not such a delay as to be violative of the sixth amendment right to a speedy trial.

Section 83-1,105(3) is not unconstitutional, and the District Court was correct in denying the petitioner's application for a writ of habeas corpus. Its judgment is affirmed.

AFFIRMED.

THOMAS P. ROEPKA, APPELLANT, V. CHARLES R. FOX, APPELLEE.

330 N.W.2d 751

Filed March 4, 1983. No. 82-257.

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

Arlen D. Magnuson, for appellant.

B. W. Strope, Holt County Attorney, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, HASTINGS, and CAPORALE, JJ., and BRODKEY, J., Retired, and Ronin, D.J., Retired.

HASTINGS, J.

This case involves a conviction of the petitioner, Thomas P. Roepka, of the January 15, 1982, felony offenses of possession of cocaine and possession of LSD. The District Court ordered him committed to the Department of Correctional Services for a 90-day evaluation under the provisions of Neb. Rev. Stat. § 83-1,105(3) (Reissue 1981). Relying upon our holding and statement in *State v. Kaba,* 210 Neb. 503,

315 N.W.2d 456 (1982), the petitioner applied for a writ of habeas corpus, which was denied by the District Court. This case was argued in this court with *Kaba v. Fox, ante* p. 656, 330 N.W.2d 749 (1983), which decision is determinative of all the issues raised here.

The judgment of the District Court in denying the application for a writ of habeas corpus was correct and its judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. BILLY BRUCE, APPELLANT.
STATE OF NEBRASKA, APPELLEE, V. BETTY BRUCE, APPELLANT.

330 N.W.2d 752

Filed March 4, 1983. Nos. 82-502, 82-503.

Municipal Ordinances: Presumptions. The existence of a valid ordinance creating the offense charged will be presumed where the ordinance is not properly set forth in the record.

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

Clay B. Statmore and Michael J. Elsken of the Statmore Law Offices, for appellants.

John C. McQuinn, Assistant City Prosecutor, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and MORAN, D.J.

PER CURIAM.

In these consolidated cases the defendants were charged with violating Lincoln Municipal Code § 27.81.010(d) (1979) by unlawfully having a mobile home on their property. The Lincoln Municipal Court, following trial on stipulated facts, found the defendants guilty and fined them $25 each, plus

court costs. The defendants appealed to the District Court, which affirmed the judgments and sentences of the municipal court, and this appeal followed.

The defendants on this appeal contend that the mobile home ordinance is unconstitutional, arbitrary, and unreasonable as applied to them.

The section of the Lincoln Municipal Code under which the defendants were sentenced does not appear in the record. This court will not take judicial notice of an ordinance which does not appear in the record. The existence of a valid ordinance creating the offense charged will be presumed where the ordinance is not properly set forth in the record. *State v. Shea,* 208 Neb. 17, 301 N.W.2d 602 (1981); *State v. Long,* 206 Neb. 446, 293 N.W.2d 391 (1980).

In the absence of the relevant ordinance in the record, the convictions and sentences are affirmed.

AFFIRMED.

Editor's Note: The opinion in *Flood v. Keller* published in the Advance Sheets at this citation, 213 Neb. 662-664, was withdrawn from the bound volume because reargument was granted.

JAMES D. QUINN, TRUSTEE, APPELLANT, V. GODFATHER'S INVESTMENTS, INC., A NEBRASKA CORPORATION, ET AL., APPELLEES.

330 N.W.2d 921

Filed March 11, 1983. No. 81-820.

1. **Declaratory Judgments: Appeal and Error.** This court has treated the determination of factual issues in a declaratory judgment action, which would otherwise be an action at law, in the same manner as if a jury had been waived. The findings of the trial court therefore have the effect of the verdict of a jury and will not be set aside unless clearly wrong.
2. **Contracts.** A provision of a contract is ambiguous when, considered with other pertinent provisions as a whole, it is capable of being understood in more senses than one.
3. **Contracts: Evidence.** In interpreting a written contract, the meaning of which is in doubt and dispute, evidence of prior or contemporaneous negotiations or understandings is admissible to discover the meaning which each party had reason to know would be given to the words by the other party.
4. **Contracts.** If it can be plainly seen from all the provisions of the instrument taken together that the obligation in question was within the contemplation of the parties when making their contract or is necessary to carry their intention into effect, the law will imply the obligation and enforce it.

Appeal from the District Court for Douglas County: D. NICK CAPORALE, Judge. Affirmed.

Paul A. Rauth and Ephraim L. Marks of Marks, Clare, Hopkins, Rauth & Cuddigan, for appellant.

Edward G. Warin and Eugene P. Welch of Gross, Welch, Vinardi, Kauffman & Day, P.C., for appellees.

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

WHITE, J.

This is a declaratory judgment action brought by James D. Quinn, lessor-appellant, against God-

father's Investments, Inc., the lessee-appellee. (The term appellee hereafter shall refer to both Godfather's Investments, Inc., and William M. Theisen, president and chairman of the board of Godfather's Investments, Inc.) The action sought determination of whether or not the appellee was liable for lost rental income and the value of contemplated leasehold improvements upon a claim arising out of a lease agreement. The trial court entered judgment in favor of the appellee, finding (1) that the lease was ambiguous with respect to the term "financing," (2) that the evidence failed to establish mutual assent among the parties with respect to the terms of said financing, and (3) that the evidence establishes that, had there been such mutual assent, the appellee made a good faith effort to obtain financing. We affirm.

Godfather's Investments, Inc., owns and operates pizza restaurants and also sells franchises to others under the name of Godfather's Pizza. In the fall of 1979 appellee embarked on a plan to erect a home office building to meet its long-term office space requirements. In the course of its search for a suitable site, appellee became interested in leasing and building upon a tract of about 2.7 acres of unimproved land located at 107th and Pacific Streets, Omaha, Nebraska. Title to the property was held in trust by James D. Quinn.

During negotiations between the parties and prior to the execution of the lease, the appellee signed an application with Banco Mortgage Company in an attempt to secure funds for the building project. The application provided that Banco would act at the exclusive agent for the appellee in locating a lender.

On February 14, 1980, after extensive negotiations, the parties executed the lease agreement. The term of the lease was 50 years, commencing June 1, 1980,

with the lessee having two 10-year options to renew. The lease agreement contained the following provision: "33. . . . H. Should Lessee be unable to obtain financing for the construction of the contemplated improvements, Lessee may terminate this lease, provided, however, termination shall not require Lessor to refund any lease payments made prior to termination, and Lessee shall be bound to make any payments becoming due on or before the date of termination."

In January 1980 Banco Mortgage Company had narrowed its list of potential lenders to four: Teachers Insurance and Annuity Association, Pacific Mutual Insurance Company, Metropolitan Life Insurance Company, and Union Labor Life Insurance Company. Between February 5 and February 12, 1980, Banco submitted the appellee's applications for mortgage financing on terms of $1.5 million, approximately 12 percent interest, and a payout on a 15- to 30-year amortization schedule to the abovementioned insurance companies. None of the four companies were interested in making a loan to the appellee on the terms contained in the applications, nor were any other terms mentioned to appellee at which a loan would have been possible. Because of interest rate increases and unstable market conditions at the time the applications were rejected, Banco recommended that the appellee withdraw from the market until more favorable conditions might prevail.

Due to a dramatic increase in its staff, the appellee decided to rent office space. The appellee formally notified the appellant by letter dated May 2, 1980, that it was terminating the project because it could not obtain financing. This litigation followed.

The appellant's first contention is that this was an equitable declaratory judgment proceeding tried to

the court without a jury and, therefore, this court must redetermine the issues of fact upon a de novo review of the record. This issue was specifically dealt with in *Larutan Corp. v. Magnolia Homes Manuf. Co.,* 190 Neb. 425, 433, 209 N.W.2d 177, 182 (1973), where we stated: "This court has treated the determination of factual issues in a declaratory judgment action which would otherwise be an action at law in the same a anner as if a jury had been waived. The findings of the trial court therefore have the effect of the verdict of a jury and will not be set aside unless clearly wrong."

The proceedings in the trial court clearly took the form of an action at law for damages for the breach of a lease agreement. We therefore find the rule of *Larutan* applicable here.

The appellant also argues that the trial court erred in (1) finding that the lease was ambiguous, (2) finding that the evidence failed to establish mutual assent between the parties as to the meaning of financing, and (3) finding that the appellee had made a good faith effort to obtain financing even if mutual assent to the term was present.

In viewing the lease we are in agreement with the trial court that it was ambiguous. The lease states that should the lessee (appellee) be unable to obtain financing for the construction of the contemplated improvements, the lessee may terminate the lease. The lease fails to explain or specify what is meant by the term "financing." A provision of a contract is ambiguous when, considered with other pertinent provisions as a whole, it is capable of being understood in more senses than one. *Hansen v. Circle Lake Development Corp.,* 199 Neb. 678, 260 N.W.2d 609 (1977).

In interpreting a written contract, the meaning of

which is in doubt and dispute, evidence of prior or contemporaneous negotiations or understandings is admissible to discover the meaning which each party had reason to know would be given to the words by the other party. *Ely Constr. Co. v. S & S Corp.*, 184 Neb. 59, 165 N.W.2d 562 (1969).

The trial court was therefore correct in allowing the admission of parol evidence for the purpose of explaining the true nature of the transaction between the parties.

Although the lease agreement contained the promise that the appellee would attempt to obtain financing in order to construct the leasehold improvements, the parol evidence admitted showed that the parties failed to agree on the exact definition of the term "financing." The trial court held that mutual assent was lacking and therefore a valid contract did not exist.

In discussing the implication of obligations, the writers of 17 Am. Jur. 2d *Contracts* § 255 at 649 (1964) stated: "If it can be plainly seen from all the provisions of the instrument taken together that the obligation in question was within the contemplation of the parties when making their contract or is necessary to carry their intention into effect, the law will imply the obligation and enforce it."

In the instant case, while it might be a better practice to set forth the interest rate, the term, the rate of repayment, and other terms and conditions, it was not necessary to an enforceable agreement because the court implies into the contract that a good faith effort will be made by the person promising to seek financing. See *Hansen, supra.* We find it unnecessary to discuss this point further because the trial court held, in the alternative, that even if a valid contract existed, the appellee made a good

faith effort to accomplish financing for the construction of the leasehold improvements.

There is ample evidence in the record to sustain the trial court's findings that the appellee made a bona fide effort to obtain financing. The appellee made a reasonable effort to determine what type of loan it needed and made a valiant effort to obtain it. Every loan application that was filled out by the appellee contained the same terms. The appellee contacted every possible interested lender under its exclusive contract with Banco. The four insurance companies which turned down the appellee's loan did so without suggesting any different rates at which a loan may have been feasible. It was at this time that Banco advised the appellee to withdraw from the market until it stabilized.

Other contentions raised by the appellant have been examined and found to be without merit.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GRANT MANCHESTER, APPELLANT.

___ N.W.2d ___

Filed March 11, 1983. No. 81-921.

1. **Homicide: Criminal Attempt.** Attempted murder requires proof of conduct amounting to a substantial step toward commission of the crime and which is strongly corroborative of the necessary criminal intent.
2. _____: _____. Solicitation of an innocent agent to kill the victim may be proof of conduct amounting to a substantial step toward commission of attempted murder.
3. _____: _____. Proof that the defendant made plans for the murder, solicited a killer, discussed the contract price and set the

money aside in his billfold, arranged for a weapon, and showed the killer the victim, his residence, and his place of work is sufficient evidence of conduct amounting to a substantial step toward commission of attempted murder in the first degree, and will support a finding of guilty.

4. **Criminal Attempt.** Abandonment is not a defense to criminal attempt in Nebraska.
5. **Trial: Evidence.** Generally, the rule of completeness is concerned with the danger of admitting a statement out of context. When this danger is not present it is not an abuse of discretion to fail to require the production of the remainder or, if it cannot be produced, to exclude all the evidence.
6. **Evidence: Appeal and Error.** The general rule is that the admissibility of physical evidence rests in the discretion of the trial court, and the determination of admissibility will not be overturned unless there is a clear abuse of discretion.
7. **Criminal Law: Jurisdiction.** Where requisite elements of the completed crime are committed in different jurisdictions, any state in which an essential part of the crime is committed has jurisdiction of the offense.
8. **Records: Appeal and Error.** A bill of exceptions is the only vehicle for bringing evidence before the Supreme Court.
9. _____: _____. Opening and closing statements must appear in the bill of exceptions before alleged errors concerning them can be reviewed.
10. **Criminal Law: Prosecuting Attorneys.** Absent bad faith and prejudice to the defendant, the action of the trial court with regard to alleged misconduct of the prosecutor will not be deemed an abuse of discretion.
11. **Sentences.** A sentence imposed within the statutory limits will not be overturned on appeal absent an abuse of discretion by the trial court.

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

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

Grant Manchester, pro se.

Paul L. Douglas, Attorney General, and G. Roderic Anderson, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and WARREN, D.J.

BOSLAUGH, J.

The defendant was convicted of attempted first

degree murder and sentenced to imprisonment for 16 to 30 years. He has appealed and assigned as error that the evidence was insufficient to support the finding of guilt; that instruction No. 10, relating to the defense of abandonment, was erroneous; and that the trial court erred in admitting into evidence tape recordings of his conversations with a witness. In a separate pro se brief the defendant contends the court lacked jurisdiction because some of the acts occurred in the State of Iowa; there was misconduct of the prosecuting attorney in his opening and closing statements; and the sentence was excessive.

The record shows that in April 1978 the defendant began having an affair with Mrs. Carolyn Rickard, who was married to Donald Rickard. In September 1979 the defendant and Mrs. Rickard went to Florida for about 3 weeks. Mrs. Rickard left a note for her husband, explaining that she was leaving to think about getting a divorce. Following her return to Omaha Mrs. Rickard told the defendant that she wanted to break off her relationship with him and go back with her husband. Mrs. Rickard testified that the defendant harassed her on several occasions after she announced her intentions, but she continued to see the defendant until January 1981, 6 months before the time of his arrest on this charge.

Donald Rickard testified that in late 1979 his wife told him of her relationship with the defendant. Rickard first encountered the defendant in a shopping center in December 1980. Rickard testified that the defendant had called him at work and had had nude pictures of Mrs. Rickard delivered to him at his place of employment. In April or May 1981 the defendant threatened Rickard with a gun while Rickard was at work; the defendant was arrested and convicted of third degree assault.

Carthell Sherrill, a cab driver for Happy Cab and a coworker of the defendant, testified that in April 1981 the defendant approached him about wanting "to give a guy a ride in a black limousine." He tes-

tified that the defendant wanted Sherrill to kill Donald Rickard, and, for insurance reasons, the defendant wanted it to look accidental.

Sherrill testified that he and the defendant discussed this matter several times a week. The initial price discussed was $800 "C.O.D." The defendant showed Sherrill the money on several occasions. The defendant and Sherrill discussed several plans concocted by the defendant for the killing. In the first, Rickard was to look like the victim of a hit and run. The next plan was to shoot Rickard while he was in his car. Another plan was to shoot him at his place of employment. The final plan was to shoot Rickard as he stood at his bedroom window.

Sherrill testified that the defendant took him on the routes Rickard used to and from work, and to his place of employment. The defendant showed Sherrill the intended victim through binoculars while Rickard was entering his workplace. The defendant also took Sherrill to Rickard's residence.

Sherrill and the defendant discussed a weapon for the killing. Sherrill told the defendant he had a .30/06 rifle, and showed it to him. The defendant discussed arranging an alibi for himself.

On June 2, 1981, Sherrill went to the police and informed them of the defendant's plan. Sherrill agreed to be outfitted with a microphone and to meet again with the defendant while under police surveillance. Sherrill, so outfitted, drove his cab out to the Omaha airport and met the defendant. The defendant had been drinking heavily that day. The defendant and Sherrill drove to a Kwik Shop in Carter Lake, Iowa, where the defendant made calls regarding the purchase of a scope for the rifle. The defendant gave Sherrill $25 for the purchase of a scope; Sherrill turned the money over to police.

At this meeting Sherrill suggested to the defendant that a third person be used for the shooting, as Sherrill's eyes were not good enough for such a distance. The defendant did not approve of another's

involvement, as he felt it was too risky. The defendant was to meet Sherrill again on the evening of June 2, but he failed to show. These conversations between the defendant and Sherrill were recorded and took place under police surveillance.

On June 3, 1981, Sherrill, again outfitted with a recording device, drove his car out to the airport. This time he brought along an undercover police officer, who was posing as a killer-for-hire. The officer had a .30/30 rifle with a scope along with him.

Sherrill met the defendant at the airport and agreed to talk with him at Kiwanis Park in Omaha. At that meeting the defendant was uncomfortable and nervous about the presence of a third person. The officer showed the defendant the gun, when the defendant finally approached Sherrill's car. Sherrill informed the defendant that they wanted partial payment up front, but the defendant insisted the deal was C.O.D. The defendant indicated that he might buy the gun. The defendant pulled out "a bunch of hundred dollar bills" and showed them to Sherrill. The defendant was then arrested and charged with attempted first degree murder. At the time of his arrest the defendant had $995 on his person, $800 of which was folded up between two pieces of paper.

The defendant maintained that any plans to kill Rickard were not seriously formulated and were devised by Sherrill. The defendant testified that Rickard was, by his wife's account, a dangerous man. The defendant felt he had been framed in a plot between Sherrill and Rickard.

The defendant contends that the evidence was insufficient to support the finding of guilt because the evidence did not show that the defendant had taken a "substantial step" toward the commission of the crime. The defendant argues that his acts amounted to "mere preparation."

Neb. Rev. Stat. § 28-201 (Reissue 1979) provides in part: "(1) A person shall be guilty of an attempt to commit a crime if he:

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

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

"(2) When causing a particular result is an element of the crime, a person shall be guilty of an attempt to commit the crime if, acting with the state of mind required to establish liability with respect to the attendant circumstances specified in the definition of the crime, he intentionally engages in conduct which is a substantial step in a course of conduct intended or known to cause such a result.

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

In *State v. Sodders,* 208 Neb. 504, 507, 304 N.W.2d 62, 64-65 (1981), we said: "[T]he statute [§ 28-201] requires that the dangerous disposition [of the actor] be manifested by some intentional act which would constitute a substantial step toward the completion of the crime if the circumstances were as the actor believed them to be. . . . Some examples of such conduct might be: Lying in wait for the intended victim; unlawful entry into a structure where it is contemplated that the crime will take place; possession or fabrication of the material necessary to complete the act which finally would constitute the crime; or soliciting an innocent agent to engage in conduct constituting an element of the crime."

In *Sodders, supra,* the defendant had arranged for the murder of his wife and had made a downpayment on the $5,000 price. The defendant pleaded guilty but filed a motion to vacate the judgment and sentence, arguing that § 28-201 was unconstitutionally vague. The motion was overruled and the judgment affirmed on appeal. We held the statute gave

adequate notice of the prohibited conduct and that the defendant's acts were sufficient to constitute the crime. See, also, *State v. Schmidt, ante* p. 126, 327 N.W.2d 624 (1982), in which the evidence was held sufficient to support a conviction for attempted murder.

Conduct similar to that in the present case has been held to support convictions of attempted murder. In *Duke v. State,* 340 So. 2d 727 (Miss. 1976), the defendant solicited an employee to kill his business partner. The murder was to take place on a hunting trip. That plan failed and the defendant sought to hire another killer. An FBI agent posed as the killer and collected $11,500 from the defendant after representing to the defendant that the partner was dead. This evidence was held sufficient to sustain the conviction, as the defendant's acts went far beyond mere preparation.

In *Braham v. State,* 571 P.2d 631 (Alaska 1977), the defendant and the hired killer agreed on a contract price. The defendant then arranged a situation whereby the killer could get to know the victim and enter into a relationship of trust with him. The court held this sufficient to support the conviction, as it was an unequivocal act toward the commission of a crime. See, also, Annot., 54 A.L.R.3d 612 (1974).

In the present case the defendant engaged in a series of acts directed at bringing about the murder of Rickard and corroborative of his criminal intent. The defendant made plans for the murder, solicited a killer, discussed the contract price and set the money aside in his billfold, arranged for the weapon and a scope, and showed the killer the victim, his residence, and his place of work. These acts were substantial steps which sustain the conviction.

Instruction No. 10 charged the jury that abandonment is not a defense to attempted murder, but it may be considered as bearing on the issue of criminal intent. The defendant contends the instruction was erroneous and cites the inclusion of abandon-

ment as a defense to attempt in the Model Penal Code § 5.01 (Tent. Draft No. 10, 1960) upon which the Nebraska attempt statute is patterned.

This issue was decided in *State v. Schmidt, supra.* In that case we said at 131-32, 327 N.W.2d at 627: "Schmidt further argues that even if he had committed the crime of attempted murder, the act was completely and voluntarily abandoned and therefore, under the provisions of the Model Penal Code from which our § 28-201 is patterned, the act of abandonment should be considered as an absolute defense to the instant charge. While it is true that the Model Penal Code, which was used as a guideline by the Legislature when it adopted § 28-201, does contain the defense of abandonment in § 5.01(4) (Tent. Draft No. 10, 1960), it is further true that the defense was not included in the act when adopted by the Legislature. Nor can it be said that the omission of the defense of 'voluntary abandonment' in connection with the crime of criminal attempt was either an oversight by the Legislature or due to its failure to know that such a defense could have been included when it adopted the criminal attempt statute in 1977. At the same time that § 28-201 was adopted, the Legislature also enacted Neb. Rev. Stat. § 28-202 (Reissue 1979), the crime of 'conspiracy.' As a part of the crime of criminal conspiracy, the Legislature specifically adopted the defense of abandonment or renunciation of criminal intent. See Neb. Rev. Stat. § 28-203 (Reissue 1979). The defense, however, was limited to the crime of conspiracy under § 28-202, and did not include criminal attempt, § 28-201. Schmidt concedes that this defense has never been adopted in Nebraska but maintains that this court should nevertheless treat abandonment as an affirmative defense to be judicially grafted into the statutes. If that portion of the Model Penal Code is to become a part of the substantive law of the State of Nebraska, it is for the Legislature to do, and not for this court. Since abandonment is not a defense

to the commission of the crime of criminal attempt under Nebraska law, Schmidt's assignment of error is without merit."

The defendant argues that the cassette sound recordings taken during the police surveillance of his conversations with Sherrill should not have been admitted into evidence. Three tapes were made; however, only tapes one and two, the June 2 conversation, were produced at trial. The police testified that the third tape, the June 3 conversation, had somehow been lost. The defendant argues that the ruling on his objections was an abuse of discretion under Neb. Rev. Stat. § 27-106 (Reissue 1979).

Section 27-106 provides: "(1) When part of an act, declaration, conversation or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other. When a letter is read, all other letters on the same subject between the same parties may be given. When a detached act, declaration, conversation or writing is given in evidence, any other act, declaration or writing which is necessary to make it fully understood, or to explain the same, may also be given in evidence.

"(2) The judge may in his discretion either require the party thus introducing part of a total communication to introduce at that time such other parts as ought in fairness to be considered contemporaneously with it, or may permit another party to do so at that time."

The general rule regarding the admissibility of tape recordings is that 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,* 209 Neb. 583, 308 N.W.2d 842 (1981). Under this rule, tapes one and two were properly admitted.

However, the defendant argues that it was an abuse of discretion to admit the first two tapes when

the third tape, possibly exculpatory, could not be produced. The trial judge reasoned that the tapes were admissible since they were simply corroborative of the conversation and the oral testimony of the parties to the conversation was available.

The defendant's argument is based on the "rule of completeness," which states that an opponent may require one introducing part of a writing or statement to introduce any part which ought in fairness to be considered with the part introduced. See, Fed. R. Civ. P. 32(a)(4), which applies the rule to use of depositions; McCormick on Evidence § 56 (2d ed. 1972); Fed. R. Evid. 106, Notes of Advisory Committee.

The Nebraska statute does not automatically require that the proponent of evidence produce remaining portions of a writing or statement upon request by an opponent. Rather, it permits inquiry into the whole on cross-examination or introduction of the whole by the opponent. In his discretion a judge may require introduction of the remainder as fairness requires. See *Spani v. Whitney,* 172 Neb. 550, 110 N.W.2d 103 (1961) (predecessor statute).

Generally, the rule of completeness is concerned with the danger of admitting a statement out of context. *McCormick, supra.* When this danger is not present it is not an abuse of discretion to fail to require the production of the remainder or, if it cannot be produced, to exclude all the evidence. In the present case tapes one and two were admitted in their entirety. The defendant was free to cross-examine with regard to them. The third tape dealt with a different conversation on a different date. Both the State and the defendant were required to prove this conversation by oral testimony. Thus, neither party was placed at a greater disadvantage because the tape could not be found. Further, tapes one and two were not severed from the third tape in such a manner as to create an "out-of-context situation" envisioned by the rule. The admission of

tapes one and two was not an abuse of discretion.

The defendant further argues that the rule of *Brady v. Maryland,* 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), applies in this case. *Brady* requires proof that exculpatory evidence was intentionally kept from the defendant. See *United States v. Hooper,* 596 F.2d 219 (7th Cir. 1979).

Here, there was no evidence of bad faith in the loss of the third tape, nor that the information contained in the tape was intentionally withheld from the defense. Therefore, the rule in *Brady* was not applicable.

In his brief pro se the defendant contends that the $25 in currency received by Sherrill from the defendant was improperly admitted since it could have been on Sherrill's person before the meeting. The general rule is that the admissibility of physical evidence rests in the discretion of the trial court, and the determination of admissibility will not be overturned unless there is a clear abuse of discretion. *State v. Weible,* 211 Neb. 174, 317 N.W.2d 920 (1982). In the present case proper foundation was laid for the admission of the $25. The jury was free to decide whether or not to believe Sherrill's testimony. The credibility of a witness is an issue for the trier of fact; it is not the function of the Supreme Court to weigh the credibility of a witness. *Mustion v. Ealy,* 201 Neb. 139, 266 N.W.2d 730 (1978). There was no abuse of discretion in admitting the evidence.

The defendant next argues that because the only "overt act," the receipt of the $25 by Sherrill, took place in Iowa, the Nebraska court had no jurisdiction in this case. The defendant had engaged in much conduct in Nebraska aimed at bringing about the murder of Rickard, which was to occur in Nebraska. The $25 paid for the scope was but one of the substantial steps required by the statute.

Where requisite elements of the completed crime are committed in different jurisdictions, any state in which an essential part of the crime is committed

has jurisdiction of the offense. *State v. Hilpert, ante* p. 564, 330 N.W.2d 729 (1983); 21 Am. Jur. 2d *Criminal Law* § 345 (1981). In the present case the crime was to be committed in Nebraska and substantial steps to complete the crime had been taken in Nebraska. The fact that one act was committed in Iowa does not deprive the Nebraska courts of jurisdiction.

In *State v. Reldan,* 166 N.J. Super. 562, 567, 400 A.2d 138, 141 (1979), the court said: "[T]he state has cited the well-established principle that a sovereign has jurisdiction to try an offense where only part of that offense has been committed within its boundaries. See, *e.g., Leonard v. United States,* 500 *F.* 2d 673 (5 Cir. 1974) . . . ."

In *State v. Poland,* 132 Ariz. 269, 275, 645 P.2d 784, 790 (1982), the court said: "When the elements of a crime are committed in different jurisdictions, any state in which an essential part of the crime is committed may take jurisdiction. *State v. Scofield,* 7 Ariz.App. 307, 438 P.2d 776 (1968). 'Any element,' then, can confer jurisdiction. *State v. Bussdieker,* 127 Ariz. 339, 621 P.2d 26 (1980)."

The defendant contends that remarks by the prosecutor, which were not corrected by the court, made it impossible to receive a fair trial. The defendant asserts that in his opening and closing statements the prosecutor misstated the law of intent and made comments regarding incidents about which the defendant did not testify. The opening and closing statements are not a part of the record.

A bill of exceptions is the only vehicle for bringing evidence before the Supreme Court. *State v. Spurgeon,* 200 Neb. 719, 265 N.W.2d 224 (1978). Opening and closing statements must appear in the bill of exceptions before alleged errors concerning them can be reviewed. *Peery v. State,* 165 Neb. 752, 87 N.W.2d 378 (1958). In *State v. Harris,* 205 Neb. 844, 290 N.W.2d 645 (1980), we held that in order to predicate error upon an improper argument to the

jury, it is necessary to make an objection, receive an adverse ruling thereon, and have the same made part of the bill of exceptions. This assignment of error is without merit.

The defendant asserts that questioning by the prosecutor of the witness Sherrill regarding the tape recording was overly suggestive. The defendant's objections in this regard were overruled.

The propriety of the conduct of a prosecutor during the examination of witnesses falls within the discretion of the trial court. Absent bad faith and prejudice to the defendant, the action of the trial court with regard to the conduct will not be deemed an abuse of discretion. See, *State v. Brown,* 169 Conn. 692, 364 A.2d 186 (1975); *State v. Hafner,* 168 Conn. 230, 362 A.2d 925 (1975), *cert. denied* 423 U.S. 851, 96 S. Ct. 95, 46 L. Ed. 2d 74. Since the tape itself was available for the jury, there was no prejudice to the defendant. There was no evidence to indicate the prosecutor acted in bad faith.

The defendant contends that the sentence was excessive. A sentence imposed within the statutory limits will not be overturned on appeal absent an abuse of discretion by the trial court. *State v. True,* 210 Neb. 701, 316 N.W.2d 623 (1982). The sentence was within the statutory range for Class II felonies. The minimum is 1 year and the maximum sentence is 50 years' imprisonment. See Neb. Rev. Stat. §§ 28-201(4), 28-105(1) (Reissue 1979).

The defendant is 40 years of age. He has a long prior record which includes several convictions and imprisonment for auto theft. In view of the violent and serious nature of the crime, there was no abuse of discretion in the imposition of the sentence.

The judgment is affirmed.

AFFIRMED.

GALYEN PETROLEUM COMPANY, A CORPORATION, APPELLANT, v. NORMAN J. HIXSON, DOING BUSINESS AS HIXSON SKELLY SERVICE, AND COMMERCIAL BANK, BASSETT, NEBRASKA, A CORPORATION, APPELLEES.

331 N.W.2d 1

Filed March 11, 1983. No. 82-001.

1. **Summary Judgment.** The primary purpose of the summary judgment statute is to pierce sham pleadings and to dispose of cases in which there is no genuine claim or defense.
2. **Banks and Banking.** A check or other draft does not of itself operate as an assignment of any funds in the hands of the drawee available for its payment, and the drawee is not liable on the instrument until he accepts it. Neb. U.C.C. § 3-409(1) (Reissue 1980).
3. _____. A check, of itself, and in the absence of special circumstances, is neither a legal nor an equitable assignment or appropriation of a corresponding amount of the drawer's funds in the hands of the drawee, and it gives the holder of the check no right of action against the drawee, even though the drawer has on deposit sufficient funds to pay it.

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

Arlen D. Magnuson, for appellant.

Cronin, Hannon & Symonds, for appellee Bank.

KRIVOSHA, C.J., WHITE, and CAPORALE, JJ., and SPRAGUE, D.J., and COLWELL, D.J., Retired.

COLWELL, D.J., Retired.

Plaintiff, Galyen Petroleum Company (Galyen), appeals a summary judgment in favor of the Commercial Bank (Bank) of Bassett, Nebraska, in a suit to recover on three checks personally presented to drawee Bank by payee Galyen, upon which payment was refused, although the drawer had funds on deposit to pay some of the checks.

Galyen was a wholesale supplier of fuels to the defendant, Norman J. Hixson, who had an account in and owed Bank more than $7,000 on promissory notes. On October 1, 1975, Hixson issued check No. 2287, $3,763.25, to Galyen, which was presented

through channels to drawee Bank for collection and returned unpaid for insufficient funds. On October 15, 1975, Hixson issued check No. 2304, $2,740.88, to Galyen, which was likewise presented and returned. On November 1, 1975, Hixson issued check No. 2324, $378.94, to Galyen, which was likewise presented and returned. On November 12 and 13, 1975, Galyen personally presented the three checks to Bank during regular banking hours at Bassett, Nebraska; upon each presentment, Bank unconditionally refused payment of all three checks and forthwith returned them to Galyen. Bank's records and the evidence show that at the close of business on November 10, 1975, Hixson's account had a credit balance of $3,048.46. There was no account activity on November 11, 1975. On November 12, three deposits were made to the account, $209.27, $92.90, and $443.17. After Galyen presented the checks for collection on November 12, Bank set off Hixson's account for two items of $1,006.75 and $2,700 that were credited to Hixson's note account, leaving a balance of $87.05. The credited notes were not then due. The printed part of the notes recite in part: "Payee shall have at all times a security interest in and right of set-off against any deposit balances of the maker(s) . . . and may at the time, without notice, apply the same against payment of this note . . . whether due or not . . . ." Bank had a financing statement and security agreement from Hixson dated March 7, 1975. Hixson did not object to the setoffs. Galyen filed its petition on August 23, 1976. Hixson was discharged as a bankrupt on December 7, 1976, and dismissed as a party defendant.

Galyen claims that summary judgment was not a proper remedy here for the reason there were genuine issues of material fact concerning Bank's transactions on November 12 and 13.

Our law relating to summary judgment is well established. "The judgment sought shall be rendered forthwith if the pleadings, depositions, and admis-

sions 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." Neb. Rev. Stat. § 25-1332 (Reissue 1979).

"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.*, 209 Neb. 61, 64, 306 N.W.2d 167, 169 (1981).

From a full review of the record, including depositions and Bank's records, there is no conflict in the evidence, and there is no genuine issue of any material fact.

Galyen assigns as error that Bank unlawfully refused payment of the checks on presentment and that it had no authority to make a setoff to credit Hixson's promissory notes where (1) the notes were not due and (2) the setoffs were exercised after presentment.

Neb. U.C.C. § 3-409(1) (Reissue 1980) provides: "A check or other draft does not of itself operate as an assignment of any funds in the hands of the drawee available for its payment, and the drawee is not liable on the instrument until he accepts it."

"The authorities are agreed . . . that a check, of itself, and in the absence of special circumstances, is neither a legal nor an equitable assignment or appropriation of a corresponding amount of the drawer's funds in the hands of the drawee, and that therefore, in and of itself, it gives the holder of the check no right of action against the drawee and no valid claim to the fund of the drawer in its hands, even though the drawer has on deposit sufficient funds to pay it. It creates no lien on the money which the holder can enforce against the bank." 10 Am. Jur. 2d *Banks* § 563 at 532-33 (1963).

There are no special circumstances or agreements claimed here. The only evidence was the hearsay statement of Richard W. Galyen that Hixson told

him that he had telephoned Bank and that the checks were good.

Summary judgment was a proper procedure here, and Galyen had no standing or cause of action against Bank on account of the dishonor of any of the three checks. It did have a remedy against the drawer. Neb. U.C.C. § 3-507(2) (Reissue 1980). We do not get to the question of setoffs. The summary judgment was properly granted.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT PATTERSON, APPELLANT.

331 N.W.2d 500

Filed March 11, 1983. No. 82-179.

1. **Criminal Law: Hypnosis.** Direct evidence obtained by reason of hypnosis is inadmissible per se.
2. **Witnesses: Hypnosis.** A witness will not be rendered incompetent merely because he or she was hypnotized during the investigatory phase of the case; rather, the witness will be permitted to testify with regard to those matters which he or she was able to recall and relate prior to hypnosis, provided that there is sufficient evidence to satisfy the court that the evidence was known and related prior to hypnosis.
3. **Circumstantial Evidence.** One accused of a crime may be convicted on the basis of circumstantial evidence if, taken as a whole, the evidence establishes guilt beyond a reasonable doubt. The State is not required to disprove every hypothesis but that of guilt.
4. **Sentences: Appeal and Error.** An order denying probation and a sentence imposed within statutorily prescribed limits will not be disturbed on appeal unless there has been an abuse of discretion on the part of the sentencing judge.

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

Larry E. Butler, Buffalo County Public Defender, for appellant.

Paul L. Douglas, Attorney General, and Dale D. Brodkey, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

KRIVOSHA, C.J.

In the case of *State v. Palmer,* 210 Neb. 206, 218, 313 N.W.2d 648, 655 (1981), this court, joining with a growing number of other jurisdictions, held that "until hypnosis gains acceptance to the point where experts in the field widely share the view that memories are accurately improved without undue danger of distortion, delusion, or fantasy, a witness who has been previously questioned under hypnosis may not testify in a criminal proceeding concerning the subject matter adduced at the pretrial hypnotic interview." The instant appeal presents to us the further question as to whether a witness who has been subjected to hypnosis may testify under any circumstances as to matters adduced prior to hypnosis. In the instant case the trial court permitted such testimony. For reasons which we more particularly set out in this opinion, we believe the trial court was correct under the circumstances and we affirm the judgment.

The appellant, Robert Patterson, was convicted of sexually assaulting a 21-year-old Kearney State College student during the early morning hours of June 3, 1981, in Kearney, Buffalo County, Nebraska, in violation of Neb. Rev. Stat. § 28-319 (Reissue 1979). Following trial and conviction, Patterson was sentenced to a term of imprisonment in the Nebraska Penal and Correctional Complex for not less than 5 nor more than 10 years. The evidence was to the effect that after the victim of the attack had completed working at a local restaurant at approximately 1 a.m., she changed into her jogging clothes and started to jog home, a trip which normally took 7 minutes. As she was jogging home she was attacked by a male assailant. For our purposes it is unnecessary to set out in detail the facts of the assault, except to say that, if believed by the jury, the

facts were sufficient to establish that the victim was forcibly knocked to the ground and sexually assaulted. While the assault was taking place, a car entered upon the street where the assault was occurring. The victim screamed. The car pulled up to the house next to where the victim and her assailant were located, and the assailant got up and ran off to the northeast. The occupants of the car, a man and a woman, got out of the car and assisted the victim into the house.

At the trial, the male occupant of the automobile testified that as he turned onto the street he saw something going on in his front yard. As he drove closer he saw that it was two individuals engaged in what appeared to be a sexual act and he heard screams. As he stopped his car he observed the male assailant flee, and he and his female occupant assisted the victim into the house.

Two officers of the Kearney Police Department testified at trial that within a few minutes of receiving a call concerning the assault they went to the eyewitnesses' home where the victim was. Inside the house one of the officers interviewed the victim, who told him what had occurred and gave him a clear description of the assailant. The second officer likewise testified that he arrived shortly after the first officer and while the first officer was still interviewing the victim. The victim was then taken to a local hospital where, according to her roommate who arrived shortly thereafter, she again related the incident and described the assailant.

A further interview was held with the victim by the police the following afternoon, where, again, the victim was interviewed by a detective of the Kearney Police Department. The victim once again related what had occurred and described her assailant as best she could remember. Her description fit the appellant, although she could not positively identify him. Written police reports of the inter-

views were prepared at or shortly after the interviews and were available at trial.

During the initial investigation, shortly after the assault, one of the officers searched the area where the assault had occurred and found a set of keys belonging to the victim, which she said were in her hand at the time the attack occurred. Also found near the keys were some auction house receipts and a cash register slip bearing numbers later identified as having been issued to Patterson. The officer went to the auction house with the receipts and determined that Patterson had been at the auction house on the evening of June 2, 1981, and had purchased the seven or eight items for which the receipts were issued. An employee of the auction house testified that Patterson returned the next day and attempted to pick up the items which he had purchased the previous evening. He was unable to produce his receipts and told the employee that he had lost the receipts. In court the employee identified the receipts and cash register slip which the officer had found. During a conversation with one of the officers, Patterson admitted that he had lost both his checkbook and the auction receipts to the things he had bought at the auction house the previous night, but did not know where he had lost them. Patterson was thereafter arrested and charged with the crime.

On June 23, 1981, the victim was placed under hypnosis by a clinical psychologist. While under hypnosis, she again related all of the matters which she had previously related to the police officers and to her roommate. The only additional matter adduced as a result of the hypnosis was a description of an automobile. The automobile turned out to be of no material consequence in the trial.

Following the hypnotic session the victim was shown eight men in a lineup, including Patterson. She was unable to identify Patterson as her assailant

and, in fact, never positively identified Patterson as her assailant.

Patterson argues that by reason of our holding in *State v. Palmer,* 210 Neb. 206, 313 N.W.2d 648 (1981), the victim in this case was precluded from testifying as to any matters involving the crime which were discussed during the hypnotic session, even though the evidence is clear and convincing that the victim related all of the matters to others long before she was placed under hypnosis. Unlike the situation in *Palmer*, no previously unknown facts were adduced during the hypnotic session.

We can begin our analysis of this problem by stating that direct evidence obtained solely by reason of hypnosis is inadmissible per se. See *State v. Palmer, supra.* That, however, is not the issue presented to us in this appeal. The question is not whether evidence previously unknown and adduced by reason of hypnosis is admissible but, rather, whether evidence obtained without the benefit of hypnosis and clearly admissible becomes inadmissible simply by reason of the fact that, after relating the facts to a number of witnesses, the facts are once again related to one who purports to be able to hypnotize the witness.

In *State v. Palmer, supra,* we pointed out that there were two lines of authority and that we opted to join those jurisdictions which made hypnotically induced testimony inadmissible per se. Among those jurisdictions are Minnesota, *State v. Mack,* 292 N.W.2d 764 (Minn. 1980); Arizona, *State v. Mena,* 128 Ariz. 226, 624 P.2d 1274 (1981); and Michigan, *People v. Gonzales,* 108 Mich. App. 145, 310 N.W.2d 306 (1981).

The rationale of those cases was that hypnosis can create a memory of perceptions which did not previously exist and therefore may bring forth a memory of events which were nonexistent but which may become fixed in the witness' mind so that the witness believes them to be true after hypnosis. But

that rationale falls short when examining memories for which there is ample support for their previous existence. To assert that such memory is the product of hypnosis is to simply ignore the reality of the matter.

Since our decision in *State v. Palmer, supra,* Minnesota, Arizona, and Michigan have been presented with the question of the admissibility of prehypnotic testimony. In *State ex rel. Collins v. Superior Court, Etc.,* 132 Ariz. 180, 644 P.2d 1266 (1982), the Arizona court, after affirming its position on the inadmissibility of hypnotically induced testimony, said at 209, 644 P.2d at 1295: "[O]ur review of the literature and the position of law enforcement experts, lead us to conclude that hypnosis is generally accepted as a reliable investigative tool by the relevant scientific community. When used for prompting recall in order to provide valuable leads for investigation, hypnosis has less serious risks than the problems the technique presents when courtroom testimony is involved. Unlike a jury, an investigator need not make subjective evaluations of the truth or falsity of the hypnotic recall. He need only obtain leads for the purpose of subsequent investigation and verification.

"As a practical matter, if we are to maintain the rule of incompetency, the police will seldom dare to use hypnosis as an investigatory tool because they will thereby risk making the witness incompetent if it is later determined that the testimony of that witness is essential. Thus, applying the *Frye* test of general acceptance and weighing the benefit against the risk, we modify our previous decision and hold that a witness will not be rendered incompetent merely because he or she was hypnotized during the investigatory phase of the case. That witness will be permitted to testify with regard to those matters which he or she was able to recall *and* relate prior to hypnosis. Thus, for example, the rape victim would be free to testify to the occurrence of the crime, the

lack of consent, the injury inflicted and the like, assuming that such matters were remembered and related to the authorities prior to use of hypnosis."

The Arizona court observed that other courts which, like Arizona, had adopted a per se rule of inadmissibility have since modified that rule to permit prehypnotic testimony to be admitted in evidence when such evidence was obtained prior to the hypnosis. See, *Com. v. Taylor,* 294 Pa. Super. 179, 439 A.2d 805 (1982); *People v. Wallach,* 110 Mich. App. 37, 312 N.W.2d 387 (1981); *State v. Koehler,* 312 N.W.2d 108 (Minn. 1981); *State v. Blanchard,* 315 N.W.2d 427 (Minn. 1982); *People v. Jackson,* 114 Mich. App. 649, 319 N.W.2d 613 (1982); *Strong v. State,* ____ Ind. ____, 435 N.E.2d 969 (1982); *People v. Hughes,* 88 A.D.2d 17, 452 N.Y.S.2d 929 (1982).

We believe that such a rule would be consistent with our position in *Palmer*, in view of the fact that we specifically said in *Palmer* that hypnosis may be used for investigatory purposes and that testimony obtained as a result of leads supplied during such hypnotic investigation was admissible. We therefore now hold that a witness will not be rendered incompetent merely because he or she was hypnotized during the investigatory phase of the case; rather, the witness will be permitted to testify with regard to those matters which he or she was able to recall and relate prior to hypnosis, provided that there is sufficient evidence to satisfy the court that the evidence was known and related prior to hypnosis. How the court is to be satisfied must be determined on a case-by-case basis, and the authorities must therefore determine whether using hypnosis is worth the possible risk.

In this case the evidence is overwhelming that the commission of the assault, the lack of consent, and the description of the assailant were all known to the victim prior to her being subjected to hypnosis and were fully and adequately related to and reported by her to a host of law enforcement officers, as well as

others. It is clear that her memory of the events was not created by hypnosis. If the purpose of rendering hypnotically induced testimony inadmissible per se is to refuse to make that which is uncertain certain and admissible, it appears to follow, as day follows night, that evidence which is otherwise reliable and admissible should not thereby be rendered inadmissible because, after having been fully related and recorded, it is once more repeated during a purported hypnotic session. Patterson's assignment of error in this regard is overruled.

Patterson raises a second error concerning the State's failure to produce evidence previously ordered by the court. In an order entered by the court on August 20, 1981, the State was ordered to permit Patterson to discover "all reports or results of scientific tests and experiments made in connection with this case" and "all information in the possession of the County Attorney" which Patterson could use as favorable evidence. It appears from the evidence that a laboratory test was conducted on the keys belonging to the victim and found near the scene of the assault. The results of that test disclosed that there was no skin or blood on the keys and therefore the test was essentially negative. The State, however, failed to advise Patterson of this fact. Normally that would be reversible error and is a practice which should not be followed by the State. *Brady v. Maryland,* 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). An order of the court requiring the State to make such information available must be followed. However, in the instant case there is simply no prejudice entitling Patterson to a reversal of his conviction. The victim was unable to testify with certainty that in fact she had scratched her assailant with the keys. Also, the officers who questioned Patterson later in the day on June 3 were in disagreement as to whether Patterson displayed a scratch on his arm. One said he may have seen a red mark which had not bled, while the other was

unable to say. There was no testimony by anyone that the assailant was scratched or that the keys should possess evidence of skin or blood. Therefore, the failure of the State to disclose that evidence in the instant case was not material and did not in any manner prejudice Patterson, entitling him to a new trial. See, *Evans v. Janing,* 489 F.2d 470 (8th Cir. 1973); *State v. Boyer,* 211 Neb. 139, 318 N.W.2d 60 (1982); *State v. Seger,* 191 Neb. 760, 217 N.W.2d 828 (1974).

Patterson further claims that the trial court erred in not sustaining his motion for directed verdict made at the close of the State's case. We do not agree. The evidence presented by the State, if not rebutted, was sufficient to permit the jury to find guilt beyond a reasonable doubt. The most damaging evidence, besides the victim's description of Patterson, was the auction house receipts issued to Patterson and found at the scene of the crime. Admittedly, the evidence was circumstantial. That does not, however, preclude a finding of guilt. One accused of a crime may be convicted on the basis of circumstantial evidence if, taken as a whole, the evidence establishes guilt beyond a reasonable doubt. The State is not required to disprove every hypothesis but that of guilt. *State v. Buchanan,* 210 Neb. 20, 312 N.W.2d 684 (1981). It is not for this court to weigh the evidence when reviewing a criminal conviction. That is for the trier of facts. *State v. Carter,* 205 Neb. 407, 288 N.W.2d 35 (1980). Patterson's assignment of error in this regard must also be overruled.

Finally, Patterson argues the sentence was excessive. Under the circumstances, we believe not. Patterson's previous criminal record, taken together with the facts of this case, makes the sentence well within appropriate guidelines, and the sentence imposed fails to disclose any abuse of discretion. It has long been the rule that an order denying probation and a sentence imposed within statutorily pre-

scribed limits will not be disturbed on appeal unless there has been an abuse of discretion on the part of the sentencing judge. *State v. Roubideaux,* 199 Neb. 251, 257 N.W.2d 828 (1977); *State v. Welsh,* 202 Neb. 249, 275 N.W.2d 54 (1979); *State v. True,* 210 Neb. 701, 316 N.W.2d 623 (1982). The assignment is overruled.

For these reasons the conviction and sentence are in all respects affirmed.

AFFIRMED.

CLINTON, J., not participating.

WHITE, J., dissenting.

Without addressing the issue of confabulation that concerned us in *State v. Palmer,* 210 Neb. 206, 313 N.W.2d 648 (1981), the majority now retreats from the square holding in that case, that if the subject was brought up in a hypnotic session, the witness cannot be permitted to testify about the subject matter at trial. The opinion in *Palmer* fully explored the consequences of that holding. I am not convinced that the concerns we there expressed have now magically vanished. I would reverse.

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

STATE OF NEBRASKA, APPELLEE, V. FRANK C. ANDERSEN, APPELLANT.

331 N.W.2d 507

Filed March 11, 1983. No. 82-182.

1. **Miranda Rights.** The prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.
2. _____. The admission of statements obtained in violation of *Miranda* may nevertheless be considered harmless error not re-

quiring reversal of an otherwise valid conviction. For the error to be prejudicial and require reversal, the court must find that the jury would have found the State's case significantly less persuasive had the disputed testimony been excluded.

3. **Jury Instructions.** The repetition of an instruction is not reversible error unless its effect is to mislead the jury.

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

Richard L. Kuhlman, for appellant.

Paul L. Douglas, Attorney General, and Dale D. Brodkey, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and WARREN, D.J.

KRIVOSHA, C.J.

The appellant, Frank C. Andersen, was convicted by a jury in the county court of Dodge County, Nebraska, of operating or having actual physical control of a motor vehicle while under the influence of alcoholic liquor or while having ten-hundredths of one percent or more by weight of alcohol in his body fluid as shown by chemical analysis of his breath, contrary to the provisions of Neb. Rev. Stat. § 39-669.07 (Reissue 1978). By reason of this being Andersen's second offense, the trial court sentenced him to 90 days in jail and suspended his driver's license for a period of 1 year. Andersen appealed the conviction to the District Court for Dodge County, Nebraska, which affirmed the conviction and sentence previously entered by the county court. He then perfected his appeal to this court.

While his assignments of error are 12 in number, when regrouped they are essentially as follows: He first complains that the trial court erred in admitting into evidence, over Andersen's objection, Andersen's own statement to the police officer that he had been celebrating getting off of probation for driving while intoxicated. He further assigns as error the fact that the trial court permitted the

introduction into evidence of the results of certain portions of a breath analyzer test without first giving Andersen notice that such results would be offered in evidence. A third assignment of error concerns the giving of two instructions concerning driving while intoxicated. And, lastly, Andersen maintains that the evidence was insufficient to sustain the finding of guilt. Our examination of the record compels us to affirm.

The record reveals that at approximately 8:25 p.m. on March 15, 1981, a vehicle driven by Andersen was observed by a Fremont police officer, Priscilla Seyboth. At the time, the Andersen vehicle was going east on Linden Street at approximately 5 m.p.h. After stopping at an intersection the Andersen vehicle made a left turn onto Clarkson Street. Officer Seyboth then observed that the vehicle was being driven on the grassy area between the street and the sidewalk and that only the wheels on the driver's side of the vehicle were in the street. Andersen continued to drive the vehicle over the curb for approximately one-half of a block. There was no other traffic on Clarkson Street at that time.

After observing this behavior Officer Seyboth pulled up behind the Andersen vehicle and turned on the overhead flashing lights on her vehicle. Andersen gave no indication that he saw the police car behind him and, instead, moved into the left turn lane on Clarkson at its 16th Street intersection. He then made a left turn onto 16th Street, and Officer Seyboth began honking her horn to attract his attention. Andersen finally pulled over about half a block from the intersection.

As Officer Seyboth was approaching the Andersen vehicle, she observed Andersen attempt to get out of the vehicle and almost fall to the ground. She also noted a very strong odor of alcohol on Andersen. Andersen was unable to find his driver's license in his wallet after fumbling with it for several minutes. Andersen told Officer Seyboth that he had been

driving his vehicle up out of the street in order to avoid traffic.

Officer Seyboth then asked Andersen to perform four field sobriety tests. He was unable to perform the balance test without swaying or staggering, and was unable to complete the heel-to-toe test after three attempts. A test requiring him to pick up a key ring while standing on one leg was demonstrated by Officer Seyboth to Andersen. He was unable to stand on one leg and he completely missed the key ring. When asked to close his eyes and touch the tip of his nose with his index finger, he was unable to comply.

Officer Seyboth then took Andersen back to the police cruiser and asked him to sit in the front seat. After she read the preliminary test advisement to Andersen, he agreed to submit to an Alco-Sensor test. While the officer and Andersen were sitting in the cruiser, prior to Andersen taking the Alco-Sensor test, Officer Seyboth asked Andersen if he had been drinking. He responded that he had just been celebrating getting off of probation for driving while intoxicated. The State concedes that Andersen had not been given a *Miranda* warning by Officer Seyboth before the inquiry was made. After waiting a requisite 15 minutes, Officer Seyboth administered the Alco-Sensor test. The device registered "fail," and Officer Seyboth informed Andersen that he was under arrest.

Andersen was then taken to the Fremont police station by Officer Seyboth. Officer Lutes read an implied consent advisement form to Andersen, who agreed to submit to a gas chromatograph test. The purpose of the test is to determine the percentage of alcohol in the body fluid of an individual. The machine was prepared in accordance with the technique previously approved by the State of Nebraska, Department of Health, including a test to check the calibration of the machine, using a known standard. After explaining the test to Andersen the test was

administered and a digital reading of .261 was obtained. The officer switched the machine to "standby" and obtained a graphic readout. Andersen was then taken to the station's holding cell.

During the trial in the county court the result of the breath test conducted at the police station was admitted into evidence over Andersen's objection. Also admitted in evidence was the statement made by Andersen to Officer Seyboth concerning his reason for drinking that evening. In addition to the result of the breath test, there was likewise offered in evidence all of the additional testimony concerning Andersen's erratic driving and his inability to perform any of the field sobriety tests. There was also evidence to the effect that there was a very strong odor of alcohol present on Andersen, that his speech was slurred, that his eyes were bloodshot, and that he nearly fell to the ground getting out of his vehicle.

Officer Tamke, the officer in charge of maintenance and calibration for the Fremont Police Department, testified at the trial about the procedures used in calibrating the equipment used to conduct the test on Andersen. The equipment was an Intoximeter Mark IV gas chromatograph. Officer Tamke also testified concerning the NALCO standard solution used to test the accuracy of the machine. He stated, without contradiction, that the device was in good working order on March 15, 1981, when the test was administered to Andersen.

Andersen testified in his own defense at the trial. He claimed that his total alcohol intake on March 15, 1981, consisted of half a can of beer and a swallow of whiskey. He maintained that a prior injury to his legs was the reason for his inability to perform the field sobriety test. He further testified that the steering mechanism on his vehicle was damaged, thereby causing the erratic driving observed by Officer Seyboth.

We turn first to Andersen's claim that the result of the breath test administered at the police station

should not have been admitted in evidence because the State failed to satisfy certain foundational requirements as set out in our opinion in *State v. Gerber,* 206 Neb. 75, 291 N.W.2d 403 (1980). In the *Gerber* case we said at 90-91, 291 N.W.2d at 411-12: "[B]efore the State may offer in evidence the results of a breath test for the purpose of establishing that a defendant was at a particular time operating a motor vehicle while having ten-hundredths of one percent or more by weight of alcohol in his body fluid, the State must prove the following: (1) That the testing device or equipment was in proper working order at the time of conducting the test; (2) That the person giving and interpreting the test was properly qualified and held a valid permit issued by the Nebraska Department of Health at the time of conducting the test; (3) That the test was properly conducted in accordance with a method currently approved by the Nebraska Department of Health; and (4) That there was compliance with any statutory requirements."

Though Andersen argues that the State failed to establish the second, third, and fourth requirements of the *Gerber* test, the record clearly establishes the contrary. Andersen's assertion that Officer Seyboth lacked sufficient knowledge of alcohol chemistry or test variables to accurately perform a breath test by using the Mark IV equipment is simply without merit. The State produced evidence that Seyboth was properly qualified and on March 15, 1981, held a valid permit issued by the Department of Health. She testified that she had passed both written and practical examinations in order to obtain the permit. Neither the Department of Health nor the law in the State of Nebraska requires that persons administering such tests must be graduate chemists; they merely must have "some knowledge of the chemistry of alcohol and of other substances of proper concern." This knowledge is shown by the individual successfully completing a written examina-

tion given by the Department of Health. The evidence establishes that Officer Seyboth satisfied the requirements of the Department of Health and properly obtained a permit authorizing her to administer the test.

Andersen next asserts that the test was not properly conducted in accordance with a method currently approved by the Department of Health. The testimony of both Officer Seyboth and Officer Tamke is clearly to the contrary. Both officers testified in detail as to the procedures followed in administering the test and in calibrating the machine. The checklist used by Officer Seyboth to document the steps is one approved and prescribed by the rules of the Department of Health of the State of Nebraska. Andersen does not tell us how the State failed to comply with the fourth requirement of the *Gerber* test, and the evidence proves otherwise. The assignment of error is simply without merit and the trial court properly admitted the result of the Intoximeter test into evidence.

Andersen's claim concerning the admissibility of his statement to Officer Seyboth concerning the reason for his drinking that evening presents a more difficult problem, though not for any reason raised by Andersen. After failing the field sobriety tests Andersen was taken by Officer Seyboth to the police cruiser for a preliminary breath test. The evidence seems fairly clear that Andersen was not free at that point to leave and therefore was in custody. Without advising Andersen of his constitutional rights Officer Seyboth interrogated him concerning whether he had been drinking. This procedure would appear to be directly contrary to the requirements set out in *Miranda v. Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and reaffirmed by our own decisions, including our recent decision in *State v. Thunder Hawk,* 212 Neb. 350, 322 N.W.2d 669 (1982). In *Miranda* the U.S. Supreme Court said at 444: "[T]he prosecution may not use statements, whether

exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." It seems clear from the evidence that at the time Officer Seyboth made inquiry of Andersen, Andersen was then, if not in custody, certainly otherwise deprived of his freedom of action in a significant way. The State's contention that the question was merely a part of an "on-the-scene investigation," not requiring the officer to advise Andersen of his rights, is simply erroneous.

Our finding, however, that a *Miranda* violation has occurred does not resolve the question, for it is well established that the admission of statements obtained in violation of *Miranda* may nevertheless be considered harmless error not requiring reversal of an otherwise valid conviction. See, *Harryman v. Estelle,* 616 F.2d 870 (5th Cir. 1980); *United States v. Cheung Kin Ping,* 555 F.2d 1069 (2d Cir. 1977); *Smith v. Estelle,* 519 F.2d 1267 (5th Cir. 1975); *Reed v. Wolff,* 511 F.2d 1369 (8th Cir. 1975); *Palmer v. State,* 604 P.2d 1106 (Alaska 1979).

As the cases cited illustrate, a finding of constitutional error in a case of this nature does not require an automatic reversal unless there appears from the evidence a reasonable possibility that the evidence complained of might have contributed to the conviction. See, *Chapman v. California,* 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); *Fahy v. Connecticut,* 375 U.S. 85, 84 S. Ct. 229, 11 L. Ed. 2d 171 (1963). For the error to be prejudicial and require reversal, we must find that the jury would have found the State's case significantly less persuasive had the disputed testimony been excluded. *Schneble v. Florida,* 405 U.S. 427, 92 S. Ct.

1056, 31 L. Ed. 2d 340 (1972); *Harrington v. California,* 395 U.S. 250, 89 S. Ct. 1726, 23 L. Ed. 2d 284 (1969). In this regard, the court must look to the record for independent evidence of guilt. *Milton v. Wainwright,* 407 U.S. 371, 92 S. Ct. 2174, 33 L. Ed. 2d 1 (1972). The court must then decide whether the error was harmless beyond a reasonable doubt. See *Chapman v. California, supra.*

In the instant case the State adduced testimony, absent Andersen's own statement, which established guilt beyond a reasonable doubt. When one considers the evidence concerning Andersen's manner of driving, his physical appearance and behavior, and the result of the Intoximeter test, no other result could have reasonably been reached but that of guilty. To say that the evidence against Andersen was overwhelming is to understate the State's case. Andersen's admission to Officer Seyboth as to the reason why he was in the condition he was in at the time of his arrest was, at most, cumulative, and a review of the record leaves no reasonable doubt that the jury would have reached the same verdict without the testimony concerning Andersen's statement.

The Alaska Supreme Court was presented a similar question in *Palmer v. State, supra.* After stopping the defendant's car the arresting officer, before formally placing him under arrest, asked him how much he had drunk. The defendant replied that he had had five or six beers. This exchange occurred before the driver was advised of his right to remain silent. In affirming the conviction, the Alaska court stated at 1111: "Assuming, *arguendo,* that there was a *Miranda* violation, we conclude that the statement, if it was incriminating, merely corroborated other evidence at trial which, standing alone, would have been more than sufficient to convict Palmer of the offense charged. If it was error to admit the statement, such error was harmless beyond a reasonable doubt, since we see no reasonable

possibility that the evidence contributed to the jury's verdict."

Based upon the evidence in this case we must therefore find that while a violation of Andersen's rights occurred, it was without prejudice and thereby does not entitle him to a reversal.

Andersen further contends that error was committed because the court permitted the introduction into evidence of the tests used in calibrating the gas chromatograph without first notifying the defendant that such tests would be offered in evidence. Andersen argues that exhibit 9, which was a standard alcohol solution certification sent to the Fremont Police Department by the Nebraska Department of Health along with the solution used by the Fremont Police Department in calibrating the gas chromatograph, and exhibit 10, which was the record made by Officer Tamke when he ran the 10 tests on the NALCO to determine its target value, constitute one of the exceptions to the hearsay rule, see Neb. Rev. Stat. § 27-803(7) (Reissue 1979), and requires the giving of reasonable notice to the opposing party before the evidence may be offered at trial. In this regard, Andersen is simply in error. Exhibits 9 and 10 were among a number of documents submitted by the State in laying foundation for the introduction of the result of the gas chromatograph test on Andersen and were submitted in conjunction with detailed testimony by Tamke as to the procedures he followed in maintaining and calibrating the gas chromatograph as a regular part of his duties. They were not offered as an exception to the hearsay rule. Tamke was present and subject to cross-examination. Under the provisions of Neb. Rev. Stat. § 27-801(3) (Reissue 1979), hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Exhibits 9 and 10 were not documents included within the definition of § 27-803(7), and notice was not required to

be given by the State to Andersen. For that reason, permitting the exhibits to be introduced in evidence in support of the witness' testimony was not error.

Andersen further assigns as error several of the jury instructions given by the trial court. He alleges that by giving two separate instructions defining "under the influence of alcoholic liquor," the trial court confused and misled the jury. There is simply no basis for that claim. We have previously stated that the repetition of an instruction is not reversible error unless its effect is to mislead the jury. *State v. Suggett,* 189 Neb. 714, 204 N.W.2d 793 (1973). Here, the instructions were correct statements of the applicable law and could in no way mislead the jury. Likewise, instruction No. 11, concerning credibility of the witnesses, is a direct statement from NJI 14.81, ¶¶ 1-7, 10-11. We find no error in the giving of this instruction.

Our review of the record satisfies us that there was no prejudicial error committed in connection with the trial in the county court, and the verdict of the jury is amply sustained by the evidence. The judgment of the District Court affirming the action of the county court is affirmed.

AFFIRMED.

JACK GREENWOOD, JR., ET AL., APPELLANTS, V. TURNER GRAIN COMPANY ET AL., APPELLEES.

330 N.W.2d 925

Filed March 11, 1983. No. 82-242.

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

Ralph A. Bradley, for appellants.

Ronald S. DePue of McDermott, Depue & McDermott, for appellees.

BOSLAUGH, WHITE, and CAPORALE, JJ., and BRODKEY, J., Retired, and GRANT, D.J.

BOSLAUGH, J.

This action was commenced to recover the net proceeds from the sale of approximately 6,000 bushels of corn delivered to the defendant Turner Grain Company by the plaintiffs Jack Greenwood, Jr., and Cory Greenwood. Pursuant to a stipulation of the parties, the proceeds were paid into the court and the action was dismissed as to the grain company. The plaintiff Phyllis Greenwood disclaimed any interest in the proceeds and the action was dismissed as to her. The record indicates the defendant Ethel Greenwood also disclaimed any interest in the proceeds and the action was dismissed as to her.

The plaintiffs are sons of the defendant Jack Greenwood, Sr. For a number of years prior to 1980 they had been employed by their father in farming land owned and rented by him. In January 1980 the defendant proposed to his sons that they each sign a farm lease with him on separate 80-acre tracts which he had been renting. Jack Greenwood, Jr., and his father signed a lease for land rented from B. J. Cunningham, Jr. Cory Greenwood and his father signed a lease for land rented from Evelyn Leonard. Jack Greenwood, Sr., paid the first one-half of the cash rent due on each tract. The understanding was that each son would pay the second one-half of the cash rent and the crop from each tract would be divided equally between the lessees. There was no understanding as to how the other expenses of farming the tracts would be divided.

The boys were to be paid an hourly wage for their services on the other land owned and rented by the defendant.

According to the defendant, at the request of each plaintiff, the oral understanding was modified in February 1980 so that instead of a share of the crop on the two 80-acre tracts, the plaintiffs would each

receive a salary or wage for their services. When the second one-half of the cash rent came due on the Cunningham and Leonard tracts, it was paid by the defendant.

At harvest time the plaintiffs delivered the crop from one-half of the Cunningham tract and the Leonard tract, amounting to approximately 6,000 bushels of corn, to the grain company.

The defendant admits that he is still indebted to Cory Greenwood in some amount for salary or wages. He claims that he has made a settlement with Jack Greenwood, Jr., and has paid him in full.

The plaintiffs claimed that they were entitled to the proceeds because of the leases they signed with their father. The defendant denied that the plaintiffs had an interest in the proceeds and alleged that the grain delivered to the grain company was his property. By cross-petition the defendant claimed that the wrongful acts of the plaintiffs forced him to default on contracts for future delivery of grain and that, as a result, he was damaged in the amount of $10,000.

The trial court found that the defendant Jack Greenwood, Sr., was entitled to the proceeds of the corn delivered to Turner Grain Company but that he was not entitled to recover on the cross-petition. The plaintiffs have appealed.

The action, essentially, is one in contract, an action at law. The decision of the trial court was equivalent to the verdict of a jury and will not be disturbed unless clearly wrong. In determining whether the evidence is sufficient to sustain the judgment, it must be considered in the light most favorable to the defendant, all conflicts must be resolved in his favor, and he is entitled to the benefit of all inferences that reasonably may be deduced from the evidence. *Atlas Steel & Wire Corp. v. L & M Constr. Chemicals, Inc.,* 212 Neb. 16, 321 N.W.2d 64 (1982).

The evidence was in direct conflict. The defend-

ant testified that Cory told him on February 6, 1980, that Cory would rather work for wages than have a share of the crop. Several weeks later Jack Jr. called the defendant and stated that he could not afford to pay the cash rent and had to have an income payable every 2 weeks. They agreed upon a salary of $1,500 per month.

Jack Jr. testified that the salary of $1,500 per month was to be in addition to his share of one-half of the crop from the Cunningham 80 and that the agreement was made before he signed the lease. Cory testified that he was to receive $3.75 per hour payable weekly or every other week, but that he was to receive a share of the crop instead of wages for farming the Leonard 80. Cory denied that there had been any further discussion with his father concerning a change in his oral contract of employment.

The evidence was sufficient to support the findings of the trial court, and the judgment must be affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WALTER L. SIMS, APPELLANT.

331 N.W.2d 255

Filed March 11, 1983. No. 82-397.

1. **Homicide: Photographs.** In a homicide case photographs of the victim, upon proper foundation, may be received in evidence for the purpose of identification, to show the condition of the body, to show the nature and extent of the wounds and injuries, and to establish malice or intent.
2. _____: _____. A photograph which illustrates or makes clear some controverted issue in a homicide case may be received in evidence even if it is gruesome.
3. **Photographs.** The admission into evidence of a gruesome photograph rests in the sound discretion of the trial court, which must determine its relevancy and weigh its probative value against its possible prejudicial effect.

4. **Rules of Evidence.** Neb. Rev. Stat. § 27-405 (Reissue 1979) permits evidence of specific instances of conduct where character is an essential element of a defense.
5. **Appeal and Error.** Error may not be predicated upon a ruling which excludes evidence unless a substantial right of a party is affected.
6. **Sentences.** Whenever a court considers a sentence for an offender convicted of a felony, the court may withhold a sentence of imprisonment unless, among other things, a lesser sentence will depreciate the seriousness of the crime or promote disrespect for the law.
7. **Sentences: Appeal and Error.** A sentence imposed by the trial court within the statutory limits will not be disturbed on appeal unless there has been an abuse of discretion.

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

M. Robert Fromkin and David L. Herzog, P.C., for appellant.

Paul L. Douglas, Attorney General, and Frank J. Hutfless, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and WARREN, D.J.

CAPORALE, J.

Defendant-appellant, Walter L. Sims, was charged with second degree murder; the intentional but unpremeditated killing of Gregory S. Combs. A jury found defendant guilty of the lesser-included offense of manslaughter, the unintentional killing of Combs. The trial court adjudged the defendant guilty pursuant to the jury's verdict and imposed a prison sentence of from 5 to 10 years. We affirm.

Defendant assigns three errors, namely, that the trial court erred in (1) admitting into evidence an allegedly gruesome and prejudicial photograph which had no probative value as to any controverted fact, (2) excluding proof probative of the fact that the decedent was the first aggressor and of decedent's violent and dangerous nature, and (3) abusing its discretion by denying probation and imposing an excessive period of imprisonment.

The defendant, a 44-year-old Omahan, planned and promoted an amateur fashion show in the summer of 1981, which was held on September 3, 1981, at his lounge known as "Walt's Bar." The participants included, among others, one Conchita Johnson and the deceased Combs. During rehearsals on September 1, 1981, Combs and Johnson were involved in an altercation wherein Combs struck and injured Johnson. As a consequence, defendant notified both that they would not be allowed to participate in the show. This was at least in part because the defendant thought it was disrespectful of Johnson to have called the police to his establishment. However, both Johnson and Combs did participate in the show and also came to the party held after the show's conclusion for the participants and others. The party was held at the apartment above defendant's other lounge, the State Bar, at which one Clarence Vaughn resided.

Johnson testified that prior to arriving at the party, Combs had assaulted her outside a downtown Omaha restaurant but denied he had a gun; however, an eyewitness gave testimony that Combs did have a gun. At the party Johnson and Combs once again became involved in an argument. First Vaughn, and then defendant and others, approached Combs and sought to eject him from the premises. Several parties became aware of the fact during this time that Combs had a gun in the waistband of his pants. Vaughn, Alfred McGee, and Gail Hepburn, as well as the defendant, testified that Combs threatened to kill defendant. Johnson testified it was defendant who threatened to kill Combs. Anthony Tate heard defendant say to decedent, "But you don't pull no pistol on me." According to Tate, upon making that statement, defendant pulled a gun and shot the decedent. On the other hand, an off-duty policeman who was a guest at the party, Isaiah Jackson, Jr., testified that Combs broke away while being led out. Jackson thereupon attempted to take

the gun from Combs but was unsuccessful. McGee testified that Jackson then yelled out, "He's got a gun." After Jackson's warning and during the scuffle which ensued, a shot rang out, which struck Combs. The defendant then left the premises, but within a few hours voluntarily accompanied Jackson to police headquarters. Police Sergeant Cousin testified that after initially denying involvement, defendant verbally admitted to him the shooting of Combs, but in self-defense. At trial, however, he testified that he did not pull the trigger and that his gun went off accidentally.

We now turn our attention to defendant's first assignment of error. The color photograph in question is 8 inches by 10 inches in size and exhibits the upper part of decedent's body, with eyes closed, draped in white sheets. Some bloodstains are visible, as is a medical cut above the decedent's heart made in an effort to revive him; the photograph also shows two tubes in the body's mouth. Defendant argues that inasmuch as it was stipulated that he, defendant, had shot the decedent and caused the death, the photograph had no probative value as to any controverted fact. We agree with the defendant that the receipt into evidence of an item for "whatever it's worth" does not render worthless evidence probative and therefore properly admissible. Although we recently cautioned against the overuse of gruesome photographs in *State v. Jones, ante* p. 1, 328 N.W.2d 166 (1982), we restated that in a homicide case photographs of the victim, upon proper foundation, may be received in evidence for the purpose of identification, to show the condition of the body, to show the nature and extent of the wounds and injuries, and to establish malice or intent. A photograph which illustrates or makes clear some controverted issue in a homicide case may be received even if it is gruesome. The admission into evidence of a gruesome photograph rests in the sound discretion of the trial court, which must determine its

relevancy and weigh its probative value against its possible prejudicial effect. The photograph in question, given the nature of photographs of crime victims, is not gruesome. Moreover, this was the only photograph of the decedent admitted into evidence and was used by the pathologist in describing where the bullet had struck, the chest; this fact is relevant to the issue of whether the shot was fired in self-defense. The trial court did not abuse its discretion by admitting the photograph into evidence.

Defendant next complains because the trial court did not permit Johnson to testify that she did not pursue the September 1, 1981, assault upon her by the decedent with the police because she feared he would have beaten her "like a dog," as he had beaten Kathy Binns. It is defendant's position that such testimony should have been admitted to support his claim that the decedent was violent and combative and had been the first aggressor, under the provision of Neb. Rev. Stat. § 27-405 (Reissue 1979), which reads: "(1) In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

"(2) In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct." Cases decided by this court prior to the adoption of the foregoing statute in 1975 hold that, where relevant, evidence of a homicide victim's propensity for violence ordinarily is admissible only in the form of reputation testimony. See, *State v. Ralls,* 192 Neb. 621, 223 N.W.2d 432 (1974); *State v. Kimbrough,* 173 Neb. 873, 115 N.W.2d 422 (1962). We conclude, however, that the language of § 27-405(2) changes that rule when character is an essential element of a "charge, claim, or defense." See, *United States v. Powers,*

622 F.2d 317 (8th Cir. 1980), *cert. denied* 449 U.S. 837, 101 S. Ct. 112, 66 L. Ed. 2d 44; *United States v. Giese,* 597 F.2d 1170 (9th Cir. 1979), *cert. denied* 444 U.S. 979, 100 S. Ct. 480, 62 L. Ed. 2d 405; and *United States v. Pantone,* 609 F.2d 675 (3d Cir. 1979), interpreting Fed. R. Evid. 405, identical in language to § 27-405, to permit evidence of specific instances of conduct where character is an essential element of a defense. Sims defended on the basis he shot in self-defense; that is, his actions were justified because he used only such force as he believed necessary to protect himself pursuant to the provisions of Neb. Rev. Stat. § 28-1409 (Reissue 1979). In order to excuse or justify a killing in self-defense, the accused must have entertained a reasonable and good faith belief his life was in great danger or that he was in danger of suffering great bodily harm. Thus, the proffered Johnson testimony was relevant to, and probative of, the question as to whether decedent was the first aggressor. The trial court therefore erred in not admitting that testimony. That finding does not, however, resolve the issue. For when error has occurred, a determination must always be made as to whether the error was prejudicial. See, Neb. Rev. Stat. § 27-103 (Reissue 1979), stating that error may not be predicated upon a ruling which excludes evidence unless a substantial right of a party is affected, and Neb. Rev. Stat. § 29-2308 (Reissue 1979), providing that no judgment in a criminal case shall be set aside or new trial granted because of the rejection of evidence, unless a substantial miscarriage of justice has actually occurred. These statutory rules find expression in cases such as *State v. Andersen, ante* p. 695, 331 N.W.2d 507 (1983), and *State v. Van Ackeren,* 194 Neb. 650, 235 N.W.2d 210 (1975).

The proffered testimony was cumulative. There was ample evidence before the jury to establish, if it chose to so find, that the decedent was violent and aggressive and that he was indeed the first aggres-

sor. In view of the cumulative nature of the excluded evidence, we conclude the error was harmless beyond a reasonable doubt. See, *Milton v. Wainwright,* 407 U.S. 371, 92 S. Ct. 2174, 33 L. Ed. 2d 1 (1972); *Schneble v. Florida,* 405 U.S. 427, 92 S. Ct. 1056, 31 L. Ed. 2d 340 (1972); *Chapman v. California,* 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), *rehearing denied* 386 U.S. 987, 87 S. Ct. 1283, 18 L. Ed. 2d 241; *United States v. Ledesma,* 632 F.2d 670 (7th Cir. 1980), *cert. denied* 449 U.S. 998, 101 S. Ct. 539, 66 L. Ed. 2d 296.

This then brings us to defendant's third and final assignment of error. Manslaughter is a Class III felony, for the conviction of which one may be sentenced to from 1 to 20 years' imprisonment, assessed a $25,000 fine, or both. Neb. Rev. Stat. § 28-105 (Reissue 1979). Although it is true that defendant has a relatively clean past record, the presentence report considered by the trial court reveals that defendant was convicted of petit larceny in 1959 and was convicted for sale of liquor without a license in 1969. In 1966 he was charged with carrying a concealed weapon; although no disposition is shown pertaining to that instance, the record does indicate defendant forfeited his bond.

Albeit unintentionally, defendant nonetheless destroyed another human life. Neb. Rev. Stat. § 29-2260 (Reissue 1979) provides that whenever a court considers a sentence for an offender convicted of a felony, the court may withhold a sentence of imprisonment unless, among other things, a lesser sentence will depreciate the seriousness of the crime or promote disrespect for the law. No one can argue but that the taking of life is a serious offense; to treat it lightly would both depreciate the seriousness of the crime and promote disrespect for the law. In any event, as we have said many times in the past, a sentence imposed by the trial court within the statutory limits will not be disturbed on appeal unless there has been an abuse of discretion.

State v. Komor, ante p. 376, 329 N.W.2d 120 (1983); *State v. Schmidt, ante* p. 126, 327 N.W.2d 624 (1982); *State v. Glover,* 207 Neb. 487, 299 N.W.2d 445 (1980). No abuse of discretion appears here.

The judgment and sentence of the trial court are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. JAMES E. LEVERING, APPELLEE.

331 N.W.2d 505

Filed March 11, 1983. No. 82-438.

Criminal Law: Hypnosis. Posthypnotic testimony of a victim which relates to matters which such victim was able to recall and relate prior to the hypnosis and as to which there is sufficient reliable recorded evidence to satisfy the court that such facts were known and related by the victim prior to hypnosis is admissible at trial.

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

Donald L. Knowles, Douglas County Attorney, S. W. Cooper, and Charles Campbell, for appellant.

Thomas M. Kenney, Douglas County Public Defender, and Michael F. Gutowski, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and MORAN, D.J.

HASTINGS, J.

This is a proceeding in error under Neb. Rev. Stat. § 29-2315.01 (Reissue 1979). Its purpose is to review the orders of the District Court in suppressing the testimony of the alleged robbery victim, Donald Playfoot, and of Deputy Sheriff Linda Valencia, in proceedings preliminary to trial. The defendant, James E. Levering, was charged with an August 24, 1981, robbery in Omaha. The State assigns as error the suppressing of the posthypnotic testimony of the

victim, as well as his testimony as to those events recalled and recorded prior to the hypnotic session. No error is assigned in suppressing the testimony of the deputy sheriff, although we will be required to discuss her testimony in order to resolve this appeal.

According to the victim's testimony, on August 24, 1981, his home in Omaha was entered by three black males who robbed him of property of value. After the robbers left he reported the incident to the Douglas County sheriff's department, and they sent Linda Valencia to take his report. As part of the suppression hearing, the State offered the testimony of Deputy Valencia as to what the victim had reported, as well as the written report itself, all of which were rejected by the court as hearsay. An offer of proof was made in the nature of the deputy sheriff's report itself, which was also rejected.

That report, dated August 24, 1981, contained a rather detailed description of the robbery of the victim. In addition, Deputy Sheriff William W. Black took a supplemental report from the victim on that same date, which was testified to by the officer at a suppression hearing. In that report the victim was quoted as saying that at approximately 12:30 a.m. he was reading in bed when he and his wife became aware of the presence of three armed, black males. He described in some detail the instructions given him by these intruders, including their demand that he show them where his money was located. During the remainder of the time while these three men were ransacking the house, he recalled the repeated demands made upon him not to look at their faces. He detailed the various items of property taken, then described the three men to the deputy sheriff as to age, height, and build, and in some instances furnished other characteristics of the alleged robbers.

The victim himself testified that on August 28, 1981, at the request of the sheriff's department, he was subjected to a hypnotic interview. According to

the testimony of Dr. George Bartholow, a licensed psychiatrist familiar with the use of hypnosis, he believes hypnosis to be a valuable tool in order to enhance and refresh memory. It was his opinion that the deputy sheriff who conducted the hypnotic interview was qualified to induce a hypnotic state, and from an examination of the recorded interview it was his judgment that the interview conducted with the victim was "excellent," and he saw no examples of leading questions or planting information.

As a result of the hypnotic interview, the victim was able to identify two of the men as having robbed him, one of whom was the defendant. According to the cassette tapes of the hypnotic interview, the facts of the alleged robbery were discussed in great detail, including the fact of the robbery and that it was perpetrated by three black men.

Both parties in their briefs agree that at the trial, held on April 30, 1982, neither the testimony of the victim nor of the deputy sheriff who took his initial report was permitted because of the suppression orders under consideration here. Also, a defense motion to dismiss due to insufficiency of the evidence was sustained in spite of the fact that the confession of the defendant was received in evidence.

It is apparent that the trial court sustained the defense motion to dismiss because the State failed to prove the corpus delecti. This could have been proved by testimony of the victim that he was robbed by three black men. That evidence, together with the defendant's confession, undoubtedly could have resulted in the defendant's conviction. That particular testimony of the victim, if permitted, would have related only to matters which he was able to recall and relate prior to hypnosis as to which there was sufficient evidence in the form of the deputy sheriff's report to satisfy the court that such evidence was known and related by the victim prior to hypnosis. That particular testimony should

not have been suppressed. See *State v. Patterson, ante* p. 686, 331 N.W.2d 500 (1983).

We therefore conclude that the orders of the District Court suppressing that evidence were erroneous and the exceptions must be sustained.

EXCEPTIONS SUSTAINED.

WHITE, J., dissenting.

For the reasons stated in the dissent in *State v. Patterson, ante* p. 686, 331 N.W.2d 500 (1983), I dissent.

MCCOWN, J., joins in this dissent.

STATE OF NEBRASKA, APPELLANT, V. PERRY J. FAVERO, APPELLEE.

331 N.W.2d 259

Filed March 11, 1983. No. 82-778.

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

Michael G. Heavican, Lancaster County Attorney, John A. Colborn, and Jan W. Sharp, for appellant.

Dennis R. Keefe, Lancaster County Public Defender, and Sean J. Brennan, for appellee.

WHITE, J.

This is an appeal by the State of Nebraska pursuant to Neb. Rev. Stat. § 29-116 (Cum. Supp. 1982) from an order of the District Court for Lancaster County, Nebraska, suppressing certain oral statements made by the defendant to a detective of the Lincoln Police Department. The statements made were in connection with the alleged participation of the defendant in the attempted second degree murder of Charles Ashley and the use of a deadly weapon in the commission of a felony. Reversed.

The standard of review in this case is that the finding of the trial court that statements or confes-

sions were or were not intelligently or voluntarily made will not be set aside on appeal unless the finding is clearly erroneous. *State v. Irwin,* 191 Neb. 169, 214 N.W.2d 595 (1974); *State v. Prim,* 201 Neb. 279, 267 N.W.2d 193 (1978).

The defendant is presently charged and awaiting trial in the Lancaster County District Court on the two above-mentioned felony counts. On August 26, 1982, the defendant filed a motion to suppress any and all statements made by him at the time of and subsequent to his arrest. At the hearing on the motion to suppress, the parties stipulated that the statements were taken from the defendant in violation of his constitutional rights to remain silent and to consult with an attorney prior to and during questioning. Thus, the State conceded that the defendant's statements were inadmissible in its case in chief. However, the State maintained that the statements were admissible evidence for impeachment purposes should the defendant testify at trial. The trial court granted the motion to suppress and held that the statements could not be used for any purpose. The State appeals, seeking review of that order.

The evidence reveals that on April 29, 1982, at approximately 4 p.m., Detective Larry E. Barksdale began an interview with the defendant. Barksdale told the defendant that the two other people who were arrested in connection with the attempted murder of Charles Ashley were making statements to the effect that the defendant was responsible for the offense. Barksdale also told the defendant that evidence had been found near the scene and that there was a good possibility that he was going to jail.

After asking the defendant whether he would make a statement or answer questions in relation to the attempted murder of Charles Ashley, Barksdale read the defendant the *Miranda* warnings at approximately 4:40 p.m. The defendant refused to make a statement and requested an attorney. Barksdale continued questioning and the defendant

stated that he wanted to tell what had happened but felt he should have an attorney present before doing so. No steps were taken to obtain an attorney, and Barksdale continued questioning and stated that as long as an attorney was not present, any statement made could not be used as an admission in court, so the defendant could tell him "off the record" what his side of the story was. The defendant then proceeded to relate how he had beaten Charles Ashley in retaliation for homosexual acts committed on the defendant's person.

In *Harris v. New York,* 401 U.S. 222, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971), the U.S. Supreme Court held that a statement that was inadmissible against the defendant in the prosecution's case in chief because of the failure of the police to give the defendant *Miranda* warnings could be used for impeachment to attack the credibility of the defendant's trial testimony. In *Harris* the defendant failed to make a claim that the statements made to police were coerced or involuntary.

In *Oregon v. Hass,* 420 U.S. 714, 95 S. Ct. 1215, 43 L. Ed. 2d 570 (1975), Hass was given *Miranda* warnings after his arrest. He requested that he be allowed to telephone an attorney but was told he could not do so until arrival at the police station. He then provided inculpatory information which was later suppressed. In *Hass* the Court pointed out that the only possible distinction between *Harris* and the case before it was the fact that the *Miranda* warnings given Hass were proper, whereas those given Harris were defective. The Court stated at 723: "The deterrence of the exclusionary rule, of course, lies in the necessity to give the warnings. That these warnings, in a given case, may prove to be incomplete, and therefore defective, as in *Harris,* does not mean that they have not served as a deterrent to the officer who is not then aware of their defect; and to the officer who is aware of the defect the full deterrence remains. The effect of inadmissibility in

the *Harris* case and in this case is the same: inadmissibility would pervert the constitutional right into a right to falsify free from the embarrassment of impeachment evidence from the defendant's own mouth." The *Hass* court reaffirmed *Harris*, which held that having denied making the statements, evidence of those statements may be used to impeach that denial. The *Hass* court also indicated the analysis which would be used in dealing with police abuse of the *Miranda* process. The Court stated that "If, in a given case, the officer's conduct amounts to abuse, that case, like those involving coercion or duress, may be taken care of when it arises measured by the traditional standards for evaluating voluntariness and trustworthiness." *Hass* at 723.

Unlike the defendants in *Harris* and *Hass,* the defendants in *Mincey v. Arizona,* 437 U.S. 385, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978), and *New Jersey v. Portash,* 440 U.S. 450, 99 S. Ct. 1292, 59 L. Ed. 2d 501 (1979), challenged the use of their statements for impeachment purposes with claims that the statements were not voluntary.

In *Mincey* the defendant had been wounded and was in a hospital receiving treatment at the time he was interrogated. While in severe pain and in a state of confusion, the defendant stated that he wished to remain silent and consult with an attorney. Mincey's request was ignored and questioning continued until a statement was obtained. The State of Arizona used the statement to impeach the defendant when he took the stand to testify in his behalf. In reversing the conviction the U.S. Supreme Court found that the statement was not the product of a free will and rational intellect and therefore was not voluntary. The *Mincey* court concluded that the impeachment use of the defendant's involuntary statements violated due process. In reaching its determination, the *Mincey* court stated at 401: "There were not present in this case some of the gross abuses that have led the Court in other cases to find

confessions involuntary, such as beatings . . . or 'truth serums,'. . . . But 'the blood of the accused is not the only hallmark of an unconstitutional inquisition.' . . . Determination of whether a statement is involuntary 'requires more than a mere color-matching of cases.' . . . It requires careful evaluation of all the circumstances of the interrogation."

In *Portash, supra,* the defendant testified at a grand jury hearing pursuant to a grant of immunity after first expressing an intention to assert his privilege against self-incrimination. The defendant was subsequently prosecuted and testified at his trial inconsistently with his grand jury testimony. The grand jury testimony was then utilized to impeach his trial testimony and he appealed. The *Portash* court noted that in *Harris* and *Hass* the process used in determining whether the impeachment evidence was properly admitted amounted to a balance between an attempt to deter police illegality and the need to prevent perjury. Referring to *Harris* and *Hass,* the *Portash* court stated at 458-59: "In both cases the Court weighed the incremental deterrence of police illegality against the strong policy against countenancing perjury. In the balance, use of the incriminating statements for impeachment purposes prevailed. The State asks that we apply the same reasoning to this case. It points out that the interest in preventing perjury is just as strongly involved, and that the statements made to the grand jury are at least as reliable as those made by the defendants in *Harris* and *Hass.*

"But the State has overlooked a crucial distinction between those cases and this one. In *Harris* and *Hass* the Court expressly noted that the defendant made 'no claim that the statements made to the police were coerced or involuntary,' . . . . That recognition was central to the decisions in those cases.

"The Fifth and Fourteenth Amendments provide that no person 'shall be *compelled* in any criminal

case to be a witness against himself.' As we reaffirmed last Term, a defendant's compelled statements, as opposed to statements taken in violation of *Miranda*, may not be put to any testimonial use whatever against him in a criminal trial. 'But *any* criminal trial use against a defendant of his *involuntary* statement is a denial of due process of law.' "

This court in *State v. Bazis,* 190 Neb. 586, 210 N.W.2d 919 (1973), followed the rule as set forth in *Harris.* See, also, *State v. Escamilla,* 195 Neb. 558, 239 N.W.2d 270 (1976). However, once the right to counsel is invoked, the rule in *Harris* becomes hard to reconcile with our decision in *In re Interest of Durand,* 206 Neb. 415, 420, 293 N.W.2d 383, 387 (1980), in which we stated: "If a suspect is told he has a right to have an attorney present during interrogation and he chooses to cut off questioning until counsel can be obtained, his choice must be 'scrupulously honored' by the police." The *Harris* rule also conflicts with the U.S. Supreme Court's decisions in *Edwards v. Arizona,* 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981), stating that once the right to counsel is exercised by the accused, the interrogation must cease until an attorney is present, and *Brooks v. Tennessee,* 406 U.S. 605, 612, 92 S. Ct. 1891, 32 L. Ed. 2d 358 (1972), in which the Court remarked that "Whether the defendant is to testify is an important tactical decision as well as a matter of constitutional right."

The facts in the present case are no different from those in *In re Interest of Durand, supra,* except that the statement is offered for impeachment purposes. After the defendant demanded an attorney for the second time, the detective ignored the defendant's request in an attempt to gather impeachment material. The defendant was assured that his statement could not be used against him as a confession or admission and that the detective just wanted to hear his side of the story "off the record."

The U.S. Supreme Court was well aware that this

type of illegal police conduct would occur when it stated in *Oregon v. Hass,* 420 U.S. 714, 723, 95 S. Ct. 1215, 43 L. Ed. 2d 570 (1975), that "One might concede that when proper *Miranda* warnings have been given, and the officer then continues his interrogation after the suspect asks for an attorney, the officer may be said to have little to lose and perhaps something to gain by way of possibly uncovering impeachment material."

Therefore, utilizing the test set forth in *Portash,* I must find that the facts of the instant case do not reveal a compelled involuntary statement of the type condemned in *Mincey* and *Portash.* In fact, the trial court found the statement was freely and voluntarily made but that the questioning procedure used by the detective had "an unfairness about it that violates, at least in this Court's mind, the concept of due process." The precise unfairness mentioned by the trial court is within the exceptions to *Miranda* contemplated by *Harris* and *Hass* and apparently did not persuade the majority in those cases to exclude the statements as impeachment evidence.

It may well be necessary, in view of the decisions of the U.S. Supreme Court which have considerably weakened the once absolute strictures of *Miranda,* for this court to reconsider our recent statements in *State v. Harper,* 208 Neb. 568, 304 N.W.2d 663 (1981), and to formulate, as have a number of the states, a state constitutional basis to deal with police conduct violative of *Miranda.* However, this determination should be made by the court and not by one judge of the court. Therefore, in light of the U.S. Supreme Court's rulings on the subject and this court's reluctance to extend the Nebraska constitutional requirements beyond those rulings, see *State v. Harper, supra,* the order of the trial court suppressing the statement is clearly erroneous and must be reversed.

REVERSED.

ROBERT E. PARMENTER, APPELLANT, v. DAVID R. JOHNSON, APPELLEE.

331 N.W.2d 263

Filed March 18, 1983. No. 44540.

1. **Negligence: Juries.** In determining whether the evidence is sufficient to submit the issues of negligence or contributory negligence of an opposing party to the jury, a party is entitled to have all conflicts in the evidence resolved in his favor and to have the benefit of every reasonable inference that may be deduced from the evidence. If reasonable minds might draw different conclusions from the set of facts thus resolved, the issues of negligence or contributory negligence are for a jury.
2. **Motor Vehicles: Rules of the Road.** A driver approaching an intersection on the right of an oncoming vehicle may not proceed in disregard of the surrounding circumstances and, where necessary to avoid a collision, may be required to yield the right-of-way.
3. _____: _____. A driver approaching an unprotected intersection where he knows or can observe that his view is obstructed must have his vehicle under such control as will give him a reasonable opportunity to react to a situation he does or could observe.
4. _____: _____. The driver of a motor vehicle has the duty to keep a proper lookout and watch where he is driving even though he is rightfully on the highway and has the right-of-way. He must keep a lookout in the direction from which others may be expected to approach.

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

Jim Zimmerman of Atkins, Ferguson, Hahn, Zimmerman & Carney, for appellant.

Michael J. Javoronok of Holtorf, Kovarik, Nuttleman, Ellison, Mathis & Javoronok, P.C., for appellee.

KRIVOSHA, C.J., HASTINGS, and CAPORALE, JJ., and DAVIS, D.J., and COLWELL, D.J., Retired.

DAVIS, D.J.

The appellant, plaintiff below, appeals a verdict and judgment for the appellee in a negligence action for injuries claimed from a collision between vehicles operated by the parties which occurred in an uncontrolled intersection of two roads in Melbeta,

Nebraska, during the day of January 25, 1975.

The trial court directed a verdict against the appellee on the issue of liability and instructed the jury on the issues of the appellant's contributory and comparative negligence, using Nebraska Jury Instructions on lookout, control, and right-of-way.

The evidence showed that just prior to the accident the appellant was operating his vehicle to the east on a two-lane gravel surfaced road at a speed of approximately 15 miles per hour. The appellee was operating his vehicle to the south on a two-lane road at 15 to 20 miles per hour, according to his testimony.

The appellant, a local resident, testified that he had used the road many times on trips from his farm to town and was familiar with the intersection.

The appellant testified that he believed he saw the appellee shortly after his earliest opportunity to do so, but stated that his vision to the north was somewhat obstructed by a house and trees on the northwest corner of the intersection. The appellee's vehicle was approximately one-half block to the north of the intersection when it was first seen by the appellant, and at that time the appellant's vehicle was 40 or 50 feet to the west of the intersection.

The appellant testified that when he first saw the appellee he realized that he could not cross the intersection safely, based upon his estimate of the speed at which the appellee was approaching. He applied his brakes hard, and testified that his truck stopped at or shortly before impact, with its front end at a point approximately 10 feet into the intersection and 1 foot into the southbound traffic lane.

The right front corner of the appellee's truck struck the left front corner of the appellant's truck.

The appellee testified that he did not see the appellant's vehicle until he had approached within 10 feet of it, at which time he applied his brakes but was unable to stop before impact.

The appellant argues that because he saw the ap-

pellee's oncoming vehicle within a short distance of his earliest opportunity to do so and that because he applied and locked his brakes prior to impact, he met the requirements of lookout and reasonable control as a matter of law, and that the trial court erred in submitting these issues to the jury, along with the issue of his right-of-way.

In determining whether the evidence is sufficient to submit the issues of negligence or contributory negligence of an opposing party to a jury, a party is entitled to have all conflicts in the evidence resolved in his favor and to have the benefit of every reasonable inference that may be deduced from the evidence. If reasonable minds might draw different conclusions from the facts thus resolved, the issues of negligence or contributory negligence are for a jury. *Pearson v. Richard,* 201 Neb. 621, 271 N.W.2d 326 (1978).

Here, because of the appellant's speed as a function of control, see NJI 7.03, a reasonable inference arises that he had no alternative but to enter the intersection, regardless of what his observation may have disclosed, when he reached a position from which he could see an oncoming vehicle to his left. *Crink v. Northern Nat. Gas Co.,* 200 Neb. 460, 263 N.W.2d 857 (1978); *Hodgson v. Gladem,* 187 Neb. 736, 193 N.W.2d 779 (1972).

Given the evidence of the respective speeds of the vehicles involved, the semiobstructed nature of the intersection, the appellant's familiarity with it, as well as his testimony as to the point at which he first observed or could have observed the appellee's vehicle, a jury question existed as to the adequacy of the appellant's lookout. *Pearson v. Richards, supra; Crink v. Northern Nat. Gas Co., supra; Hodgson v. Gladem, supra; Jones v. Consumers Coop. Propane Co.,* 186 Neb. 629, 185 N.W.2d 458 (1971).

Based upon the evidence of the location and speed of the vehicles involved, the trial court properly submitted to the jury the question of right-of-way.

Crink v. Northern Nat. Gas Co., supra; Pearson v. Richard, supra.

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

AFFIRMED.

KAREN L. MUIR, APPELLEE, V. ROCKNEY L. MUIR, APPELLANT.

331 N.W.2d 265

Filed March 18, 1983. No. 81-903.

Appeal from the District Court for Hall County: RICHARD L. DEBACKER, Judge. Affirmed.

Cunningham, Blackburn, VonSeggern, Livingston, Francis & Riley, for appellant.

Chesley S. Baker of Lauritsen, Baker & Brownell, for appellee.

BOSLAUGH, CLINTON, and HASTINGS, JJ., and CAMBRIDGE, D.J., and COLWELL, D.J., Retired.

PER CURIAM.

This appeal involves a domestic relations matter.

This court, having reviewed the record in this case de novo, agrees with the result reached by the trial court. The judgment is affirmed.

AFFIRMED.

CLINTON, J., not participating.

RUTH E. RASKIN AND BERNARD H. RASKIN, APPELLANTS, V. SELDIN DEVELOPMENT & MANAGEMENT COMPANY, A CORPORATION, MILLARD R. SELDIN, THEODORE M. SELDIN, STANLEY C. SILVERMAN, AND NORMA R. SILVERMAN, APPELLEES.

331 N.W.2d 783

Filed March 18, 1983. No. 82-034.

Damages. It is the duty of the District Court to refrain from submitting to a jury the issue of damages when the evidence is such that it cannot determine such issue except by indulging in speculation and conjecture.

Appeal from the District Court for Douglas County: D. NICK CAPORALE, Judge. Affirmed.

Martin A. Cannon of Matthews, Cannon & Riedmann, P.C., for appellants.

John W. Delehant and James D. Sherrets of Kutak Rock & Huie, for appellees.

KRIVOSHA, C.J., MCCOWN, and HASTINGS, JJ., and HOWARD, D.J., and COLWELL, D.J., Retired.

HOWARD, D.J.

Plaintiffs in an action for breach of contract appeal from the trial court's dismissal of the petition at the close of plaintiffs' case. The only parties signatory to the contract are the plaintiffs and Millard R. Seldin, Theodore M. Seldin, and Stanley C. Silverman. For reasons unexplained, Norma R. Silverman and Seldin Development & Management Company are also named parties defendant.

The plaintiffs and the defendants were in 1972 owners of varying shares in eight corporations. Plaintiffs were stockholders in five, which owned income-producing assets. Beginning in 1971, Bernard and "the brothers," Millard, Theodore, and Stanley, began to plan the merger of the eight corporations into a new successor corporation, Seldin Development & Management Company (SDM). The formation of SDM included not only the assets of the eight corpo-

rations but also individual partnership assets contributed by Bernard and the brothers in varying amounts, described as "motel operations."

The initial capitalization of SDM was to be $100,000, consisting of 1,000,000 shares of $.10 par common, of which the Raskins were to receive 11.8 percent for a total of 118,000 shares. It was initially contemplated that the individual stockholders would offer to the public on a pro rata basis a total of 225,000 shares, namely, 22½ percent of their 1,000,000 shares. Assuming a public offering price of $14 per share, the Raskins, on a pro rata offering of 22½ percent of their 118,000 shares, would have received $371,700. In addition to the 225,000 stockholder shares to be sold for profit, it was also contemplated that SDM would issue and sell 75,000 new shares for corporation expansion and payment of high-interest debt. At $14 per share the offering would be apportioned:

Stockholders:	225,000 @ $14	=	$3,150,000
SDM:	75,000 @ $14	=	1,050,000
			$4,200,000

In March 1972, at the time the merger was being finalized, the Raskins negotiated with the brothers for an arrangement whereby the Raskins would sell out all of their shares if there was a public offering. If the price was right, the Raskins were willing to sell out and retire. The Raskins wanted a price of $1,000,000. Since the anticipated public price was to be $14 per share, this required the reduction of the Raskin shares from 118,000 to 71,429, because $14 × 71,429 = $1,000,006. The agreement provided that the other signatory parties would pay to the Raskins any shortage if the price received should be less than $14 per share.

There was concern about the consequences if the contemplated registration and public offering should not, in the event, take place. For reasons which will become apparent, we do not detail the evidence or respond to the arguments concerning the negoti-

ations between the Raskins and the brothers as bearing upon the meaning of the provision in the contract finally adopted: "If said contemplated registration and public offering does not take place by September 30, 1972 (regardless of the reason), then all covenants, terms and conditions of this Agreement shall automatically become void, and the parties will return to their respective stock ownership status prior to the merger." During the period between April and July of 1972 the market for stock deteriorated. It was anticipated that the public offering would be underwritten by a broker on a firm underwriting basis which would guarantee a specific price to the sellers at the risk of the underwriter. Although there was talk of a possible market at $14, and later at $9 per share, the undisputed fact is that the broker never offered any underwriting contract at any price; thus, the public offering never took place by the September 30, 1972, deadline or thereafter. The Raskins were restored to an 11.8 percent ownership in SDM, and earnings of over $53,000 for the first fiscal year ending June 30, 1973, were distributed to the Raskins, based upon their restored ownership of 118,000 shares in SDM. The additional shares were specifically demanded on July 12, 1973, by the Raskins' attorney.

Plaintiffs' theory is that either they are entitled to have the now extinguished corporations somehow reconstituted and their stock interests in those corporations restored (which they concede to be an impossibility) or that they should be awarded judgment of $1,000,006. The plaintiffs overlook the fact that no defendant was obliged to pay any amount to them (except the shortage below $14 per share if, and only if, the offering of shares should be underwritten). If plaintiffs have a cause of action it is for breach of contract. If the alleged breach is for failure to deliver shares of stock, "the measure of recovery . . . is the value of the stock at the time of the breach." *Katleman v. Leon's, Inc.*, 110 Neb. 129,

133, 193 N.W. 254, 255 (1923). No evidence of any kind was offered on the value of the Raskin shares in the five merged corporations at the time of the alleged breach. Additionally, an essential but missing factor in any calculation of damages is the value of the Raskins' 118,000-share interest in SDM and their earnings therefrom. If plaintiffs have sustained damages by whatever measure, it is their duty to present some evidence from which the amount can be reasonably computed. "It is the duty of the district court to refrain from submitting to a jury the issue of damages when the evidence is such that it cannot determine such issue except by indulging in speculation and conjecture." *Midlands Transp. Co. v. Apple Lines, Inc.*, 188 Neb. 435, 440, 197 N.W.2d 646, 649 (1972).

Defendants' motion to dismiss was grounded both on a failure to prove liability and on a failure to prove damages. Because of the view we take of the second ground, we need not consider the first. The judgment of the District Court was correct and is affirmed.

AFFIRMED.

MICHAEL A. ENYEART, APPELLANT, V. STEVEN P. SWARTZ, APPELLEE.

331 N.W.2d 513

Filed March 18, 1983. No. 82-073.

1. **Jury Instructions: Appeal and Error.** It is uniform and proper practice in this state that where specific acts of negligence are charged and supported by the evidence, the trial court instructs as to specific acts so alleged and supported. The failure to do so, even though not requested, is error.
2. _____: _____. Ordinarily, a failure to object to instructions after they have been submitted to counsel for review will preclude raising an objection thereafter.
3. _____: _____. Noncompliance by counsel with the requirement that he object to a proposed jury instruction when it is submitted to

him does not bar this court from opting to consider plain errors in a record indicative of a probable miscarriage of justice.

4. **Jury Instructions.** It is the duty of the trial court, whether requested to do so or not, to submit to and properly instruct the jury on all material issues presented by the pleadings and supported by the evidence.

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

Jeffrey A. Silver, for appellant.

Jerry J. Milner of Grimminger, Milner & Lamberty, for appellee.

KRIVOSHA, C.J., WHITE, and CAPORALE, JJ., and BUCKLEY, D.J., and COLWELL, D.J., Retired.

BUCKLEY, D.J.

This action results from a motor vehicle accident on September 7, 1978, at the intersection of Eddy and West Fourth Streets in Grand Island, Nebraska. Plaintiff-appellant, in his petition, and defendant-appellee, in his counterclaim, alleged damages resulting from the other driver's negligence. Neither party alleged contributory negligence as an affirmative defense.

Trial was had to a jury, which found against both parties on their respective claims. Defendant filed a motion for a new trial, which was sustained, and from that order plaintiff appeals.

Plaintiff was operating an automobile and the defendant a motorcycle. Plaintiff was proceeding north on Eddy Street and was attempting a left turn in the intersection when the defendant, proceeding in the opposite direction on Eddy Street, collided with him. Neither driver saw the other before the collision. It was between dusk and dark at the time and the evidence varied as to the need to have headlights on. Plaintiff's headlights were on; whether defendant's headlight was on was in conflict. Issues of negligence as to reasonable control and proper lookout were properly submitted to the jury.

Although the trial court did not specify its reasons for granting a new trial, both parties concede by their briefs and oral arguments that the only apparent issue is whether the jury was adequately instructed as to right-of-way.

Defendant's allegations of plaintiff's negligence included the charge that plaintiff failed to yield the right-of-way. Right-of-way is defined in the statutory Nebraska Rules of the Road as "the right of one vehicle or pedestrian to proceed in a lawful manner in preference to another vehicle or pedestrian approaching under such circumstances of direction, speed, and proximity as to give rise to danger of collision unless one grants precedence to the other." Neb. Rev. Stat. § 39-602(80) (Reissue 1978).

Further, Neb. Rev. Stat. § 39-636 (Reissue 1978) provides that "The driver of a vehicle who intends to turn to the left within an intersection or into an alley, private road, or driveway shall 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."

The trial court did instruct the jury that the defendant charged the plaintiff with the specific act of negligence in failing to yield the right-of-way, and it did submit the standard instruction on lookout and reasonable control, which advises the jury that a motorist has a duty to keep a proper lookout and watch where he is driving, even though he has the right-of-way. However, the instructions did not define right-of-way, nor did they submit the left turn statutory rule of the road embodied in § 39-636, nor did they instruct the jury in any other manner as to the rights and duties of a motorist intending to make a left turn at an intersection.

It is the uniform and proper practice in this state that where specific acts of negligence are charged and supported by the evidence, the trial court instructs as to specific acts so alleged and supported.

The failure to do so, even though not requested, is error. *Pool v. Romatzke,* 177 Neb. 870, 131 N.W.2d 593 (1964); *Herman v. Midland Ag Service, Inc.,* 200 Neb. 356, 264 N.W.2d 161 (1978). The instructions given were wholly lacking in any advice to the jury as to what facts and circumstances would entitle either party to the right-of-way. They provided no guidance to the jury to determine which party had the right-of-way over the other as they approached and entered the intersection. The failure to so instruct is clearly prejudicial error.

Plaintiff, however, contends that even if the court should have so instructed, no request for any instructions was made by defendant at the instruction conference and, therefore, he cannot object now. The trial court did hold an instruction conference at which each of the instructions given were reviewed. The court neither invited nor did counsel tender any requested instructions. Counsel for defendant in his brief claims that he requested the statutory left turn instruction prior to the instruction conference, but there is no record of it.

It is true that, ordinarily, a failure to object to instructions after they have been submitted to counsel for review will preclude raising an objection thereafter. *McCready v. Al Eighmy Dodge,* 197 Neb. 684, 250 N.W.2d 640 (1977). However, in that case we also said that such noncompliance by counsel does not bar this court from opting to consider plain errors in a record indicative of a probable miscarriage of justice. In addition thereto, we do not intend to abrogate the long-standing rule that it is the duty of the trial court, whether requested to do so or not, to submit to and properly instruct the jury on all material issues presented by the pleadings and supported by the evidence. This fundamental duty of the trial court has not been altered by our rule adopted in 1969, which formalized the trial court's instruction conference. *Herman v. Midland Ag Service, Inc., supra; Pool v. Romatzke, supra.*

Here, the instructions given were correct as far as they went. Therefore, it was not defendant's failure to object to the instructions given but the trial court's failure to adequately instruct that requires a new trial.

The trial court's order sustaining defendant's motion for new trial was correct and should be affirmed. We also note that the trial court did not instruct the jury on comparative negligence. If, upon retrial of the case, the issue of both plaintiff's and defendant's negligence is submitted to the jury, the comparative negligence instruction should be given.

AFFIRMED.

JOSEPH L. VACCA, ASSIGNEE OF BIEDERMANN & SONS, INC., MONOGRAM OF CALIFORNIA, DECORA IMPORTS, INC., SUNRISE PUBLICATIONS, INC., AND CREATIVE CONCEPTS, APPELLANT, V. ROBERT J. DEJARDINE, R.J.D., INC., W.M., INC., DOING BUSINESS AS THE VIKING SHOP OR THE OTHER VIKING SHOP, APPELLEES.

MIDWEST IMPORTERS OF CANNON FALLS, INC., APPELLANT, V. ROBERT J. DEJARDINE, R.J.D., INC., W.M., INC., DOING BUSINESS AS THE VIKING SHOP OR THE OTHER VIKING SHOP, APPELLEES.

331 N.W.2d 516

Filed March 18, 1983. Nos. 82-132, 82-133.

1. **Default Judgments: Appeal and Error.** An order vacating a default judgment is an appealable order.
2. **Default Judgments.** The matter of the vacation of a default judgment rests in the sound discretion of the trial court, but this discretion is not an arbitrary one and it must be exercised reasonably.
3. _____. In addition to the requirements of Neb. Rev. Stat. § 24-537 (Reissue 1979), a party seeking to vacate a default judgment must also tender an answer or other proof disclosing a meritorious defense.
4. _____. Before imposing the sanction of entering a default judgment against a party who has failed to serve answers to interrogatories as provided by Neb. Rev. Stat. § 25-1267.44 (Reissue 1979),

the court should first issue an order requiring such party to show cause why such default judgment should not be entered.

Appeal from the District Court for Douglas County: KEITH HOWARD, Judge. Vacca v. DeJardine reversed and remanded with directions to reinstate the original default judgment. Midwest Importers of Cannon Falls, Inc. v. DeJardine affirmed as modified, and remanded with directions.

Joseph L. Vacca of J. L. Vacca & Associates, P.C., for appellants.

Betty L. Egan of Walsh, Walentine, Miles, Fullenkamp & O'Toole, for appellees.

BOSLAUGH, MCCOWN, and HASTINGS, JJ., and BRODKEY, J., Retired, and RIST, D.J.

HASTINGS, J.

These cases are appeals from the District Court for Douglas County, which affirmed two decisions of the municipal court of Omaha, Douglas County, Nebraska. In the municipal court both plaintiffs-appellants moved for and obtained default judgments against the defendants-appellees. On motion of the defendants and payment of costs, these judgments were ordered vacated and set aside. It is from these orders that the plaintiffs appealed to the District Court, which in turn affirmed that action. These appeals followed.

At the outset, both in District Court and here, the defendants insist that the orders vacating the default judgments were not final orders and therefore not appealable. Cited in support of this contention are *Brown v. Edgerton,* 14 Neb. 453, 16 N.W. 474 (1883), and *Roh v. Vitera,* 38 Neb. 333, 56 N.W. 977 (1893). Both of those cases stand for that proposition. However, in *Jones v. Nebraska Blue Cross Hospital Service Assn.,* 175 Neb. 101, 120 N.W.2d 557 (1963), this court squarely held in a similar case that "The order vacating the judgment is an appealable one."

Id. at 102, 120 N.W.2d at 559. We believe that this expresses the better-reasoned rule.

In the case of *Vacca v. DeJardine et al.,* following the filing of a petition a summons was issued showing answer day to be July 30, 1981. On July 31, 1981, the plaintiff appeared in court and showed that the defendants had failed to appear or answer, and obtained a default judgment. On August 24, 1981, on motion of the defendants and payment of costs, the default judgment was set aside and the case set for pretrial on September 23, 1981. To this date, as disclosed by the record, no answer was or has since been filed by the defendants.

Neb. Rev. Stat. § 24-537 (Reissue 1979) provides: "When judgment shall have been rendered against a defendant in his absence, the same may be set aside upon the following conditions: (1) That he pay the costs awarded against him; (2) that his motion be made within thirty days after such judgment was entered; (3) that he notify in writing the opposite party . . . of the opening of such judgment and of the time and place of trial . . . ." However, more is required of a defendant in this situation. In *Steinberg v. Stahlnecker,* 200 Neb. 466, 263 N.W.2d 861 (1978), we affirmed the orders of both the Omaha Municipal Court and the District Court in refusing to set aside a default judgment wherein the defendant had filed nothing but a general denial. We said: "The matter of the vacation of a default judgment rests in the sound discretion of the trial court but this discretion is not an arbitrary one and it must be exercised reasonably. A party seeking to vacate a default judgment must tender an answer or other proof disclosing a meritorious defense." *Id.* at 468, 263 N.W.2d at 863.

Under the circumstances in *Vacca v. DeJardine et al.,* both the municipal court and the District Court abused their discretion in setting aside the default judgment in favor of the plaintiff. Accordingly, that case is reversed and remanded with directions to

reinstate the original default judgment.

In *Midwest Importers of Cannon Falls, Inc. v. DeJardine et al.,* the defendants did file a timely answer to the plaintiff's petition, although they have failed to file any response to an amended petition. However, the default judgment in this case was entered on July 24, 1981, on plaintiff's motion, setting forth that the defendants had failed and neglected to answer or object to interrogatories served on them by the plaintiff. On August 24, 1981 (August 23 having fallen on a Sunday), on motion of the defendants and payment of costs, the default judgment was set aside and the cause set for pretrial on September 23. No order was made regarding the failure to serve and file answers to interrogatories and nothing has been done in that regard to this date.

The statutory provision regarding the failure to answer interrogatories is found in Neb. Rev. Stat. § 25-1267.44 (Reissue 1979). It provides in part as follows: "(4) If a party . . . willfully . . . fails to serve answers to interrogatories . . . after proper service of such interrogatories, the court on motion and notice may . . . enter a judgment by default against that party." Although not directly in point, we find instructive some of the language in *Anoka-Butte Lumber Co. v. Malerbi,* 180 Neb. 256, 142 N.W.2d 314 (1966).

In that case the plaintiff-appellee, upon defendants' appeal from a judgment in county court, had failed to file its petition on appeal within "fifty days from the date of the rendition of such judgment by the justice," as required by Neb. Rev. Stat. § 27-1307 (Reissue 1964). The District Court, on appeal, denied the defendants' motion to nonsuit the plaintiff. We said: "Unless the statute is enforced in some manner by the court, it would be within the power of a litigant to continue the litigation almost without end. Where the provisions of the statute provide for a showing of good cause, good cause must be required. Here, however, there is no such require-

ment. The proper procedure in such situation would appear to be for the appellant to direct the court's attention to the fact that the appellee has not filed a petition on appeal within the time required. The court should then order that the plaintiff be nonsuited unless a petition on appeal is filed within a time specified." *Id.* at 261, 142 N.W.2d at 317.

Applying that rationale to the present case, we believe that had the municipal court not have set aside the default judgment in the face of no order to show cause, it would have been an abuse of discretion, prejudicial to the defendants, requiring reversal. *Von Seggern v. Kassmeier Implement,* 195 Neb. 791, 240 N.W.2d 842 (1976). It therefore follows that the setting aside of the judgment was not an abuse of discretion, and the judgment of the District Court should be affirmed. However, following the teaching of *Anoka-Butte,* the municipal court, in the first instance, instead of granting a default judgment, should have issued an order to the defendants to show cause why such judgment should not be granted because of their failure to file and serve answers. Therefore, the order of affirmance is modified to the extent that on remand the trial court is directed to issue an order to the defendants to show cause within a reasonable time period why a default judgment should not be entered.

VACCA V. DEJARDINE REVERSED AND REMANDED WITH DIRECTIONS TO REINSTATE THE ORIGINAL DEFAULT JUDGMENT.

MIDWEST IMPORTERS OF CANNON FALLS, INC. V. DEJARDINE AFFIRMED AS MODIFIED, AND REMANDED WITH DIRECTIONS.

IN RE INTEREST OF CARMELITA MADONNA BIRD HEAD, A MINOR CHILD.
STATE OF NEBRASKA, APPELLEE, V. ALVA BIRD HEAD RATTLING CHASE, APPELLANT.

331 N.W.2d 785

Filed March 18, 1983. No. 82-197.

1. **Indian Child Welfare Act: Words and Phrases.** Under the provisions of the Indian Child Welfare Act, 25 U.S.C.A. §§ 1901 et seq. (1983), "preadoptive placement" means the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement.
2. **Child Custody: Appeal and Error.** Factual support in the record in the trial court as to "good cause" for failure to comply with statutory child placement preference directives are necessary for appropriate appellate review.

Appeal from the District Court for Sheridan County: PAUL D. EMPSON, Judge. Affirmed in part, and in part reversed and remanded with directions for further proceedings.

Susan I. Buckles and Joe Louie Romero of Western Nebraska Legal Services, for appellant.

Dennis D. King and Terrance O. Waite, and Michael T. Varn, guardian ad litem, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and COLWELL, D.J., Retired.

MCCOWN, J.

This is a proceeding to declare an Indian infant a neglected and dependent child and to terminate parental rights. The county court of Sheridan County, acting in its capacity as a juvenile court, found Carmelita Madonna Bird Head to be a neglected and dependent child, terminated parental rights, placed custody of the child in the Nebraska Department of Public Welfare to be placed for adoption, and directed that temporary custody of the child should be continued in the foster parents previously designated by the Department of Public Welfare. Alva

Bird Head Rattling Chase, the child's maternal aunt, appealed to the District Court, which affirmed the judgment of the county court. The aunt has again appealed.

Carmelita Madonna Bird Head was born on September 3, 1979. Following the birth of the child her mother, Martha Bird Head, and the child resided with the mother's uncle, Thomas Plenty Wounds in Gordon, Nebraska. The residence periodically also served as a temporary residence for several other individuals, including Alva Bird Head Rattling Chase, a sister of Martha Bird Head. On many occasions, and for extensive periods of time before July 31, 1980, her mother had left the child in the care of Patricia and Delmer Dunnick of Rushville, Nebraska. Martha Bird Head died on July 31, 1980, in Denver, Colorado, shortly after being taken to the hospital.

Between July 31, 1980, and August 12, 1980, the child was in the care of her aunt, Alva Bird Head Rattling Chase, or Patricia and Delmer Dunnick. The child had been left at the residence of Thomas Plenty Wounds in Gordon, Nebraska, when her mother went to the hospital. On August 12, 1980, the child was taken into custody by the sheriff and a welfare worker. The sheriff delivered the child into the temporary custody of the Sheridan County Welfare Department, which placed her in the temporary care of Patricia and Delmer Dunnick.

On August 15, 1980, a petition was filed seeking to have the child declared to be neglected and dependent as described in Neb. Rev. Stat. § 43-202(1) (Reissue 1978), and seeking the termination of the parental rights of any natural father.

Two men listed by the mother on two different ADC applications as the father of the child were notified of the proceeding, neither of whom appeared. The former husband of Martha Bird Head, Fred Tail, was also notified. He appeared through counsel but later withdrew. Notice was also given to

the tribal prosecutor of the Oglala Sioux Tribe in Pine Ridge, South Dakota.

The appellant aunt, Alva Bird Head Rattling Chase, did not personally appear at the first hearing on September 3, 1980, but did appear by counsel. Following hearing, the court ordered that the Oglala Sioux Tribal Court be given notice of the proceeding, appointed a guardian ad litem for the minor child, continued temporary custody and care of the child in Patricia and Delmer Dunnick, and continued the proceeding.

On September 23, 1980, an adjudication hearing was held. The appellant was present and represented by counsel. Patricia and Delmer Dunnick were present and represented by counsel and the guardian ad litem for the child was also present. A motion requesting the court to transfer jurisdiction to the Oglala Sioux Tribal Court was made on behalf of Fred Tail by an individual who had no tribal authority to make such a motion.

The court noted that notice of the proceedings had been served on the tribal prosecutor of the Oglala Sioux Tribe and that the prosecutor had not appeared in the proceedings or authorized anyone else to appear on his behalf, and no appearance had been made on behalf of the tribe, the tribal juvenile court, the tribal prosecutor's office, or any other party who might be authorized to appear on behalf of the tribe, and that consideration of any such motion was premature.

The court then proceeded with the adjudication hearing and found that Carmelita Bird Head was a child described in § 43-202(1) and (2) and took under advisement the termination of parental rights. The court further found that the adjudication hearing did not preclude interested parties from addressing the issue of the court's jurisdiction pursuant to the Indian Child Welfare Act of 1978. The court therefore ordered the matter continued until October 31, 1980, for a hearing on motions which might be filed per-

taining to whether the matter should be transferred to the Oglala Sioux Tribal Court for further proceedings. The court directed that any such motions should be filed on or before October 16, 1980, and briefs in support or in opposition on or before October 26, 1980.

On October 18, 1980, a petition for transfer of the proceedings to the Oglala Sioux juvenile court was filed, signed by a judge of the tribal court. Objection was made on the ground of late filing. On October 30, 1980, the court accepted the filing and continued the hearing upon the petition to transfer proceedings to November 25, 1980.

On November 25, 1980, hearing on the petition to transfer jurisdiction to the tribal court was held as scheduled. No representative of the Oglala Sioux Tribe or of the tribal court was present to argue the motion or present evidence. The guardian ad litem and Patricia and Delmer Dunnick had filed objections to the petition.

Hearing was held and argument had. There was no evidence that the petition for transfer had been authorized by the tribe. The court apparently determined that the petition for transfer was unauthorized by the tribe or had been declined by the tribal court. The court found that the petition was deemed to have been abandoned and good cause had been shown by the evidence why the transfer should not be ordered. The court therefore denied the transfer and set the date for dispositional hearing. Neither the Oglala Sioux Tribe nor the tribal court appealed from the order, and neither has taken any further part in these proceedings.

A dispositional hearing was held on January 9, 1981. Evidence was submitted and the court found that the mother of the child was deceased and that the father of the child was unknown and had abandoned the child for more than 6 months, and that the child should be placed for adoption. The court therefore terminated the parental rights of any po-

tential father and ordered custody of the child placed with the Nebraska Department of Public Welfare to be placed for adoption by that agency, and continued temporary custody in Patricia and Delmer Dunnick pending further disposition by the Department of Public Welfare.

Alva Bird Head Rattling Chase appealed to the District Court. After extensive delays involving the right to proceed in forma pauperis and problems of preparation and completion of the bill of exceptions from the county court, the District Court received the bill of exceptions and some additional documentary evidence and took the case under advisement on February 2, 1982.

On February 16, 1982, the District Court found that the appellant's history of criminal conduct, her use of alcohol and resulting intoxication, and the apparent abuse of the child while in her care established that she was unfit to have custody. The District Court also found that the tribe and the tribal court had abandoned the motion to transfer jurisdiction and that the appellant was not an Indian custodian under the Indian Child Welfare Act. The District Court affirmed the judgment of the county court and this appeal followed.

The issues on this appeal revolve around the application of the Indian Child Welfare Act. 25 U.S.C.A. §§ 1901 et seq. (1983). The national policy undergirding the Indian Child Welfare Act is to protect the best interests of Indian children by the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture. See 25 U.S.C.A. § 1902.

The appellant first contends that she was an Indian custodian within the meaning of that act and that as such a custodian she is entitled to certain procedural and substantive rights similar to the rights of parents, including the right to petition to transfer to a tribal court.

25 U.S.C.A. § 1903 defines "Indian custodian" as

"any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child."

The evidence in the record here shows that before the sheriff took Carmelita into custody the child had spent a major part of her lifetime in the custody of the Dunnicks, who had been chosen to care for her by her mother. After the mother's death, and before the sheriff took custody, the child was in the possession of the appellant aunt for less than 1 week. The remainder of that time the child spent with the Dunnicks, with the approval of the appellant.

The appellant, at the dispositional hearing, admitted that she had a severe alcohol problem and that she had been convicted of more than ten misdemeanors and was on probation following her conviction for felonious entry of a building. There was also testimony as to bruises found on Carmelita's back when the child was taken from the appellant's possession by the sheriff.

No evidence was presented to indicate that the child's mother ever transferred temporary care or custody of the child to the appellant or intended for her to have custody of the child. The evidence indicates that the mother was taken from the residence to the hospital, suffering an overdose of drugs, and that she took no actions at all with reference to the care or custody of the child. The evidence fails to indicate that the mother ever transferred, attempted to transfer, or intended to transfer temporary physical care, custody, and control of the child to the appellant or anyone else at the time the mother was taken to the hospital.

The evidence in the record supports the findings of the District Court that the appellant was not an Indian custodian within the meaning of 25 U.S.C.A. § 1903, and that the appellant was unfit to have custody of the child.

The appellant next contends that the county court erred in failing to transfer the proceedings from the county court to the tribal court.

25 U.S.C.A. § 1911(b) provides: "In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided,* That such transfer shall be subject to declination by the tribal court of such tribe."

In the present case the only petition for transfer of proceedings which is involved here was filed on October 18, 1980, by a juvenile judge of the Oglala Sioux Tribal Court. Hearing was set and objections to the filing and answers to the petition, alleging good cause for denial, were filed.

Neither the Oglala Sioux Tribe nor the tribal court nor any representative of either appeared at the time set for hearing, and there was no evidence that the petition had been authorized by the tribe or the proceedings accepted or approved by the tribal court. The trial court, after hearing, found that the proceedings had been abandoned and good cause for denial shown, and denied the transfer. The validity of the finding of abandonment is further established by the fact that neither the tribe nor the tribal court nor any representative of either appealed from the order, and neither has taken any further part in these proceedings.

There was ample evidence at the hearing to establish good cause for denial of the transfer. The minor child resided in Sheridan County, Nebraska, and not on the reservation. Virtually all the witnesses, including the appellant, also resided in Sheridan County, Nebraska. The reservation and the tribal court are located in South Dakota. Wit-

nesses also testified as to problems existing in the placement of Indian children on the reservation.

The record supports a determination that the petition was unauthorized and the transfer declined, and the finding that the proceedings had been abandoned and that good cause existed for denying the transfer.

Finally, the appellant contends that the court erred in failing to follow the preferential preadoptive placement provisions of the Indian Child Welfare Act, or to make any findings as to good cause for not doing so.

25 U.S.C.A. § 1903(1)(iii) provides that " 'preadoptive placement' . . . shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement."

25 U.S.C.A. § 1915(b) provides: "Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with—

"(i) a member of the Indian child's extended family;

"(ii) a foster home licensed, approved, or specified by the Indian child's tribe;

"(iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

"(iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs."

In this case a second cousin of the child, Severt Young Bear, testified at the dispositional hearing and offered to take custody of the child. He was an extended family member under the provisions of 25

U.S.C.A. § 1903(2). Young Bear testified that there were other extended family members who would take the child but were unable to attend the hearing. There was also testimony by another witness that Young Bear's home could be certified as a foster home by the tribe within a week's time. There was also evidence that there were several Indian foster homes available which were licensed by the state or by the Bureau of Indian Affairs. There was also testimony by a witness that she maintained an Indian foster home in Sheridan County, Nebraska, which was licensed by both the State of Nebraska and by the Bureau of Indian Affairs.

The evidence therefore reflects that there were several possible placements which had a statutory preference over placement with the Department of Public Welfare or the Dunnicks. Although there was evidence that Patricia Dunnick was of partial Indian blood, the Dunnicks have no statutory claim of preference under 25 U.S.C.A. § 1915(b). The only evidence is that the Dunnicks are fit and proper persons to have custody of the child, but there is no finding by the county court to that effect, nor a finding as to their fitness compared to the fitness of the statutorily preferred individuals.

The Indian Child Welfare Act does not require a state court to make a child placement with a statutorily preferred person or agency. It requires only that a preference shall be given to such a person or agency in the absence of good cause to the contrary. While there may well be good cause for not complying with the statutory order of preference in the present case, the only direct finding which the court made as to any specific preferred person was the finding that the appellant was unfit to have custody of the child. The evidence supporting that finding constituted good cause as to the appellant, but the evidence is uncertain and no finding was made by either the county court or the District Court as to good cause for failing to comply with the statutory

order of preference as to the other statutorily preferred individuals or agencies.

The importance of the evidence and record as to good cause is illustrated by other portions of the preference statute. 25 U.S.C.A. § 1915(d) and (e) provides: "(d) The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

"(e) A record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of preference specified in this section. Such record shall be made available at any time upon the request of the Secretary or the Indian child's tribe."

The Indian Child Welfare Act does not change the cardinal rule that the best interests of the child are paramount, although it may alter its focus. The legislative history of the act states explicitly that the use of the term "good cause" was designed to provide state courts with flexibility in determining the disposition of a placement proceeding involving an Indian child. Factual support in the record in the trial court as to "good cause" for failure to comply with statutory child placement preference directives are necessary for appropriate appellate review.

The record in this case is devoid of any findings by the county court as to what good cause was shown to warrant a failure to give statutorily specified preference to persons or agencies, other than the appellant, designated in 25 U.S.C.A. § 1915(b). The matter must, therefore, be remanded for further proceedings on that issue.

That portion of the order of the county court dated January 16, 1981, placing the minor child with the Nebraska Department of Public Welfare for adop-

tion is vacated and the cause is remanded for further proceedings with respect to preadoptive placement in accordance with this opinion. The termination of parental rights is affirmed. Temporary custody of the child is continued in Patricia and Delmer Dunnick pending a final order on disposition.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS FOR FURTHER PROCEEDINGS.

KRIVOSHA, C.J., concurring.

I concur in the result reached by the majority in this case. I believe, however, that we are in error in suggesting that the trial court was correct in finding that the petition to transfer was "abandoned." There is no way in which the tribal court may, under the specific provisions of the Indian Child Welfare Act, 25 U.S.C.A. § 1911(b) (1983), "abandon" the proceedings contemplated by the act. Under the provisions of the federal code, if either a parent of an Indian child or the Indian custodian or the Indian child's tribe petitions the state court to transfer the proceedings, the state court is obligated to transfer the proceedings unless either parent objects or good cause is shown why such transfer should not be made. Neither the parent nor the Indian custodian nor the Indian child's tribe has any further duties or obligations once the petition is filed. Absent an objection or proof why the transfer should not occur, the transfer is obligatory unless the tribal court declines the transfer. The act grants to the tribal court of such tribe the authority to decline the transfer but does not extend that right to anyone else authorized to file a petition. It is clear from reading the code that the entity authorized to decline the transfer, to wit, the tribal court, is not the same entity authorized to petition for the transfer. To therefore suggest that the tribal court abandoned the proceedings because one of the parties purporting to petition for the transfer failed to appear when no one is required to appear is to simply read something

into the act which does not exist. The tribal court has no obligation to do anything except receive the transfer unless it affirmatively takes action to decline. Its inaction, absent a requirement to perform any positive act, cannot and should not be deemed to be an abandonment.

WHITE and CAPORALE, JJ., join in this concurrence.

COLWELL, D.J., Retired, dissenting.

I respectfully dissent.

It would appear that the appellant in this case lacks standing to raise questions concerning the possible rights of others to the custody of Carmelita, a nonreservation Indian child under the Indian Child Welfare Act. It is noted that no other person has filed a notice of appeal.

I disagree with the majority opinion that assumes the constitutionality of the Indian Child Welfare Act and its directives to our courts on procedure and subject matter. The act is an attempt to invade a primary power and duty of the State of Nebraska to protect the rights and best interests of children reserved to it by article X of the Constitution of the United States.

Some of the objectionable parts of the act are:

Section 1912: "(d) Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful."

Section 1915: "(a) In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.

"(b) Any child accepted for foster care or preadoptive placement shall be placed in the least re-

strictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with—

"(i) a member of the Indian child's extended family;

"(ii) a foster home licensed, approved, or specified by the Indian child's tribe;

"(iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

"(iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

"(c) In the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in subsection (b) of this section. . . .

"(d) The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties."

At the time the law was under consideration by the Congress, the U.S. Department of Justice advised there were serious constitutional questions concerning the act. In a letter to the committee chairman it was stated: "A third and more serious constitutional question is, we think, raised by section 102 of the House draft. That section, taken together with sections 103 and 104, deals generally with the

handling of custody proceedings involving Indian children by State courts. Section 102 establishes a fairly detailed set of procedures and substantive standards which State courts would be required to follow in adjudicating the placement of an Indian child as defined by section 4(4) of the House draft.

"As we understand section 102, it would, for example, impose these detailed procedures on a New York State court sitting in Manhattan where that court was adjudicating the custody of an Indian child and even though the procedures otherwise applicable in this State court proceeding were constitutionally sufficient. While we think that Congress might impose such requirments [sic] on State courts exercising jurisdiction over reservation Indians pursuant to Public Law 83-280, we are not convinced that Congress' power to control the incidents of such litigation involving nonreservation Indian children and parents pursuant to the Indian commerce clause is sufficient to override the significant State interest in regulating the procedure to be followed by its courts in exercising State jurisdiction over what is a traditionally State matter. It seems to us that the Federal interest in the off-reservation context is so attenuated that the 10th Amendment and general principles of federalism preclude the wholesale invasion of State power contemplated by section 102. See Hart, 'The Relations Between State and Federal Law,' 54 Colum. L. Rev. 489, 508 (1954)." 1978 U.S. Code Cong. & Ad. News 7561, 7562-63.

The Recommended Guidelines for State Courts-Indian Child Custody Proceedings, 44 Fed. Reg. 24,000 at 24,002 (1979), states in part: "For purposes of any such foster care, preadoptive, or adoptive placement, a determination of good cause to the contrary for such placement in accord with the preferences set out above should consider:

"(1) the requests of the biological parents, or the child when the child is of sufficient age."

It is of some significance in this case that the mother of the child, "on many occasions and for extensive periods of time," left the child in the care of the Dunnicks, the parties who have temporary custody of the child. The child has spent a major part of her lifetime in the care of the Dunnicks, who were chosen by the mother to care for the child.

I would affirm.

BOSLAUGH, J., joins in this dissent.

NEBRASKA TRUCK SERVICE AND SALES, INC., APPELLANT AND CROSS-APPELLEE, V. UNITED STATES FIRE INSURANCE COMPANY, A CORPORATION, APPELLEE; JOHNSTON INSURANCE AGENCY, INC., A CORPORATION, AND ROBERT LAMPE, APPELLEES AND CROSS-APPELLANTS.

331 N.W.2d 266

Filed March 18, 1983. No. 82-227.

1. **Insurance: Brokers: Damages.** The measure of damages for the loss caused by the negligence of the broker is the amount that would have been due under the policy if it had been obtained by the broker.
2. **Damages: Proof.** Damages, like any other element of plaintiff's cause of action, must be pled and proved, and the burden is on the plaintiff to offer evidence sufficient to prove plaintiff's alleged damages.
3. _____: _____. It is fundamental that the plaintiff's burden to prove the nature and amount of damages cannot be sustained by evidence which is speculative and conjectural.
4. _____: _____. Damages must be proved with all the certainty the case permits and cannot be left to conjecture, guess, or speculation.

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

Richard J. Gilloon of Schicker & Leahy, for appellant.

Melvin C. Hansen and Richard J. Rensch of Hansen, Engles & Locjer, P.C., for appellee U.S. Fire Ins. Co.

John F. Thomas of McGrath, North, O'Malley & Kratz, P.C., for appellees Johnston Ins. and Lampe.

KRIVOSHA, C.J., WHITE, and CAPORALE, JJ., and BUCKLEY, D.J., and COLWELL, D.J., Retired.

KRIVOSHA, C.J.

The appellant, Nebraska Truck Service and Sales, Inc. (Nebraska Truck Service), appeals from an order entered by the District Court for Douglas County, Nebraska, sustaining a motion for judgment notwithstanding the verdict in favor of the appellees, United States Fire Insurance Company, Johnston Insurance Agency, and Robert Lampe, hereinafter jointly referred to as Insurers. We affirm.

Nebraska Truck Service filed suit against Insurers, alleging that Nebraska Truck Service, the owner of a 1978 Cobra fifth-wheel trailer, requested the Johnston Insurance Agency to obtain a garage and auto fleet insurance policy providing comprehensive coverage for the trailer. Nebraska Truck Service maintains that Johnston Insurance Agency negligently failed to obtain a comprehensive policy for the full value of the trailer and, instead, obtained coverage from U.S. Fire with a limit of $8,500. The trailer was stolen during the Labor Day weekend in September of 1979. U.S. Fire paid Nebraska Truck Service $8,500 for the loss of the trailer, pursuant to the policy.

In its order sustaining the motion for judgment notwithstanding the verdict, the trial court acknowledged that it should have sustained the motions for directed verdict made by Insurers at the close of the case. The rationale for the court's conclusion was that Nebraska Truck Service was contributorily negligent in not reading the policy when it was sent to it and that the policy, on its face, disclosed that the limit of liability was $8,500. The record is fairly clear that had the policy been examined it would have been apparent that the maximum amount of liability under the comprehensive section of the

policy was $8,500. We need not, however, reach that issue, because our examination of the record discloses that Insurers' motions for directed verdict, made both at the close of Nebraska Truck Service's case in chief and at the close of all the evidence, should have been sustained on the basis, as asserted by the Insurers, that Nebraska Truck Service had failed to prove the value of the trailer on the date of the loss. Under the terms of the policy issued, Nebraska Truck Service was required to do so and clearly did not.

As we noted in *Kenyon & Larsen v. Deyle,* 205 Neb. 209, 217, 286 N.W.2d 759, 764 (1980): "The measure of damages for the loss caused by the negligence of the broker is the amount that would have been due under the policy if it had been obtained by the broker." That amount is clearly provided for by the contract of insurance, and reads as follows: "B. The most we will pay for loss is the *smallest* of the following amounts: 1. The amount shown in the schedule of this endorsement. 2. The actual cash value of the damaged or stolen property at the time of loss. 3. The cost of repairing or replacing the damaged or stolen property with other of like kind or quality." (Emphasis supplied.) Nebraska Truck Service maintains that it should have been entitled to receive payment in an amount of not less than the difference between $18,347.94 and the $8,500 paid to it by U.S. Fire. In order to be entitled to that sum, or any sum in excess of the amount actually received, Nebraska Truck Service was obligated to introduce evidence showing that the actual cash value of the Cobra or the cost of replacing the Cobra on the date of loss was in excess of the amount which, in fact, it received from U.S. Fire. Damages, like any other element of plaintiff's cause of action, must be pled and proved, and the burden is on the plaintiff to offer evidence sufficient to prove plaintiff's alleged damages. See *Settell's, Inc. v. Pitney Bowes, Inc.,* 209 Neb. 26, 305 N.W.2d 896 (1981).

The record in this case is simply silent as to those matters. The only evidence which remotely approaches value is testimony by an officer of Nebraska Truck Service as to the "approximate cost" of purchasing the trailer in question almost a year before the loss. Even then the testimony as to the purchase price is not precise. Nebraska Truck Service produced at trial two sales slips to reflect the purchase price of the trailer. One, offered and received in evidence, showed a price of $16,212. This admittedly was a duplicate prepared some time after the purchase. A second sales slip was not offered in evidence. William Smith, the president of Nebraska Truck Service, testified as follows: "Well, do you remember what the exact figure was, sir? A No, I don't." If all of the checks offered by Smith, allegedly representing the purchase price, are added together, the amount reached is $16,310.56. Smith testified that he also paid some cash, but he could not remember an exact amount. On redirect by its own counsel a Nebraska Truck Service officer was again asked about the purchase price, as follows: "Q . . . Mr. Smith, is that $16,212.00 an accurate figure for what you paid for the 1978 Cobra fifth-wheel trailer when you purchased it in Logan, Iowa? A No." Smith again attempted to testify as to some approximate figure, but the answer was stricken by the court.

Assuming, for the sake of argument, that one can determine from all of the evidence a specific dollar amount representing the purchase price of the trailer, the most that one can determine is the purchase price of the trailer nearly a year earlier than the loss; and while the purchase price might, under proper conditions, reflect present value, the evidence in this case is simply insufficient. There is no testimony as to the condition of the trailer after its purchase, nor any testimony from which it can be concluded that the value of the trailer when it was stolen was equal to or greater than the purchase

price nearly a year earlier. It was Nebraska Truck Service's burden to present that evidence, and its failure to do so was fatal. "It is fundamental that the plaintiff's burden to prove the nature and amount of damages cannot be sustained by evidence which is speculative and conjectural." *Dawson v. Papio Nat. Resources Dist.,* 206 Neb. 225, 232, 292 N.W.2d 42, 47 (1980). See, also, *Clearwater Corp. v. City of Lincoln,* 202 Neb. 796, 277 N.W.2d 236 (1979). "Damages must be proved with all the certainty the case permits and cannot be left to conjecture, guess, or speculation." *Hatch v. Heim,* 200 Neb. 735, 738, 265 N.W.2d 444, 445-46 (1978).

In the instant case Nebraska Truck Service was alerted to the problem when Insurers moved for a directed verdict, both at the close of the plaintiff's case and again at the close of all the evidence, on the specific ground that Nebraska Truck Service had failed to prove the value of the trailer on the date of its loss. It was not too much to ask Nebraska Truck Service to offer testimony as to the value on the date of the loss, as required by the policy. Having failed to do so, there was no evidence upon which the jury could determine the proper measure of damages, and the trial court therefore should have sustained the motion to dismiss. Recognizing its error and having entered a judgment notwithstanding the verdict, the court corrected the defect which earlier had gone uncorrected. The fact that it may have given a reason other or different than the one upon which we base our decision is of no moment in the present case. The judgment of the trial court is affirmed.

AFFIRMED.

GENERAL MOTORS ACCEPTANCE CORPORATION, APPELLEE, V. DON FRITZ, APPELLANT, AND NADINE FRITZ, APPELLEE.

331 N.W.2d 269

Filed March 18, 1983. No. 82-232.

Contempt. In a contempt proceeding for disobedience of an order, language of duty in the order is not expandable beyond a reasonable interpretation in light of the purposes for which the order was entered.

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

William W. Griffin, for appellant.

Cronin, Hannon & Symonds, and Otis M. Smith and John F. Farmer, for appellee General Motors.

KRIVOSHA, C.J., WHITE, and CAPORALE, JJ., and BUCKLEY, D.J., and COLWELL, D.J., Retired.

WHITE, J.

This is an appeal from an order of the District Court for Holt County, Nebraska, holding the appellant, Don Fritz, in contempt for failure to obey a court order of November 9, 1981.

The principal case arose in the District Court by the filing of a petition in replevin by appellee, General Motors Acceptance Corporation. The petition alleged a security instrument in a certain motor vehicle, a promissory note, and default by Don Fritz and Nadine Fritz, and requested delivery of the motor vehicle.

After reciting the facts above described, the court entered the following order: "The Court being fully advised in the premises finds that the Court should and hereby does issue a temporary order addressed to the defendants ordering and directing the defendants to hold the above described property in his possession, unimpaired and unencumbered, and in all respects in the same state and condition as it is at

the time of the receipt of this order, until further order of the Court."

After hearing, the court, on November 20, 1981, found that the appellee was entitled to possession and directed the clerk to issue an order in replevin. On January 12, 1982, the order was returned unsatisfied, with the return of the sheriff stating that the Fritzes were not found in Holt County. No mention is made in the return of the sheriff as to his fortune in locating the automobile. However, we assume for the purposes of this opinion that the automobile was not found in Holt County either.

In any event, the next move in the appellee's attempt to secure possession was the filing of a verified "Motion for Citation" on December 4, 1981, prior to the return of the order of replevin, which alleged in part: "That notwithstanding the premises, the defendants have disregarded the order of this Court dated November 9, 1981, as follows, to-wit: that they have failed to hold said 1981 Oldsmobile in their possession in *Holt County,* Nebraska." (Emphasis supplied.)

At a hearing held on February 2, 1982, testimony was offered that the sheriff and/or deputies of Holt County had been at appellant's home on a number of occasions and did not locate the automobile, and on one occasion at appellant's place of employment. Appellant maintained that the vehicle was in his possession, unencumbered and unimpaired. However, when asked the location of the motor vehicle, the appellant refused to answer, claiming that since a criminal charge was then pending of concealing mortgaged property, the answer would tend to incriminate him. The court did not compel the appellant to answer. Although no formal order so holding is found in the transcript, the bill of exceptions reveals that at the conclusion of the hearing the trial court held the appellant in contempt. "[T]he Court finds the defendant to be in contempt of Court for having failed to hold said described property in his

possession, unimpaired and unencumbered, as directed in the order of November 9, 1981 . . . ."

We reverse. It is not necessary to here discuss the appropriate procedures in contempt cases, nor the fine distinction between civil and criminal contempt. It is sufficient to point out that the appellant was cited for contempt for failure to hold the automobile in his possession in Holt County, a duty that the order of November 9, 1981, did not impose on him. There was no proof that the appellant was not in possession of the automobile in Holt County or elsewhere; simply that the sheriff could not find it in Holt County. Neither the order of November 9, 1981, nor the order for a writ of replevin commanded the appellant to produce the automobile. While the Fritzes have unquestionably frustrated the appellee's right to possession, their refusal to produce the car is not contempt, absent an order directing them to produce it.

The most that can be said is that appellee offered evidence that the automobile was not located in Holt County. Since the order did not require the automobile to be kept in Holt County, it follows that the appellant cannot be held in contempt for that reason.

"In a contempt proceeding for disobedience of an order, language of duty in the order is not expandable beyond a reasonable interpretation in light of the purposes for which the order was entered." *Malec v. Malec,* 196 Neb. 533, 537, 244 N.W.2d 82, 85 (1976).

Reversed with directions to dismiss the contempt citation.

REVERSED AND REMANDED WITH DIRECTIONS.

FARMERS COOPERATIVE ASSOCIATION, ST. EDWARD, NEBRASKA, APPELLEE, V. BOONE COUNTY BOARD OF EQUALIZATION, APPELLANT.
CEDAR VALLEY COOPERATIVE, APPELLEE, V. BOONE COUNTY BOARD OF EQUALIZATION, APPELLANT.
FARMERS CO-OP EXCHANGE OF ELGIN, APPELLEE, V. BOONE COUNTY BOARD OF EQUALIZATION, APPELLANT.

332 N.W.2d 32

Filed March 25, 1983. Nos. 44440, 44441, 44442.

1. **Taxation.** Under the provisions of Neb. Rev. Stat. § 77-1502 (Reissue 1981) the county board of equalization may meet at any time for the purpose of equalizing assessments of any omitted or undervalued property and is not limited in its actions to property which the assessor has adjusted prior to April 1 of the year in question.
2. _____. An owner is not deprived of his property without due process of law by means of taxation, if he has an opportunity to question its validity or the amount of such tax or assessment at some stage of the proceedings, either before that amount is finally determined or in subsequent proceedings for its collection.
3. **Taxation: Presumptions.** In the absence of other evidence, proof that the guidelines provided by the Tax Commissioner were applied raises a presumption that the assessment is legally proper. Where, however, evidence which establishes that following the guidelines will violate either the constitutional provisions requiring that property be taxed uniformly and proportionately or the statutory requirement that property be taxed at its actual value is introduced by either party, the guidelines must give way to the evidence.
4. **Taxation: Valuation.** 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. Approximation of value and uniformity of taxation is all that can be accomplished, and substantial compliance with the requirement of equalization and uniformity of taxation laid down by the Constitution is all that is required.
5. **Taxation: Valuation: Appeal and Error.** 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 persuasion 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.

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

Bernard L. McNary, Boone County Attorney, for appellant.

Larry D. Bird of Treadway & Bird, P.C., for appellees.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

KRIVOSHA, C.J.

This appeal involves three tax cases which were consolidated for trial in the District Court for Boone County, Nebraska, and for appeal in this court. The appellees, Farmers Cooperative Association, St. Edward, Nebraska (St. Edward), Farmers Co-op Exchange of Elgin (Elgin), and Cedar Valley Cooperative (Cedar Valley), are cooperatives which own and operate grain elevators and concomitant facilities in Boone County. The facilities at St. Edward and Elgin are located upon land owned by the cooperatives, while the Cedar Valley facilities at Primrose and Cedar Rapids are located upon land leased by the cooperative from a railroad. They appealed from orders of the county board of equalization of Boone County which increased actual values of their properties for the year 1980 over the valuations which had been set for the preceding year. The increases made by the board were founded upon two factors. In some cases the increase was occasioned by the removal or reduction of a factor previously allowed by the county and referred to in the record as "economic obsolescence." In some cases the increase was occasioned by the addition of improvements on the property which had been apparently omitted and unreported in earlier years. The cooperatives appealed to the District Court from the valuations set by the county board of equalization. Upon trial de novo in the District Court, the court

set aside the increases in valuation of both the St. Edward property and the Elgin property because it found the action of the board was void for want of proper notice under the provisions of Neb. Rev. Stat. § 77-1315 (Reissue 1981) and for want of a proper hearing under the provisions of Neb. Rev. Stat. § 77-1502 (Reissue 1981), and set the valuations at those of the previous year, that is, 1979. As to the property of Cedar Valley, it made a finding that the decision of the board and the order of the board increasing Cedar Valley's valuations should be reversed. The trial court found that the property of Cedar Valley should have been allowed the same economic obsolescence as other commercial property in the village of Primrose and the village of Cedar Rapids, which was 50 percent, and entered an order in conformity with its findings. However, the trial court allowed the addition of omitted property by the board and remanded the Cedar Valley case back to the board so as to permit the board to compute the appropriate economic obsolescence. For reasons set out herein, we reverse the decision of the trial court.

The record discloses that St. Edward has two parcels of land at issue here. Their combined actual valuation was increased from $46,050 for 1979 to $90,690 for 1980, nearly all of which, except for a 4 percent mandatory increase ordered by the State Board of Equalization and Assessment, was by reason of the board removing a 50-percent economic obsolescence factor previously given the property. The board also removed a bin which had previously been taxed and which apparently no longer existed.

The valuation of the Elgin facility at Petersburg was increased from $72,925 to $119,330, including the 4-percent increase ordered by the state board. The increase was mostly the consequence of reducing the economic obsolescence factor from 50 to 25 percent. The 25 percent was allowed because the elevator did not have access to rail facilities. Twenty-

five-percent economic obsolescence was also allowed on the omitted improvements. The actual valuation of Cedar Valley's Primrose facility was increased from $143,605 to $216,605 by the addition of omitted improvements, plus the state board's mandatory 4-percent increase. No economic obsolescence had previously been allowed on this property and none was allowed on the omitted improvements. The Cedar Rapids facility's valuation was increased from an actual value of $43,255 to $235,276, including the state board's 4-percent mandatory increase. This increase consisted of adding improvements not previously listed. Economic obsolescence was not granted to these values because none had previously been allowed. The issues raised in the District Court and in this court involve three in number. Two of the issues concern the procedure followed in making the changes in valuation. The third issue has reference to the proper allocation of economic obsolescence to the elevators.

The record made in the District Court establishes that early in the year 1980 the county assessor of Boone County and the county board of equalization determined that elevators in the county should be reexamined to determine if those elevators, including the ones owned by St. Edward and Elgin, should continue to receive depreciation for economic obsolescence. As already noted, not all elevators in the county, including the two owned by Cedar Valley, were previously given depreciation for economic obsolescence. The board asked for assistance from the office of the state Tax Commissioner. That office furnished an appraiser who inspected the properties. The state appraiser determined that the elevators were in fact fully functional and, except for Elgin, should not receive any depreciation for economic obsolescence. On April 18, 1980, notice of the increased assessments was given to the owners. Each notice stated the amount of change and the

reason for the change. For St. Edward and Elgin, the notice explained that the adjustment was due to the change in the depreciation factor for economic obsolescence, and for Cedar Valley it listed the addition of omitted property. The property owners were also advised of a hearing to be held on May 5, 1980, for the purpose of equalizing the omitted or undervalued property.

The cooperatives, either through their managers or their attorney, appeared at the May 5 hearing and objected to the increases because of the failure of the board to make the adjustments prior to April 1, 1980, as allegedly required by the provisions of § 77-1315. Neither the cooperatives nor the assessor presented any evidence at this hearing, and the hearing was recessed by the board.

On June 3, 1980, the board met again and the appraiser from the state met with them. The board questioned the appraiser and the county assessor, but no further evidence was presented and the board adhered to the changed valuations stated in the earlier notices sent to the cooperatives. The cooperatives did not receive notice of the June 3, 1980, meeting and did not appear.

Before proceeding to address the errors assigned by the county board, we deem it appropriate to note what is not involved in this case. This case is not one involving the question of whether the properties in question were assessed in excess of their actual value. No evidence was introduced by any of the parties regarding actual value. Rather, this is a case questioning whether the properties of the various elevators have been assessed uniformly and proportionately as required by the provisions of Neb. Const. art. VIII, § 1. The resolution of that question depends upon whether the county board was required to give to each of the elevators depreciation for economic obsolescence as referred to in a manual prepared by the Tax Commissioner. Before addressing that question, however, we turn first to

the procedural questions previously raised by the property owners and determined by the trial court.

St. Edward and Elgin maintained that the county board was without jurisdiction to act in this case because notice of the board's action in increasing the values of the various properties was not sent to property owners prior to April 1 of the taxing year, as required by the provisions of § 77-1315. We believe, however, that the property owners are in error with regard to this contention. It is true that § 77-1315 does require the *county assessor,* or the county clerk where he is ex officio county assessor, to complete his revision of the assessment rolls, schedules, lists, and returns and to file them with the county clerk on or before April 1 of each year and to give notice of increased assessments to the owners before such filing. In this case, however, the adjustments were not made by action of the county assessor, and the provisions of § 77-1315 have no application as to notice. Rather, this is a case involving the board's direct authority over either the addition of omitted property or the increasing of undervalued property. The provisions of § 77-1502 apply, not § 77-1315.

Section 77-1502 first provides for a procedure whereby the county board, between April 1 and May 30, must hold a session of not less than 3 nor more than 60 days for the purpose of reviewing and deciding protests filed pursuant to §§ 77-1502 to 77-1507. It is clear from a reading of the statutes that this procedure arises as a result of protests filed by taxpayers in response to action taken by the county assessor prior to April 1, pursuant to § 77-1315. Section 77-1502, however, does not end at that point. It goes on to provide that in addition to the protest review meeting, "The board may meet at *any time* upon the call of the chairman or any three members of the board for the purpose of equalizing assessments of any omitted or undervalued property." (Emphasis supplied.)

In *Ewert Implement Co. v. Board of Equalization,* 160 Neb. 445, 70 N.W.2d 397 (1955), we examined that very clause and pointed out that the authority of the board to meet at any time was the result of an amendment adopted in 1947 by the Nebraska Legislature. In *Ewert* at 447-48, 70 N.W.2d at 399-400, we said: "It appears to us that the authorities cited by the plaintiff still apply to matters contemplated by the first sentence of section 77-1502, R.S. Supp., 1953. But as to the second sentence, the power of the county board of equalization to deal with omitted and undervalued property is greatly extended from what it was prior to 1947. The county board of equalization is authorized in terms by the second sentence of section 77-1502, R.S. Supp., 1953, to equalize assessments of omitted or undervalued property. It is clear therefore that the second sentence of section 77-1502, R.S. Supp., 1953, was intended as an extension of the power of the county board of equalization. The use of the words 'at any time' therein certainly means that the assessment of omitted or undervalued property may be dealt with after the expiration of the 40 days and after July 1, the date the county assessor is required to forward a certified copy of the abstract of the assessment rolls to the Tax Commissioner." We find nothing, either in the applicable statutes or in any of our subsequent decisions, to persuade us that the reasoning of the *Ewert* decision is not correct. Obviously, when the Legislature authorized the board to meet "at any time," it meant at any time and did not intend to require the board to act prior to April 1, thereby depriving the board of a great deal of the authority just given. We hold that under the provisions of § 77-1502 the county board of equalization may meet at any time for the purpose of equalizing assessments of any omitted or undervalued property and is not limited in its actions to property which the assessor has adjusted prior to April 1 of the year in question. Therefore, the fact that the adjustments to valuation

were made after April 1 or that St. Edward and Elgin did not receive notice under the provisions of § 77-1315 was of no significance in that such action and the notice thereof could occur at any time during the year. The trial court was in error in holding to the contrary.

We now turn to the second contention of the county board that the court erred in finding that the board did not give the appellees a proper hearing under § 77-1502. A reading of § 77-1502 does not disclose any requirement for a hearing. The board is authorized to add omitted property or adjust undervalued property on its own motion and without any prior hearing. The only hearing required to be given by the board is in connection with protests filed by taxpayers as a result of action taken by the county assessor. While this may appear to be an anomaly, it is the language of the statute and we are not at liberty to amend the statute. The issue, therefore, is not whether the county board failed to grant a hearing under the provisions of § 77-1502 before adjusting the values in question, but whether the action of the board in increasing the value of the appellees' property, either by adding omitted property or refusing to grant economic obsolescence, without further notice or a subsequent hearing before the board, denied to the appellees due process of law. We think not. The statutes of the State of Nebraska make it clear that one who is dissatisfied with the actions of the board may appeal to the District Court within 45 days after adjournment of the board. See Neb. Rev. Stat. § 77-1510 (Reissue 1981). The District Court is to hear such appeals as in equity and without a jury and is to determine anew all questions raised before the board which relate to the liability of the property to assessment, or the amount thereof. See, Neb. Rev. Stat. § 77-1511 (Reissue 1981); *Hastings Building Co. v. Board of Equalization,* 190 Neb. 63, 206 N.W.2d 338 (1973). That is to say, by reason of the provisions of the

Nebraska statute, appeals to the District Court are de novo and the property owner is afforded the opportunity in the District Court to introduce any and all relevant evidence for the purpose of establishing that the action of the county board was in error. In effect, the action of the county board is not final and binding, if appealed, until the District Court acts after affording the property owner a full due process hearing.

In *Frye v. Haas,* 182 Neb. 73, 152 N.W.2d 121 (1967), we were given the opportunity to review this very issue. In upholding a statute which allowed educational service units to levy a tax without it being certified by the county board, we said at 76-77, 152 N.W.2d at 124-25: "The rule is stated in Nickey v. State of Mississippi, 292 U.S. 393, 54 S. Ct. 743, 78 L. Ed. 1323, as follows: 'There is no constitutional command that notice of the assessment of a tax, and opportunity to contest it, must be given in advance of the assessment. It is enough that all available defenses may be presented to a competent tribunal before exaction of the tax and before the command of the state to pay it becomes final and irrevocable. [Citations omitted.]'

"The application of this rule is well stated in 16A C.J.S., Constitutional Law, § 650(a) (2), p. 977, as follows: 'Due process is afforded if the taxpayer has an opportunity to question the validity or the amount of an assessment before the amount is determined, or at any subsequent proceedings to enforce its collection, or subsequent to collection in a suit for refund of taxes paid under protest, or at any time before liability for the tax becomes finally and irrevocably fixed.' "

In *County of Douglas v. State Board of Equalization & Assessment,* 158 Neb. 325, 335, 63 N.W.2d 449, 457 (1954), we said: " 'An owner is not deprived of his property without due process of law by means of taxation, if he has an opportunity to question its validity or the amount of such tax or assessment at

some stage of the proceedings, either before that amount is finally determined, or in subsequent proceedings for its collection.' " See, also, *State ex rel. Douglas v. State Board of Equalization and Assm't,* 205 Neb. 130, 286 N.W.2d 729 (1979). While it ought to be apparent that giving notice to property owners by the county board before increasing the values should reduce unnecessary appeals and may oftentimes resolve disputes, absent a requirement by the Legislature that such hearing be held, and in light of the de novo hearing before the District Court, failure by the county board to afford the property owner a hearing does not deny to a property owner due process of law. To accept the appellees' position would be to expand the Administrative Procedures Act to cover county government. This the Legislature has refused to do. Neb. Rev. Stat. § 84-901(1) (Reissue 1981). See *County of Gage v. State Board of Equalization & Assessment,* 185 Neb. 749, 178 N.W.2d 759 (1970).

We believe that the trial court's finding that the board did not give the property owners a proper hearing under the provisions of § 77-1502 or, more importantly, denied to them due process of law was in error and must be reversed.

That leaves us, then, with the final question, whether the board acted arbitrarily with regard to the matter of economic obsolescence. In essence, the property owners maintain that the county board was *required* to grant economic obsolescence to the grain elevators by reason of guidelines previously promulgated by the Department of Revenue. Unfortunately for us, all of the regulations have not been introduced in evidence and are not before us. All that we have are selected sheets which do not tell us precisely how or in what manner the guidelines are to be administered. What we do have, however, does not support the contention that economic obsolescence was required to be given to the owners of the grain elevators simply by reason of the fact

that some commercial properties in the areas in which the elevators were located were also granted economic obsolescence. Page 157 of the Nebraska Cost Construction Manual reads in part as follows: "Unlike physical and functional factors, loss in value due to economic factors *usually* effects [sic] an entire neighborhood rather than individual properties." We have no disagreement with this language. We do not believe, however, that this language in any way compels the granting of economic obsolescence to every piece of property in an area which otherwise has been determined to suffer from economic obsolescence.

The guidelines further define economic obsolescence as "caused by factors outside the property," *Id.* at 182, as "the loss in value due to the effect of functional or economic factors. A condition of being out of date," *Id.* at 181, and as "influences of the district upon the property," *Id.* at 183. The evidence in this case supports the board's conclusion that while other businesses in the area may have suffered from economic obsolescence, the grain elevators have not. The grain elevators continue to perform their designated function, even though the surrounding areas have deteriorated. Farmers continue to bring their grain to the elevators without regard to what the rest of the community may look like and the elevators continue to receive rent for storage of government grain at the same rate. The evidence establishes that the elevators have not had any significant reduction in business.

The final provision urged upon us by the property owners as evidence of their right to economic obsolescence is found in the manual at page 185 and reads as follows: "Economic obsolescence is rarely curable. It attaches to a neighborhood and displays itself in conditions that surround a structure rather than in the actual buildings or property itself. The loss in value rate, when determined, applies to all structures in the area and is identified on the prop-

erty record card as an area allowance." It is apparent that the type of economic obsolescence referred to in this passage of the guidelines is due to the fact that an entire area becomes victim to economic obsolescence. However, where the particular buildings in question are one-purpose buildings, such as grain elevators, and are dependent not so much upon location but, rather, upon the function they may perform, then it is apparent that, absent other evidence, the withholding of economic obsolescence from a grain elevator located on a rail line cannot be said to be arbitrary or improper. This is further supported by a passage at page 182 of the manual which cautions the appraisers to "make a thorough investigation of the economic background of *each individual property* in order to determine the degree of functional or economic obsolescence which exists." (Emphasis supplied.)

In essence, the property owners argue that the guidelines are law and *must* control both classification and value, regardless of the evidence. We think not. In the absence of other evidence, proof that the guidelines provided by the Tax Commissioner were applied raises a presumption that the assessment is legally proper. Where, however, evidence which establishes that following the guidelines will violate either the constitutional provisions requiring that property be taxed uniformly and proportionately or the statutory requirement that property be taxed at its actual value is introduced by either party, the guidelines must give way to the evidence.

The decision of the county board in removing or reducing economic obsolescence on the St. Edward and Elgin properties in question and withholding it from the two Cedar Valley properties is amply supported by the evidence in the record. The chief appraiser for the state testified that he personally examined and appraised each of the grain elevators and determined that economic obsolescence was not appropriate because, based on government storage

rates, the elevators did not measure a loss in economic rent. He said that economic rent is a more standard measure than is market sales. Appellees disputed this claim and contended that market sale methods should have been used. However, in *Riha Farms, Inc. v. County of Sarpy,* 212 Neb. 385, 389, 322 N.W.2d 797, 800 (1982), we said: "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. Approximation of value and uniformity of taxation is all that can be accomplished, and substantial compliance with the requirement of equalization and uniformity of taxation laid down by the Constitution is all that is required."

And in *Bumgarner v. County of Valley,* 208 Neb. 361, 366, 303 N.W.2d 307, 310 (1981), we said: "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 persuasion 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."

It cannot be said in this case that the guidelines promulgated by the Department of Revenue require the imposition of a depreciation factor which, if granted, would clearly undervalue the property in question. By its action, the county board in fact appears to have fulfilled its constitutional obligation of assessing grain elevators uniformly and proportionately throughout the county. The appellees have failed to prove that this treatment of grain elevators as a separate class violates the uniformity principles

as against all other property in the county. Therefore, the judgment of the trial court must be reversed and the cause remanded with instructions to enter a judgment reinstating the valuations as established by the county board of equalization.

REVERSED AND REMANDED WITH DIRECTIONS.

CLINTON, J., not participating.

KERREY CONSTRUCTION COMPANY, APPELLEE, V. WILMER A. HUNT ET AL., APPELLANTS.

331 N.W.2d 519

Filed March 25, 1983. No. 81-732.

1. **Contracts: Damages.** The general measure of damages for a breach of contract to convey land is the market value at the time of breach less the contract price.
2. _____: _____. Where it appears that special damages have also arisen from the breach, the damages recoverable are such as may fairly and reasonably be supposed to have been in the contemplation of the parties at the time the contract was made.

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

Randal B. Brown, for appellants.

Rollin R. Bailey of Bailey, Polsky, Cada & Todd, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

WHITE, J.

This is an action brought by Kerrey Construction Company, a Nebraska corporation, plaintiff-appellee, against Wilmer A. and Marcella R. Hunt, husband and wife, defendants-appellants, to recover damages for the breach of a written real estate purchase agreement executed on March 9, 1978, and later modified on March 9 and 11, 1978. At the conclusion of the trial the jury returned a verdict of

$35,000 for Kerrey Construction Company. The Hunts appeal, raising several assignments of error. We affirm.

The Hunts are the owners of a tract of land of approximately 12½ acres, located at Lot 11 of Irregular Tracts in the southeast quarter of the southwest quarter of Section 11, Township 9 North, Range 6 East of the 6th P.M., Lincoln, Lancaster County, Nebraska. Mr. Hunt is a deputy city engineer for the city of Lincoln, Nebraska.

Kerrey Construction Company is a family corporation, with James H. Kerrey and his son John Kerrey as the principal officers. John Kerrey is also a licensed real estate broker, and at the time the contract was signed he was an employee of Re/Max realty company, a member of the Multiple Listing Service.

The Hunts (sellers) listed their land for sale with Austin Realty Co., a member of the Multiple Listing Service.

On February 10, 1978, John Kerrey, acting on behalf of Kerrey Construction Company (buyer), submitted a written real estate purchase offer for sellers' property to Ronald Tonniges, sellers' agent at Austin Realty Co. Under the multiple listing arrangement, Austin Realty was to act as the listing agent and Re/Max was to act as the selling agent. Both agents were to share in commission from the sale.

Tonniges presented the offer to the sellers, and they rejected it on February 11, 1978. Three other written offers were subsequently submitted to the sellers by buyer, and all were rejected. After the last offer was turned down buyer proposed that Tonniges might be able to get together with sellers and prepare a contract that would be satisfactory.

Tonniges, working with the sellers, prepared a contract on March 9, 1978, on the same "Offer to Purchase" multiple listing form that had been used

in all the previous offers from buyer. The signed proposal contained a typed provision which stated, "This counter-offer is to be null and void if not signed by the buyer and returned to Austin Realty before Saturday March 11, 1978 at 5:00 P.M." Re/Max was listed as the selling agent, with a total price of $105,000 for the land and $5,000 of the total to be paid down by check. Closing was to take place on June 1, 1978.

On March 11, 1978, the sellers' proposal was delivered to John Kerrey who, on behalf of buyer, executed a $5,000 check for the downpayment. Then, on behalf of Re/Max, John Kerrey signed a receipt for the $5,000 check and placed it in a desk drawer at the Re/Max office.

Buyer crossed out sellers' request in the form for a specific name to be given to a street in the new development, and also added that buyer's officers were licensed real estate salesmen. Buyer signed and returned the proposal to Tonniges before the deadline. Sellers approved the changes, and on March 15, 1978, returned the contract, with the acceptance receipt signed on the back. Buyer also signed at the place designated on the contract which specified that it had received it, and proceeded to deliver the $5,000 check to Re/Max, with the completed contract.

After the modified contract had been signed buyer contacted Bill Kennedy, a coworker at Re/Max, to see if he might know of anyone interested in developing the land. Kennedy contacted James Christo of Christo Construction Company, and a purchase agreement was signed on March 21, 1978, between John Kerrey and Christo on behalf of their respective companies. Christo agreed to pay $4,000, plus 1/60th of the amenities for each of 60 townhouse sites, or a total of $240,000 for the same land buyer was purchasing from sellers for $105,000.

The buyer had retained the services of an engi-

neering and architectural firm to prepare estimates and the layouts of the proposed construction site.

Shortly before closing was to take place, the buyer's attorney examined the abstract of the property furnished by the sellers and determined that the property was unmarketable since the actual metes and bounds of the tract were not described. The title problem was relayed to Tonniges, who informed sellers that the sale could not be closed on June 1 unless the title problem was remedied.

On June 5, 1978, sellers wrote a letter to the buyer and Austin Realty, stating that the contract had been terminated: "Your violation consisted of failing to close on the purchase of the contract on June 1, 1978, advising my realtors that you did not have the money to close."

Upon receipt of the letter buyer's attorney informed sellers that, in his opinion, title was not marketable but that his client was still interested in completing the contract once title was cleared. Additional correspondence occurred during the summer, with no further development between the parties.

On August 13, 1978, buyer wrote sellers a check for $99,828.51 and signed a closing statement, both of which were delivered to Austin Realty, the listing agent. On August 14, 1978, the attorney for buyer wrote a letter to the sellers reaffirming that buyer was ready to perform and was waiving all title defects. The letter also stated that buyer had sold the land to a third party for $240,000 and that if sellers refused to close the transaction by noon on August 16, 1978, an action for damages would be instituted against them.

Sellers refused to close on the new date specified by buyer's attorney. On August 30, 1978, Christo Construction Company wrote a letter to buyer canceling its agreement to purchase the property because buyer was not able to obtain the land.

Buyer filed suit and trial was had. At the conclu-

sion of the trial the court instructed the jury, and the jury returned a verdict of $35,000 for Kerrey Construction Company.

The Hunts raised several defenses at trial: (1) That Kerrey Construction did not accept their counteroffer by March 11, 1978, and therefore the offer was null and void; (2) that there was no consideration because of the failure of Kerrey Construction to have its check certified; and (3) that John Kerrey violated his fiduciary duty to the Hunts because he induced them to accept $105,000 for the land when he knew it was worth more. These factual issues were disputed at trial, properly submitted on instructions, and the jury found against the Hunts on each defense by finding that a breach had occurred. Although not specifically assigned as error, the Hunts appear to be attempting to reargue the factual findings of the jury, in addition to the assignments of error set forth in their brief. There was sufficient evidence presented, and therefore we do not quarrel with the decision of the jury in this case finding that a breach had occurred and its resolution of the other factual issues presented.

This opinion will therefore discuss only whether the trial court erred in submitting the loss of Kerrey Construction Company's resale contract to the jury as an element of damages in this case. We find the Hunts' other assignments of error relating to the trial court's failure to give proposed instructions and failure to grant a motion for judgment notwithstanding the verdict to be unmeritorious.

The general measure of damages for a breach of contract to convey land is the market value at the time of breach less the contract price. *Hahn v. International Management Services, Inc.*, 207 Neb. 229, 298 N.W.2d 140 (1980); *Oman v. City of Wayne*, 152 Neb. 341, 40 N.W.2d 916 (1950). The exception to this rule is that where it appears that special damages have also arisen from the breach, the damages recoverable are such as may fairly and reasonably

be supposed to have been in the contemplation of the parties at the time the contract was made. *Violet v. Rose,* 39 Neb. 660, 58 N.W. 216 (1894); *Hadley v. Baxendale,* 9 Ex. 341, 156 Eng. Rep. 145 (1854); Restatement (Second) of Contracts § 351 (1981).

Kerrey Construction maintained throughout trial that it was entitled to receive lost profits because of its inability to complete the arrangements it had made for the resale of the land at a profit. Evidence at trial showed that after the contract was signed between Kerrey Construction and the Hunts, Kerrey Construction had arranged to sell the land to Christo Construction Company for a considerable profit. The sole reason that these arrangements fell through appears to have been the inability to procure title from the Hunts.

The trial court proceeded to give instructions upon the measure of damages, couched in the specific terms of the loss of the resale bargain, and the issue of general damages was not presented to the jury.

We are unable to say upon the facts of this case that, as a matter of law, the damages caused by the loss of the resale contract were not within the contemplation of the parties at the time they entered into the contract. There was evidence presented that the Hunts knew they were conveying to a construction company whose principal officers were real estate agents. Mr. Hunt was the city engineer of Lincoln, was very familiar with land development, and even provided Kerrey Construction with several maps as to how the tract could be developed.

While it may or may not have been reasonable to assume that the Hunts thought Kerrey Construction would develop and build on the land, selling it parcel by parcel rather than contracting to sell the entire tract to a third party, the issue was properly submitted to the jury and a verdict was returned against the Hunts. Applying the rule in *Hadley v. Baxendale, supra,* we believe that the loss of a prospective sale of land can be considered as arising

naturally from the breach of contract in this case and that a prospective sale can reasonably be supposed to have been in the contemplation of both parties at the time they made the contract. Any language in *Violet v. Rose, supra,* inconsistent with this opinion is hereby overruled.

Therefore, we find that the trial court was correct in admitting evidence regarding the resale contract with Christo Construction Company and submitting the issue of special damages to the jury.

AFFIRMED.

CLINTON, J., not participating.

NATIONAL CRANE CORPORATION, A CORPORATION, APPELLANT, V. OHIO STEEL TUBE COMPANY, A CORPORATION, APPELLEE.

332 N.W.2d 39

Filed March 25, 1983. No. 81-747.

1. **Torts: Strict Liability: Damages.** The doctrine of strict liability in tort may be used to recover damages to the defective product itself where the damage occurred as a result of a sudden, violent event and not as a result of an inherent defect that reduced the property's value without inflicting physical harm to the product.
2. **Torts: Negligence: Strict Liability: Case Disapproved.** To the extent that *Hawkins Constr. Co. v. Matthews Co., Inc.,* 190 Neb. 546, 209 N.W.2d 643 (1973), held that strict liability in tort may not be used to recover for physical harm to property only, it is disapproved.
3. **Torts: Negligence: Strict Liability.** The purchaser of a product pursuant to contract cannot recover economic losses from the seller manufacturer on claims in tort based on negligent manufacture or strict liability in the absence of physical harm to persons or property caused by the defective product.

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

Fredric H. Kauffman and Terry R. Wittler of Cline, Williams, Wright, Johnson & Oldfather, for appellant.

Michael G. Helms of Schmid, Ford, Mooney & Frederick, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

MCCOWN, J.

This is an action under various tort and contract theories to recover all or a portion of the cost of conducting a retrofit program to replace all steel tubing manufactured and sold by the defendant to plaintiff and incorporated into cranes manufactured and sold to ultimate users or consumers by the plaintiff. The District Court sustained defendant's demurrers and dismissed plaintiff's petitions. The plaintiff has appealed.

The plaintiff, National Crane Corporation, is a Nebraska corporation which manufactures and sells a diversified line of cranes. The defendant, Ohio Steel Tube Company, is an Ohio corporation engaged in the business of designing and manufacturing various types of steel tubing.

During the period beginning in July 1970 and ending in May 1975, plaintiff purchased sections of welded steel tubing from the defendant for use in the tilt cylinder mechanism of cranes manufactured by plaintiff. During the period of time from January 1, 1971, to June 1, 1976, 1,232 cranes manufactured by plaintiff utilizing the steel tubing purchased from defendant were sold by the plaintiff to various customers.

Failures of the tilt cylinder mechanism of the cranes containing the steel tubing supplied by defendant commenced on April 4, 1973, when the first failure occurred. Three more failures occurred in 1974. Each failure was reported to defendant by plaintiff. Defendant represented to the plaintiff that the first failure was due to an inadequacy of material specification. In two 1974 cases defendant acknowledged the failure was due to an imperfection in the weld, and in the other reported that the

material met specifications and the weld was satisfactory.

In March 1975, following inquiry by plaintiff, defendant advised plaintiff that the tubing which had been and was still being furnished to plaintiff had been thoroughly and completely tested. The last tubing manufactured by the defendant and involved in this case was delivered to plaintiff in May 1975.

Between January 1976 and June 1976 four more cylinder failures occurred, each of which was also reported to defendant. All the cranes involved in this action were sold by June 1, 1976.

In July 1976 plaintiff launched its own internal investigation and analysis of the cylinder failures which were being reported. Three additional cylinder failures occurred between July 22 and November 5, 1976, in one of which a loss of life occurred.

By December 1976 plaintiff's testing and investigation reflected that the failures were not caused by overloading or piston seal leakage and that the cylinder design was adequate. Although plaintiff concluded that the cylinder failure problem must lie with the cylinder material, it was unable to reach specific, precise conclusions on which it could reasonably rely.

On December 29, 1976, plaintiff engaged independent engineering and testing consultants to assist in determining the precise cause of the cylinder failures. Thereafter, and throughout the year 1977, representatives of the plaintiff met with representatives of the defendant, and the defendant was advised of the status of the engineering testing and evaluation being carried on.

Between January 17 and December 7, 1977, four more cylinder failures occurred. In January 1978 defendant formally advised plaintiff that it would not participate in the testing and evaluation program because defendant believed the failures were

not the result of any defects in defendant's manufacturing.

In May 1978 plaintiff was advised by its engineering and technical consultants that material and product defects existed in the welded tubing used in the manufacture of the boom cylinders for plaintiff's cranes. Plaintiff was informed that unexpected failures of the cylinders could occur at any time without warning and that to insure the safety of others the cylinders must be replaced.

Plaintiff undertook a retrofit program to replace all of the potentially dangerous cylinders with suitable and safe substitute cylinders, and expended $1,078,960 in testing and replacing the defective tubing manufactured by defendant and incorporated in cranes manufactured and sold by plaintiff.

Plaintiff filed its petition in this proceeding on June 20, 1980, seeking recovery of the costs and expenses of the retrofit program under three different theories based on the basic facts set out above. The 15 actual failures are not involved. The first cause of action was for breach of express and implied warranties. The second cause of action was for negligent manufacture of tubing known to be dangerous unless carefully made. The third cause of action was pleaded on the basis of strict liability.

The defendant demurred to the petition on the grounds that the first cause of action was barred by the statute of limitations and the other two causes of action were not available for the recovery of economic loss. The District Court sustained the demurrer on those grounds.

Plaintiff filed an amended petition alleging the same facts but seeking recovery under theories of indemnity and contribution. Defendant demurred to the causes of action in the amended petition upon the grounds that they either were barred by the applicable statute of limitations or were unavailable to the plaintiff, the plaintiff being a volunteer in the alleged action. The District Court sustained de-

fendant's demurrer to the amended petition. Plaintiff elected to stand on the original and amended petitions and the court dismissed them. Plaintiff has appealed.

Plaintiff contends that the principles of tort law should be extended to permit plaintiff to recover the economic losses incurred under the retrofit program involved here, and that plaintiff should not be limited to recovery on the contractual basis of express or implied warranties. The argument is that because the plaintiff and defendant might be liable to an ultimate user or consumer of plaintiff's cranes under tort theories of liability if the defective tubing were not replaced, therefore the expense of eliminating that potential tort liability as between plaintiff and defendant is recoverable as a tort claim rather than being recoverable under contract law as a claim for the breach of express or implied warranties under the Uniform Commercial Code.

The great majority of courts which have considered the issue have held that the purchaser of a product pursuant to contract cannot recover economic losses from the manufacturer on claims based on principles of tort law, in the absence of property damage or personal injury from the use of the product. See *Jones & Laughlin Steel v. Johns-Manville Sales,* 626 F.2d 280 (3d Cir. 1980), and cases and authorities there cited.

The line of demarcation between physical harm and economic loss has been said to reflect the line of demarcation between tort theory and contract theory. See *Alfred N. Koplin & Co. v. Chrysler Corp.,* 49 Ill. App. 3d 194, 364 N.E.2d 100 (1977), and cases there cited. "Economic loss" in that case was defined by the court as " 'damages for inadequate value, costs of repair and replacement of the defective product or consequent loss of profits—without any claim of personal injury or damage to other property * * *.' " *Id.* at 199, 364 N.E.2d at 103.

Chief Justice Traynor analyzed the distinction

which the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss. "He [the manufacturer] can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm. He cannot be held for the level of performance of his products in the consumer's business unless he agrees that the product was designed to meet the consumer's demands. A consumer should not be charged at the will of the manufacturer with bearing the risk of physical injury when he buys a product on the market. He can, however, be fairly charged with the risk that the product will not match his economic expectations unless the manufacturer agrees that it will. Even in actions for negligence, a manufacturer's liability is limited to damages for physical injuries and there is no recovery for economic loss alone." *Seely v. White Motor Co.,* 63 Cal. 2d 9, 18, 403 P.2d 145, 151, 45 Cal. Rptr. 17, 23 (1965).

Dean Prosser, after pointing out that a seller's liability for negligence covers any kind of physical harm, including not only personal injuries but also property damage, said: "But where there is no accident, and no physical damage, and the only loss is a pecuniary one, through loss of the value or use of the thing sold, or the cost of repairing it, the courts have adhered to the rule . . . that purely economic interests are not entitled to protection against mere negligence, and so have denied the recovery." W. Prosser, Law of Torts, *Products Liability* § 101 at 665 (4th ed. 1971).

The rule that the purchaser of a product pursuant to contract cannot recover economic losses from the manufacturer under a claim of strict liability in tort has been adopted by this court. In *Hawkins Constr. Co. v. Matthews Co., Inc.,* 190 Neb. 546, 209 N.W.2d 643 (1973), we said: "From a review of the authorities and giving maximum import to the basic doc-

trine of strict tort liability, we feel that the doctrine of strict tort liability was not conceived as a substitute for warranty liability in cases where the purchaser has only lost the benefit of his bargain. . . . If the loss is merely economic, the Uniform Commercial Code has given the purchaser an ample recourse under the particular provisions and requirements of the code." *Id.* at 561-62, 209 N.W.2d at 653.

Sections 323, 395, and 402 A and B of the Restatement (Second) of Torts (1965) all apply to tort liability for "physical harm." The title of § 402 A is "Special Liability of Seller of Product for Physical Harm to User or Consumer." The section then provides: "(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if . . . ." *Id.* at 347-48.

The Restatement sections referred to are applicable only where the product causes physical harm. Nowhere in the comments or illustrations does the Restatement indicate that the doctrine of strict liability covers economic loss in the absence of physical harm caused by the product. In addition, Neb. Rev. Stat. § 25-21,180 (Reissue 1979) defines a product liability action as an action brought "for or on account of personal injury, death, or property damage caused by" the product. The statute refers only to physical harm, not to economic loss.

Section 402 A specifically applies to liability for physical harm caused to the ultimate user or consumer or to his property. It is the unanimous view of the courts that plaintiffs may utilize a strict liability cause of action to recover for damage to property other than the defective product. That consensus is not present, however, as to damage to the defective product itself.

Damage to the product itself is sometimes characterized as economic loss or indirect loss resulting

from the inability to make use of the defective product or loss of the benefit of the bargain. The difficulty in determining whether to apply strict liability for any type of economic loss results from the distinction between tort doctrine of strict liability and contract theory embodied in the Uniform Commercial Code.

A majority of courts that have considered the applicability of strict liability to recover damages to the defective product itself have permitted use of the doctrine, at least where the damage occurred as a result of a sudden, violent event and not as a result of an inherent defect that reduced the property's value without inflicting physical harm to the product. See *Star Furniture Co. v. Pulaski Furniture Co.*, 297 S.E.2d 854 (W. Va. 1982). In essence, this court has reached the same result. See *Morris v. Chrysler Corp.*, 208 Neb. 341, 303 N.W.2d 500 (1981).

To the extent that *Hawkins Constr. Co. v. Matthews Co., Inc.*, 190 Neb. 546, 209 N.W.2d 643 (1973), held that strict liability in tort may not be used to recover for physical harm to property only, it is disapproved. To hold otherwise would penalize the fortunate persons who escape personal injury and ignore the specific language of § 402 A of the Restatement and a virtually unbroken line of decisions of other courts.

In the case at bar the facts pleaded establish that the damages sought to be recovered are the costs and expenses of removing the defective tubing manufactured by the defendant and replacing it. Such damages are not damages resulting from physical harm caused by the defective product. Instead, they are damages resulting from the purchase of defective or unsatisfactory products.

Plaintiff contends that because the "economic loss" here was incurred to remove a potential future liability in tort, such expenses are recoverable by a tort action under theories of negligent manufacture

or strict liability in addition to an action under a warranty or contract theory.

At this point it should be noted that the parties tacitly concede that, upon the facts pleaded in the instant case, the plaintiff stated a cause of action against the defendant under a warranty or contract theory of liability. That cause of action, however, was barred by the statute of limitations under the Uniform Commercial Code, and the plaintiff does not seriously contend that the sustaining of the demurrer to the first cause of action on that ground was erroneous. Instead, plaintiff's position is that the facts pleaded gave rise to two separate causes of action, one in tort and one in contract under a theory of express or implied warranty.

The proper relationship between tort law and the Uniform Commercial Code dictates that a cause of action for "economic loss" under the facts of the present case be pursued under a warranty or contract theory. The fact that the incurring of replacement costs here also removed a potential future tort liability to ultimate users or consumers does not convert economic loss into physical harm, nor transform a contract warranty cause of action into a product liability tort action. It should again be noted that the 15 cases in which actual failures in defendant's product occurred are not involved in this litigation.

We hold that the purchaser of a product pursuant to contract cannot recover economic losses from the seller manufacturer on claims in tort based on negligent manufacture or strict liability in the absence of physical harm to persons or property caused by the defective product.

Plaintiff's amended petition, relying on the same basic facts, sets out purported causes of action seeking to recover on the basis of indemnity or contribution. Before a right to indemnity or contribution arises, the underlying liability must first be established. In this case defendant has been found not

liable to the plaintiff in contract or in tort on the basic facts pleaded, and therefore cannot be liable to the plaintiff for indemnity or contribution on the same facts.

The action of the District Court in sustaining demurrers to the petition and amended petition was correct and is affirmed.

AFFIRMED.

KRIVOSHA, C.J., concurs in the result.

CLINTON, J., not participating.

BOSLAUGH, J., dissenting.

It has been said that the underlying rationales of the doctrine of product liability are (1) consumer protection and compensation, (2) risk distribution, and (3) deterrence of defective manufacture. Note, *Comparative Contribution and Strict Tort Liability: A Proposed Reconciliation,* 13 Creighton L. Rev. 889 (1980). To require that an injury to a third person must occur before an action for damages in tort arises between the manufacturer and supplier defeats these rationales.

The majority opinion holds that the plaintiff can not recover in tort for what it terms "pure economic loss." The rationale for this is that the plaintiff had a cause of action for such losses under the warranty provisions of the Uniform Commercial Code. Further, because there is no underlying liability in tort to an injured party, and because there was no express contract provision between the parties, the plaintiff has no right to indemnity or contribution.

Generally, a manufacturer is under a duty to protect the consumer from the risk of unreasonable harm and a duty to use due care in product manufacture and design. Thus, in products liability a manufacturer can be sued both in strict tort and negligence. *Kohler v. Ford Motor Co.,* 187 Neb. 428, 191 N.W.2d 601 (1971); *Friedrich v. Anderson,* 191 Neb. 724, 217 N.W.2d 831 (1974). Actions on both theories are also available against the supplier of a component part. *City of Franklin v. Badger Ford*

Truck Sales, 58 Wis. 2d 641, 207 N.W.2d 866 (1973). Should the manufacturer be held liable in tort for a defect caused by a supplier, courts permit the manufacturer to recover from the supplier. *Hill v. Joseph T. Ryerson & Son, Inc.,* 268 S.E.2d 296 (W. Va. 1980). However, as indicated in the majority opinion, courts have generally required an injury to person or property and have not permitted an action in tort for pure "economic loss" against a supplier or manufacturer.

The majority reasons that the loss suffered by the plaintiff was an economic one, as there was no claim for injury or property damage to anything other than the product itself. The proper action, it states, was in warranty only. Had an injured party sued National Crane, National Crane would have been permitted recovery from Ohio Steel Tube.

The effect of the decision is to require that some injury occur either to a person or to property before a manufacturer can recover from the supplier of material or a defective party independently in tort or under theories of indemnity or contribution. Such a result is inconsistent with the policies of consumer protection, risk distribution, deterrence, and equity underlying products liability theories.

It would seem that the plaintiff should be entitled to recover independently in tort from the supplier for the losses suffered to retrofit the cranes. Several rationales are available: (1) The loss resulted from the duty to provide a safe product and was not a "pure economic loss"; (2) The Uniform Commercial Code remedy was inappropriate for such losses; (3) The economic loss distinction is a specious one and should be abolished; and (4) It is against public policy to require an injury before a manufacturer can recover from a supplier of defective material or parts.

The expenses incurred in plaintiff's retrofit program do not fall neatly into the category designated "economic loss," for which most jurisdictions do not

permit recovery in tort. " 'Economic loss' is defined as the diminution in the value of the product because it is inferior in quality and does not work for the general purposes for which it was manufactured and sold." Note, *Manufacturers' Liability to Remote Purchasers for "Economic Loss" Damages — Tort or Contract?,* 114 U. Pa. L. Rev. 539, 541 (1966) (definition quoted in *Alfred N. Koplin & Co. v. Chrysler Corp.,* 49 Ill. App. 3d 194, 364 N.E.2d 100 (1977)). Generally, the cases which have held that economic loss is recoverable only under the warranty provisions of the Uniform Commercial Code have dealt with defects which affected the product's performance but did not present an unreasonable risk of harm to persons or property outside of the product itself. See, e.g., *Alfred N. Koplin & Co., supra* (air-conditioner breakdown); *Jones & Laughlin Steel v. Johns-Manville Sales,* 626 F.2d 280 (3d Cir. 1980) (roof material blistered and cracked); *Morrow v. New Moon Homes, Inc.,* 548 P.2d 279 (Alaska 1976) (defects in mobile home); *Fredonia Broadcasting Corp., Inc. v. RCA Corporation,* 481 F.2d 781 (5th Cir. 1973) (defective broadcasting equipment). The rationale behind these cases was expressed in *Seely v. White Motor Co.,* 63 Cal. 2d 9, 18, 403 P.2d 145, 151, 45 Cal. Rptr. 17, 23 (1965): "[A consumer] can, however, be fairly charged with the risk that the product will not match his economic expectations unless the manufacturer agrees that it will." Such manufacturer agreements or warranties are covered in the Uniform Commercial Code.

In the present case it would seem that the retrofit program was conducted in order to fulfill both the plaintiff's and the defendant supplier's duty in tort to protect the consumer from the risk of unreasonable harm. Courts have indicated that manufacturers must take post sale remedial measures once an excessive danger is discovered in a product line. *Braniff Airways, Inc. v. Curtiss-Wright Corporation,* 411 F.2d 451 (2d Cir. 1969), *cert. denied* 396 U.S. 959,

90 S. Ct. 431, 24 L. Ed. 2d 423 (duty to remedy defective aircraft engines); *Sterling Drug, Inc. v. Yarrow,* 408 F.2d 978 (8th Cir. 1969) (duty to have detail men personally contact physician regarding side effect of drugs). See discussion of this duty in Ramp, *The Impact of Recall Campaigns on Products Liability,* 44 Ins. Couns. J. 83 (1977). The imposition of such a duty comports with the underlying rationales of products liability.

The plaintiff should be entitled to recover in tort for the losses incurred as a result of the retrofit program, because the expenses were not pure economic losses but, rather, were expenses incurred to fulfill both parties' duty in tort to the consumer. When a manufacturer has conducted a recall program necessitated by the duty to protect the consumer, that manufacturer should have an action in tort against the supplier of a defective part, provided that the defect caused the recall and was the result of negligent manufacture or design, or presented an unreasonable risk of harm. An injury to a third person or to property should not be a prerequisite.

The court reasons that since the warranty provisions of the Uniform Commercial Code provided a remedy, its refusal to extend tort liability is justified. However, it does not seem that the Uniform Commercial Code was designed with such losses in mind, that is, losses which stem from the post sale duty in tort to the consumer. The Uniform Commercial Code is primarily concerned with contract notions of losses on bargains and the expectations of parties. It is neutral on consumer safety. Ribstein, *Guidelines for Deciding Product Economic Loss Cases,* 29 Mercer L. Rev. 493 (1978).

For example, the losses incurred to finance a recall program are consequential, not actual, damages under the Uniform Commercial Code. See Neb. U.C.C. §§ 2-714, 2-715 (Reissue 1980). The test for such damages is whether the losses were foreseeable by the seller at the time of the contracting.

See *Burgess v. Curly Olney's, Inc.,* 198 Neb. 153, 251 N.W.2d 888 (1977). One commentator has stated that this test, when applied to recall situations, requires consideration of other factors, i.e., the willfulness of the breach and the relative sizes of the economic units involved, before an equitable result under the law of contract can be reached. This author proposes legislative changes to handle allocating the risk of loss in recall situations. Stone, *Recovery of Consequential Damages for Product Recall Expenditures,* 1980 B.Y.U. L. Rev. 485; Stone, *Allocation of Risk for Product Recall Expenditures: A Legislative Proposal,* 1975 Det. C.L. Rev. 1. Arguably, the equitable doctrine of contribution may be better suited to the recall situation, as both are based upon tort concepts. See, Jensvold, *A Modern Approach to Loss Allocation Among Tortfeasors in Products Liability Cases,* 58 Minn. L. Rev. 723 (1974); Note, *Comparative Contribution and Strict Tort Liability: A Proposed Reconciliation,* 13 Creighton L. Rev. 889 (1980).

Further, the disclaimer provisions of the Uniform Commercial Code permit a seller to limit his liability for consequential damages, provided the disclaimer is not unconscionable. In strict tort, courts do not permit a disclaimer to bar liability when a person or property is damaged. *Sipari v. Villa Olivia Country Club,* 63 Ill. App. 3d 985, 380 N.E.2d 819 (1978). See *Haugen v. Ford Motor Company,* 219 N.W.2d 462 (N.D. 1974). However, the courts will not apply strict tort where the loss is "economic," and will uphold the disclaimer. The effect of the decision in the present case is to term the costs of fulfilling a duty in tort an "economic loss" and thus permit a supplier to avoid his responsibility for product safety by shifting it to the manufacturer through disclaimer—at least until an accident occurs. To require an accident rather than permit the costs of a preventive recall program to be allocated to the supplier when a disclaimer is present contra-

dicts the policies of consumer protection, risk allocation, and deterrence, upon which the duty to recall is founded.

Thus, the Uniform Commercial Code seems inappropriate as a sole remedy in this situation because it is concerned not with product safety for the intended consumer but with the benefit of the bargain between two commercial entities. In the recall situation the concern is for product safety, and the cost should be borne by the responsible party. Comment, *Comparative Causation, Indemnity, and the Allocation of Losses Between Joint Tortfeasors in Products Liability Cases,* 10 St. Mary's L.J. 587 (1979). A few courts have abolished the economic loss distinction and hold that such loss is recoverable both in tort and warranty. Generally, it is no objection that an alternative remedy was available to the plaintiff.

In *Berg v. General Motors,* 87 Wash. 2d 584, 555 P.2d 818 (1976), plaintiff was permitted to sue in negligence for lost profits. In listing its reasons the court said at 592-93, 555 P.2d at 822-23: "Second, we are not convinced of the accuracy of the statement made in *Curtiss-Wright* at page 482, that: 'It is only when the danger inherent in a defectively made article causes an accident that a cause of action against the manufacturer also arises.' A distinction that would allow recovery if the product in question destroyed the property of another, yet would deny recovery were the same product merely to disintegrate, is a specious one. . . . A manufacturer intending and foreseeing that its product would eventually be purchased by persons operating commercial ventures, owes such persons the duty not to impair that purchaser's commercial operations by a faulty product."

New Jersey has permitted recovery in strict tort for economic losses. *Santor v. A & M Karagheusian, Inc.,* 44 N.J. 52, 66, 207 A.2d 305, 312 (1965) (defect in rug): "[A]lthough the doctrine has been

applied principally in connection with personal injuries sustained by expected users from products which are dangerous when defective . . . the responsibility of the maker should be no different where damage to the article sold or to other property of the consumer is involved." In *Monsanto v. Alden Leeds,* 130 N.J. Super. 245, 259, 326 A.2d 90, 97 (1974), the court said, "Injuries to a man's business can be as detrimental to our society as injuries to his person."

The plaintiff should be able to recover from the supplier under an indemnity or contribution theory. Contribution is an equitable doctrine which divides the losses between tort-feasors. Contribution applies where both parties are under a common liability to the injured party and one party has paid more than his share of the burden. Note, 13 Creighton L. Rev., *supra.* Indemnity, also an equitable concept, transfers the entire loss to the tort-feasor who ought to bear it. *Id.* The right to indemnity or contribution can arise either through express agreement or implication of law. Phillips, *Contribution and Indemnity in Products Liability,* 42 Tenn. L. Rev. 85 (1974). See *Tober v. Hampton,* 178 Neb. 858, 136 N.W.2d 194 (1965).

In product liability actions a manufacturer can seek indemnity from the maker of a defective component part. *Hill v. Joseph T. Ryerson & Son, Inc.,* 268 S.E.2d 296 (W. Va. 1980). The issue presented here is whether a manufacturer can recover under indemnity or contribution if there has been no injury to a third person for which judgment or settlement has been had against the manufacturer.

The reasoning of the majority in the present case appears to follow that expressed in *Waldinger Co. v. P & Z Co., Inc.,* 414 F. Supp. 59, 60 (D. Neb. 1976): "Contribution and indemnification are inchoate rights which do not arise until one tort feasor has paid more than his share of the damages or judgment."

However, it does not appear that a judgment is always required before recovery in contribution or indemnity can be had. Restatement of Restitution § 86, Comment d at 391 (1937), states: "The rule stated in this Section is applicable whether or not suit has been brought by the injured person against the payor. If, however, suit is not brought by the injured person, and the payor seeks restitution from a fellow tortfeasor, it is necessary for him to prove that his payment terminated or reduced a valid claim against the other . . . ." Section 86 at 389 states, "A person who has discharged a tort claim to which he and another were subject is entitled to indemnity or contribution . . . ." The illustrations indicate that settlements are contemplated by this section.

In Restatement (Second) of Torts § 886B at 344 (1979), it is stated: "(1) If two persons are liable in tort to a third person for the same harm and one of them discharges the liability of both, he is entitled to indemnity from the other if the other would be unjustly enriched at his expense by the discharge of the liability."

The Comment states that the basis for indemnity is restitution, which seeks to prevent unjust enrichment. A person confers a benefit when he saves the other from expense or loss.

Indemnity is permitted for settlement of a claim if the indemnitee can prove *at least potential liability* to the third party. *Central Nat. Ins. Co. v. Devonshire Coverage,* 565 F.2d 490 (8th Cir. 1977).

In *Burlington Northern, Inc. v. Hughes Bros., Inc.,* 671 F.2d 279, 283 (8th Cir. 1982), the court said: "As this court recently observed, 'the indemnitee need not prove its legal liability to the injured party when its indemnitor denies liability under a contract and refuses to assume defense of the claim or to otherwise hold the indemnitee harmless for any loss.' . . .

"BN notified Hughes of the claim and requested that it assume responsibility. BN also kept Hughes

informed about the settlement negotiations. Hughes refused to participate in any manner.

"In the present case, BN's potential liability under the FELA was established as a matter of law. . . . Under the FELA, BN possessed a 'nondelegable duty to provide its employees with a safe place to work.' . . . Additionally, BN was liable for its employee's injury if its negligence 'played any part, even the slightest, in producing the injury.' . . . The placement of the wall and the failure to remove the snow and ice were undisputably contributory factors . . . . Thus *the likelihood* that the railroad would be held liable was clearly established and the only issue which should have been submitted to the jury was the reasonableness of the amount of the settlement."

In *Parfait v. Jahncke Service, Inc.,* 484 F.2d 296 (5th Cir. 1973), *cert. denied* 415 U.S. 957, 94 S. Ct. 1485, 39 L. Ed. 2d 572 (1974), the court discussed the equitable concepts underlying implied indemnity between tort-feasors when one has settled an action without the consent of the other. The court held that a showing of potential liability was necessary in order to get indemnity.

In the present case both the manufacturer and the supplier owe a duty to the consumer. When the manufacturer is required to rectify a defect caused by the supplier which, under the law of strict liability, will almost certainly result in liability, the manufacturer should be permitted to maintain an action for indemnity. Such recall expenses terminate a potential valid claim against the supplier. To permit the supplier the benefit of this form of settlement is a form of unjust enrichment which equity seeks to prevent. To require an injury to a third person to occur before indemnity can be had would also seem to violate the principles of equity.

The following rule, suggested by the plaintiff, should be applicable in cases such as this: "One who sells a product in a defective condition unreasonably dangerous to a user or consumer is entitled

to receive indemnity from a supplier of a defective component part for the reasonable costs of remedying the defect, if

"(a) the defective condition is created by the supplier's defective component part;

"(b) the defective product creates a substantial risk of serious injury or loss of life to users or third parties;

"(c) a warning alone would be inadequate to avoid the risk created; and

"(d) the supplier of the defective component part has been given reasonable notice of the existence of the defect and an opportunity to provide, or participate in, the remedial action."

HASTINGS, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V. VINCENT VAINIUNAS, APPELLANT.

331 N.W.2d 522

Filed March 25, 1983. No. 81-819.

Drunk Driving: Prior Convictions. The record of a conviction used for enhancement purposes in a prosecution for third offense driving while intoxicated must show on its face a voluntary and intelligent waiver of the right to counsel or that the defendant was represented by counsel.

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

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

Paul L. Douglas, Attorney General, and Martel J. Bundy, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and COLWELL, D.J., Retired.

PER CURIAM.

The defendant was convicted of third offense

driving while under the influence of intoxicating liquor and sentenced to 1 to 3 years' imprisonment. He has appealed and contends the sentence was excessive and that a prior conviction relied upon by the State was invalid for enhancement purposes.

In *State v. Smith, ante* p. 446, 329 N.W.2d 564 (1983), we held that the record of a conviction used for enhancement purposes in a prosecution for third offense driving while intoxicated must show on its face a voluntary and intelligent waiver of the right to counsel or that the defendant was represented by counsel.

At the enhancement proceeding the State introduced records of convictions in 1972 and 1978. Objection was made only to the record of the 1972 conviction.

The judgment in the 1972 case, dated September 1, 1972, recites: "Now, on this day, comes the City Prosecutor on behalf of the State of Nebraska and defendant, Vincent Vainiunas, is represented in court."

The appearance docket sheet for that case lists "Lawrence I. Batt" as attorney for the defendant. We think this is a sufficient showing on the record of that case that the defendant was represented by counsel in the District Court.

An additional record of the District Court entitled "Criminal Docket-Appeal Cases" contains several entries under the date of the judgment, some of which are lined out or partially lined out. The entries consist of rubber stamp impressions, with blanks filled in by writing. One such entry indicating sentence was deferred has the name "Batt" written in the blank for the name of defendant's counsel. This entry is crossed out, presumably because sentence was not deferred but was imposed on that date.

Another entry showing sentence was imposed contains no reference or showing as to whether defendant was represented by counsel. We do not think

these entries conflict with the judgment and the appearance docket.

The defendant is 65 years of age. He has six previous convictions for driving while intoxicated. On three other occasions the charges were dismissed or reduced. The sentence imposed was not excessive.

The judgment is affirmed.

AFFIRMED.

LARRY E. REISER ET AL., APPELLEES, V. MICHAEL HARTZLER ET AL., APPELLANTS.

331 N.W.2d 523

Filed March 25, 1983. No. 81-894.

1. **Special Assessments: Collateral Attack.** Where the physical facts are such that real property was not and could not be specially benefited by an improvement project, the assessment levied to pay for such improvement may be held to be arbitrary, constructively fraudulent, and therefore void and subject to collateral attack.
2. _____: _____. However, to sustain a collateral attack on a special assessment, it is necessary that the evidence support a determination that in fact the property in question was not and could not be specially benefited by the particular improvement.
3. _____: _____. Mere excessiveness of a special assessment may not be corrected in a collateral attack upon the assessment.
4. **Special Assessments: Proof.** A property owner who attacks a special assessment as void has the burden of establishing its invalidity.
5. **Equity: Special Assessments: Appeal and Error.** The review of a collateral attack upon a special assessment is a proceeding in equity, which this court reviews de novo on the record.

Appeal from the District Court for Cheyenne County: JOHN D. KNAPP, Judge. Reversed and remanded with directions to dismiss.

John P. Peetz III of John Peetz, P.C., for appellants.

P. J. Heaton, Jr., for appellees.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, HASTINGS, and CAPORALE, JJ., and BRODKEY, J., Retired.

HASTINGS, J.

The plaintiffs are the owners of certain residential lots located on the north side of Toledo Street in the city of Sidney. They brought this action in equity against the defendants, members of the city council and the city of Sidney itself, seeking to have declared null and void certain special assessments levied against their properties resulting from the paving of Toledo Street, alleging an absence of special benefits. The District Court found that the "[b]enefits to plaintiffs appear to the Court to be little, if any, greater than to the public at large," and ordered "that the taxes assessed, levied and collected from plaintiffs . . . were illegally assessed, levied and collected and that plaintiffs . . . shall be and are entitled to the refund of such taxes paid . . . ." The defendants on appeal to this court have alleged as errors: (1) That the plaintiffs failed to follow the specified statutory scheme for relief in this type of situation; and (2) That the evidence does not support a finding that plaintiffs' properties were not and could not be specially benefited so as to sustain a collateral attack on the assessment.

Neb. Rev. Stat. § 16-637 (Reissue 1977) provides generally that any party feeling aggrieved by any special assessment may pay the same under protest, shall give written notice to the city treasurer of an intention to sue to recover such payment and within 60 days thereafter shall have the right to bring a civil action to recover so much of such special taxes as may be shown to be illegal, inequitable, and unjust. Neb. Rev. Stat. §§ 19-2422, 19-2423, and 19-2425 (Reissue 1977) provide that any owner of real property who feels aggrieved by the levy of a special assessment may appeal the same, both as to the validity and amount thereof, to the District Court by filing with the city clerk a written notice of appeal

within 10 days of the levy and a petition on appeal and transcript with the District Court within 30 days of the levy of such special assessment.

Neither of these statutory procedures was complied with in this case. According to the contention of the defendants, these remedies are exclusive and therefore the plaintiffs' action should be dismissed. However, the plaintiffs cite the general rule that where it is alleged and proved that the physical facts are such that property was not and could not be specially benefited, the levy may be held to be arbitrary, constructively fraudulent, and therefore void and subject to collateral attack. *Nebco, Inc. v. Speedlin,* 198 Neb. 34, 251 N.W.2d 710 (1977). We agree with the position taken by the plaintiffs.

However, to sustain the action taken by the trial court, it is necessary that the evidence support a determination that in fact the property in question was not and could not be specially benefited by the paving of Toledo Street. Mere excessiveness of a special assessment may not be corrected in a collateral attack upon the assessment. A property owner who attacks a special assessment as void has the burden of establishing its invalidity. Since this is a proceeding in equity we examine the record de novo. *Nebco, Inc. v. Speedlin, supra.*

The properties which are the subject of this litigation are Lots 5 through 12, Block 2, Park Manor Estates Addition to Sidney. These properties form the southern tier of lots in the subdivision and, as previously mentioned, are located on the north side of Toledo Street. The front, or north side, of these lots borders on William Way, a street running generally east and west with an outlet onto Keller Drive which forms the eastern boundary of the subdivision and which, in turn, connects with Toledo Street to the south at a T-intersection. Presently, Toledo Street is accessible from Park Manor Estates only by way of Keller Drive.

Shortly before the formal plat and dedication of

Park Manor Estates, the then owners of that property created an easement over what is now the extreme south 16 feet of the properties in question. In other words, it covers a strip of ground lying at the extreme south, or rear side, of the properties, immediately adjacent to Toledo Street. The grantees of that easement were the City of Sidney, Kansas-Nebraska Natural Gas Company, Inc., Wheat Belt Public Power District, and Sidney Community T.V. Company. Its purpose was for the "construction, reconstruction, replacement, removal, maintenance, and operation of electrical lines, cable lines, natural gas mains, sewer lines and other utilities incident to the business of the Grantee . . . ." It provided for ingress and egress across the property described for the purposes named above, and further provided that "Except for the ingress and egress granted to the Grantee, there shall be no ingress or egress over the above described Easement by any parties other than the Grantee without the express written consent of the Grantor and the Grantee."

The evidence presented by the plaintiffs suggested that everyone concerned understood that there was no right of access to Toledo Street from the affected properties without getting the required permission. As a matter of fact, all of the lot owners have constructed a fence which runs along the south end of the lots and separates the easement from the right-of-way on which Toledo Street is located. Their testimony also admitted that there is no requirement that all of the houses face north, away from Toledo Street, but the fact is that all were constructed in that way. One of the plaintiffs did admit in his testimony that the paving of Toledo Street might have benefited the lots in question a little, particularly because of less dust. There was evidence adduced that the municipal park was located on the south side of Toledo Street, which drew a great deal of

traffic, and that in the years before the street was paved, the dirt street created a lot of dust.

Testifying in behalf of the defendants was the project engineer on this paving job. He stated that the total cost of the paving project was approximately $62 per foot, so that a full assessment for a lot bordering on the street would be $31 plus, whereas the lots in Park Manor Estates were assessed but $15.53 per foot. He explained this as simply a matter of fairness, because these were double-fronted lots, i.e., there was a paved street at both the front and rear. This was not an unusual procedure in making assessments, according to him, and he pointed to other areas within the city of Sidney where only one-quarter assessments were made on double-fronted lots.

However, this witness gave as his opinion that the assessments recommended by him and adopted by the city were in proportion to the special benefits to the lots, and, as a matter of fact, the benefits exceeded the amount of assessments. He described the benefits in this particular situation as resulting in an all-weather road to travel in and out of the area; the elimination of dust caused by traffic; the establishment of drainage within the area; the establishment of a uniform grade in the adjacent area, allowing proper landscaping; the elimination of borrow pits, which are a trap for casual water; reduced noise; and modernization.

We believe the record fully supports a conclusion that the lots in question received substantial benefits from the paving of Toledo Street. Whether the amount settled on was correct we need not and may not determine because that question is not properly before us. What we do determine is that the record fails to support a conclusion that the property in question was not and could not be specially benefited by the paving project. Therefore, the landowner plaintiffs have failed to meet their burden of proving

the invalidity of the special assessments, and such assessments shall stand.

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

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

WHITE, J., participating on briefs.

AUDREY D. HANCOCK, APPELLEE, V. STATE OF NEBRASKA EX REL. STATE REAL ESTATE COMMISSION OF THE STATE OF NEBRASKA, APPELLANT.

331 N.W.2d 526

Filed March 25, 1983. No. 81-913.

1. **Statutes.** A penal statute is one by which a forfeiture is imposed for transgressing the provisions of the act and where the extent of liability imposed is not measured or limited by the damage caused by the act or omission.
2. _____. A penal statute is strictly construed, and its import may not be extended by construction to situations not clearly within its provisions. Nothing will be recognized, presumed, or inferred that is not expressed, unless necessarily or unmistakably implied in order to give effect to the statute.
3. **Statutes: Words and Phrases.** The meaning of the word "know," when used in a penal statute, varies with the context in which it is used.
4. **Brokers: Contracts.** Under the provisions of Neb. Rev. Stat. § 81-885.24(14) (Reissue 1981), a real estate broker or salesperson will be considered to know of a prior listing contract if he has actual knowledge of it or if he had actual knowledge of facts that would cause a reasonably prudent person to believe such a contract existed.
5. _____: _____. A finding that a real estate salesperson "should have known that there was a possibility" of a prior listing contract does not meet the standard of knowledge required by Neb. Rev. Stat. § 81-885.24(14) (Reissue 1981).

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

Robert H. Petersen, Special Assistant Attorney General, for appellant.

James R. Place of Breeling, Welling & Place, for appellee.

BOSLAUGH, MCCOWN, and HASTINGS, JJ., and BRODKEY, J., Retired, and Rist, D.J.

RIST, D.J.

This is an appeal from an order of the District Court of Douglas County, Nebraska, reversing an order of the State Real Estate Commission of Nebraska, which latter order had suspended the real estate salesperson's license of plaintiff-appellee, Audrey D. Hancock, for a period of 30 days. The District Court held the commission's order to be arbitrary and capricious and ordered it set aside.

The following facts are relevant. On April 21, 1980, Angelina Prochaska entered into an exclusive real estate listing contract with Henry A. Hrdlicka, a licensed realtor, for the sale of Prochaska's residence in Wahoo, Nebraska. The contract provided the listing should continue to October 21, 1980. Hrdlicka placed his "for sale" sign on the premises sometime in April 1980. At some time thereafter and prior to July 26 of that year, the sign was lying on the ground and remained in that condition during the pertinent times thereafter.

On or about July 26, 1980, appellee, a licensed real estate salesperson, upon advice from others in the firm for which she worked that the Prochaska home might be for sale, made an appointment on July 27 to see Mrs. Prochaska. On arrival at the residence Hancock noticed the Hrdlicka sign lying in the yard. She asked Prochaska if Prochaska had listed the house before and Prochaska advised she had, but that she had "fired" Hrdlicka and that the property was no longer listed with him. Hancock then prepared a listing contract, which Prochaska signed, and shortly thereafter Hancock sold the house.

Hrdlicka then filed a complaint against Hancock with the State Real Estate Commission, alleging in

substance that Hancock had violated Neb. Rev. Stat. § 81-885.24(14) (Reissue 1981) by negotiating a listing and sale contract when she knew or should have known of another outstanding listing contract.

At the commission hearing Hrdlicka testified that Prochaska had told him sometime after the original listing that she was taking the house off the market, but denied he released her from his listing contract. He did testify that illness during the listing period limited his ability to carry on his real estate business. He said he first learned of the other listing in early August and later advised Hancock's firm of the fact that he also had a listing contract.

Prochaska testified at the commission hearing that after she had listed her home with Hrdlicka she became dissatisfied with his lack of effort in selling the property; that she called him by telephone and told him of this and that she was discharging him. She further testified that Hrdlicka asked what he should do with the listing contract, and she told him to throw it away and to pick up his sign. She said Hrdlicka told her he would have his son pick up the sign, but it was never done. Hrdlicka denied this conversation took place.

Hancock testified at the hearing that when Prochaska told her she had fired Hrdlicka, Hancock assumed a cancellation of that listing contract. She made no further inquiry about it. Through her efforts the Prochaska property was sold on August 20, 1980.

The broker for whom Hancock worked testified that Hrdlicka made no contact with them about this matter until August 20, 1980, when he inquired about his commission.

On January 27, 1981, the commission, following hearing, found that Hancock had entered into a listing agreement with Prochaska "when *she should have known that there was a possibility* that Hrdlicka had not released Prochaska from her obligation under his listing," by virtue of which she

violated the statute previously noted "by negotiating directly with Prochaska to withdraw from or break such listing contract for the purpose of substituting, in lieu thereof, a new listing contract granting an exclusive agency . . . to Hancock's employing broker." (Emphasis supplied.) The commission ordered Hancock's real estate salesperson's license suspended for 30 days. It was this action that was appealed by Hancock to the District Court, which court, on November 17, 1981, found that such order was not supported by substantial evidence, and vacated and set it aside as arbitrary and capricious.

The scope of review was treated in the briefs as being governed by Neb. Rev. Stat. § 81-885.31 (Reissue 1976). We note said section was repealed, effective February 18, 1981, and Neb. Rev. Stat. § 81-885.30 (Reissue 1981), then in effect, provided for judicial review of the commission's action under Neb. Rev. Stat. §§ 84-917 to 84-919 (Reissue 1981). These latter sections, insofar as material herein, provide that the case on appeal will be considered on the record of the agency involved, and the action reversed or modified if unsupported by competent, material, and substantial evidence, or when arbitrary or capricious. The latter sections govern since they were in effect at the time the District Court heard and acted upon the appeal. *Happy Hour, Inc. v. Nebraska Liquor Control Commission,* 186 Neb. 533, 184 N.W.2d 630 (1971); *Lovelace v. Boatsman,* 113 Neb. 145, 202 N.W. 418 (1925).

Section 81-885.24(14) gives the commission power to revoke or suspend a real estate license when the licensee has been found guilty of, among others, the following unfair trade practice: "(14) Negotiating a sale . . . [or] listing . . . of real estate directly with an owner . . . if he or she knows that such owner has a written outstanding listing contract in connection with such property granting an exclusive agency or an exclusive right to sell to another broker, or negotiating directly with an owner to withdraw from or

break such a listing contract for the purpose of substituting, in lieu thereof, a new listing contract granting an exclusive agency . . . to sell to himself or herself or his or her employing broker."

A basic issue is the construction of this statute. Appellee argues that the statute is penal in nature, must be strictly construed, that the commission cannot read into the statute a duty that she "should have known" of Hrdlicka's contract, and that the statute requires a showing that she in fact "knew" such a contract existed. Appellant argues that Hancock knew of the possibility of Hrdlicka's having a contract, that she should have known Prochaska could not cancel it unilaterally by "firing" Hrdlicka, that she should have made further inquiry about it, and that under these circumstances she has violated the statute.

We conclude that the statute is penal in nature and must be strictly construed. A penal statute is one by which a forfeiture is imposed for transgressing the provisions of the act and where the extent of the liability imposed is not measured or limited by the damage caused by the act or omission. *Department of Banking v. McMullen,* 134 Neb. 338, 278 N.W. 551 (1938). A penal statute is strictly construed, and its import may not be extended by construction to situations not clearly within its provisions. *Anderson v. Robbins Incubator Co.,* 143 Neb. 40, 8 N.W.2d 446 (1943); *Shamberg v. City of Lincoln,* 174 Neb. 146, 116 N.W.2d 18 (1962); *Misle v. Miller,* 176 Neb. 113, 125 N.W.2d 512 (1963); *Bachus v. Swanson,* 179 Neb. 1, 136 N.W.2d 189 (1965). In construing a penal statute nothing will be recognized, presumed, or inferred that is not expressed, unless necessarily or unmistakably implied in order to give effect to the statute. *Misle v. Miller, supra.*

In light of these rules of construction, we turn to the meaning of the word "know" as used in the statute under consideration. The meaning of the word "know" or "knowingly" in a penal statute varies in

the context in which it is used. *R. D. Lowrance, Inc. v. Peterson,* 185 Neb. 679, 178 N.W.2d 277 (1970). We have considered a number of penal statutes in which the word is used with respect to the actions of others or of facts not in the actual knowledge of the person to whom the statute is applied. A statute making it an offense to leave the scene of an accident "knowing" that injury has resulted to another has been held to mean actual, not constructive, knowledge, or such notice as would put one on inquiry, and more than mere negligence in failing to know, or the mere presence of facts which might have induced belief in the mind of a reasonable person. *State v. Dougherty,* 358 Mo. 734, 216 S.W.2d 467 (1949). A statute making it a crime to "knowingly" receive stolen goods has been held to require a person to have such information from facts which should convince him that the property was stolen, or which should lead a reasonable man to believe they have been stolen, before, in a legal sense, he knew they were stolen. *Pettus v. State,* 200 Miss. 397, 27 So. 2d 536 (1946). See, also, *Bennett v. State,* 211 So. 2d 520 (Miss. 1968). A statute making it unlawful for a person to "knowingly" deliver liquor intended for sale in a dry territory has been held to require such person to have such information as would cause a person of ordinary prudence to believe the liquor was to be so sold, before being liable under the statute. *American Express Co. v. Commonwealth,* 171 Ky. 1, 186 S.W. 887 (1916). In *Leary v. United States,* 395 U.S. 6, 89 S. Ct. 1532, 23 L. Ed. 2d 57 (1969), the Supreme Court was considering offenses involving the "knowing" transportation of marijuana, and in footnote 93 of the opinion it accepted the Model Penal Code definition of knowledge: "When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist." *Id.* at 46.

We conclude from an examination of these authorities and the statute here involved that a broker or salesperson will be considered to "know" of a prior listing contract if he had actual knowledge of it or if he had actual knowledge of facts that would cause a reasonably prudent person to believe such contract existed.

Applying this standard to the commission's finding that appellee "should have known that there was a possibility" of a prior contract, we determine that such finding does not meet the standard of knowledge required to show a violation of this statute. The commission was apparently unwilling on the evidence before it to find that appellee had such knowledge as would meet the necessary standard set out above, and its failure to make such a finding is fatal to its action. In that sense the commission's action is arbitrary and capricious, being an action taken on findings of fact that do not represent a breach of conduct within the terms of the statute.

We further note that under the provisions of §§ 84-917 to 84-919, which govern the scope of our review, we are not at liberty on the record in this case to make other or different findings of fact than those determined by the commission, so the latter's findings must stand as the factual determination herein. See, *The 20's, Inc. v. Nebraska Liquor Control Commission,* 190 Neb. 761, 212 N.W.2d 344 (1973); *Gosney v. Department of Public Welfare,* 206 Neb. 137, 291 N.W.2d 708 (1980).

We need not determine other issues raised in light of our decision on the issue set forth above.

Accordingly, the order of the District Court vacating and setting aside the commission's order of suspension and dismissing the complaint against appellee is affirmed.

AFFIRMED.

DOROTHY M. EVANS, APPELLEE, V. CHARLES W. EVANS, APPELLANT.

331 N.W.2d 531

Filed March 25, 1983. No. 82-012.

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

Charles W. Evans, pro se.

Frost & Meyers, for appellee.

KRIVOSHA, C.J., WHITE, and CAPORALE, JJ., and BUCKLEY, D.J., and COLWELL, D.J., Retired.

PER CURIAM.

The court, having considered oral arguments and having reviewed the record de novo, finds that the decree of the trial court should be affirmed.

AFFIRMED.

JACK MANN, APPELLEE, V. ROBERT GLEASON AND BETTY GLEASON, APPELLANTS.

331 N.W.2d 531

Filed March 25, 1983. No. 82-128.

Appeal from the District Court for Nance County: JOHN M. BROWER, Judge. Affirmed. See Rule 7A.

Philip T. Morgan of Morgan & Morgan, for appellants.

No appearance for appellee.

KRIVOSHA, C.J., MCCOWN, and HASTINGS, JJ., and HOWARD, D.J., and COLWELL, D.J., Retired.

PER CURIAM.

The judgment is supported by substantial evidence in the record as a whole, and no error of law appears.

AFFIRMED. SEE RULE 7A.

BEYNON FARM PRODUCTS CORPORATION, APPELLANT, V. THE BOARD OF EQUALIZATION OF GOSPER COUNTY, NEBRASKA, APPELLEE.

331 N.W.2d 531

Filed March 25, 1983. No. 82-188.

1. **Taxation: Appeal and Error.** An appeal from a county board of equalization is tried in this court de novo as in an equitable proceeding.
2. **Taxation.** Neb. Rev. Stat. § 77-201 (Reissue 1981) requires that real estate not expressly exempted therefrom be taxed at actual value.
3. **Taxation: Presumptions.** In the absence of other evidence, proof that the guidelines provided by the Tax Commissioner were applied correctly raises a presumption that the assessment is legally proper.
4. **Taxation: Valuation.** Authorities charged with the duty of valuing property for taxation are not limited to just one method of determining value; they are required to use methods and consider such relevant factors as result in a proper assessment.
5. _____: _____. A landowner is entitled to have his property assessed uniformly and proportionately with other property even though the result may be that it is assessed at less than actual value.
6. **Taxation.** Misclassifying property may result in a lack of uniformity and proportionality; in such an event the taxpayer is entitled to relief.

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

Ira D. Beynon and John H. Sohl, for appellant.

Carlton E. Clark, Gosper County Attorney, for appellee.

BOSLAUGH and CAPORALE, JJ., and SPENCER and BRODKEY, JJ., Retired, and GRANT, D.J.

CAPORALE, J.

Plaintiff-appellant, Beynon Farm Products Corporation (Beynon), appeals from the judgment of the District Court finding the actual value of its quarter section of agricultural real estate in Gosper County for taxation purposes in 1981 to be $188,070, including an assessment of $11,240 for the single improvement

of a grain bin and associated equipment. That value was fixed by the county assessor and left undisturbed by the defendant-appellee, Board of Equalization of Gosper County. We reverse.

Beynon has made two assignments of error, the first being that the District Court erred in holding the county assessor did not act in an arbitrary, capricious, discriminatory, and illegal manner in increasing the assessed value of its property; and, secondly, that the District Court erred in holding the county could legally increase the value of plaintiff's property for taxation by relying entirely on the Nebraska Department of Revenue's manual published for valuation purposes, and also on opinions of certain members of that department, both of which are allegedly unsupported by the evidence required by the taxing statute. The imprecision of these assignments makes it difficult to determine exactly what it is that plaintiff is complaining about, except the ultimate claim that its property has been assessed at too great a value. Although plaintiff's petition on appeal asserts, among sundry other things, that the valuation of its property has not been equalized with the valuations of similar property in Gosper County, there is no competent evidence to support that allegation except, as is seen in the discussion which follows, with respect to 15 acres which the record establishes were misclassified.

Article VIII, §§ 1 and 5, of the Nebraska Constitution requires that taxes be levied "uniformly and proportionately." Neb. Rev. Stat. § 77-201 (Reissue 1981) requires that real estate not expressly exempted be taxed at actual value. Actual value has been held to mean fair market value. *Hastings Building Co. v. Board of Equalization,* 212 Neb. 847, 326 N.W.2d 670 (1982); *Beaver Lake Assn. v. County Board of Equalization,* 210 Neb. 247, 313 N.W.2d 673 (1981). Neb. Rev. Stat. § 77-112 (Reissue 1981) provides: "Actual value of property for taxation shall mean and include the value of property for taxation

that is ascertained by using the following formula where applicable: (1) Earning capacity of the property; (2) relative location; (3) desirability and functional use; (4) reproduction cost less depreciation; (5) comparison with other properties of known or recognized value; (6) market value in the ordinary course of trade; and (7) existing zoning of the property." Neb. Rev. Stat. § 77-1330(1) (Reissue 1981) provides: "The Tax Commissioner shall prepare, issue, and annually revise guides for county assessors in the form of handbooks of rules and regulations, appraisal manuals, special manuals and studies, cost and price schedules, news and reference bulletins, property tax laws, and memorandums. County assessors shall continually use such guides in the performance of their duties. All appraisals or reappraisals of property for tax purposes shall be in compliance with such manuals and guides."

With the foregoing rules in mind, we review the pertinent evidence in this case. No independent expert testified at the District Court trial as to the actual or fair market value of the property in question. Ira D. Beynon, president of the plaintiff corporation, testified that a portion of the land was low and was consequently inundated with water such that 10 acres were useless and an additional 5 acres were nearly so. He nonetheless plants these acres because it is too much trouble to turn the tractor around before he gets to them. Mr. Beynon, who has had experience in buying, selling, and valuing farmland, answered the following question affirmatively: "And that you are actually saying that the total property — the total value of the property and improvements for this farm should be a hundred and sixty thousand, some higher?" Plaintiff's protest, received in evidence, asked that the valuation of the realty and improvement be reduced to $161,110. The only evidence as to the value of the low-lying 15 acres was Mr. Beynon's testimony that

10 of those acres were worth $100 per acre and the remaining 5 were worth $300 per acre. There is also evidence that the single improvement, consisting of a 10,000-bushel grain bin along with associated equipment, was 9 years old and that the equipment had deteriorated to such a point that it had become inoperable. There is uncontested evidence that the actual value of the bin and equipment does not exceed $7,459.

The assessor, Mary Gruber, testified that she followed the Nebraska Agricultural Land Valuation Manual prepared by the Nebraska Department of Revenue; that she had no discretion to depart from the valuations established by the manual for various classifications of ground without Department of Revenue approval; and that she had made no inquiry as to the earnings produced by the subject farm. As county assessor she has access to information on all sales of real estate in the county and is familiar with comparable sales, and opined, without objection, that the taxed value of the subject property "does not exceed the fair market value" and is "just lower than market value." She testified that as the farm in its entirety is used as irrigated farmland she necessarily classified it as such, classifications being based on the use of the land. She further testified, however, that there is a classification for wasteland, that some land in the county is so classified, and that if plaintiff were using the 15 acres in question differently they would be assessed differently.

It does appear, as plaintiff argues, that the Gosper County assessor may not be entirely clear as to the factors she must consider and the proper role information supplied by the Department of Revenue plays in her duty to assess property. We do not know what the Legislature had in mind when it included "property tax laws" in the listing of items it characterizes as "guides" in § 77-1330(1), other than instructing the Tax Commissioner to keep assessors

advised annually with information as to current property tax laws. It is necessarily the fact, however, that all things except constitutionally valid property tax laws are no more than guidelines to be employed in arriving at an ultimate assessment against a particular taxable unit which meets the constitutional and statutory requirements that property be taxed uniformly and proportionately, at an amount which does not exceed actual value. As we have said in the past, authorities charged with the duty of valuing property for taxation are not limited to just one method of determining value. They are required to use methods and to consider such relevant factors as result in a proper assessment. *Farmers Co-op Assn. v. Boone County, ante* p. 763, 332 N.W.2d 32 (1983); *Potts v. Board of Equalization, ante* p. 37, 328 N.W.2d 175 (1982); *Lincoln Tel. & Tel. Co. v. County Board of Equalization,* 209 Neb. 465, 308 N.W.2d 515 (1981); *Gradoville v. Board of Equalization,* 207 Neb. 615, 301 N.W.2d 62 (1981). In the absence of other evidence, proof that the guidelines provided by the Tax Commissioner were applied correctly raises a presumption that the assessment is legally proper. *Farmers Co-op Assn., supra.* Here, however, there is uncontradicted evidence which establishes that the 15 acres in question are misclassified, i.e., they are in fact wasteland but classified as irrigated farmland. Thus, even if the farm unit in question is assessed at less than market value, that part consisting of those 15 acres is not being assessed "uniformly and proportionately" to other similar land. A landowner is entitled to have his property assessed uniformly and proportionately with other property even though the result may be that it is assessed at less than actual value. *Konicek v. Board of Equalization,* 212 Neb. 648, 324 N.W.2d 815 (1982). Misclassifying property may result, as the evidence in this case establishes, in a lack of uniformity and proportionality. In such an event the taxpayer is entitled to relief.

We review an appeal from a board of equalization de novo as in an equitable proceeding. *Hastings Building Co. v. Board of Equalization,* 212 Neb. 847, 326 N.W.2d 670 (1982). Applying that standard, we find that the assessment in question should be reduced so as to reflect a value for the 15 acres in question of $2,500 and further reduced to reflect the value of the improvement to be $7,459.

We remand the case to the District Court for further proceedings consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. CORNELIUS M. CHRISTENSEN, ALSO KNOWN AS DEAN CHRISTENSEN, APPELLANT.

331 N.W.2d 793

Filed March 25, 1983. No. 82-243.

1. **Sentences: Appeal and Error.** When a court considers a sentence for a convicted offender, it shall, among other things, consider the offender's delinquency and criminal history.
2. _____: _____. Absent an abuse of discretion, the sentence imposed by the trial court is to be affirmed.

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

Tad D. Eickman, for appellant.

Paul L. Douglas, Attorney General, and G. Roderic Anderson, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and COLWELL, D.J., Retired.

CAPORALE, J.

Defendant-appellant, Cornelius M. Christensen, also known as Dean Christensen, was found guilty upon his plea of such to a charge of third offense driving while under the influence of alcohol, in viola-

tion of Neb. Rev. Stat. § 39-669.07 (Reissue 1978). The offense took place January 29, 1982. The plea was entered and accepted on March 4, 1982, as the result of a plea bargain by which another pending charge of driving while intoxicated, third offense, would be dismissed, and yet another case of driving while intoxicated, in which appellant had been adjudged guilty, would proceed to sentencing. Pursuant to the plea and finding of guilt herein, appellant was sentenced to a term of not less than 20 months and not more than 5 years in the Nebraska Penal and Correctional Complex.

In this appeal appellant contends the trial court erred in refusing probation or a rehabilitative plan, thereby excessively sentencing him; and since the statute under which he was originally charged has been amended by 1982 Neb. Laws, L.B. 568, Neb. Rev. Stat. §§ 28-106 and 39-669.07 (Cum. Supp. 1982), to provide for a maximum period of confinement of 6 months, he should be released.

Defendant devotes portions of his brief and supplemental brief developing the proposition that this court has the power to reduce excessive sentences under the provisions of Neb. Rev. Stat. § 29-2308 (Reissue 1979). The power of this court to so do is not the question; the question is whether the sentence imposed is in fact so excessive as to warrant the exercise of this court's power to reduce it.

The record reveals defendant has a monumentally lengthy prior record, the bulk of which results from behavior related to drinking. It includes at least 10 drunken driving arrests; 5 other driving-related offenses; an aggravated assault, the disposition of which is unknown; and 3 drinking-related violations of probation. Defendant has been "treated" for alcoholism on four different occasions at three different institutions; yet reports from these institutions indicate no real interest or cooperation as regards his dependency on alcohol. In the face of that history, defendant's excessive sentence claim is

fatuous. A sentencing judge is required to have only an open mind, not an empty one. Neb. Rev. Stat. § 29-2260 (Reissue 1979) provides that when a court considers a sentence for a convicted offender, it shall, among other things, consider the offender's delinquency and criminal history. It is one of the most well-settled principles of law in this jurisdiction that there will be no modification of a sentence absent an abuse of discretion. Certainly there was no abuse of discretion by the sentencing judge herein such as worked to the defendant's detriment. Absent such an abuse, the sentence of the trial court is to be affirmed. *State v. Sims, ante* p. 708, 331 N.W.2d 255 (1983); *State v. Komor, ante* p. 376, 329 N.W.2d 120 (1983); *State v. Beckner,* 211 Neb. 442, 318 N.W.2d 889 (1982).

There remains for consideration defendant's urging that his sentence must be reduced in light of the passage of L.B. 568 subsequent to the event in question, relating to third offense drunk driving convictions. This issue was decided adversely to defendant in the supplemental opinions issued in *State v. Peiffer,* 212 Neb. 864, 326 N.W.2d 844 (1982), and *State v. Phillips,* 212 Neb. 875, 326 N.W.2d 849 (1982).

For the reasons set forth in the majority opinions therein, L.B. 568 does not apply to offenses committed prior to its effective date, July 17, 1982.

AFFIRMED.

NEBRASKA STATE BANK AND TRUST COMPANY OF BROKEN BOW, NEBRASKA, APPELLEE, V. LARON L. WRIGHT ET AL., APPELLEES, EMELIA PROROK, APPELLANT.

331 N.W.2d 535

Filed March 25, 1983. No. 82-246.

Judicial Sales. It is the general rule that confirmation of judicial sales rests largely within the discretion of the trial court, and will

not be reviewed except for manifest abuse of such discretion. The discretion to be exercised is not arbitrary, however, but should be one which is sound and equitable in view of all the circumstances. The court must act in the interest of fairness and prudence, and with a regard to the rights of all concerned, and the stability of judicial sales.

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

Ross, Schroeder & Fritzler, for appellant.

Knapp, Mues, Anderson & Beavers, for appellee Bank.

Gregory G. Jensen, for amicus curiae County of Custer, County Attorney and County Sheriff.

KRIVOSHA, C.J., MCCOWN, and HASTINGS, JJ., and HOWARD, D.J., and COLWELL, D.J., Retired.

COLWELL, D.J., Retired.

Defendant Emelia Prorok appeals the confirmation of a land foreclosure sale, claiming the judge abused his discretion in setting aside the first sale.

On April 15, 1980, plaintiff, Nebraska State Bank and Trust Company of Broken Bow, Nebraska (Bank), was awarded a decree of foreclosure of its blanket $341,696.88 mortgage on separate tracts of land. We are concerned here with one tract, Lots 14, 15, and 16, Block 13, J. P. Gandy's Addition to Broken Bow, Custer County, Nebraska (hereinafter referred to as Tract X). These lien priorities were established: First lien, First Federal Savings and Loan Association of Lincoln (First Federal), on an unforeclosed mortgage, $24,698.58; second lien, defendants Hosticks, on a foreclosed mortgage, $5,339.32; third lien, Bank, allocated at $12,035.98; fourth lien, Prorok, $9,558. The decree provided that in the event of a sale, Tract X was to be sold subject to First Federal's mortgage. On February 9, 1981, an order of sale was issued directing the sale of Tract X subject to First Federal's mortgage. The sheriff's published notice of sale made no reference

to First Federal's mortgage. At the sale, Tract X was sold to Bank for $45,500. Bank's motion to confirm the sale was conditioned that the court order the payment of First Federal's mortgage out of the sale proceeds, otherwise to set the sale aside, claiming the sheriff made misleading statements during the sale concerning the liens due on the land. First Federal objected to the confirmation of the sale. On April 23, 1981, hearing was had on these motions, and the sale was set aside. Prorok filed her motion for new trial. Thereafter, two other public sales were ordered and set aside, on bids of $10,100 and $12,001. On January 8, 1982, the last sale was ordered, notice published, and the sale had, following which the sale was confirmed in Burdette Christensen for the bid price of $19,000. Prorok objected to the confirmation, or in the alternative moved the court to readjust the lien priorities. Prorok filed a motion for new trial. Both of Prorok's motions for new trial were denied. This appeal follows. We affirm.

Prorok's assigned errors focus on her claim that the judge abused his discretion in setting aside the first sale. If the first sale had been confirmed in the sum of $45,500, she might have realized satisfaction of her lien.

At the first confirmation hearing two affidavits, exhibits 2 and 3, were marked and offered in evidence; they were later filed in the court file. Exhibit 2 was the affidavit of Sheriff Neal Fink showing that, during the sale, inquiry was made by Carl Norden (bidding for Bank) as to "whether the property was being sold subject to any liens of record." Fink consulted with the county attorney and, as stated in his affidavit, "returned and informed the bidders . . . that the bidding would be subject to all liens of record." According to his affidavit, more bidder inquiries were made concerning the terms of the sale, and Fink, after again consulting with the county attorney, "informed all bidders that the prop-

erty would be sold subject only to taxes of record and it would not be subject to any current liens of record."

Exhibit 3 was the affidavit of Carl Norden, an officer of and bidder for Bank. He inquired of the sheriff as to the terms of the sale, and stated in his affidavit that "after much duration and debate the Sheriff, Neal Fink, at open sale, informed all the bidders that the property was being sold subject only to taxes of record and that all liens of record would be foreclosed and, further, the purchaser would take clear title to said property." Affiant stated that he would not have bid as he did if he had known the sale was subject to First Federal's lien.

The evidence and the journal entry in the court file show that the trial court considered the affidavits, the special sale provisions included in the decree, the rights of the purchaser, and the equities of all parties. The court found that the sheriff made inadvertent, erroneous statements concerning the terms of sale, that Norden had no knowledge of the decree terms and he was not at fault in relying on the sheriff's statements as to the sale terms, and the equitable solution was to order a resale of the property.

Appellant's assigned errors 1 and 4 urge that the two affidavits could not be considered by the court. An affidavit may be used "upon a motion, and in any other case permitted by law." Neb. Rev. Stat. § 25-1244 (Reissue 1979). We have consistently held that in a judicial sale confirmation hearing, the trial court has broad discretion and authority in determining what evidence can be considered, including affidavits. See *Occidental Building & Loan Ass'n v. Beal,* 122 Neb. 40, 239 N.W. 202 (1931). The affidavits were properly considered by the court.

Assigned errors 2, 3, and 6 are considered together, as they urge that the first sale was properly conducted, Neb. Rev. Stat. § 25-1531 (Reissue 1979),

and that the buyer could not rely on the representations made by the county sheriff.

In *Fisher v. Minor,* 159 Neb. 247, 66 N.W.2d 557 (1954), we said a purchaser at a judicial sale is bound to examine the title and not rely upon statements made by the officer conducting the sale as to its condition. We also said, "The vacation of the sale or its confirmation is a judicial matter within the sole control of the court." *Id.* at 254, 66 N.W.2d at 561.

The applicable standard to apply here is stated in *Michelson v. Wagner,* 170 Neb. 28, 31, 101 N.W.2d 498, 501 (1960): " 'It is the general rule that confirmation of judicial sales rests largely within the discretion of the trial court, and will not be reviewed except for manifest abuse of such discretion. The discretion to be exercised is not arbitrary, however, but should be one which is sound and equitable in view of all the circumstances. The court must act in the interest of fairness and prudence, and with a regard to the rights of all concerned, and the stability of judicial sales.' " See, also, *Rupe v. Oldenburg,* 184 Neb. 229, 166 N.W.2d 417 (1969); *Kleeb v. Kleeb,* 210 Neb. 637, 316 N.W.2d 583 (1982).

In our de novo review we find that the foreclosure judgment provided that any sale of Tract X should be made subject to First Federal's lien, and the order of sale so provided; that the published notice of sale was contrary to the judgment, in that there was no mention of First Federal's lien; that there were several bidders at the sale; that the bidders at the sale were concerned about the terms of the sale, and they asked direct questions about liens; that after consulting with the county attorney the sheriff announced untrue conditions of sale; that these statements were contrary to court orders, and related to facts basic to any informed bidder; that the first sale was not held in conformity to law; that Bank and its agent Norden should have known that

the sale was subject to First Federal's lien; and that Bank's bid of $45,500 was a mistake.

Generally, the concern of courts to preserve the stability of judicial sales deals with upset bids and the possibility of chilling the bidding. Here, the stability concerns an improper notice of sale and erroneous statements made by the court's agent in conducting the sale, and it was the overriding duty of the court to do equity to all the parties.

Considering the whole record we cannot say that the court abused its discretion in setting the first sale aside. The other error has no merit. The final sale is confirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WILLIS B. BROMWICH, APPELLANT.

331 N.W.2d 537

Filed March 25, 1983. No. 82-357.

1. **Criminal Law: Constitutional Law: Waiver.** The accused may waive his right of confrontation, and the waiver of this right may be accomplished by the accused's counsel as a matter of trial tactics or strategy.
2. _____: _____: _____. Counsel in a criminal case may waive his client's fourteenth amendment right of the U.S. Constitution of confrontation by stipulating to the admission of evidence as a legitimate trial tactic.
3. **Rules of Evidence.** Neb. Rev. Stat. § 27-401 (Reissue 1979) defines relevance as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
4. **Criminal Law: Evidence.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

5. **Evidence: Appeal and Error.** The admission of irrelevant evidence is not reversible error unless there is prejudice to the defendant.
6. **Judgments: Appeal and Error.** It is well settled that the judgment of the District Court is presumed correct, and the party assailing same has the burden of pointing out specifically the rulings of which he complains and the mistakes made by the court.
7. **Sentences: Appeal and Error.** A sentence imposed within the statutory limits will not be disturbed on appeal in the absence of an abuse of discretion on the part of the trial court.

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

Lynn B. Lamberty of Grimminger, Milner & Lamberty, for appellant.

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

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and WARREN, D.J.

WHITE, J.

The defendant-appellant, Willis B. Bromwich, appeals from his conviction in the District Court on a charge of felony motor vehicle homicide under Neb. Rev. Stat. § 28-306(1) and (3) (Reissue 1979) and Neb. Rev. Stat. § 39-669.01 (Reissue 1979) for the death of Lyle D. Curley. The assignments of error are: (1) The trial court erred by trying the case on stipulated facts without first determining whether the appellant entered into the stipulation intelligently and voluntarily; (2) The trial court erred by disregarding the stipulated facts of counsel; (3) The trial court erred by admitting irrelevant evidence which prevented the appellant from receiving a fair trial; (4) The trial court erred by retaining in its possession letters from the family of the deceased prior to the determination of guilt without disclosing that fact to defense counsel; and (5) The trial court erred by imposing an excessive sentence. We affirm.

On August 30, 1981, at approximately 2:45 p.m.,

the appellant was southbound in his pickup truck on a gravel road in Holt County, Nebraska. The speed of the appellant's pickup was stipulated to be 60 to 62 miles per hour. Lyle Curley was in an eastbound automobile with four other passengers. The two roads upon which the two vehicles were traveling intersected, with stop signs for the north-south traffic. The appellant failed to stop at the stop sign and skidded 124 feet before colliding with the Curley vehicle. As a result of the collision Lyle Curley was killed and several of the passengers in the automobile were severely injured.

At the preliminary hearing the State put several expert witnesses on the stand and appellant's counsel conducted extensive cross-examination of each.

At a trial without a jury the parties stipulated that (1) the preliminary hearing transcript would be allowed as evidence at trial, (2) appellant was operating the pickup at the time of the accident, (3) the pickup was traveling at a speed of 60 to 62 miles per hour prior to impact or braking, (4) the pickup left 124 feet of skid marks and skidded through the stop sign at the intersection, and (5) the proximate cause of Lyle Curley's death was the collision.

In addition to the stipulated evidence the prosecution offered photos of the accident scene and a certified abstract of the appellant's past driving record. The photos were received and the abstract came in over an objection to its relevance. No other evidence was introduced by either side.

In this appeal the appellant asserts that counsel in a criminal case may not waive his client's fourteenth amendment right of the U.S. Constitution of confrontation by stipulating to the admission of evidence unless the trial court first determined that the defendant entered into the stipulation intelligently and voluntarily. As authority for his position the appellant cites *Barber v. Page,* 390 U.S. 719, 88 S. Ct. 1318, 20 L. Ed. 2d 255 (1968), and *Pointer v.*

Texas, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965), which hold that the right of confrontation and cross-examination is an essential and fundamental requirement for a fair trial.

This sixth amendment right of the U.S. Constitution of an accused to confront the witnesses against him is a fundamental right made obligatory on the states by the fourteenth amendment. *Dutton v. Evans,* 400 U.S. 74, 91 S. Ct. 210, 27 L. Ed. 2d 213 (1970). However, it has been consistently held that the accused may waive his right of confrontation and that the waiver of this right may be accomplished by the accused's counsel as a matter of trial tactics or strategy. *United States v. Goldstein,* 532 F.2d 1305 (9th Cir. 1976), *cert. denied* 429 U.S. 960, 97 S. Ct. 384, 50 L. Ed. 2d 327.

Counsel in a criminal case may waive his client's fourteenth amendment right of confrontation by stipulating to the admission of evidence if the attorney's decision is a legitimate trial tactic and the defendant does not dissent from the decision. *United States v. Stephens,* 609 F.2d 230 (5th Cir. 1980).

The appellant in this case admitted to the truth of the stipulated facts in open court, and there is no evidence that he dissented from his attorney's decision to enter into the stipulations. It would also be difficult for us to find in hindsight that counsel's decision in this matter was not part of a prudent trial strategy or tactic. Counsel may very well have concluded that he was better off to try the case on the preliminary hearing testimony rather than parade further live expert witness testimony before the trial court which could have been augmented to a greater extent than in the preliminary hearing.

Appellant has analogized the waiver of confrontation right to the waiver of trial by jury by entering a guilty plea under *Boykin v. Alabama,* 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). The appellant urges this court to impose a duty upon our trial courts to question each defendant prior to the ac-

ceptance of stipulated evidence in order to insure that a waiver of the confrontation right is effected personally by an accused who is acting intelligently and knowledgeably. We are reluctant to place further procedure upon an already overburdened trial court. Carried to its logical conclusion, appellant's argument would require the trial court to instruct an accused every time counsel makes a decision not to cross-examine an adverse witness. On these facts we find no grounds for reversal.

Appellant's second assignment is that the trial court erred in disregarding the stipulated facts of counsel as to speed. While there is evidence in the record that the trial judge considered the 60 to 62 miles per hour to be a minimum speed rather than the exact speed as agreed to by the parties, he was perfectly justified in so doing because the parties also stipulated that the preliminary hearing testimony was admitted. At the preliminary hearing the State's expert in vehicle speed testified that the 60- to 62-miles-per-hour speed that he fixed for the appellant's vehicle was at the minimum range of possible speeds prior to impact or braking. Thus, it was more of a case of one stipulation supplementing another rather than the trial judge totally disregarding a stipulation of the parties. We therefore find that the court was entitled to take into consideration the additional testimony with regard to speed.

The appellant contends that the trial judge erred in admitting an abstract of the appellant's driving record. The abstract showed that appellant's license had been suspended prior to the collision, in addition to his past driving violations. Defense counsel objected on the ground that the exhibit was irrelevant to the charge.

Neb. Rev. Stat. § 27-401 (Reissue 1979) defines relevance as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more

probable or less probable than it would be without the evidence."

" 'Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.' " *State v. Classen,* 202 Neb. 324, 329, 275 N.W.2d 91, 94 (1979).

In the instant case it was error for the trial court to admit the abstract of the appellant's past driving record. The abstract had no probative value one way or the other as to whether the appellant drove his vehicle with indifferent or wanton disregard for the safety of persons or property on August 30, 1981. Rather, the abstract was more in the nature of evidence of other crimes or wrongs offered to prove the character of a person in order to show that he acted in conformity therewith.

However, the admission of irrelevant evidence is not reversible error unless there is prejudice to the defendant or he is prejudiced from having a fair trial. *Classen, supra.* In the present case we would be hard pressed to find that the appellant was prejudiced by the admission of the abstract because of the ample amount of evidence remaining to substantiate the charge that he drove his vehicle with indifferent or wanton disregard for the safety of persons or property in violation of the statute.

The automobile driven by Lyle Curley was visible 642 feet north of the intersection protected by stop signs. The appellant failed to stop at the stop sign and left 124 feet of skid marks before colliding with the Curley vehicle while exceeding the speed limit. We therefore conclude that the trial court's allowance of the abstract into evidence did not prejudice the right of appellant to a fair trial.

We also find appellant's position that the trial court erred by retaining in its possession letters

from the family of the deceased prior to the determination of guilt without disclosing that fact to defense counsel to be untenable. Appellant makes a bare assertion without any showing of prejudice by the trial court.

It is well settled that the judgment of the District Court is presumed correct, and the party assailing same has the burden of pointing out specifically the rulings of which he complains and the mistakes made by the court. *Smith v. Damato,* 172 Neb. 811, 112 N.W.2d 21 (1961).

Trial judges are not required to sequester themselves from the media or private communication in the same manner as a juror might be. A judge does not become disqualified or prejudice the rights of an accused to a fair trial merely because someone sends him a letter.

After the trial judge pronounced the appellant guilty in this case, he properly informed defense counsel that he had received letters from the victim's family, permitted counsel to examine them, and directed that they be included in the presentence investigation. There is no evidence in the record that the trial court considered the letters in reaching its decision as to guilt or innocence.

Appellant also argues that his sentence is excessive. The trial court sentenced appellant to not more than 5 years nor less than 20 months and a fine of $10,000.

Appellant's first traffic violation occurred 1 month after his 16th birthday when he was charged and convicted of careless driving. Subsequently, appellant had two convictions for drag racing, six for speeding, two for reckless driving, two for having no driver's license on his person, and two for driving under a suspended license. Appellant was also driving on a suspended license at the time of the accident at issue in the case at bar, and had had six prior accidents, not including this one. The trial

court clearly did not abuse its authority in imposing the maximum sentence.

A sentence imposed within the statutory limits will not be disturbed on appeal in the absence of an abuse of discretion on the part of the trial court. *State v. Parks,* 212 Neb. 635, 324 N.W.2d 673 (1982).

AFFIRMED.

LAVERNE R. LAUBSCHER ET AL., APPELLANTS AND CROSS-APPELLEES, V. SANITARY AND IMPROVEMENT DISTRICT NO. 20 OF SARPY COUNTY, NEBRASKA, APPELLEE AND CROSS-APPELLANT.

331 N.W.2d 542

Filed March 25, 1983. No. 82-505.

Administrative Hearings: Notice: Waiver. Where one appears before an administrative body and presents evidence or makes argument, the party so appearing cannot thereafter claim a denial of due process solely on the ground that proper notice of the hearing was not given. After appearing at the hearing the party is deemed to have waived any objection with regard to notice.

Appeal from the District Court for Sarpy County: GEORGE H. STANLEY, Judge. Reversed and remanded for further proceedings.

Jay L. Welch, for appellants.

P. F. Render, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ.

PER CURIAM.

This is an inverse condemnation action brought by the plaintiff property owners against the defendant sanitary and improvement district to recover damages for an alleged taking and damaging of plaintiffs' property resulting from the wrongful construction of a concrete flume without having brought condemnation proceedings or paying compensation.

The District Court determined that there was error in the proceedings because of a failure to comply with Neb. Rev. Stat. § 76-706 (Reissue 1981), and remanded the matter to the county court for further proceedings, with orders that the petition of plaintiffs be adjudged as being filed as of the date of remand at no additional costs to plaintiffs. The plaintiffs have appealed to this court and the defendant has cross-appealed. We reverse.

The record discloses that on February 1, 1982, plaintiffs filed a petition with the county judge of Sarpy County, Nebraska, against Sanitary and Improvement District No. 20 of Sarpy County, Nebraska, alleging that the district had taken and damaged plaintiffs' property by the construction of a concrete flume in 1980 without having instituted condemnation proceedings, and without payment of compensation.

On March 3, 1982, the county judge entered its order appointing three appraisers to appraise the damage to plaintiffs' land. On the same date the county judge issued a notice to condemnor and condemnees, informing the parties that a petition had been filed and that appraisers had been appointed and would qualify and take their oath as required by law on March 30, 1982, at 9 a.m., and proceed to the site for the purpose of inspecting and viewing the property and assessing the damages. The notice also stated that the appraisers would thereafter meet "at the County Courtroom of Sarpy County, Nebraska at the hour of ____ o'clock ____ .M., on the ____ day of ____, 1982 and receive whatever evidence may be submitted on the matter of damages sustained by the condemnees."

On March 5, 1982, the sheriff served the notice on Robert Meisinger, clerk of the defendant S.I.D., and Melvin Gilsdorf, chairman of the defendant S.I.D., by leaving copies at the "usual place of residence" of each of the individuals.

On March 26, 1982, the defendant filed a document

entitled "Special Appearance" for the purpose of contesting jurisdiction over the person of the defendant. The grounds for the "special appearance" were that the appraisers were not appointed within 3 days from the filing of the petition as required by law; that notice of the time and place of meeting of the board of appraisers to have the damages assessed had not been served upon the defendant; and that the notice was not served upon the defendant in accordance with Nebraska law.

On March 30, 1982, the appraisers were sworn, and they inspected and viewed the premises and heard the evidence and arguments of *all* parties, including the defendant, as to the amount of damages sustained. Thereafter, the appraisers assessed damages against the defendant in the sum of $4,985, and filed their return in the county court on April 9, 1982. The defendant appealed to the District Court.

On June 4, 1982, the defendant filed a motion in the District Court to vacate the return of the appraisers in the county court. The grounds were the same grounds set forth in the "special appearance" of defendant in the county court.

The position of the defendant is that because the county court failed to appoint appraisers within 3 days after the petition was filed and the notice of the proceedings was not served on the defendant in strict accordance with all the requirements of § 76-706, the entire proceedings in the county court were null and void. The defendant makes this claim notwithstanding the fact that it appeared at the proceedings before the board of appraisers, presented evidence, and made argument to the appraisers.

The single question presented by the appeal, then, is whether one who appears at an administrative hearing, gives testimony, and makes argument can thereafter claim the proceeding to be void because the party appearing did not receive advance notice of the hearing. In *Watkins v. Dodson,* 159 Neb. 745, 754, 68 N.W.2d 508, 514 (1955), we said: "Due proc-

ess of law in the most comprehensive sense implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty, or property, to be heard by testimony or otherwise, and to have the right of controverting by proof every material fact which bears on the question of right in the matter involved." In the instant case the defendant was afforded every opportunity which more formal notice would have granted to it before the board of appraisers. It was aware of the hearing and in fact appeared. It presented evidence and made argument and, most important of all, it was still afforded the opportunity of appealing the decision of the board of appraisers to the District Court where the proceedings would be de novo. See Neb. Rev. Stat. §§ 76-715 to 76-717 (Reissue 1981). The defendant has failed to show us how it was denied due process of law under the factual circumstances in this case. Where one appears before an administrative body and presents evidence or makes argument, the party so appearing cannot thereafter claim a denial of due process solely on the ground that proper notice of the hearing was not given. After appearing at the hearing the party is deemed to have waived any objection with regard to the matter of notice.

The action of the District Court in remanding the proceedings to the county court for further proceedings was erroneous. The order of June 22, 1982, is vacated and the case remanded for further proceedings in the District Court.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STEVEN E. STUART, APPELLANT, V. OMAHA PORKERS, INC., ET AL., APPELLEES.

331 N.W.2d 544

Filed March 25, 1983. No. 82-577.

1. **Employment Security Law: Appeal and Error.** This court reviews cases regarding unemployment benefits de novo on the record and will retry all issues of fact and reach an independent conclusion.
2. **Employment Security Law: Words and Phrases.** While the term "misconduct" is not specifically defined in Neb. Rev. Stat. § 48-628(b) (Reissue 1978), it has generally been defined to include behavior which evidences (1) wanton and willful disregard of the employer's interests, (2) deliberate violation of rules, (3) disregard of standards of behavior which the employer can rightfully expect from the employee, or (4) negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard of the employer's interests or of the employee's duties and obligations.

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

Larry R. Spain, for appellant.

Pamela A. Mattson, for appellee Commissioner of Labor.

Roger J. Miller and Dale E. Bock of Nelson & Harding, for appellee Omaha Porkers.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ.

WHITE, J.

This is an appeal from a decision of the District Court for Douglas County, Nebraska, which affirmed the decision of the Nebraska Appeal Tribunal of the Department of Labor disqualifying claimant, Steven E. Stuart, from receiving unemployment benefits for a period of 7 weeks. The tribunal found that the claimant had been discharged for misconduct connected with his work.

This court reviews cases regarding unemployment benefits de novo on the record and will retry all

issues of fact and reach an independent conclusion. Neb. Rev. Stat. § 48-640 (Reissue 1978); *Heimsoth v. Kellwood Co.,* 211 Neb. 167, 318 N.W.2d 1 (1982).

The appellant, Steven E. Stuart, was employed as a packinghouse laborer by appellee Omaha Porkers, Inc., until he was discharged on November 23, 1981. At the time Stuart commenced his employment with Omaha Porkers, he, as well as all other new employees, was informed of a company rule that 3 days' absence without a notification to the company of such intended absence would result in automatic termination.

Stuart had been injured while working at the plant on September 25, 1981, and was released by his physician to return to work on November 13, 1981, a Friday. Stuart worked November 13 and again on November 16, 1981. On November 17, 1981, Stuart called in and notified the company representative that he did not intend to work on that day. He did so again on November 18, 1981. The reason given was "chronic and persistent pain." He did not indicate the length of his absence. On November 19, 1981, Stuart contacted the company's workmen's compensation insurance carrier in order to arrange a medical examination. He spoke to Nancy Heaton concerning the company rule that he notify the company, and was assured that she would take care of it. It appears Heaton did speak with the company representative. However, Stuart did not notify the employer on any subsequent date and he was discharged on November 23, 1981.

Neb. Rev. Stat. § 48-628(b) (Reissue 1978) of the Nebraska Employment Security Law provides that an individual shall be disqualified for benefits "[f]or the week in which he has been discharged for misconduct connected with his work, if so found by the commissioner, and for not less than seven weeks nor more than ten weeks which immediately follow such week, as determined by the commissioner in each

case according to the seriousness of the misconduct . . . ."

While the term "misconduct" is not specifically defined in the statute, it has generally been defined to include behavior which evidences (1) wanton and willful disregard of the employer's interests, (2) deliberate violation of rules, (3) disregard of standards of behavior which the employer can rightfully expect from the employee, or (4) negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard of the employer's interests or of the employee's duties and obligations. *Snyder Industries, Inc. v. Otto,* 212 Neb. 40, 321 N.W.2d 77 (1982); *Bristol v. Hanlon,* 210 Neb. 37, 312 N.W.2d 694 (1981).

Stuart admitted on cross-examination that he was completely familiar with the company work rules and that he had been warned with respect to his absenteeism. Regardless of whether the notification to Nancy Heaton of his absence of November 19, 1981, was sufficient to show the absence of misconduct on that date, the continued failure to notify the company on subsequent dates was a clear violation of the company's rule. In common experience, the presence of or at least the preshift notice of absence of a workman is essential to the efficient operation of an assembly line production system and is a legitimate interest of the employer. The absence without notice, taken with previous warning, was sufficient to find that Stuart was discharged for willful misconduct. *Strauss v. Square D Co.,* 201 Neb. 571, 270 N.W.2d 917 (1978).

The judgment of the District Court affirming the decision of the appeal tribunal was correct and is hereby affirmed.

AFFIRMED.

GAYLE MCCAUL ET AL., APPELLANTS AND CROSS-APPELLEES, V. AMERICAN SAVINGS COMPANY, A NEBRASKA CORPORATION, ET AL., APPELLEES AND CROSS-APPELLANTS.

L & M RENTALS, A NEBRASKA PARTNERSHIP, APPELLANT AND CROSS-APPELLEE, V. AMERICAN SAVINGS COMPANY, A NEBRASKA CORPORATION, APPELLEE AND CROSS-APPELLANT.

STREAMLINE, INC., A NEBRASKA CORPORATION, APPELLANT AND CROSS-APPELLEE, V. AMERICAN SAVINGS COMPANY, A NEBRASKA CORPORATION, APPELLEE AND CROSS-APPELLANT.

T-B CONSTRUCTION, INC., A NEBRASKA CORPORATION, APPELLANT AND CROSS-APPELLEE, V. AMERICAN SAVINGS COMPANY, A NEBRASKA CORPORATION, APPELLEE AND CROSS-APPELLANT.

TREND 100, INC., A NEBRASKA CORPORATION, APPELLANT AND CROSS-APPELLEE, V. AMERICAN SAVINGS COMPANY, A NEBRASKA CORPORATION, APPELLEE AND CROSS-APPELLANT.

331 N.W.2d 795

Filed April 1, 1983. Nos. 81-812, 82-100, 82-134, 82-160, 82-161.

1. **Installment Loans.** The exemptions specified in Neb. Rev. Stat. § 45-101.04(2), (3), and (4) (Reissue 1978) exempt the specified transactions from the installment loan act, Neb. Rev. Stat. §§ 8-435 et seq. (Reissue 1977), as well as from the interest rate limitations of § 45-101.03.
2. _____. Under the provisions of Neb. Rev. Stat. § 59-1617 (Reissue 1978) an installment loan by an industrial loan and investment company, regulated by the Nebraska Department of Banking and Finance, is exempt from the Consumer Protection Act, §§ 59-1601 et seq.

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

W. Eric Wood of Dwyer, O'Leary & Martin, P.C., for appellants.

James B. Cavanagh of Erickson, Sederstrom, Leigh, Eisenstatt, Johnson, Kinnamon, Koukol & Fortune, P.C., for appellee American Savings.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and MORAN, D.J.

MCCOWN, J.

The plaintiffs, McCaul et al., stockholders of Westmont Enterprises, Inc., and guarantors of a promissory note from Westmont to defendant American Savings Company, sought to enjoin American Savings Company from selling real property pursuant to a trust deed executed in conjunction with a loan to Westmont. American Savings Company counterclaimed and cross-claimed, praying that Westmont be found to be in default on the loan, that judgment for American be entered, and that the sale of the property be authorized. The District Court dismissed the plaintiffs' petition and entered judgment in favor of American Savings Company against Westmont and the plaintiffs, and ordered sale of the property. The plaintiffs have appealed.

Four additional cases brought against American Savings Company have been consolidated with the *McCaul* case on appeal. They involve various factual aspects of the same central issue, and an affirmance of the District Court judgment in the *McCaul* case will be decisive as to all the cases.

On October 23, 1978, the plaintiffs and Westmont Enterprises, Inc., entered into a loan agreement with American Savings Company, an industrial loan and investment company licensed under the provisions of Neb. Rev. Stat. §§ 8-401 et seq. (Reissue 1977).

On October 23, 1978, Westmont executed a promissory note to American in the principal sum of $176,375.69, with interest at 12 percent per annum. The plaintiffs were guarantors of the promissory note. The terms of the loan agreement also included the payment of a $5,000 fee by Westmont to American as a "service charge" and the assignment of four life insurance policies to be issued on the lives of the individual plaintiffs as collateral. As

principal security for the loan, Westmont executed a first trust deed to American on real property owned by Westmont.

Westmont failed to pay the installment of principal and interest due on December 1, 1979, or any payments thereafter. American declared a default and accelerated the entire debt.

In addition to failure to pay principal and interest when due, Westmont was also in default for failure to pay taxes and assessments, failure to preserve and maintain the property, and in allowing a receiver to be appointed over the business of Westmont. American gave notice that the property would be sold at public auction under the terms of the trust deed. The plaintiffs then brought this action seeking to enjoin the sale on the ground that the loan was in violation of the industrial installment loan act and the Consumer Protection Act, and a temporary restraining order was granted.

American filed a counterclaim and cross-claim, praying that the court find Westmont in default on the promissory note and loan, enter judgment for American, and authorize sale of the property.

Following trial on August 4, 1981, the District Court held that the loan by American to Westmont was not subject to the industrial installment loan act, Neb. Rev. Stat. §§ 8-435 et seq. (Reissue 1977), and was also exempt from the Consumer Protection Act, Neb. Rev. Stat. §§ 59-1601 et seq. (Reissue 1978). The court dissolved the temporary restraining order, dismissed plaintiffs' petitions, and entered judgment for American Savings Company against Westmont and the plaintiffs in the amount of $231,766.84, which included principal and interest to the date of the judgment on October 21, 1981. The plaintiffs have appealed.

Judgments for American Savings Company were also entered in each of the four consolidated cases and in each of them the plaintiffs have appealed.

The plaintiffs contend that the loan from Ameri-

can to Westmont is in violation of the installment loan act, §§ 8-435 et seq., and is not exempt from that act under any of the subsections of Neb. Rev. Stat. § 45-101.04 (Reissue 1978).

At the time American made the loan to Westmont which is involved here, Neb. Rev. Stat. § 45-101.03 (Reissue 1978) provided: "Except as provided in section 45-101.04, any rate of interest which may be agreed upon, not exceeding eleven per cent per annum on the unpaid principal balance, shall be valid upon any loan or forbearance of money, goods, or things in action and may be taken yearly, for any shorter period, or in advance, if so expressly agreed."

At the same time, § 45-101.04 provided in part: "The limitation on the rate of interest provided in section 45-101.03 shall not apply to:

"(1) Loans made by any licensee or permittee operating under a license or permit duly issued by the Department of Banking and Finance pursuant to sections 8-319, 8-401 to 8-417, 8-815 to 8-823, 8-825 to 8-829, 21-1760 to 21-1764, 21-1766 to 21-1796, 21-1799 to 21-17,108, 21-17,110 to 21-17,119, 45-114, 45-116 to 45-140, or 45-142 to 45-155;

"(2) Loans made to any corporation, partnership, or trust;

"(3) The guarantor or surety of any loan to a corporation, partnership, or trust;

"(4) Loans made when the principal amount of the indebtedness is one hundred thousand dollars or more." Sections 8-401 to 8-417 refer to industrial loan and investment companies and American is such a licensee.

Subsection (1) of § 45-101.04 exempts loans made by specific *lenders* from general maximum interest limitations when they are operating in compliance with a license or permit duly issued by the Department of Banking and Finance which authorizes specialized interest rate ceilings above the general maximum. The remaining subsections of § 45-101.04

exempt various specified *transactions* from all state interest rate ceilings.

The plaintiffs contend that if a lender is exempt from general usury limits under subsection (1) of § 45-101.04 as to loans made within the terms of its license authority, the remaining transactional exemptions do not apply to licensees. The argument is that although any unlicensed lender would be able to enter into any of the loan transactions specified in subsections (2) et seq. of § 45-101.04, free of the limitations of general and special usury laws, a licensed lender would still be subject to all the limitations applicable to lenders as to loans made under the specific authorization of the licensing law.

Most entities which regularly lend money in Nebraska are regulated by the Department of Banking and Finance and hold a license or permit to make specified types of loans under statutory terms and specified interest rates. Virtually all of such lenders have loans which are made within general usury limits, others which are made under special license limits, and still other loans which are exempt from both general and special usury statutes. To hold that the transactional exemptions of §§ 45-101.04(2) et seq. do not apply to licensees or permittees but only to nonlicensees would render the statute virtually meaningless.

In *Gruenemeier v. Commonwealth Co.,* 178 Neb. 66, 131 N.W.2d 713 (1964), we held that the industrial loan and investment company act did not impinge upon the general powers of loan and investment companies to make loans which were otherwise valid and legal loans in the absence of the act. We held that the authority to make loans under the act constituted an additional grant of power, but did not affect the power to make loans which were not in violation of the general usury law. In that case, with respect to loan transactions by a licensee which would have been valid and legal under the general usury statutes, we said: "An industrial loan and in-

vestment company stands in the same position as a nonlicensee." *Id.* at 73, 131 N.W.2d at 717. See, also, *Albers v. Overland Nat. Bank,* 212 Neb. 578, 324 N.W.2d 396 (1982).

The evidence in the present cases is undisputed that the Department of Banking and Finance, charged with the duty of enforcing the provisions of §§ 8-435 et seq., has consistently taken the position that the loan transactions specified in subsections (2), (3), and (4) of § 45-101.04 are exempt from the provisions of §§ 8-435 et seq. Although construction of a statute by a department charged with enforcing it is not controlling, considerable weight will be given to such a construction, particularly when the Legislature has failed to take any action to change such an interpretation. See *Seldin v. Northland Mortgage Co.,* 189 Neb 175, 202 N.W.2d 174 (1972).

The exemptions specified in § 45-101.04(2), (3), and (4) exempt the specified transactions from the installment loan act, §§ 8-435 et seq., as well as from the interest rate limitations of § 45-101.03.

The plaintiffs also contend that the conduct of American Savings Company in making the loans involved here constituted an unfair trade practice in violation of the Nebraska Consumer Protection Act, §§ 59-1601 et seq.

Section 59-1617 provides in part: "Nothing in sections 59-1601 to 59-1622 shall apply to actions or transactions otherwise permitted, prohibited or regulated under laws administered by the Director of Insurance, the Public Service Commission, the federal power commission or any other regulatory body or officer acting under statutory authority of this state or the United States . . . ."

In *Kuntzelman v. Avco Financial Services of Nebraska, Inc.,* 206 Neb. 130, 291 N.W.2d 705 (1980), we held that an installment loan made by a licensee under the installment loan act was a transaction permitted, prohibited, or regulated by a regulatory body acting under the statutory authority of the

state and was therefore exempt from the provisions of the Consumer Protection Act.

The records in the cases now before us establish that each of the loans involved here was reported to and at least indirectly approved by the Department of Banking and Finance. Under the provisions of § 59-1617 an installment loan by an industrial loan and investment company, regulated by the Nebraska Department of Banking and Finance, is exempt from the Consumer Protection Act, §§ 59-1601 et seq.

In view of the disposition made of the basic issues it is unnecessary to discuss the remaining assignments of error.

The judgment of the District Court in *McCaul* was correct and is affirmed. The judgment in that case is determinative of the issues in the remaining consolidated cases, and each of those judgments is affirmed.

AFFIRMED.

ALVIN H. STIGGE ET AL., APPELLANTS, V. MARGARET M. GRAVES, COUNTY SUPERINTENDENT, CUMING COUNTY, NEBRASKA, APPELLEE.

332 N.W.2d 49

Filed April 1, 1983. No. 81-838.

1. **Pleadings.** The character of a pleading is determined by its content, not by its caption.
2. **Appeal Bonds.** Where an appeal bond is given within the proper time, even if defective, the court has obtained jurisdiction, and the proper procedure is for the adverse party to move to compel the appellant to give a proper bond in an amount and conditioned as required by law.
3. _____. If the appellant fails to comply with an order requiring that a new or amended bond be furnished, the appeal may be dismissed.
4. _____. The filing of an appeal bond is a "proceeding" as used in Neb. Rev. Stat. §§ 25-852 and 25-853 (Reissue 1979), and the right to amend an appeal bond is within the purview of those sections.

Appeal from the District Court for Cuming County:

RICHARD P. GARDEN, Judge. Reversed and remanded with directions.

John M. Thor of Grady, Caskey & Thor, for appellants.

John D. Feller, Cuming County Attorney, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and MORAN, D.J.

MCCOWN, J.

The defendant county superintendent of schools entered an order dissolving a school district. The plaintiff landowners filed a petition on appeal in the District Court for Cuming County. The District Court sustained a demurrer to plaintiffs' petition on appeal on the ground that the court was without jurisdiction to hear the appeal, and dismissed the petition. This appeal followed.

On June 2, 1981, the defendant, Margaret Graves, superintendent of schools of Cuming County, entered an order dissolving school district No. 3 under the provisions of Neb. Rev. Stat. § 79-420 (Reissue 1981).

On June 11, 1981, the plaintiff landowners filed their petition in the District Court for Cuming County requesting an appellate review of the defendant's order. On the same day the plaintiffs deposited $50 cash in the District Court and also filed in the District Court (1) a copy of a notice of appeal addressed to the defendant superintendent notifying her that the plaintiffs intended to appeal to the District Court from her order of June 2; (2) a copy of a bond for appeal, signed on behalf of plaintiffs, undertaking to the defendant superintendent, in the sum of a $50 cash bond, conditioned that the plaintiffs would prosecute their appeal to effect and without unnecessary delay and that if judgment be adjudicated against them on appeal they would satisfy such judgment and costs; and (3) a copy of a praecipe for transcript addressed to the clerk of the

District Court and to the defendant superintendent requesting the preparation of a certified transcript of the proceedings undertaken by her, inclusive of all documents in her possession and filed relevant to the order.

In addition to filing the notice of appeal, appeal bond, and praecipe for transcript in the District Court, a duplicate copy of each of the three documents was delivered to the defendant personally on June 12, 1981, by the sheriff of Cuming County. Summons was also served on the defendant at the same time, notifying her that plaintiffs sought appellate review of her order of June 2, 1981, and an order of the District Court determining that the defendant had no legal authority to dissolve the school district, and declaring the order void and vacating it.

The defendant superintendent prepared and delivered a transcript which was filed in the District Court within 30 days, but the transcript did not contain copies of the praecipe for transcript, notice of appeal, or bond for appeal.

Thereafter, the defendant superintendent demurred to the plaintiffs' petition on the ground that the District Court did not have jurisdiction of the appeal.

On September 3, 1981, the District Court found that it did not have jurisdiction over the appeal because of a failure of plaintiffs to file a notice of appeal and bond for appeal as required by law, sustained the defendant's demurrer, and dismissed plaintiffs' petition.

On September 8, 1981, plaintiffs filed a motion for new trial and a motion for leave of court to amend the bond on appeal if the bond was found to be defective. On November 5, 1981, the District Court overruled plaintiffs' motion for a new trial but did not sustain or deny the motion for leave to amend the bond. Plaintiffs have appealed.

The defendant contends that the notice of appeal, the bond for appeal, and the praecipe for transcript

were not "filed" with her but were only delivered to or served on her. She also contends that the $50 cash deposit was made with the clerk of the District Court rather than with her and that she has never approved any surety on the bond for appeal. For these reasons she argues that plaintiffs have failed to comply with the statutory requirements for appeal and that the District Court did not acquire jurisdiction. It is undisputed that the documents were submitted within the statutory time and contained the statutorily defined provisions if they were properly "filed."

The statute under which the defendant acted in issuing the order of June 2, 1981, provides that appeals from the action of the county superintendent may be made to the District Court of the county of the official concerned, but provides no procedure. See § 79-420.

Neb. Rev. Stat. § 25-1937 (Reissue 1979) provides in part: "When the Legislature enacts a law providing for an appeal without providing the procedure therefor, the procedure for appeal to the district court shall be the same as for appeals from the county court to the district court in civil actions. Trial in the district court shall be de novo upon the issues made up by the pleadings in the district court."

The statutes governing appeals from county court to District Court in effect at the time of this proceeding were Neb. Rev. Stat. §§ 24-541 et seq. (Reissue 1979). Section 24-542 requires that the party appealing from a decree, judgment, or order of a county court shall, within 10 days of the rendition of judgment, file a notice of appeal with the county court, specifying the parties taking the appeal, and the decree, order, or judgment, or part thereof, appealed from.

Section 24-543 requires that the party appealing, within 10 days from the rendition of judgment, shall post a cash bond with the clerk of the court or enter into an undertaking to the adverse party, with at

least one good and sufficient surety to be approved by the court, in a sum not less than $50 in any case, nor less than the amount of the judgment and costs, conditioned that the appellant will prosecute his appeal to effect and without unnecessary delay, and that if judgment be adjudged against him on the appeal he will satisfy such judgment and costs.

Section 24-544 provides that the clerk of the county court shall make out a certified transcript of the proceeding, including the undertaking or cash taken for such appeal. The section requires the transcript to be filed with the clerk of the District Court within 30 days from the entry of judgment, and provides that filing of the transcript shall constitute filing of the appeal with the District Court.

Obviously, the appeal statutes referred to cannot be applied literally to a case such as the present one in which the order appealed from is not an order of any court. The matter is further complicated here by the fact that the defendant who entered the order appealed from is not only the issuer of the order but is also the adversary party defendant on the appeal.

In effect, the defendant contends that since she did not approve the surety on the appeal bond, the District Court could not acquire jurisdiction of the appeal. If the argument were valid, the adversary party, by failing to approve a surety on an appeal bond, could deprive the appealing party of a right of appeal and prevent the District Court from acquiring jurisdiction.

The appeal statutes are obviously intended to apply only to courts, and application to a factual situation such as the present one must be drawn by analogy. Some cases involving orders of superintendents of schools have interpreted the statutes by substituting the words "county superintendent" for the words "county court." See, *Cherry v. Lofgren,* 187 Neb. 133, 187 N.W.2d 652 (1971); *School Dist. of Wilbur v. Pracheil,* 180 Neb. 121, 141 N.W.2d 768 (1966).

The defendant does not contend that she failed to receive a duplicate copy of the notice of appeal and the bond on appeal with its undertaking addressed to her. She asserts only that plaintiffs failed to properly "file" the documents with her. The defendant's action in preparing and delivering a transcript of the proceedings which did not include the disputed documents established without dispute that she actually received the documents in her official capacity as county superintendent and acted upon some of them. Her failure to include the documents in the transcript should not be allowed to foreclose the plaintiffs' right to appeal.

The various documents were captioned "In the District Court of Cuming County." The contents of the documents, however, clearly indicate that they are addressed to the defendant and concern an appeal from her order as superintendent. The character of a pleading is determined by its content, not by its caption. See *Walkenhorst v. Apolius,* 172 Neb. 830, 112 N.W.2d 31 (1961).

This court has frequently held that where an appeal bond is given within the proper time, even if defective, the court has obtained jurisdiction, and the proper procedure is for the adverse party to move to compel the appellant to give a proper bond in an amount and conditioned as required by law. If the appellant fails to comply with an order requiring that a new or amended bond be furnished, the appeal may be dismissed. See, *Ballantyne Co. v. City of Omaha,* 173 Neb. 229, 113 N.W.2d 486 (1962); *In re Estate of Arnold,* 210 Neb. 528, 315 N.W.2d 642 (1982).

Neb. Rev. Stat. § 25-852 (Reissue 1979) provides: "The court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding, by adding or striking out the name of any party or by correcting a mistake in the name of the party, or a mistake in any other respect, or by inserting other allegations material to the case, or, when the

amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved. Whenever any proceeding taken by a party fails to conform, in any respect, to the provisions of this code, the court may permit the same to be made conformable thereto by amendment."

Neb. Rev. Stat. § 25-853 (Reissue 1979) provides: "The court in every stage of an action must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect."

The filing of an appeal bond is a "proceeding" as used in the above statutes, and the right to amend an appeal bond is within the purview of both of the cited sections. See *Ballantyne Co. v. City of Omaha, supra.*

In the present case the evidence established that there was substantial performance of the statutory requirements for appeal and that the District Court acquired jurisdiction of the appeal. The judgment of the District Court is reversed and the cause remanded for further proceedings with directions to permit the amendment of the current bond on appeal or to permit the filing of a new bond on appeal.

REVERSED AND REMANDED WITH DIRECTIONS.

A. ANN SCOTT, APPELLANT, V. ARTHUR R. LANGVARDT, ADMINISTRATOR DE BONIS NON OF THE ESTATE OF WADE H. SCOTT, JR., DECEASED, ET AL., APPELLEES.
IN RE ESTATE OF WADE H. SCOTT, JR., DECEASED.
A. ANN SCOTT, APPELLANT, V. ARTHUR R. LANGVARDT, ADMINISTRATOR DE BONIS NON OF THE ESTATE OF WADE H. SCOTT, JR., DECEASED, APPELLEE.

331 N.W.2d 799

Filed April 1, 1983. No. 81-847.

Subrogation. The doctrine of subrogation includes every instance in which one person pays a debt for which another is primarily liable and which in equity and good conscience should have been discharged by the latter, so long as the payment was made under compulsion or for the protection of some interest of the one making the payment and in discharge of an existing liability.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Reversed and remanded with directions.

Joseph Ginsburg of Ginsburg, Rosenberg, Ginsburg, Cathcart, Curry & Gordon, for appellant.

No appearance for appellee.

BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and BRODKEY, J., Retired.

WHITE, J.

This is an appeal by appellant, A. Ann Scott, the wife of Wade H. Scott, Jr., deceased, from an order of the District Court for Lancaster County, Nebraska, in the above consolidated cases, dismissing the claim against her husband's estate. We reverse with directions.

At the time of his death in October 1974 the deceased had a $30,000 retirement policy with Lincoln Mutual Life Insurance Company, of which Mrs. Scott was the beneficiary.

On May 28, 1974, the decedent purchased a liquor store from Lois Pasco and R. R. L. Enterprises, Inc. The price of the store was approximately $58,000

and was paid with one note of $28,450 signed by the decedent and A. Ann Scott, an additional note of $5,472 which was secured by second mortgages on property owned jointly by Ann and Wade Scott, and the balance in cash. The indebtedness to Lois Pasco and R. R. L. Enterprises was further secured by a perfected security agreement and financing statement.

After her husband's death Ann Scott continued to operate the liquor store upon the mistaken belief that she was now the owner. She paid off the store purchase debt to Lois Pasco with $27,707.85 of the retirement policy insurance proceeds and the remaining balance of $8,266.41 from the proceeds of a personal loan. Ann Scott brought this action to be subrogated to the lien Lois Pasco and R. R. L. Enterprises held on the liquor store.

The doctrine of subrogation includes every instance in which one person pays a debt for which another is primarily liable and which in equity and good conscience should have been discharged by the latter, so long as the payment was made under compulsion or for the protection of some interest of the one making the payment and in discharge of an existing liability. *Sheridan v. Dudden Implement, Inc.*, 174 Neb. 578, 119 N.W.2d 64 (1962).

" ' "The doctrine of subrogation is not administered by courts of equity as a legal right, but the principle is applied to subserve the ends of justice and to do equity in the particular case under consideration. It does not rest on contract, and no general rule can be laid down which will afford a test in all cases for its application. Whether the doctrine is applicable to any particular case depends upon the peculiar facts and circumstances of such case." '

. . . .

"Subrogation may be had where certain facts exist, or do not exist, which justify an equity court doing justice in the premises. However, presence or absence of comparable certain facts in other cases

does not necessarily become a criterion which requires granting or denial of subrogation. The essential element is that facts exist which require subrogation that justice be done." *Rapp v. Rapp,* 173 Neb. 136, 144-45, 112 N.W.2d 777, 782 (1962).

Under the circumstances as presented, we find that Ann Scott is entitled to be subrogated to the rights of Lois Pasco and R. R. L. Enterprises. She did not make any payments as a volunteer; rather, she paid in good faith as one with an obligation or liability on the debt and an interest in property affected by the debt. Ann was liable as a cosigner on the $28,450 note, and the $5,472 note was secured by a second mortgage on property in which she had an interest. The funds that were used to pay these debts were procured through Ann Scott from her insurance proceeds or the incurrence of additional personal liability in the form of a bank loan. The estate therefore would be unjustly enriched if it were able to keep Ann's money and pay it out for the benefit of creditors of the deceased.

In a case very similar to the instant case the debt of an insured was paid from the proceeds of his life insurance policy by his two sister-beneficiaries. In holding that the beneficiaries of the policy were subrogated to the creditor's claim against the estate of the insured, the court in *In re Stafford's Estate,* 278 A.D. 612, 101 N.Y.S.2d 904, 906 (1951), stated: "The Surrogate determined that the debt due to the bank was a primary obligation of the decedent and consequently became a debt against his estate. He held that the respondents have valid claims against the estate for the difference between what they received from the insurance company and the amount of decedent's debt. The relationship between the decedent and the bank was that of debtor and creditor and when decedent's note was paid from the policies involved, respondents became subrogated to the rights of the bank."

The fact that the liquor license and title to the

property were in the name of the deceased was competent evidence on which the District Court correctly held the Pasco debt to be a primary obligation against the decedent's estate. However, the District Court did not go further and hold that in equity and good conscience the debt should have been paid by the estate.

We therefore find that Ann Scott has been subrogated to the rights of Lois Pasco and R. R. L. Enterprises to the extent of $35,974.26, which was applied in payment of the decedent's notes which were a primary obligation of the decedent. The claim of Ann Scott is allowed against decedent's estate, with interest and costs.

Reversed and remanded for a decree to be issued in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

MARY L. SCULLY, APPELLEE, V. DANIEL T. SCULLY, APPELLANT.

331 N.W.2d 801

Filed April 1, 1983. No. 81-890.

1. **Child Support.** This court does not have authority to reduce past due installments of child support. This is not to say, however, that it may not find in a proper case that a party is estopped from collecting installments accruing after some affirmative action which would ordinarily terminate future installments.
2. **Estoppel.** Equitable estoppel is based upon grounds of public policy and good faith and is interposed to prevent injustice and inequitable consequences. Ordinarily, there must be reliance in good faith upon statements or conduct of the party to be estopped and a change of position by the party claiming the estoppel to his injury, detriment, or prejudice.

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

Hal Bauer of Bauer, Galter & Geier, for appellant.

Douglas W. Marolf, for appellee.

KRIVOSHA, C.J., WHITE, and CAPORALE, JJ., and SPRAGUE, D.J., and COLWELL, D.J., Retired.

COLWELL, D.J., Retired.

Daniel T. Scully, respondent-appellant, appeals an order denying his application to modify a child support judgment, claiming that he provided full support of the children during a period of attempted family reconciliation with petitioner-appellee, Mary L. Scully. We affirm.

The 1975 original decree provided in part: (1) Assignment of the family home to appellant; (2) An alimony award in favor of appellee in the amount of $265 per month ending in June 1983; (3) Award of custody of daughters Dianna, born November 19, 1962, and Dana, born December 15, 1963, to appellee; (4) Appellant ordered to provide medical and dental care and to pay child support for the two daughters in the sum of $150 per month for each child; and (5) Award of custody of son Daniel, born November 6, 1959, to appellant. Appellee moved to Iowa. All accrued alimony payments have been paid.

Appellant was current on all child support payments until April 1977 when appellee and the two daughters returned to appellant's home in Lincoln, Nebraska, after the parties had agreed to attempt a family reconciliation. Appellant discontinued child support payments. The parties did not marry. They lived together with the children until June 1980 when appellee and Dana left the home. Dianna remained in the home with appellant and appellant resumed payment of $150 a month child support for Dana. In March 1981 appellant received notice from the clerk of the District Court that he was in arrears for child support in the sum of $11,700. No proceedings were instituted to recover the delinquencies by either appellee, Neb. Rev. Stat. § 42-370 (Reissue

1978), or other authority, Neb. Rev. Stat. § 42-358 (Reissue 1978).

Appellant filed his application on April 3, 1981, alleging that during the period of attempted reconciliation "both of said children resided in Respondent's home and Respondent fully supported said minor children . . . ." The prayer was for an order finding that he had paid child support in kind by actual support of the children. Appellee's answer was a general denial. The trial court found: "The evidence is insufficient to find that Respondent is entitled to credit for child support payments during said period . . . ."

Appellant assigns a general claim of error. He argues equitable estoppel, accord and satisfaction, and acquiescence.

Giving the pleadings and the evidence a liberal interpretation, equitable estoppel was an issue. See, *Robbins v. National Life & Acc. Ins. Co.,* 182 Neb. 749, 157 N.W.2d 188 (1968); *Ruehle v. Ruehle,* 161 Neb. 691, 74 N.W.2d 689 (1956).

During the reconciliation period appellant was self-employed, earning about $65,000 annually, and appellee worked from September 1977 to June 1980, earning a total sum of $18,000. Both parties had separate bank accounts and contributed to the family living expenses. Appellee testified that all of her earnings, all $265 alimony payments, and all other contributions she received from appellant were spent for expenses of the five-member family, including food, clothing, household items, entertainment, health care, and beauty aids for herself and the two girls. She documented most expenditures by canceled checks totaling approximately $18,000. Appellant testified that he furnished the family home, including loan interest, taxes, repairs, insurance, and upkeep; that he gave appellee $70 or $80 a week for family groceries; that he provided family autos; and that he paid for clothing, entertainment, and medical and dental care for the children. None

of these expenditures were corroborated except as related to the house and groceries.

"Where a divorce decree provides for the payment of stipulated sums monthly for the support of a minor child or children, contingent only upon a subsequent order of the court, such payments become vested in the payee as they accrue. The courts are without authority to reduce the amounts of such accrued payments." *Ruehle v. Ruehle, supra* at 698, 74 N.W.2d at 693.

An exception to *Ruehle* was considered in *Smith v. Smith,* 201 Neb. 21, 28-29, 265 N.W.2d 855, 860 (1978), where we held: "This court does not have authority to reduce past-due installments of child support. This is not to say, however, that it may not find in a proper case that a party has equitably estopped herself from collecting installments accruing after some affirmative action which would ordinarily terminate future installments."

. . . .

". . . 'Equitable estoppel is based upon grounds of public policy and good faith and is interposed to prevent injustice and inequitable consequences. Ordinarily, there must be a reliance in good faith upon statements or conduct of the party to be estopped and a change of position by the party claiming the estoppel to his injury, detriment, or prejudice.' " The claimed estoppel in *Smith* involved an adoption proceeding.

Appellee's representations to appellant were her unexplained silence and inaction. When she returned to Lincoln, appellant told her that he would pay all the bills. There was never any further agreement or discussion between the parties concerning either payment, nonpayment, waiver, substitute payments, or satisfaction of child support obligations. Appellant immediately discontinued payments. Appellee made no objection or demand for the same, and she took no affirmative court action to recover on the judgment. Her silence and inaction

are not explained in the record, and it is not for courts to speculate or supply answers, under these and similar circumstances, where general rules cannot be formulated. See 47 A.L.R.3d 1031 (1973).

There were no inducements here upon which appellant in good faith could rely. His proof of change of position and prejudice is also less than convincing. Some of his family expenditures did increase during this period, since they were made for five persons in an effort to make the attempted reconciliation succeed. At the same time, appellee contributed all of her funds toward the support of the same five persons. Certainly this was not in keeping with appellant's representation that he would pay all the bills.

Appellant's relief was to utilize the available forum and procedures. *Ferry v. Ferry,* 201 Neb. 595, 271 N.W.2d 450 (1978). The District Court order should be affirmed. There is no merit for appellant's claim of accord and satisfaction and acquiescence.

AFFIRMED.

SWEEP LEFT, INC., A NEBRASKA CORPORATION, APPELLANT, V. DARM CORPORATION, A NEBRASKA CORPORATION, APPELLEE.

331 N.W.2d 546

Filed April 1, 1983. No. 82-071.

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

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

J. David Thurber of the Law Offices of John R. Doyle, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and COLWELL, D.J., Retired.

PER CURIAM.

The court, having reviewed the record de novo, finds that the decree of the District Court is supported by sufficient competent evidence and there is no error of law.

AFFIRMED.

LINCOLN WELDING SUPPLY CO., APPELLEE, V. INHALATION PLASTICS, INC., APPELLANT.

331 N.W.2d 804

Filed April 1, 1983. No. 82-080.

1. **Default Judgments.** The vacating of a default judgment rests in the sound discretion of the trial court, but such discretion is not an arbitrary one and must be exercised reasonably.
2. **Default Judgments: Appeal and Error.** The determination of whether there has been an abuse of discretion by the trial court in failing to set aside a default judgment must be made in light of the facts and circumstances of each case.
3. _____: _____. Among the factors to be considered in determining whether there has been an abuse of discretion in refusing to set aside a default judgment are those of the promptness of the motion to vacate, the negligence or want of diligence of the party moving to vacate, and the avoidance of unnecessary delays and frivolous proceedings in the administration of justice.

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

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

Rollin R. Bailey of Bailey, Polsky, Cada & Todd, for appellee.

BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and COLWELL, D.J., Retired.

CAPORALE, J.

Inhalation Plastics, Inc., defendant-appellant, appeals from a default judgment entered in favor of plaintiff-appellee, Lincoln Welding Supply Co., in the sum of $27,774 on October 7, 1981.

Inhalation Plastics urges that the trial court erred in entering the default judgment and abused its discretion in refusing to set it aside. We cannot agree, and affirm the judgment of the trial court.

Lincoln Welding is a Lincoln, Nebraska, business which, among other things, supplied medical gases and associated equipment to hospitals for use in respiratory or inhalation therapy. Inhalation Plastics is an Illinois corporation with its principal place of business in Chicago. At the relevant time it engaged in the manufacture and sale of various medical and hospital products, including an oxygen humidifier known as Ster-O_2-Mist. This lawsuit for damages originated in connection with the purchase by Lincoln Welding from Inhalation Plastics of the Ster-O_2-Mist. The suit was initiated sometime in October of 1977; the briefs of the parties disagree as to the date of filing and the clerk's date stamp on the transcript copy of the original petition is not readable.

The first pleading on behalf of Inhalation Plastics contained in the transcript is a motion for enlargement of its time within which to answer certain discovery requests. That pleading was filed by a member of the Nebraska bar who was granted leave to withdraw from his representation of Inhalation Plastics on March 20, 1981. Although there are a number of references in various notices and pleadings to a Chicago, Illinois, law firm as representing Inhalation Plastics, after the withdrawal of Nebraska counsel, no pleadings bearing any Illinois attorney's signature were filed until after the default judgment had been entered. The record reveals a history of delays by Inhalation Plastics in responding to Lincoln Welding's various and numerous discovery re-

quests and a variety of efforts on the part of Lincoln Welding to secure compliance with the court's numerous orders relating thereto. The record reveals as well that the plaintiff amended its documents a number of times. This matter was finally resolved on the basis of a third amended petition filed on March 20, 1981.

The relevant history includes an order directing the defendant to answer certain interrogatories on or before May 1, 1981, or "default judgment to be entered." Although the record before us does not show what service, if any, was made of that order, a subsequent order was entered on May 11, 1981, directing Inhalation Plastics to show cause on June 15, 1981, why default judgment should not be entered against it. In accordance with the trial court's directions, a copy of that order was served by certified mail upon Inhalation Plastics' president and upon the Chicago law firm previously mentioned. Inhalation Plastics did not appear as ordered; whereupon the trial court found it to be liable to Lincoln Welding. A hearing was scheduled for June 30, 1981, to determine the amount of that liability. Again, as directed by the trial court, a copy of the order finding liability and scheduling the further hearing was served by certified mail upon Inhalation Plastics' president and upon the Chicago law firm discussed above. Inhalation Plastics again failed to appear at the scheduled time on June 30, 1981. An evidentiary hearing was conducted at that time, which included the testimony of an associate professor of finance with experience in projecting business earnings; he testified concerning Lincoln Welding's losses as a consequence of the breach of its warranties by Inhalation Plastics. The evidence, if believed by the trier of fact, supports a finding that Lincoln Welding suffered losses in the amount of the default judgment.

Inhalation Plastics filed a motion on December 11, 1981, to vacate and set aside the judgment. At the

hearing thereon the trial court received a number of affidavits offered by Inhalation Plastics which purport to establish that its Chicago attorney misrepresented the facts as to the conduct, status, and progress of the case and had assured it that its interests were being protected. The Chicago attorney's affidavit also recites that his conduct was caused by severe mental problems, which he sought to overcome through psychiatric care. One of Inhalation Plastics' affidavits contains assertions which tend to establish that Inhalation Plastics had a meritorious defense to Lincoln Welding's action. Lincoln Welding points out, however, that there is a lack of evidence to establish that Chicago counsel was incapable either mentally or physically to carry out the legal matters involved in this case and that he appears to have continued to practice law throughout the period of time involved.

Vacca v. DeJardine, ante p. 736, 331 N.W.2d 516 (1983), contains the most recent restatement of the rule that the vacating of a default judgment rests in the sound discretion of the trial court, but such discretion is not an arbitrary one and must be exercised reasonably. We held therein that it was an abuse of discretion to grant a default judgment in the absence of a prior order to show cause why such should not be done because of the failure to serve answers to certain discovery requests. We also held it was an abuse of discretion to set aside a default judgment where no answer had ever been filed, because a party seeking to vacate a default judgment must tender an answer or other proof disclosing a meritorious defense.

A determination of whether there has been an abuse of discretion by the trial court in failing to set aside a default judgment must of course be made in light of the facts and circumstances of each case. The facts of this case are not the facts of *Vacca, supra.* Although there was a showing of a meritorious defense in the instant matter, the entry of the

default judgments had each been preceded by an order to show cause why such should not be done. Those orders were ignored by Inhalation Plastics.

In *Michaelis v. Michaelis,* 187 Neb. 350, 190 N.W.2d 783 (1971), it was said that among the factors to be considered in determining whether there has been an abuse of discretion in refusing to set aside a default judgment are those of the promptness of the motion to vacate, the negligence or want of diligence of the party moving to vacate, and the avoidance of unnecessary delays and frivolous proceedings in the administration of justice. In light of those factors it cannot be said there was any abuse of discretion by the trial court's refusal to set aside the default judgment in this case. The defendant waited fully 2 months and 4 days before moving to vacate the damage default judgment. Further, nearly 6 months elapsed between the finding of liability and the filing of the motion to vacate.

Inhalation Plastics seeks to hide behind the conduct of its Chicago attorney. The record, however, allows a clear inference that Inhalation Plastics, through its president, either knew or should have known that something was sorely amiss in the conduct of this case.

Inhalation Plastics cites a number of cases in which this court reversed a denial of a motion to vacate a default judgment. However, those cases are readily distinguishable on the facts from the instant situation. *Lacey v. Citizens Lumber & Supply Co.,* 124 Neb. 813, 248 N.W. 378 (1933), presented a situation wherein the defendants had no knowledge of the default proceedings. In *Beren Corp. v. Spader,* 198 Neb. 677, 255 N.W.2d 247 (1977), neither the defendants nor their attorneys were aware of the plaintiff's intention to take a default judgment. In *Coates v. O'Connor,* 102 Neb. 602, 168 N.W. 102 (1918), the opinion notes that some allegations in the petition of the plaintiff were indisputably false, the debt on which judgment was had was in fact not owed by the

defendant therein, and, further, the plaintiff had traveled to a foreign jurisdiction so as to surreptitiously attach and sell the property of the defendant without his knowledge. Those are not the facts of the present case. *Beem v. Davis,* 111 Neb. 96, 195 N.W. 948 (1923), appears at first blush to be similar to the case presently before us, as the defendants against whom a default judgment had been taken, and which was subsequently reopened, had been relying entirely on the assurances of their attorney that the matter was being taken care of. However, in *Beem,* unlike the situation here, defendants had no personal knowledge to the contrary. In *Beliveau v. Goodrich,* 185 Neb. 98, 173 N.W.2d 877 (1970), there was some confusion as to what the parties had told each other they would do concerning the taking of a default judgment; that is, the default judgment seems to have been one element of negotiations carried on between the parties as to how the liability suit would be resolved. Such was not the case here. In *Barney v. Platte Valley Public Power and Irrigation District,* 147 Neb. 375, 23 N.W.2d 335 (1946), this court indicates that not all of the appropriate corporate officials were aware of the pendency of the suit, nor was counsel for the corporate entity aware of opposing counsel's intention to take a default judgment. Again, such is not the case in the instant matter. Finally, in the last case cited by Inhalation Plastics, *Anthony & Co. v. Karbach,* 64 Neb. 509, 90 N.W. 243 (1902), the parties against whom default judgment was taken were misled by the attorney, and therefore, on first reading, the case appears remarkably similar to the one at hand. This court, in affirming the setting aside of the default judgment therein, stated that one who has suffered by the dishonesty of his attorney, an officer of the court, is the victim of casualty and misfortune such as will justify the setting aside of a default judgment. However, in *Anthony* the attorney was a member of the Nebraska bar, upon whom the injured parties could

rightfully rely to represent them in the Nebraska courts. More importantly, *Anthony* is another case in which there was no showing that the injured parties themselves either knew or should have known of the status of the case.

Inhalation Plastics could not reasonably have ignored the default notices sent to its president, and should not have done so. It should have, particularly after more than one such occurrence, and particularly when the notices indicated events of such major severity were about to occur, taken some independent and meaningful steps to insure itself that its interests were in fact actually being adequately protected.

The actions of the trial court were entirely correct and, accordingly, are affirmed.

AFFIRMED.

JULENE C. MORRIS, APPELLEE, V. ROBERT LAAKER, APPELLANT.

331 N.W.2d 807

Filed April 1, 1983. No. 82-085.

1. **Directed Verdict.** A party against whom a directed verdict is requested is entitled to have every controverted fact resolved in favor of that party and to have the benefit of every inference that can reasonably be deduced from the evidence.
2. **Motor Vehicles: Negligence.** By the very nature of the passing maneuver it is necessary for the passing vehicle to be in such close proximity to the overtaken vehicle that if the latter suddenly and without warning swerves so as to block the way and slows down precipitously, there may be a collision. The operator of such passing vehicle need not anticipate that a motorist being overtaken will suddenly swerve so as to block the way, nor slow or stop so as to cause the passing vehicle to lose control, and the question of the negligence of either driver is generally a question of fact for the jury.
3. **Rules of Evidence: Appeal and Error.** Generally, in the absence of an offer of proof no error may be predicated upon the court's ruling in excluding testimony.

4. **Expert Witnesses.** If a hypothetical question, calling for expert skill or knowledge, is so framed as to fairly and reasonably reflect the facts proved by any of the witnesses in the case, it will be sufficient.

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

Jeffrey A. Silver, for appellant.

David A. Domina of the Domina Law Firm, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and COLWELL, D.J., Retired.

HASTINGS, J.

On July 17, 1980, Julene C. Morris, the plaintiff, was operating her motorcycle in an easterly direction on Eisenhauer Avenue in Norfolk, Nebraska, following an automobile being driven by Robert Laaker, the defendant. A noncontact accident occurred which caused the plaintiff to run into the ditch on the south side of the road. As a result she was thrown from the motorcycle and sustained injuries, including multiple fractures of the left forearm. Following a jury trial in which issues as to the negligence and contributory negligence of both parties were submitted, a verdict in the amount of $15,472.31 in favor of the plaintiff was returned and judgment was entered accordingly.

The defendant has appealed to this court and assigns the following errors: (1) The court failed to direct a verdict in favor of the defendant based on the plaintiff's contributory negligence as a matter of law; (2) The court refused to allow the defendant to testify as to certain circumstances surrounding the giving of an earlier out-of-court statement; and (3) The court erred in allowing certain medical testimony without sufficient foundation.

In dealing with the first assignment of error, we are bound by the rule that the party against whom a

directed verdict is requested is entitled to have every controverted fact resolved in favor of that party and to have the benefit of every inference that can reasonably be deduced from the evidence. *Esbenshade v. National Life Ins. Co.,* 208 Neb. 216, 303 N.W.2d 272 (1981). Therefore, in that light, the jury could have found from the evidence the following: That shortly before 8 a.m. on July 17, 1980, the plaintiff was driving her 1979 Kawasaki motorcycle easterly on Eisenhauer Avenue in Norfolk, Nebraska, on her way to work; that driving ahead of her was an older automobile driven by the defendant; that before the road straightened out, she was about 3 to 4 car lengths behind the car; and that she then looked for oncoming traffic and, seeing none, accelerated for the purpose of passing the automobile. According to her testimony, as she pulled into the left-hand lane to accomplish this purpose, and was within a car length of defendant's automobile, the latter swerved over into the left-hand lane, swerved back to the center, back to the left-hand lane, and back to the center again. The plaintiff said that she then let up on the throttle, slowing down, and moved back into the right-hand lane. At this time, she was then a car length or less behind the automobile and it pulled back into the right-hand lane. She said she saw the defendant make an obscene gesture with the middle finger of his hand, and observed the brake lights of the automobile come on and the automobile slowing down. She then explained that she applied her brakes and tried to slow down because the gap between the automobile and her motorcycle was closing quickly. However, in order to avoid a collision, she stated she had to take to the ditch on the right-hand side of the road, as a result of which she lost control of the motorcycle, was thrown from it, and was injured.

It is on this set of facts that the defendant would have us conclude that the plaintiff was guilty of contributory negligence as a matter of law sufficient to

require a directed verdict. In support of that contention, he cites several authorities for the proposition that as a general rule it is negligence as a matter of law for a motorist to drive a vehicle on a highway in such a manner that it cannot be stopped in time to avoid a collision with an object within the range of vision, and that a motorist who sees an object on a highway which is abnormal must consider that a warning, requiring such motorist to slow down. We have no quarrel with *Guerin v. Forburger,* 161 Neb. 824, 74 N.W.2d 870 (1956), and *Hyde v. Cleveland,* 203 Neb. 420, 279 N.W.2d 105 (1979). However, neither case is applicable to this set of facts. *Guerin* involved a situation in which the decedent, while driving at a speed of approximately 50 miles per hour, simply ran into the rear end of the defendant's truck which was either stopped or proceeding very slowly down the highway in the same direction and which was in plain sight. *Hyde* presented a somewhat similar situation in which the plaintiff admitted seeing the lights of two vehicles side by side some 250 feet ahead of him, but failed to slow down sufficiently to avoid a collision.

The instant case was not one where the plaintiff saw a dangerous situation on the highway and failed to heed the warning, nor where she failed to observe a dangerous condition on the road ahead of her. She was attempting to pass a vehicle, which she had every right to do. By the very nature of the passing maneuver it is necessary for the passing car to be in such close proximity to the overtaken vehicle that if the latter suddenly and without warning swerves so as to block the way and slows down precipitously, there may be a collision. The operator of such passing vehicle need not anticipate that a motorist being overtaken will suddenly swerve so as to block the way nor slow or stop so as to cause the passing vehicle to lose control, and the question of the negligence of either driver is generally a question of fact for the jury. *Maurer v. Harper,* 207 Neb. 655, 300

N.W.2d 191 (1981). There is no merit to the defendant's first assignment of error.

The defendant next complains that the court refused to allow him to testify as to the nature of a discussion had with a state patrolman, during which a written statement was taken from the defendant and which statement was received in evidence as an admission. It is his position that somehow such unreported discussion would have been pertinent to rebut a charge of recent fabrication, under the provisions of Neb. Rev. Stat. § 27-801 (Reissue 1979). However, no offer of proof was made and, accordingly, error, if any, in the court's refusal to allow the defendant's testimony may not be predicated upon that ruling. *Slocum v. Hevelone,* 196 Neb. 482, 243 N.W.2d 773 (1976); Neb. Rev. Stat. § 27-103 (Reissue 1979).

Finally, objection is made to the testimony of the attending orthopedic surgeon, Dr. Goff, as to the present degree of permanent disability in the plaintiff's arm. The basis of the objection was lack of foundation, in that such physician had not seen the plaintiff since July 29, 1980, and offered his opinion as of December 3, 1981. However, Dr. Gross, another orthopedic surgeon who had examined the plaintiff as recently as November 25, 1981, and who had surgically removed the plates inserted by Dr. Goff, testified that the plaintiff had attained normal healing. However, because of a 5- to 10-degree diminished supination in the hand, he gave as his opinion that she was suffering from a 5-percent permanent disability in the left upper extremity.

The testimony of Dr. Goff, attacked by the defendant, was elicited in the form of a hypothetical question which had the witness assume a 10-degree loss of supination and an otherwise normal recovery from the original fracture surgery. His response, over objection, was that "If she has a ten-degree loss of supination I would consider this a five percent disability." Dr. Goff's testimony was indeed based upon facts furnished to him in the hypotheti-

cal question. However, there is nothing wrong with an expert witness expressing an opinion based on facts "perceived by or made known to him." Neb. Rev. Stat. § 27-703 (Reissue 1979). If a hypothetical question, calling for expert skill or knowledge, is so framed as to fairly and reasonably reflect the facts proved by any of the witnesses in the case, it will be sufficient. *Fowler v. Bachus,* 179 Neb. 558, 139 N.W.2d 213 (1966). In any event, the testimony of Dr. Goff was cumulative of that given by Dr. Gross.

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

AFFIRMED.

OMAHA NATIONAL BANK, TRUSTEE FOR RAYMOND C. CUTCHALL, APPELLANT, V. THE MANUFACTURERS LIFE INSURANCE COMPANY, APPELLEE.

332 N.W.2d 196

Filed April 1, 1983. No. 82-130.

1. **Jury Instructions.** In instructing a jury, the trial court is not required to define language commonly used and generally understood.
2. _____. The meaning of an instruction and not its phraseology is the important consideration. An inadvertent grammatical error in an instruction is harmless error if it is clear from the instruction itself and the other instructions given that the jury was not confused or misled by the error.
3. _____. When the trial court does not give verbatim requested instructions but does adequately instruct regarding the issues upon which the requests are made, it is not error to refuse the proffered instructions.
4. **Fraud.** Where one party to a transaction induces the other party to enter into it by willful misrepresentation, he cannot escape liability for his fraud by showing that such party could have investigated the representations made and would then have found that they were untrue.
5. _____. Contributory negligence is generally not a defense to deliberate, active, or willful fraud.
6. _____. A person is justified in relying upon a representation in all cases if it is a positive statement of fact and if an investigation would be required to discover the truth.

7. ———. The fact that inquiries were made elsewhere which did not disclose the falsity of the representations is no defense.
8. **Insurance: Fraud.** An insurer may justifiably rely on the insured's representations unless to do so would be so utterly unreasonable, in the light of the information open to it and of its skill or experience, that its loss is its own responsibility.
9. **Depositions.** If only part of a deposition of a witness is offered in evidence by a party, an adverse party may require him to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts relevant to the issues and not introduced.
10. **Rebuttal Evidence.** The admission of rebuttal testimony is largely within the discretion of the trial court.

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

John F. Thomas and William F. Hargens of McGrath, North, O'Malley & Kratz, P.C., for appellant.

Raymond M. Crossman, Jr., of Crossman & Norris, for appellee.

BOSLAUGH, MCCOWN, and HASTINGS, JJ., and BRODKEY, J., Retired, and RIST, D.J.

BOSLAUGH, J.

The plaintiff bank as trustee is the primary beneficiary of a life insurance policy issued to Raymond C. Cutchall, the insured, by the defendant insurer on March 23, 1976. Cutchall died on August 13, 1977, during the contestable period of the policy. This action was brought on December 10, 1979, to recover the proceeds of the policy.

It is undisputed that the premiums due under the policy were paid and the only issue is whether the defendant was entitled to rescission because of false representations made by the insured in the application for the policy. The premiums paid by the insured, together with interest, were paid into court by the defendant on January 15, 1980.

The record shows that on October 5, 1972, the insured consulted Dr. Thomas J. Gurnett concerning pain underneath his breastbone, which radiated into his shoulders and upper arms. Dr. Gurnett ex-

amined the insured and made a number of tests, including an electrocardiogram (EKG). The EKG showed evidence of a prior coronary thrombosis or myocardial infarction. Dr. Gurnett told the insured that he had experienced a heart attack, and prescribed nitroglycerin as a short-term vasodilator and also longer term and more persistent dilatation medicine. Dr. Gurnett advised the insured that his heart disease would be an ongoing problem.

In October 1975 the insured submitted an application for additional life insurance to The Guardian Life Insurance Company. Guardian offered to issue a policy to the insured at an increased premium because of evidence that the insured had high blood pressure. The insured then submitted applications to Business Men's Assurance Company and the defendant.

While the application to Business Men's Assurance Company was pending, the application to the defendant was accepted and the policy was then issued to the insured by the defendant.

The jury returned a verdict for the defendant, and judgment was entered on the verdict. The plaintiff has appealed. The principal issue on the appeal involves justifiable reliance, that is, whether the defendant was entitled to rely upon the statements made by the insured in the application for the policy. The plaintiff contends the evidence does not support the verdict and that certain of the instructions to the jury were erroneous. The plaintiff also contends the trial court erred in permitting the defendant to offer portions of a deposition and in refusing to allow the plaintiff to offer portions of another deposition.

In determining whether the evidence is sufficient to support the verdict, the evidence must be viewed in the light most favorable to the defendant, all questions of fact must be resolved in its favor, and it is entitled to the benefit of every inference that may reasonably be deduced from the evidence.

It is undisputed that the application submitted to

the defendant by the insured on February 4, 1976, contained the following questions and answers: "SO FAR AS YOU KNOW HAVE YOU EVER HAD ANY DISTURBANCE OF: . . . 4. The HEART, BLOOD VESSELS such as- (c) Chest discomfort, angina or heart disease?" "No"; . . . "(e) Have you had any electrocardiograms, when, why, result?" "Yes"; "4E)- 4-16-75 - Routine phys. WNL."; "4E)1-14-76 - Ins. physical." . . . "12. So far as you know have you had any illness or injury in the last 5 years not mentioned above?" "No." . . . "14. (a) Have you had any operation, treatment, hospital care or medical examination during the last 5 years not mentioned above?" "No."

The statements made on the application which were material to the risk were clearly false. The insured concealed the fact that the EKG by Dr. Gurnett in 1972 disclosed a prior heart attack and coronary artery disease, for which he had received medication.

The evidence is that the defendant relied upon the false statements in the application. If the defendant had known the truth concerning the heart disease of the insured, it would have requested additional information and would not have issued the policy or would have offered a policy at a much higher premium.

The insured died on August 13, 1977, of cardiac arrest as a consequence of an acute myocardial infarction.

The plaintiff contends that the defendant's failure to properly investigate the information available to it precluded justifiable reliance upon the false statements made by the insured.

In addition to the application submitted by the insured, the defendant required that a "heart chart" be completed by a local physician, including an EKG which was made on January 14, 1976. The examination was made by Dr. David Jasper, the personal physician of insured, and the chart was com-

pleted by him. The insured did not consult Dr. Gurnett after February 23, 1973, and did not advise Dr. Jasper of Dr. Gurnett's diagnosis and treatment for his previous difficulty.

The insured reported a negative history of heart disease on the chart submitted to the defendant. In a letter to the defendant dated February 27, 1976, Dr. Jasper stated that the insured was in "excellent health" except for a brief occurrence of high blood pressure.

The application submitted by the insured, together with the other medical evidence submitted to the defendant, was reviewed by Dr. Paul Aggett, a cardiovascular and peripherovascular surgeon, who is the associate medical director for the defendant. Dr. Aggett testified that he relied on the answers to the health questions in the application, and the heart chart submitted by Dr. Jasper. He interpreted the January 14, 1976, EKG supplied by Dr. Jasper as being "within normal limits."

Much of the evidence concerns the interpretation of the January 14, 1976, EKG. Several cardiologists called as expert witnesses by the plaintiff testified that the EKG was "abnormal" and indicated a prior myocardial infarction. These witnesses varied in their testimony as to how positive or apparent the abnormality was shown, and all conceded that the interpretation of an EKG is a matter of opinion about which experts may differ. The evidence further shows that it is possible for a person to have a normal EKG although having suffered a prior heart attack. The evidence also shows that an EKG may be influenced by many factors extraneous to the condition of the patient's heart.

The most that can be said regarding the interpretation of the EKG of January 14, 1976, is that the evidence was conflicting and presented a question of fact for the jury. The jury resolved the conflict in favor of the defendant, and the evidence supports that finding.

The evidence shows that insurance companies can obtain information on applicants for insurance from two sources. The Medical Information Bureau (MIB) is a centralized information bank for medical information collected by member insurance companies. Equifax is a company which investigates applicants.

The defendant requested information on Cutchall from MIB on two occasions. The first time was after the application had been received. The second request was made after Cutchall had asked to increase the coverage. Neither response indicated that Cutchall had heart disease. The defendant did not subscribe to a service whereby MIB would provide followup information.

After Cutchall's death the defendant requested an Equifax investigation. The report revealed information concerning Cutchall's heart condition which was in Equifax's files at the time the policy was issued.

The plaintiff argues that the trial court improperly instructed the jury on the elements of misrepresentation.

Instruction No. 7 instructed the jury that in order to find for the defendant it must find by clear and convincing evidence that Cutchall made a misrepresentation in response to questions asked on the application. The plaintiff complains that the instruction did not state that the false statements relied upon must constitute part of the completed application endorsed upon or annexed to the policy. The application was in fact attached to the policy and there was no issue of fact concerning the matter. It was not error to not submit that question to the jury.

The plaintiff contends that the court should not have used the term "misrepresentation" without defining it. The meaning of "misrepresentation" is reasonably clear and no further definition was required. In instructing a jury the trial court is not

required to define language commonly used and generally understood. *Otte v. Taylor,* 180 Neb. 795, 146 N.W.2d 78 (1966); *Flanagin v. DePriest,* 182 Neb. 776, 157 N.W.2d 389 (1968). There was no prejudicial error.

The plaintiff further argues that instruction No. 7 was erroneous because it required the jury to find for the defendant if the "defendant relied on the truthfulness of the misrepresentation . . . and was therefore deceived to its injury." The plaintiff argues that this equated reliance with injury; that is, if the defendant relied, it was injured. It is apparent that the instruction should have read "thereby" instead of "therefore." In *Greenberg v. Bishop Clarkson Memorial Hospital,* 201 Neb. 215, 221, 266 N.W.2d 902, 907 (1978), we said: "The meaning of an instruction and not its phraseology is the important consideration. . . . An inadvertent grammatical error in an instruction is harmless error if it is clear from the instruction itself and the other instructions given that the jury was not confused or misled by the error." The remainder of instruction No. 7 and instruction No. 9 made it clear that to find for the defendant, the jury was required to find that the defendant issued the policy in reliance upon Cutchall's misrepresentation. There was no prejudicial error.

The plaintiff argues that the jury was improperly instructed on the element of reliance. The plaintiff requested four instructions dealing with reliance. The first stated that an insurer can not rely on a misrepresentation if, through "proper attention to its own business," it should have known that such statements were false. The second stated that an insurer has a duty to investigate if the insurer had facts in its possession which would have led a prudent person to make such an inquiry, and an insurer will be charged with the knowledge it should have known. The third stated that an insurer will be charged with knowing what is in its files. The

fourth stated that if an investigation is conducted, the insurer is chargeable with the knowledge which would have been revealed by a thorough investigation. All four instructions were refused.

The trial court instructed the jury that an insurer may rely on the answers given in an application and need not conduct an investigation. Such reliance is not justified if there is something to put the insurer on notice that the answers are false. Such notice may require an investigation. The jury was instructed that the fact that an investigation is conducted by the insurer does not absolve the applicant from speaking the truth nor lessen the right of the insurance company to rely on the applicant's statements.

This instruction, together with an instruction dealing with imputing knowledge of its agents to the corporation, incorporates portions of the instructions requested by the plaintiff. The jury was instructed that notice of certain facts may negate justifiable reliance or may require the insurer to conduct an investigation. Thus, the jury was instructed that an insurer will be charged with knowing what is in its files; that is, it can not justifiably rely where it has actual knowledge of a falsehood. The jury was further instructed that a duty may exist to investigate if there are facts available to prompt such an investigation. When the trial court does not give verbatim requested instructions but does adequately instruct regarding the issues upon which the requests are made, it is not error to refuse the proffered instructions. *Jones v. Consumers Coop. Propane Co.,* 186 Neb. 629, 185 N.W.2d 458 (1971); *Treffer v. Seevers,* 195 Neb. 114, 237 N.W.2d 114 (1975); *Belitz v. Suhr,* 208 Neb. 280, 303 N.W.2d 284 (1981).

The court did not instruct the jury that an insurer can not rely on a misrepresentation if, through "proper attention to its own business," it should have known of the falsehood. Nor was the jury instructed that an insurer who conducts an investiga-

tion will be chargeable with the knowledge which should have been revealed by a thorough investigation.

The plaintiff relies upon *Traynor v. Automobile Mutual Ins. Co.,* 105 Neb. 677, 181 N.W. 566 (1921), as the basis for the first requested instruction. In the *Traynor* case the insured in good faith had indicated on the application that the automobile to be insured was built in 1913 when in fact it had been built in 1910. The judgment on a directed verdict for the defendant, who had asserted misrepresentation as a defense to its liability on the policy, was reversed. This court held that the statement as to when the car was built was not an index of the car's real value and thus not material to the risk. The court further stated that there was no deception to the injury of the insurer, and since *the model number of the car was revealed on the application,* the insurer had the duty and the means to ascertain the truth through "proper attention to its own business." *Id.* at 683, 181 N.W. at 568.

The plaintiff urges that the *Traynor* case creates a duty to discover the truth based on a standard of care of "proper attention to its own business." Thus, the plaintiff would hold the insurer to a standard of due care in issuing policies. This conclusion does not follow.

It is a general rule that a party can not set up negligence as a defense to an intentional act, but may when negligence rather than intent is pleaded against him. "In an action for . . . negligent misrepresentation, an honest belief in the truth of the representation is no defense, although the defense of contributory negligence is available . . . ." 86 C.J.S. *Torts* § 50 at 973 (1954). "[W]here the defendant's conduct is actually intended to inflict harm upon the plaintiff, there is a difference, not merely in degree but in the kind of fault; and the defense [contributory negligence] never has been extended to such intentional torts." W. Prosser, Law of Torts, *Negli-*

gence: Defenses § 65 at 426 (4th ed. 1971).

In *Hoock v. Bowman,* 42 Neb. 80, 85, 60 N.W. 389, 390 (1894), this court said: "The omission by one of the parties to an agreement, to make inquiries as to the truth of facts stated by the other, cannot be imputed to him as negligence. Every contracting party has an absolute right to rely on the express statement of an existing fact, the truth of which is known to the opposite party, and unknown to him, as the basis of a mutual agreement."

In 37 Am. Jur. 2d *Fraud and Deceit* § 250 at 333-34 (1968), the text states: "In consideration of the effect of negligence of a representee on the right to rely, the policy of the law toward actual fraud must always be considered, since, under modern judicial concepts of social relationship, the actual wrongdoing of the representor is considered to outweigh the carelessness of the representee, at least in instances of actual machination and deception. It has frequently been stated or held that the doctrine of negligence does not authorize deception in what is said or unsaid, and hence, the effect of negligence on the part of the party deceived may be tolled by the active fraud of the other party. In other words, the rule sanctioned by most of the courts is that where one party to a transaction induces the other party to enter into it by wilful misrepresentation, he cannot escape liability for his fraud by showing that such party could have investigated the representations made and would then have found that they were untrue. According to this view, negligence in trusting a representation will not excuse a positive wilful fraud, and contributory negligence is generally held not to be a defense to deliberate, active, or wilful fraud."

The general rule is that a person is justified in relying upon a representation in all cases if it is a positive statement of fact and if an investigation would be required to discover the truth. *Fricke v. Hart,* 206 Neb. 590, 294 N.W.2d 737 (1980). The fact that in-

quiries were made elsewhere which did not disclose the falsity of the representations is no defense. *Foxley Cattle Co. v. Bank of Mead,* 196 Neb. 1, 241 N.W.2d 495 (1976).

While no action will lie where ordinary prudence would have prevented the deception, that rule is generally applied where the means of discovering the truth was in the hands of the party defrauded. It is applicable where the party who claims to have been defrauded failed to read an instrument before signing it, or purchased real estate after inspecting the property and failed to notice obvious defects. See, *Erftmier v. Eickhoff,* 210 Neb. 726, 316 N.W.2d 754 (1982); *Dyck v. Snygg,* 138 Neb. 121, 292 N.W. 119 (1940).

Prosser, in a discussion of justifiable reliance as an element of an action for misrepresentation, dealt with the defense of contributory negligence and set forth the following standard of conduct: "[W]here there is an intent to mislead, it [contributory negligence] is clearly inconsistent with the general rule that mere negligence of the plaintiff is not a defense to an intentional tort. The better reasoned cases have rejected contributory negligence as a defense applicable to intentional deceit . . . .

". . . [T]he person deceived is not held to the standard of precaution, or of minimum knowledge, or of intelligent judgment, of the hypothetical reasonable man . . . .

"Rather . . . the matter seems to turn upon an individual standard of the plaintiff's own capacity and the knowledge which he has, or which may fairly be charged against him from facts within his observation . . . ." W. Prosser, Law of Torts, *Misrepresentation* § 108 at 716-17 (4th ed. 1971).

As applied to insurers, it has been held that they may justifiably rely on answers given them. "As a general rule, one has no duty to investigate another's representation, but may rely on its truth." *Fireman's Fund Ins. Co. v. Knutsen,* 132 Vt. 383, 392,

324 A.2d 223, 229 (1974). 12A Appleman, Insurance Law and Practice § 7296 (1981). The caveat to this rule is found in *Apolskis v. Concord Life Insurance Company,* 445 F.2d 31, 36 (7th Cir. 1971): "An insurance company need not make any independent investigation and may rely on the truthfulness of answers contained in an insurance application at least if there is nothing to put it on notice that certain answers may be false."

In *Fireman's Fund Ins. Co. v. Knutsen, supra,* the court held that there is no obligation to investigate each routine application where no suspicion arises.

The language of negligence is notably absent in these cases. The implication of these cases is that an insurer may justifiably rely on the insured's representations unless to do so would be "so utterly unreasonable, in the light of the information open to him," and of his skill or experience, "that his loss is his own responsibility." W. Prosser, *supra* § 108 at 715. "[A] fraud-feasor will not be heard to assert that his victim was negligent in relying on the misrepresentation." *Kubeck v. Consolidated Underwriters,* 267 Or. 548, 555, 517 P.2d 1039, 1042 (1974).

Thus, the prudent person standard is not applicable to an insurer's review of applications or to the decision to investigate. Nor should the insurer be held to a negligence standard in making an investigation. See *Fireman's Fund Ins. Co. v. Knutsen, supra.* Rather, the actions of the insurer should not be "so utterly unreasonable" that there could be no justifiable reliance. The instructions imposing a negligence standard were properly refused.

Parker Precision Products Co. v. Metropolitan Life Ins. Co., 407 F.2d 1070 (3d Cir. 1969), involved facts similar to the present case. EKGs taken in 1957, 5 years before the application, revealed a heart attack. In 1962 insured's physician did not, at insured's request, report the heart attack nor indicate any abnormalities in the insured's EKGs of 1959 and 1960 in the insurance application. All EKGs re-

mained in the possession of the attending physician. The insurer's examiner relied on these representations in rating the application. The court held that when an insured answers a question and there is nothing else in the application to impair that statement, the insurer is entitled to rely on the answer given. A report on the application by a medical examiner consistent with the answers is sufficient to warrant this reliance. The court further indicated that an insurer is not under an obligation to examine each applicant to reveal obscure health problems.

The instruction that the fact that an investigation was conducted does not absolve the applicant from telling the truth nor lessen the right of reliance was proper. *Wainwright v. Washington Nat. Ins. Co.,* 142 Neb. 372, 6 N.W.2d 368 (1942). See, also, *MFA Mut. Ins. Co. v. Meisinger,* 183 Neb. 285, 159 N.W.2d 829 (1968); *Allstate Ins. Co. v. Vincent Meloni, et al.,* 98 N.J. Super. 154, 236 A.2d 402 (1967); 12A Appleman, *supra* § 7296.

The plaintiff argues that the insurer should not have been permitted to read into the record portions of the deposition of Otto Staehr and to introduce an exhibit from the deposition. The plaintiff asserts that since counsel for the insurer was not present at the deposition it waived the right to cross-examination.

The plaintiff had read part of the Staehr deposition at the trial. The defendant then read a statement and offered an exhibit which, with the plaintiff's consent, had been included in the deposition by the counsel for Staehr's employer, MIB.

Neb. Rev. Stat. § 25-1267.04(4) (Reissue 1979) provides: "If only part of a deposition of a witness is offered in evidence by a party, an adverse party may require him to introduce all of it which is relevant to the part introduced, and *any party may introduce any other parts relevant to the issues and not introduced.*" (Emphasis supplied.) The evidence was properly admitted.

Further, because the plaintiff consented to the statement being made a part of the deposition record, it was estopped from complaining of its use at trial. See *Smith v. Smith,* 201 Neb. 21, 265 N.W.2d 855 (1978). Foundation for the exhibit was properly laid through the deposition.

On rebuttal the plaintiff sought to read portions of the deposition of Dr. Aggett as admissions against interest. The trial court excluded this evidence, stating that Dr. Aggett had been on the witness stand for several hours, during which time counsel had ample opportunity to confront him with the deposition. At the time of rebuttal Dr. Aggett was unavailable. The plaintiff argues that the exclusion of this deposition testimony of Dr. Aggett was reversible error.

In *Hyde v. Cleveland,* 203 Neb. 420, 279 N.W.2d 105 (1979), we held that it may be error to refuse deposition testimony offered as an admission on rebuttal. However, it must be shown that the exclusion of the evidence prejudiced the defendant in some way. *Bailey v. Mohr,* 199 Neb. 29, 255 N.W.2d 866 (1977).

Here, the plaintiff had been permitted to cross-examine Dr. Aggett at length concerning his deposition. During that examination, Dr. Aggett repeatedly sought to explain the technical nature of his answers. The excluded evidence, which consisted of isolated bits of technical testimony taken out of context of such explanation, did not clearly constitute admissions against interest. It was also somewhat cumulative.

The admission of rebuttal testimony is largely within the discretion of the trial court. *Gee v. Dinsdale Brothers, Inc.,* 207 Neb. 224, 298 N.W.2d 147 (1980). Since the plaintiff was allowed to probe into the deposition at length on cross-examination, no prejudice resulted to the plaintiff. To have admitted the evidence would have been prejudicial to the defendant because the technical nature of the testimony warranted an opportunity to explain.

There being no error, the judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LESTER REDDING, ALSO KNOWN AS JACK JOHNSON, APPELLANT.

331 N.W.2d 811

Filed April 1, 1983. No. 82-168.

1. **Jury Instructions.** It is the duty of the trial court to instruct the jury on the correct law of the case whether requested to do so or not.
2. **Criminal Attempt: Theft: Value of Goods.** The value of goods stolen under Neb. Rev. Stat. §§ 28-510 et seq. (Reissue 1979) is a material or essential element of the crime of attempted theft in order to establish the gradation of the offense, and it must be proven beyond a reasonable doubt.
3. **Value of Goods.** In the absence of evidence to the contrary, cash in the amount of $12,000 must have a value of "over one thousand dollars."
4. **Criminal Attempt: Theft: Value of Goods.** If the uncontroverted evidence supports a finding beyond a reasonable doubt of the attempted theft of but one item of property consisting of cash of a stated amount, the fact that a jury returns a verdict of guilty based upon instructions which failed to include specific value as a material element of the crime is harmless error.

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

Dennis R. Keefe, Lancaster County Public Defender, and Sean J. Brennan, for appellant.

Paul L. Douglas, Attorney General, and Martel J. Bundy, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and WARREN, D.J.

HASTINGS, J.

The defendant, Lester Redding, following a jury trial, was convicted of the offense of attempted theft by deception of property of the value of more than $1,000, a violation of Neb. Rev. Stat. §§ 28-512 et seq.

(Reissue 1979), and a Class IV felony. He has appealed to this court and has assigned but two errors, which can be restated as follows: That the court failed to include in its instructions that the value of the property stolen was an essential element of the crime and therefore required proof beyond a reasonable doubt. He makes no complaint of the jury's finding that he was guilty of the attempted theft of some property of value.

Section 28-512 provides in part that "A person commits theft if he obtains property of another by deception. . . ." Section 28-518 provides that "(1) Theft constitutes a Class III felony when the value of the thing involved is over one thousand dollars." Neb. Rev. Stat. § 28-201(1) (Reissue 1979) states that a person is guilty of an attempt to commit a crime if he "(b) Intentionally engages in conduct which, under the circumstances as he believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his commission of the crime." Section 28-201(4) provides that criminal attempt is a Class IV felony when the crime attempted is a Class III felony. The penalty imposed in this case, imprisonment of from 20 months to 4 years, was within the statutory limits for a Class IV felony.

Although the evidence necessary to support a conviction of theft of property of value is not contested, it is necessary to set forth some of the facts in order to resolve the legal problem presented.

On June 8, 1981, the victim met the defendant and what turned out to be two of his accomplices under somewhat strange, albeit apparently planned, circumstances. The victim was enticed into a three-card shell or shill game, into the "pot" of which game he had placed his watch, ring, and billfold, worth approximately $234. He lost that game to the defendant. He was given a chance to win back his property in a game which the defendant insisted be played for $15,000. The victim won. However, as the defendant started to pay off, he suddenly chal-

lenged whether the victim could have paid off had he lost, and eventually insisted that the victim obtain $12,000 in cash and show it. Leaving his property, which was a part of the "pot," with the defendant's female accomplice, the victim and the second accomplice went to a downtown financial institution. While there, the victim actually took out a loan of $12,000 and a draft to his order was actually issued, although the victim did not take it with him. He did ask to use a phone, dialed 911, asked that the authorities be notified of the circumstances of the apparent confidence game, and requested that the police be notified that he was returning to the parking lot on the edge of town where the "action" was taking place. He then returned to the parking lot with the one accomplice and they were reunited with the defendant and the other accomplice. Immediately thereafter, the police arrived and the three took off in different directions, but were all arrested. The red handkerchief containing the victim's property, as well as a large amount of currency which the defendant had placed in the "pot," was found by a police officer underneath a car several stalls down from the victim's vehicle and on the route of escape that the female accomplice had attempted.

The principal complaint of the defendant involves the giving of instruction No. 5. By that instruction the court informed the jury as follows: "The *material elements* which the state must prove by evidence beyond a reasonable doubt in order to convict the defendant of the crime charged are:

"1. That the defendant intentionally engaged in conduct which, under the circumstances as he believed them to be, constituted a substantial step in a course of conduct intended to culminate in his commission of the crime of theft by deception.

"2. That defendant did attempt to steal by deception money or property of value belonging to [the victim].

"3. That he did so on or about the 8th day of June, 1981, in Lancaster County, Nebraska.

"The state has the burden of proving beyond a reasonable doubt each and every one of the *foregoing material elements* necessary for a conviction.

"If you find beyond a reasonable doubt that the defendant is guilty of attempted theft by deception it will be necessary for you to find the value of the money or property attempted to be taken by deception from [the victim], if any.

"If you find from the evidence beyond a reasonable doubt that each of the *foregoing material elements* is true, it is your duty to find the defendant guilty. On the other hand, if you find the state has failed to prove beyond a reasonable doubt any one or more of the *foregoing material elements* it is your duty to find the defendant not guilty.

"The burden of proof is always on the state to prove beyond a reasonable doubt all of the *material elements* of the crime charged, and this burden never shifts." (Emphasis supplied.)

The defendant's counsel objected to the giving of instruction No. 5 in the following manner: "My objection to that instruction, Your Honor, is that the instruction be omitted entirely and in substitute thereof the standard Nebraska Jury Instruction on lesser included crimes to be substituted for this instruction." The court's response was in part as follows: "The jury, however, can determine . . . the value of the items so taken or attempted to be taken. And the Court's position is that the statute on theft by deception or the theft statutes, the crime is the theft. The value that is involved goes to the punishment, and the jury will find under the verdicts [sic] the amount of property taken. And therefore, there is a lesser included offense the way the instructions are structured."

The foregoing objection is not literally in accord with those raised by the defendant in his assignments of error. However, we believe that the trial

court was sufficiently informed of the claimed defect in general so as to have been given the opportunity to remedy any such deficiency if it had felt it necessary to do so. In any event, it is the duty of the trial court to instruct the jury on the correct law of the case whether requested to do so or not. *State v. Duis,* 207 Neb. 851, 301 N.W.2d 587 (1981). The jury returned a verdict of guilty as charged and declared the value of the property to be $12,000. The question on this appeal is whether a specific value of property is a material element of the crime or if it is only a factor going to the classification of the crime for punishment purposes, and in any event what burden of proof must be met by the State to prove such value.

It is readily apparent from an examination of instruction No. 5 that value was not included within the term "material elements," and therefore the jury was never instructed as to what burden of proof must be met in determining such value.

Prior to the adoption of the present Nebraska Criminal Code there were two "grades" of larceny: grand larceny and petit larceny. Neb. Rev. Stat. § 28-506 (Reissue 1975) provided in part that "Whoever steals . . . goods . . . the property of another, of the value of three hundred dollars or upwards . . . shall, upon conviction thereof, be imprisoned . . . not more than seven years . . . ." Petit larceny was defined by Neb. Rev. Stat. § 28-512 (Reissue 1975) in part: "(1) If any person shall steal any . . . goods . . . of less value than three hundred dollars, the property of another, . . . upon conviction . . . shall be punished by imprisonment in the county jail not more than six months . . . ." In *State v. Frandsen,* 199 Neb. 546, 260 N.W.2d 206 (1977), we held, in effect, that a material element of a crime of *petit larceny* was that the defendant stole " 'property of value' " without requiring a declaration by the jury of a specific value. Obviously, this was consistent with the then existing statute which required only

that the property stolen be found to be of less value than three hundred dollars. However, in *State v. Hayes,* 187 Neb. 325, 326, 190 N.W.2d 621, 622 (1971), a prosecution for grand larceny, we said: "The value of the goods in question is an essential element of the crime and like all other elements thereof the evidence must be sufficient to support a finding of the necessary value beyond a reasonable doubt."

We presently have four grades of larceny, or theft: Class III felony, Class IV felony, Class I misdemeanor, and Class II misdemeanor, all having common elements except for the value of the goods stolen. § 28-518. We see no reason why the same rationale as that contained in *Frandsen* and *Hayes* should not apply to the present statutes. In other words, if all that is proven beyond a reasonable doubt is that goods of value were stolen, it is a Class II misdemeanor, "the value of the thing involved is one hundred dollars or less." § 28-518(4). On the other hand, to establish a Class III felony, an essential element of the crime is to prove beyond a reasonable doubt that "the value of the thing involved is over one thousand dollars." § 28-518(1). The instruction was clearly incomplete and therefore erroneous.

The question now remaining is whether the giving of such instruction was prejudicial to the rights of the defendant. In *State v. Tamburano,* 201 Neb. 703, 271 N.W.2d 472 (1978), we held that where the State offers uncontroverted testimony on an essential element of a crime, mere speculation that the jury might disbelieve the testimony does not entitle the defendant to an instruction on a lesser-included offense. In that case the defendant was charged with first degree sexual assault, which required proof of penetration. The defendant had insisted that an instruction on second degree sexual assault be given, which only necessitated proof of sexual contact. The only evidence offered on that issue was the testimony of the prosecutrix, who claimed that penetra-

tion was achieved. We went on to say: "Evidence which requires the submission of a lesser-included offense is necessarily left to a case-by-case basis. It is sufficient to say that that evidence does not rise to that required level by speculating that an essential element uncontroverted in the evidence may be disbelieved by the jury." *Id.* at 708, 271 N.W.2d at 475.

The rationale of *Tamburano* is applicable here. The defendant offered no evidence. The testimony of the victim established without question that the ring, watch, and billfold had already been "obtained" by the defendant. The jury determined under proper instructions that beyond a reasonable doubt there had been an attempted theft of property of value. The only evidence relating to such property involved the $12,000 in cash. It would be ludicrous to argue that $12,000 in cash is not a thing of value of "over one thousand dollars." If the uncontroverted evidence supports a finding beyond a reasonable doubt of the attempted theft of but one item of property consisting of cash of a stated amount, the fact that a jury returns a verdict of guilty based upon instructions which failed to include specific value as a material element of the crime is harmless error. The error in the giving of instruction No. 5 was harmless beyond a reasonable doubt. *Chapman v. California,* 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), *rehearing denied* 386 U.S. 987, 87 S. Ct. 1283, 18 L. Ed. 2d 241.

The judgment and sentence of the District Court are affirmed.

AFFIRMED.

WHITE, J., dissenting.

The reliance on *State v. Tamburano,* 201 Neb. 703, 271 N.W.2d 472 (1978), by the majority is misplaced. *Tamburano* did not relieve the trial court of its heretofore mandatory duty to instruct the jury that each essential element of a crime must be proven beyond a reasonable doubt. *State v. Hayes,* 187 Neb. 325, 190 N.W.2d 621 (1971). *Tamburano* stands

for the simple principle that if the defendant desires a lesser-included instruction, some evidence must be present in the record tending to show that a lesser crime was in fact committed. We specifically did not deal with burden of proof.

In this case we simply are not able to state the standard by which the jury found that the amount attempted to be stolen was $12,000. In the absence of a specific instruction by the trial court that the standard of proof is beyond a reasonable doubt, the error is obvious and the case must be reversed and remanded.

McCown and Caporale, JJ., join in this dissent.

State of Nebraska, appellee, v. Arthur H. Hellbusch, appellant.

331 N.W.2d 815

Filed April 1, 1983. No. 82-189.

1. **Directed Verdict: Waiver.** Where a motion for a directed verdict is made at the close of the evidence of the State in a criminal case, introduction of evidence thereafter by the defendant waives any error in ruling or failing to rule on the motion. The defendant, however, is not prevented from questioning the sufficiency of the evidence in the entire record to sustain a conviction.
2. **Criminal Law: Appeal and Error.** In determining the sufficiency of the evidence to sustain a conviction in a criminal prosecution, it is not the province of the Supreme Court to resolve conflicts in the evidence, pass upon the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence, as such matters are for the jury. The verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
3. **Sentences: Appeal and Error.** In the absence of an abuse of discretion a sentence imposed within statutory limits will not be disturbed on appeal.

Appeal from the District Court for Colfax County: John M. Brower, Judge. Affirmed.

Mark M. Sipple of Luckey, Sipple & Hansen, for appellant.

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

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and WARREN, D.J.

MCCOWN, J.

The defendant was found guilty by a jury of felony motor vehicle homicide. He was sentenced to 3 years' probation, conditioned that the first 90 days be served in the county jail, and fined $10,000.

On June 27, 1981, at approximately 10 a.m., the defendant was driving a pickup truck towing an irrigation trailer on a two-lane highway in Colfax County, Nebraska. The defendant attempted to pass a vehicle in front of him while going around a curve in a no-passing zone. He crossed over the solid yellow no-passing line into the left lane of traffic where he collided with an oncoming motorcycle driven by Norman Brown, who was killed in the accident.

A trooper of the State Patrol arrived at the accident scene and administered an alcohol breath test to the defendant. The equipment was calibrated so that anyone having a blood alcohol content of .13 or less would have passed the test. The defendant failed the test. Following the breath test the defendant was taken to a nearby hospital, where he submitted to a blood test. The blood test showed a body fluid alcohol content of .166. The defendant was charged with felonious motor vehicle homicide in causing the death of Norman Brown while operating a motor vehicle while under the influence of alcohol in violation of Neb. Rev. Stat. § 39-669.07 (Reissue 1978).

Trial was held beginning January 27, 1982. The jury found the defendant guilty of felony motor vehicle homicide. The defendant was sentenced to 3 years' probation, with the first 90 days to be served in the county jail, and upon release he was ordered to enter an inpatient alcohol program in Omaha, Nebraska. His driver's license was suspended for 1

year and he was ordered to pay a fine of $10,000 and the costs of the action.

The defendant first contends that the trial court erred in overruling a motion to dismiss at the close of the State's case in chief. The argument is that the state trooper's evidence was insufficient to establish that the violation of the drunk driving law was the proximate cause of the death of Brown. The defendant tacitly concedes that medical testimony offered by the State in rebuttal may have been sufficient to establish the issue. Even if there were some doubt as to whether the State presented sufficient evidence to constitute a prima facie case in its case in chief, the defendant waived any error on that score by proceeding to present evidence. The defendant cannot now be heard to complain of the trial court's failure to dismiss the case at the conclusion of the State's case in chief where the defendant proceeded thereafter to present evidence on his behalf. Where a motion for a directed verdict is made at the close of the evidence of the State in a criminal case, the introduction of evidence thereafter by the defendant waives any error in ruling or failing to rule on the motion. The defendant, however, is not prevented from questioning the sufficiency of the evidence in the entire record to sustain a conviction. *State v. Hilpert, ante* p. 564, 330 N.W.2d 729 (1983); *Henggler v. State,* 173 Neb. 171, 112 N.W.2d 762 (1962).

The defendant also contends that the evidence is insufficient to support the verdict of guilty. The jury was specifically instructed that it must find that the defendant's intoxication proximately and directly caused the death of Norman Brown. There is no serious question that the evidence in this case was more than sufficient to support the jury verdict. In determining the sufficiency of the evidence to sustain a conviction in a criminal prosecution, it is not the province of the Supreme Court to resolve conflicts in the evidence, pass upon the credibility of

witnesses, determine the plausibility of explanations, or weigh the evidence, as such matters are for the jury. The verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. True,* 210 Neb. 701, 316 N.W.2d 623 (1982).

Finally, the defendant contends that his sentence is excessive. Defendant argues that because he is 65 years old, and has no prior criminal record and only minor traffic violations, no jail sentence should have been given and the maximum fine should not have been assessed.

The maximum statutory penalty for the offense involved here is 5 years' imprisonment or a $10,000 fine, or both. The only imprisonment involved here was 90 days in the county jail, imposed as a condition of probation, and there is no evidence that the imposition of the maximum fine was not fully justified.

This court has consistently held that in the absence of an abuse of discretion a sentence imposed within statutory limits will not be disturbed on appeal. *State v. Last,* 212 Neb. 596, 324 N.W.2d 402 (1982). There was no abuse of discretion in the present case.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DANIEL J. McMAHON, APPELLANT.

331 N.W.2d 818

Filed April 1, 1983. No. 82-284.

Pleas. A plea of guilty cannot be voluntary if the defendant is unaware of the penal consequences of such plea because of having been misinformed by the trial court, and such plea must be vacated and the defendant rearraigned.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Reversed and remanded.

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

Paul L. Douglas, Attorney General, and G. Roderic Anderson, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and COLWELL, D.J., Retired.

HASTINGS, J.

Following a plea of guilty, Daniel J. McMahon was convicted of the crime of delivering marijuana, a violation of Neb. Rev. Stat. §§ 28-416(1)(a) and (2)(b), and 28-405, Schedule I (c)(10) (Cum. Supp. 1982), a Class III felony. He was sentenced to a term of imprisonment of not less than 3 nor more than 5 years. The defendant assigns as error on appeal that the District Court, in connection with the arraignment proceedings, misinformed him as to the possible penalty for the crime, i.e., that it included imprisonment of up to 5 years or a $10,000 fine, or both such fine and imprisonment, when in fact the correct penalty for a Class III felony was not less than 1 year nor more than 20 years or a $25,000 fine, or both such fine and imprisonment.

It is apparent that the actual maximum penalty imposed on the defendant was within the limitation erroneously stated by the trial court. He therefore suffered no prejudice in that regard. However, the minimum portion of the indeterminate sentence, 3 years, exceeded by 16 months that which the court could have imposed had its advice to the defendant of the limitation of "up to five years" been correct. Neb. Rev. Stat. § 83-1,105(1) (Reissue 1981). We cannot order a reduction of the minimum sentence to 20 months because it was a permissible sentence for a Class III felony.

What we are here faced with is a situation in which the defendant was unaware of the penal consequences of his guilty plea because he had been misinformed by the court, and therefore his plea could hardly be said to have been voluntary. *State v. Turner,* 186 Neb. 424, 183 N.W.2d 763 (1971). In *State v. Curnyn,* 202 Neb. 135, 274 N.W.2d 157 (1979), after directing a hearing on the issue of whether the defendant had knowledge of the applicable penalties, we said: "If the court finds he was not aware of the penal consequences of the plea, the judgment of conviction shall be deemed vacated and he shall be permitted to plead again." *Id.* at 140-41, 274 N.W.2d at 161.

The judgment and sentence of the District Court are reversed and vacated and the cause is remanded for further proceedings.

REVERSED AND REMANDED.

COZAD CARPET CENTER, INC., A NEBRASKA CORPORATION, APPELLEE, V. FAY MALOLEY, APPELLANT.

331 N.W.2d 547

Filed April 1, 1983. No. 82-665.

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

Nye, Hervert, Jorgensen & Watson, P.C., for appellant.

Claude E. Berreckman, P.C., for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ.

PER CURIAM.

The court, having reviewed the record, finds no error. The judgment of the trial court is, in all respects, affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. ROBERT L. ROTH, APPELLEE.

331 N.W.2d 819

Filed April 1, 1983. No. 82-824.

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

Michael G. Heavican, Lancaster County Attorney, and Thomas S. Jaudzemis, for appellant.

Robert B. Creager of Berry, Anderson, Creager & Wittstruck, for appellee.

MCCOWN, J.

This is an appeal by the State to a single judge of the Supreme Court for summary review of an order of the District Court for Lancaster County granting a motion to suppress physical evidence in a criminal case charging possession of cocaine with intent to deliver. The application for and grant of review have been made pursuant to Neb. Rev. Stat. § 29-824 (Cum. Supp. 1982).

On September 26, 1981, two undercover police officers of the Lincoln Police Department were detailed for surveillance of a residence in Lincoln, Nebraska, in connection with a drug investigation. When they arrived at the scene, the officers noticed a pickup truck with a camper shell on it parked in front of the house. As the officers watched, a man, a woman, and a small child walked from the yard to the area near the camper, and the man placed an article in the back of the camper. Shortly afterward, the woman and child went into the house and the man got in the pickup and drove away.

The officers followed in their unmarked car for a few blocks and obtained the license number of the pickup. There were no traffic violations by the vehicle, but at a heavy traffic intersection a few blocks from the house the officers lost the pickup. The officers ran a radio check on the license number of the

pickup and were informed that the license plates had expired.

The undercover officers called for assistance from the uniformed division to locate the pickup. Officer Knuth was detailed to assist the undercover officers. She located the pickup parked on the street in front of a house 4 or 5 blocks away from the intersection where the officers had lost it. It was in a residential area of Lincoln which had no history of drug traffic. Officer Knuth informed the undercover officers by radio of the location.

The two undercover officers met her near that location and informed her that the first residence had been under surveillance by the undercover officers and that the driver of the pickup had come from that house and placed something in the rear of the camper. She knew that the undercover officers worked with the drug unit. She was also told by the undercover officers to ticket the pickup for improper plates and to look closely to see if any drugs or drug paraphernalia were in plain view.

Officer Knuth went to the parked pickup and ticketed it for improper plates. The window on the driver's side was open and she looked into the cab of the pickup and observed a partially smoked hand-rolled cigarette resting in plain view in the open ashtray. In her opinion it was a marijuana cigarette.

Officer Knuth radioed the information to the undercover officers and was instructed to watch the vehicle. Officer Knuth was parked approximately a block away from the pickup. She saw a white male come out of the house and enter the pickup truck. He remained in the truck a short time and then got out and went back into the house. Two or three minutes later he again came out, got into the pickup, and drove away. Officer Knuth followed. She activated her red lights and followed for a few blocks, honking her horn, but had no response. She turned on her siren and the pickup pulled over and stopped. Officer Knuth had called for assistance as she fol-

lowed, and Officer Palmer arrived on the scene as the pickup pulled over.

Officer Knuth approached the pickup and asked the driver for his license and registration. He handed her his license and she told him that she wanted to talk to him about the "roach" in the ashtray. The driver leaned over, pushed the cigarette into the ashtray, closed the ashtray, and told Officer Knuth it was not important. Officer Knuth asked him to get out of the vehicle and ordered him to stand with Officer Palmer.

Officer Knuth got into the vehicle, removed the marijuana cigarette from the ashtray and examined it, noting the presence of seeds, and identified it as a marijuana cigarette. Officer Knuth then asked the driver what the roach was doing in the truck and he replied it belonged to someone else whose name he could not reveal. The driver was cited and placed under arrest for possession of marijuana, patted down, and put in the back seat of the police cruiser.

Officer Knuth and Officer Palmer then proceeded to search the cab of the pickup. They opened the glove compartment where they discovered a bag containing a sifter, a small bottle, and a white powdery substance which was identified as cocaine. The defendant was thereafter charged with possession of cocaine with intent to deliver.

The defendant filed a pretrial motion to suppress the physical evidence seized from the pickup cab. Following the evidentiary hearing on the motion the District Court found that the search incident to a lawful arrest doctrine was not applicable, and there was no probable cause to search inside the vehicle. The District Court therefore granted the motion, suppressed all physical evidence seized from the cab of the pickup, and this appeal followed.

The critical issue in this case is whether probable cause existed to arrest the defendant for possession of marijuana at the time Officer Knuth ordered the defendant out of the pickup. This court has con-

sistently followed the doctrine that where contraband materials in a motor vehicle are in plain view of an officer, who has a lawful right to be in the position from which he makes his observations, there is probable cause to make an arrest and seize the contraband. See, *State v. Shepardson,* 194 Neb. 673, 235 N.W.2d 218 (1975); *State v. Oltjenbruns,* 187 Neb. 694, 193 N.W.2d 744 (1972).

In the case at bar Officer Knuth knew from her previous personal observation that what she reasonably believed to be a marijuana cigarette was in the ashtray of the pickup. When she later stopped the pickup and told the defendant she wanted to talk to him about the roach, the defendant's conduct and comments confirmed her observations and constituted probable cause for an arrest on a charge of possession of marijuana.

Since there was probable cause for arresting the defendant on a charge of possession of marijuana, this case is controlled by *New York v. Belton,* 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981). The facts in that case are remarkably similar to those in the case at bar. The issue in *Belton* was whether, in the course of a search incident to the lawful custodial arrest of the occupants of an automobile, police may search inside the automobile after the arrestees are no longer in it. In *Belton* the Supreme Court held that when a police officer has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile. The police officer may also examine the contents of any containers found within the passenger compartment. The Court's definition of "containers" includes glove compartments and bags such as are involved in the case at bar.

The finding of the District Court that the search of the pickup cab was not incident to a lawful custodial arrest was erroneous. Therefore, the order of the

District Court suppressing all contraband seized from the pickup must be reversed.

REVERSED.

HEADNOTES
Contained in this Volume

Abandonment
Abatement
Accounting
Actions
Administrative Agencies
Administrative Hearings
Administrative Law
Aiding and Abetting
Appeal and Error
Appeal Bonds
Arson
Assessments

Banks and Banking
Blood, Breath, and Urine Tests
Breach of Contract
Brokers

Case Disapproved
Case Overruled
Child Custody
Child Support
Circumstantial Evidence
Civil Rights
Claims
Class Actions
Collateral Attack
Collateral Estoppel
Colleges and Universities
Comprehensive Development Plans
Confessions
Conspiracy
Constitutional Law
Construction Contracts
Contempt
Contracts
Conveyances
Convictions
Corporations
Costs
Courts
Criminal Attempt
Criminal Law

Damages
Debtors and Creditors
Decedents' Estates
Declaratory Judgments
Deeds
Default Judgments
Demurrer
Depositions
Directed Verdict
Disciplinary Proceedings
Discrimination
Drunk Driving
Due Process

Easements
Effectiveness of Counsel
Eminent Domain
Employment Security Law
Equal Protection
Equity
Escape
Estates
Estoppel
Evidence
Expert Witnesses

Fees
Foreclosure
Foreign Judgments
Fraud

Guardians Ad Litem

Habeas Corpus
Highways
Homicide
Hypnosis

Immunity
Implied Consent Law
Independent Contractor
Indian Child Welfare Act
Indictments and Informations
Injunction
Insanity
Installment Loans
Insurance
Intent
Intervention

Joinder
Judgments
Judicial Notice
Judicial Sales
Juries
Jurisdiction
Jurors
Jury Instructions

Laches
Leases
Legislature
Licenses
Liens
Liquor Licenses

Mandamus
Marriage
Mental Competency
Mental Health
Mentally Disordered Sex Offender
Miranda Rights
Modification of Decree
Mortgages
Motions for New Trial
Motions to Strike
Motions to Suppress
Motor Carriers
Motor Vehicles
Municipal Corporations
Municipal Ordinances

Negligence
Notice

Ordinances
Parental Rights
Parol Agreement
Parol Evidence
Parties
Partnerships
Pedestrians
Pensions
Perjury
Photographs
Physicians and Surgeons
Plea in Abatement
Pleadings
Pleas
Police Officers and Sheriffs
Police Powers
Political Subdivisions
Political Subdivisions Tort Claims Act
Prejudgment Interest
Presumptions
Prior Convictions
Probable Cause
Proof
Property
Property Division
Prosecuting Attorneys
Prosecutorial Discretion
Public Officers and Employees
Public Property
Public Service Commission

Railroads
Real Estate
Rebuttal Evidence
Records
Res Judicata
Restrictive Covenants
Right to Counsel
Rules of Evidence
Rules of the Road

Schools and School Districts
Search and Seizure
Security Interests
Self-Incrimination
Sentences
Service of Process
Special Assessments

Specific Performance
Speedy Trial
Statutes
Stock
Strict Liability
Subrogation
Summary Judgment
Supersedeas Bonds

Taxation
Teacher Contracts
Termination of Employment
Theft
Tort Claims Act
Torts
Trial
Trusts

Undue Influence

Uniform Commercial Code

Valuation
Value of Goods
Vendor and Vendee
Venue
Verdicts
Visitation

Waiver
Waters
Wills
Witnesses
Words and Phrases
Workmen's Compensation

Zoning

INDEX

Abandonment.

Abandonment must be pled and proved, the burden of proof being on the party alleging it. Masid v. First State Bank 431

Abatement.

Where it appears that the vendor is unable to make a complete or perfect title, or that there is a deficiency in the quantity of land contracted to be sold, the general rule is that the vendee, if he so elects, is entitled to have the contract specifically performed to the extent of the vendor's ability to comply therewith and at the same time have a just abatement out of the purchase price for the deficiency of title, quantity, or quality of the estate to compensate for the vendor's failure to perform the contract in full. The measure of abatement should be such portion of the purchase price as the relative value of the land lost bears to the purchase price of the whole tract. Kuhlman v. Grimminger 64

Accounting.

1. An action for the dissolution of a partnership and an accounting between partners is one in equity and is reviewed in this court de novo on the record. Bass v. Dalton 360
2. Imposed upon the Nebraska Supreme Court in such a case is the duty to reach an independent conclusion without reference to the findings of the District Court, bearing in mind and according respect and weight to the trial court's superior position as the original finder of fact. Bass v. Dalton 360

Actions.

1. A petition in error is designed to review the decision of the inferior tribunal. It is not to act as a super legislative or administrative agency to come to an independent conclusion. Andrews v. City of Fremont 148
2. The pendency of another action does not ipso facto require that a demurrer be sustained. Miller v. Miller .. 219
3. Generally, the pendency of a former action for the same cause between the same parties and in the same court constitutes a good plea in abatement. Miller v. Miller 219

4. The general rule that pendency of a prior action between the same parties for the same cause may be pled in abatement of a subsequent action will not be sustained where the prior action is pending in a court of a foreign or different jurisdiction. Miller v. Miller 219

Administrative Agencies.

1. Where an administrative agency is charged with the responsibility of protecting the public interest as distinguished from determining the rights of two or more individuals in a dispute before such agency, it is a necessary party in any appellate proceeding. Leach v. Dept. of Motor Vehicles 103
2. An "appeal" from an order of the director of the Department of Motor Vehicles under Neb. Rev. Stat. § 60-420 (Reissue 1978) or § 84-917(2) (Reissue 1981) is commenced or perfected by filing a petition within 30 days of the service of the final decision of the director and causing a summons to issue on the petition and be served within 6 months of such filing. Leach v. Dept. of Motor Vehicles 103
3. Making an administrative agency a party defendant in an appeal under the provisions of Neb. Rev. Stat. § 60-420 (Reissue 1978) or § 84-917(2) (Reissue 1981) is not an action against the State of Nebraska within the meaning of Neb. Rev. Stat. §§ 24-319 et seq. (Reissue 1979) so as to require service of summons upon the Governor and the Attorney General. Leach v. Dept. of Motor Vehicles 103
4. The failure of an administrative agency to prepare and transmit to the court a certified transcript of the proceedings had before it within 15 days after service of the petition, pursuant to Neb. Rev. Stat. § 84-917(4) (Reissue 1981), does not, in and of itself, entitle the party seeking review to have the agency's order set aside. Maurer v. Weaver 157
5. Where appeals are taken from an administrative agency to the District Court, pursuant to the provisions of Neb. Rev. Stat. § 84-917 (Reissue 1981), the certified transcript as prepared by the agency and transmitted to the court shall be considered to be before the court and shall, unless objected to by one of the parties, be considered without the need of either party formally offering the record into evidence. Maurer v. Weaver . 157

Administrative Hearings.

1. In an administrative hearing an agency may take notice of judicially cognizable facts and in addition take

notice of general, technical, or scientific facts within its specialized knowledge. However, parties to such hearings will be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material so noticed so as to be afforded an opportunity to contest the facts so noticed. In re Application of ATS Mobile Telephone 403

2. An agency may utilize its experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to it during any hearing. In re Application of ATS Mobile Telephone 403

3. Even though the method by which an administrative agency takes notice of facts not presented at the hearing may not be technically correct, if the parties had full and fair opportunity to address that subject by cross-examination or otherwise, they may very well not have been prejudiced or unfairly surprised by the notice of facts taken by the agency. In re Application of ATS Mobile Telephone 403

4. At a hearing on an application for a liquor license, the burden is upon the applicant to prove its fitness and willingness to provide the service proposed, its ability to conform to the rules of the Nebraska Liquor Control Act, that its management and control exercised over the premises will insure compliance with such rules and regulations, and that the issuance of the license is or will be required by the present or future public convenience and necessity. Although the Liquor Control Commission may consider the recommendation of the local governing body in determining whether or not to issue such license, the burden is not on the applicant to provide evidence of such recommendation. Kerrey's, Inc. v. Neb. Liquor Control Comm. 442

5. Where one appears before an administrative body and presents evidence or makes argument, the party so appearing cannot thereafter claim a denial of due process solely on the ground that proper notice of the hearing was not given. After appearing at the hearing the party is deemed to have waived any objection with regard to notice. Laubscher v. S.I.D. No. 20 834

Administrative Law.

1. Where factfindings under criteria in Neb. Rev. Stat. § 84-917(6)(e) (Reissue 1981) are involved, we review the decision of the District Court only to determine that it and the board have applied the proper criteria, and it is in this sense that we review de novo. Simonds v. Board of Examiners 259

2. The substantial evidence standard of review of decisions of administrative agencies requires the reviewing court to search the entire record to determine whether, on the basis of all the testimony and exhibits before the agency, it could fairly and reasonably find facts as it did. Simonds v. Board of Examiners 259
3. The Legislature may authorize an agency to make rules and regulations for the operation and enforcement of a law, such to be limited to rules within the express legislative purpose of the act and to be administered in accordance with standards expressed in the act. State v. Sprague 581
4. No unconstitutional delegation of authority occurs when the Legislature defines a crime and sets a penalty therefor, but delegates the implementation of details to an administrative agency. State v. Sprague 581
5. The manner and method of enforcing a law may be delegated, since of necessity this must be left to the reasonable discretion of administrative officers. State v. Sprague 581

Aiding and Abetting.
1. Aiding and abetting criminal dealings in controlled substances, whatever the motivation of an attorney may be, constitutes conduct involving moral turpitude and warrants disciplinary action. State ex rel. NSBA v. Matt 123
2. Where a defendant has knowledge that another is violating the law, or possesses information sufficient to place a reasonable person on inquiry as to the possibility that such violations are taking place, yet continues to furnish essential materials for the purpose of continuing such violations, he may be guilty of aiding and abetting such criminal activity. State v. Hilpert .. 576
3. The evidence is sufficient to convict a person as an aider and abettor if it shows that the crime was committed by someone and that the defendant incited or instigated, i.e., aided and abetted in, its commission. Such evidence may be circumstantial only, but if the facts which such evidence tends to establish may be accounted for upon no rational theory which does not include the guilt of the accused, it is sufficient to sustain a conviction. State v. Hilpert 576

Appeal and Error.
1. The admission of expert testimony is ordinarily within the trial court's discretion, and its ruling will be upheld in the absence of an abuse of discretion. State v. Jones 1

2. The trial of an appeal from a county board of equalization involving the valuation of real estate, both in the District Court and the Supreme Court, is de novo as an equitable proceeding. Potts v. Board of Equalization 37
Beynon Farm Products v. Bd. of Equalization 815
3. Upon an appeal from an order of the Public Service Commission, this court may decide only whether the commission acted within the scope of its authority and whether the order was based on evidence which shows that such order was not unreasonable or arbitrary. In re Application of Crusader Coach Lines 53
4. It is not the province of this court to weigh or resolve conflicts in the evidence or the credibility of witnesses. The Supreme Court does not act as an appellate public service commission, but will sustain the action of the commission if there is evidence in the record to support it. In re Application of Crusader Coach Lines 53
In re Application of ATS Mobile Telephone 403
5. The issue of public convenience and necessity is ordinarily one of fact, and where there is evidence in the record to sustain the Public Service Commission's order, this court cannot say that it is unreasonable and arbitrary. 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 Public Service Commission. In re Application of Crusader Coach Lines 53
6. This court will not interfere with a jury verdict of guilty 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 guilty beyond a reasonable doubt. State v. Brown 68
State v. Holland 170
State v. Hilpert 564
State v. Hellbusch 894
7. The review in this court of the assessment of railroad operating property made by the State Board of Equalization and Assessment is de novo on the record. In re Assessment of OL&B Ry. Co. 71
8. A challenge to a spouse's statutory election to take against a will is tried in this court de novo on the record. In re Estate of Carman 98
9. Where an administrative agency is charged with the responsibility of protecting the public interest as distinguished from determining the rights of two or more individuals in a dispute before such agency, it is a necessary party in any appellate proceeding. Leach v. Dept. of Motor Vehicles 103

10. An "appeal" from an order of the director of the Department of Motor Vehicles under Neb. Rev. Stat. § 60-420 (Reissue 1978) or § 84-917(2) (Reissue 1981) is commenced or perfected by filing a petition within 30 days of the service of the final decision of the director and causing a summons to issue on the petition and be served within 6 months of such filing. Leach v. Dept. of Motor Vehicles 103
11. Making an administrative agency a party defendant in an appeal under the provisions of Neb. Rev. Stat. § 60-420 (Reissue 1978) or § 84-917(2) (Reissue 1981) is not an action against the State of Nebraska within the meaning of Neb. Rev. Stat. §§ 24-319 et seq. (Reissue 1979) so as to require service of summons upon the Governor and the Attorney General. Leach v. Dept. of Motor Vehicles 103
12. In reviewing criminal cases this court will not set aside the judgment of the trial court if there is sufficient evidence, taking the view most favorable to the State, to support the judgment. State v. Schmidt 126
13. A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion.
State v. Schmidt 126
State v. Komor 376
State v. Hilpert 564
State v. Isherwood 592
State v. Sims 708
State v. Christensen 820
State v. Bromwich 827
State v. Hellbusch 894
14. In the absence of a bill of exceptions it is presumed that the evidence sustained the findings of the trial court. The only issue that can be considered is whether the pleadings support the judgment. Caynor v. Caynor ... 143
Snyder v. Nelson 605
State v. Manchester 670
15. Courts of general jurisdiction will not take judicial notice of municipal ordinances not present in the record, nor will the Supreme Court. Andrews v. City of Fremont 148
16. New evidence is not permitted in the appellate court to determine if errors of law occurred in the tribunal giving rise to the error proceeding. Andrews v. City of Fremont 148
17. The giving of an incorrect instruction which may have affected the result unfavorably to the party complaining constitutes reversible error. In re Estate of Flider 153
18. The failure of an administrative agency to prepare and

transmit to the court a certified transcript of the proceedings had before it within 15 days after service of the petition, pursuant to Neb. Rev. Stat. § 84-917(4) (Reissue 1981), does not, in and of itself, entitle the party seeking review to have the agency's order set aside. Maurer v. Weaver 157

19. Where appeals are taken from an administrative agency to the District Court, pursuant to the provisions of Neb. Rev. Stat. § 84-917 (Reissue 1981), the certified transcript as prepared by the agency and transmitted to the court shall be considered to be before the court and shall, unless objected to by one of the parties, be considered without the need of either party formally offering the record into evidence. Maurer v. Weaver 157

20. The findings of fact made by the Nebraska Workmen's Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong. The decision of the compensation court after rehearing must be considered in the light most favorable to the successful party, and every controverted fact must be decided in its favor. Noah v. Creighton Omaha Health Care Corp. .. 169
Caradori v. Frontier Airlines 513

21. The defendant may not predicate error on the admission of evidence to which no objection was made when adduced. State v. Holland 170

22. Where evidence is conflicting or where reasonable minds may draw different inferences or conclusions from the evidence, it is within the province of the jury to decide the issues of fact, and the Supreme Court will not set aside or direct a verdict in such a situation. Koerner v. Perrella 189
Holly v. Mitchell 203

23. Instructions should be considered together, and if, when considered as a whole, they correctly state the law, error cannot be predicated thereon. Holly v. Mitchell 203

24. An appeal to the District Court from an order or decision of the human rights commission of a city of the primary class in an employment discrimination case is heard as in equity and without a jury. American Stores v. Jordan 213

25. In an appeal in an equity action it is the duty of this court to try issues of fact de novo upon the record and to reach an independent conclusion thereon without reference to the findings of the District Court. American Stores v. Jordan 213
Masid v. First State Bank 431

26. To sustain a charge of discrimination in employment where there is no charge of a universal discriminatory practice or system, complainant, in the record, must establish that the employer intentionally engaged in acts that discriminated against complainant in violation of the statutory prohibitions. American Stores v. Jordan 213
27. An appellee can not cross-appeal against another appellee. Maricle v. Spiegel 223
28. Generally, a proper objection to the receipt of evidence is required to preserve for review any error in the overruling of a motion in limine. Maricle v. Spiegel 223
29. A defendant can not predicate error on the denial of a motion in limine when his objection to the evidence was sustained. Maricle v. Spiegel 223
30. The admission or rejection of photographs in evidence is largely within the discretion of the trial court. In the absence of a showing of an abuse of discretion, error may not be predicated upon such a ruling. Maricle v. Spiegel 223
31. A verdict will not be set aside unless it is against the weight of the evidence, or appears to have been the result of passion, prejudice, mistake, or disregard of the rules of evidence or the law. Maricle v. Spiegel 223
32. A jury verdict will not be disturbed on appeal unless it is clearly erroneous. Maricle v. Spiegel 223
Schroll v. Fulton 310
33. In the absence of some evidence of arbitrary behavior or bad faith, courts will not substitute their judgment for the necessarily discretionary judgment of a school or university as to a student's educational performance. State ex rel. Mercurio v. Board of Regents 251
34. Where factfindings under criteria in Neb. Rev. Stat. § 84-917(6)(e) (Reissue 1981) are involved, we review the decision of the District Court only to determine that it and the board have applied the proper criteria, and it is in this sense that we review de novo. Simonds v. Board of Examiners 259
35. The substantial evidence standard of review of decisions of administrative agencies requires the reviewing court to search the entire record to determine whether, on the basis of all the testimony and exhibits before the agency, it could fairly and reasonably find facts as it did. Simonds v. Board of Examiners 259
36. The court must accept the facts as set forth in the petition and may not notice or consider extrinsic matters in determining whether a pleading states a cause of action. Heinzman v. County of Hall 268

37. 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. Schroll v. Fulton 310
38. The findings of fact made by the District Court in an action under the Political Subdivisions Tort Claims Act will not be disturbed on appeal unless clearly wrong. Richards v. Douglas County 313
39. An action for the dissolution of a partnership and an accounting between partners is one in equity and is reviewed in this court de novo on the record. Bass v. Dalton 360
40. Imposed upon the Nebraska Supreme Court in such a case is the duty to reach an independent conclusion without reference to the findings of the District Court, bearing in mind and according respect and weight to the trial court's superior position as the original finder of fact. Bass v. Dalton 360
41. The Nebraska Supreme Court has authority to reduce a sentence when it is excessive and would result in a substantial miscarriage of justice. State v. Komor 376
42. Only a sentence which is clearly excessive is to be reduced by the Nebraska Supreme Court. State v. Komor 376
43. An action to construe a trust indenture will be reviewed in this court de novo on the record. In re Testamentary Trust of Criss 379
44. A party who objects to testimony on a particular subject may not later claim that it was prejudiced because it had itself foreclosed inquiry into that subject matter. In re Application of ATS Mobile Telephone 403
45. The determination by the Public Service Commission as to whether the granting or rejecting of an application for service is within the public interest is a matter peculiarly within its expertise and involves a breadth of judgment and policy determination that will not be disturbed by this court in the absence of a showing that the action of the commission was illegal or arbitrary, capricious, or unreasonable. In re Application of ATS Mobile Telephone 403
46. The striking of the balance between the competing interests of legitimate competition and the protection of the public interest as to the authorization of services regulated by the Public Service Commission are matters of legislative and administrative determination peculiarly resting in the judgment of the commission. The determination of the public interest is one that is peculiarly for the determination of the commission,

and if there is evidence to sustain the finding this court cannot intervene. In re Application of ATS Mobile Telephone 403

47. If the record supports a decision by the Public Service Commission that an application for service should not be granted because the area proposed for the service is presently receiving or within a reasonable time will receive reasonably adequate service and that granting the application will create a duplication of facilities and is not in the interest of the public as provided by Neb. Rev. Stat. § 75-604 (Reissue 1981), the mere fact that the commission adds to its findings that to grant the particular application will unnecessarily extend the monopoly of the applicant to another area is not a necessary finding to justify the denial of such application; and although it may be an ill-advised statement, and as such objectionable, it does not constitute reversible error under the circumstances. In re Application of ATS Mobile Telephone 403

48. The findings of the District Court under the State Tort Claims Act will not be disturbed on appeal unless clearly wrong. Catania v. University of Nebraska 418

49. Where there is a conflict in the evidence, but there is believable evidence to support the findings of the District Court in a claim of this nature, those findings will be affirmed. Catania v. University of Nebraska 418

50. An appeal from the disallowance of a claim against a city of the primary class is perfected by filing a notice of appeal and bond as provided in Neb. Rev. Stat. § 15-841 (Reissue 1977). Cole Investment Co. v. City of Lincoln 422

51. This court will not disturb the District Court finding that an individual is a mentally disordered sex offender presently untreatable unless it can be said that there was no evidence upon which such conclusions could be based and that such declaration was an abuse of discretion. State v. Sell 437

52. In actions for the modification of dissolution proceedings, it is the duty of this court to review de novo the determination of the District Court with regard to whether a change in circumstances has occurred which justified the modification of the original decree. Albers v. Albers 471

53. In an appeal from property tax valuations set by a board of equalization, the taxpayer has the burden of proving that the value of his property has been arbitrarily or unlawfully fixed by the board of equalization in an amount greater than its actual value, or that its

value has not been fairly and proportionately equalized with all other property, resulting in a discriminatory, unjust, and unfair assessment. Beynon v. Board of Equalization[2] 488
54. All conflicts in the evidence and questions of the credibility of witnesses are for the jury to resolve; a jury verdict may not be set aside unless it is clearly wrong. Flakus v. Schug 491
55. When a party has sustained the burden and expense of trial and has succeeded in securing the decision of a jury on the facts in issue, he has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured. Flakus v. Schug 491
56. Consideration of assignments of error in this court is limited to those discussed in the brief. Flakus v. Schug 491
State v. Lamb 498
57. Factfindings by the trial court on a motion to suppress will not be overturned on appeal unless clearly wrong. State v. Lamb 498
58. A determination by the trial court that a statement was made voluntarily will not be disturbed on appeal unless clearly wrong. State v. Lamb 498
59. A conviction will not be reversed because of the admission of evidence not prejudicial to the defendant. State v. Lamb 498
60. The action of the board under Neb. Rev. Stat. § 79-403 (Reissue 1981) is an exercise of a quasi-judicial power, equitable in character, and upon appeal from the District Court to this court the cause is triable de novo as in any other equitable action. In re Freeholder Petition 532
61. The determination of factual issues in a declaratory judgment action, which would otherwise be an action at law, will be treated in the same manner as if a jury had been waived, and hence a trial court's findings have the effect of a jury verdict and will not be set aside unless clearly wrong. Roth v. School Dist. of Scottsbluff 545
Quinn v. Godfather's Investments 665
62. The computing of damages and the finding that a teacher has properly mitigated damages under Neb. Rev. Stat. § 79-1254.07 (Reissue 1981) are factual issues, and the findings of the trial court in this regard will not be set aside unless clearly wrong. Roth v. School Dist. of Scottsbluff 545
63. Failure to file a cross-appeal precludes consideration in this court of errors claimed by appellee against appellant. Lord v. Lord 557

64. Assignments of error requiring an examination of the evidence are not available on appeal in the absence of a bill of exceptions, the bill of exceptions being the only vehicle for bringing evidence to this court. This remains so even though certain evidence has been physically filed in the office of the clerk of the trial court. Snyder v. Nelson 605
65. This court will not interfere on appeal with a final order made by the District Court in a mental health commitment proceeding unless the court can say as a matter of law that the order is not supported by clear and convincing proof. State v. Simants 638
66. Delaying the right of appeal beyond a commitment for evaluation under Neb. Rev. Stat. § 83-1,105(3) (Reissue 1981) and until a final sentence is pronounced does not violate article I, § 23, of the Nebraska Constitution, which grants to everyone in a felony case the right to appeal to the Supreme Court. Kaba v. Fox 656
67. The general rule is that the admissiblity of physical evidence rests in the discretion of the trial court, and the determination of admissibility will not be overturned unless there is a clear abuse of discretion. State v. Manchester 670
68. Opening and closing statements must appear in the bill of exceptions before alleged errors concerning them can be reviewed. State v. Manchester 670
69. An order denying probation and a sentence imposed within statutorily prescribed limits will not be disturbed on appeal unless there has been an abuse of discretion on the part of the sentencing judge. State v. Patterson 686
70. Error may not be predicated upon a ruling which excludes evidence unless a substantial right of a party is affected. State v. Sims 708
71. It is uniform and proper practice in this state that where specific acts of negligence are charged and supported by the evidence, the trial court instructs as to specific acts so alleged and supported. The failure to do so, even though not requested, is error. Enyeart v. Swartz 732
72. Ordinarily, a failure to object to instructions after they have been submitted to counsel for review will preclude raising an objection thereafter. Enyeart v. Swartz 732
73. Noncompliance by counsel with the requirement that he object to a proposed jury instruction when it is submitted to him does not bar this court from opting to consider plain errors in a record indicative of a probable miscarriage of justice. Enyeart v. Swartz 732

74. An order vacating a default judgment is an appealable order. Vacca v. DeJardine 736
75. Factual support in the record in the trial court as to "good cause" for failure to comply with statutory child placement preference directives are necessary for appropriate appellate review. In re Interest of Bird Head 741
76. 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 persuasion 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. Farmers Co-Op Assn. v. Boone County 763
77. The review of a collateral attack upon a special assessment is a proceeding in equity, which this court reviews de novo on the record. Reiser v. Hartzler 802
78. When a court considers a sentence for a convicted offender, it shall, among other things, consider the offender's delinquency and criminal history. State v. Christensen 820
79. The admission of irrelevant evidence is not reversible error unless there is prejudice to the defendant. State v. Bromwich 827
80. It is well settled that the judgment of the District Court is presumed correct, and the party assailing same has the burden of pointing out specifically the rulings of which he complains and the mistakes made by the court. State v. Bromwich 827
81. This court reviews cases regarding unemployment benefits de novo on the record and will retry all issues of fact and reach an independent conclusion. Stuart v. Omaha Porkers 838
82. The determination of whether there has been an abuse of discretion by the trial court in failing to set aside a default judgment must be made in light of the facts and circumstances of each case. Lincoln Welding Supply v. Inhalation Plastics 862
83. Among the factors to be considered in determining whether there has been an abuse of discretion in refusing to set aside a default judgment are those of the promptness of the motion to vacate, the negligence or want of diligence of the party moving to vacate, and the avoidance of unnecessary delays and frivolous proceed-

ings in the administration of justice. Lincoln Welding Supply v. Inhalation Plastics 862
84. Generally, in the absence of an offer of proof no error may be predicated upon the court's ruling in excluding testimony. Morris v. Laaker 868

Appeal Bonds.
1. Where an appeal bond is given within the proper time, even if defective, the court has obtained jurisdiction, and the proper procedure is for the adverse party to move to compel the appellant to give a proper bond in an amount and conditioned as required by law. Stigge v. Graves 847
2. If the appellant fails to comply with an order requiring that a new or amended bond be furnished, the appeal may be dismissed. Stigge v. Graves 847
3. The filing of an appeal bond is a "proceeding" as used in Neb. Rev. Stat. §§ 25-852 and 25-853 (Reissue 1979), and the right to amend an appeal bond is within the purview of those sections. Stigge v. Graves 847

Arson.
1. Under Neb. Rev. Stat. § 28-502 (Reissue 1979), arson in the first degree does not require proof that some part of the building was ignited. It is sufficient if the evidence shows there was some damage to the building. State v. Hohnstein 296
2. The fact that a building was constructed of nonflammable materials does not prevent proof of first degree arson under Neb. Rev. Stat. § 28-502 (Reissue 1979), since it is only necessary to show that some damage to the building resulted from the fire. State v. Hohnstein 296
3. In order to establish the corpus delicti in an arson case, it is necessary that the evidence disclose the burning of the property as charged and that the burning was caused by the willful act of some person criminally responsible. State v. Workman 479

Assessments.
1. The review in this court of the assessment of railroad operating property made by the State Board of Equalization and Assessment is de novo on the record. In re Assessment of OL&B Ry. Co. 71
2. The burden of showing the assessment was improper is on the complaining party. In re Assessment of OL&B Ry. Co. 71

Banks and Banking.

1. A check or other draft does not of itself operate as an assignment of any funds in the hands of the drawee available for its payment, and the drawee is not liable on the instrument until he accepts it. Neb. U.C.C. § 3-409(1) (Reissue 1980). Galyen Petroleum Co. v. Hixson 683
2. A check, of itself, and in the absence of special circumstances, is neither a legal nor an equitable assignment or appropriation of a corresponding amount of the drawer's funds in the hands of the drawee, and it gives the holder of the check no right of action against the drawee, even though the drawer has on deposit sufficient funds to pay it. Galyen Petroleum Co. v. Hixson 683

Blood, Breath, and Urine Tests.

1. Neb. Rev. Stat. § 39-669.09 (Reissue 1978) does not require the officer to inform the person to be tested of his privilege to request an independent test. State v. Miller 274
2. The use of an anticoagulant as a preservative for a blood sample is not a foundational requirement for the admission of evidence relating to test results, and the failure to use an anticoagulant goes only to the weight and credibility of the evidence. State v. Miller 274

Breach of Contract.

An insurer is precluded from asserting a forfeiture where, after acquiring knowledge of the facts constituting a breach of condition, it has retained the unearned portion of the premium or has failed to return or tender it back with reasonable promptness, especially where the nature of the breach or ground for forfeiture is of such character as to render the policy void from its inception. Dairyland Ins. Co. v. Kammerer 108

Brokers.

1. Where a broker and the owner of a business enter into a brokerage agreement which contains an extension clause entitling the broker to the payment of a commission in the event a sale occurs after termination of the brokerage agreement, but during the extension period, to any prospect solicited by the broker during the contract period, the broker must show some minimal causal connection between the efforts of the broker and the ultimate sale before the broker may receive the compensation. Chapman Co. v. Western Neb. Broadcasting 322

2. The measure of damages for the loss caused by the negligence of the broker is the amount that would have been due under the policy if it had been obtained by the broker. Nebraska Truck Serv. v. U.S. Fire Ins. Co. ... 755
3. Under the provisions of Neb. Rev. Stat. § 81-885.24(14) (Reissue 1981), a real estate broker or salesperson will be considered to know of a prior listing contract if he has actual knowledge of it or if he had actual knowledge of facts that would cause a reasonably prudent person to believe such a contract existed. Hancock v. State ex rel. Real Estate Comm. 807
4. A finding that a real estate salesperson "should have known that there was a possibility" of a prior listing contract does not meet the standard of knowledge required by Neb. Rev. Stat. § 81-885.24(14) (Reissue 1981). Hancock v. State ex rel. Real Estate Comm. 807

Case Disapproved.

To the extent that *Hawkins Constr. Co. v. Matthews Co., Inc.*, 190 Neb. 546, 209 N.W.2d 643 (1973), held that strict liability in tort may not be used to recover for physical harm to property only, it is disapproved. National Crane Corp. v. Ohio Steel Tube Co. 782

Case Overruled.

1. To the extent that the holding in *A. Borchman Sons v. Carpenter*, 166 Neb. 322, 89 N.W.2d 123 (1958), is understood to provide that both members of nonstriking unions and nonunion employees who may ultimately benefit by reason of a strike called by another union are disqualified from receiving unemployment compensation under the provision of Neb. Rev. Stat. § 48-628(d) (Reissue 1978), even though they are not directly involved in the work stoppage, it is overruled. Gilmore Constr. Co. v. Miller 133
2. At an enhancement proceeding, a defendant's objection to the reception in evidence of a transcript of a former conviction which fails to show on its face that counsel was afforded or the right waived does not constitute a collateral attack on such prior conviction. To the extent that *State v. Orosco*, 199 Neb. 532, 260 N.W.2d 303 (1977), and *State v. Voight*, 206 Neb. 829, 295 N.W.2d 112 (1980), conflict with this holding, they are overruled. State v. Smith 446

Child Custody.

1. The best interests of the children are the primary con-

cern in the determination of custody and visitation matters. Caynor v. Caynor 143
2. While it is true that a parent has a natural right to the custody of his child, the court is not bound as a matter of law to restore a child to a parent under any and all circumstances. The welfare of a child of tender years is paramount to the wishes of the parent where it has formed a natural attachment for persons who have long been in the relation of parents with the parents' approval and consent. Nye v. Nye 364
3. It may be said that a natural parent, who by reason of past conduct and defaults has made it necessary to place a minor child in a situation where such child has formed a natural attachment for persons standing in a parental relationship, has approved of and consented to such relationship and has forfeited his or her natural rights to custody. Nye v. Nye 364
4. Factual support in the record in the trial court as to "good cause" for failure to comply with statutory child placement preference directives are necessary for appropriate appellate review. In re Interest of Bird Head 741

Child Support.

This court does not have authority to reduce past due installments of child support. This is not to say, however, that it may not find in a proper case that a party is estopped from collecting installments accruing after some affirmative action which would ordinarily terminate future installments. Scully v. Scully 857

Circumstantial Evidence.

1. One accused of a crime may be convicted on the basis of circumstantial evidence if, taken as a whole, the evidence established guilt beyond a reasonable doubt. State v. Workman 479
2. One accused of a crime may be convicted on the basis of circumstantial evidence if, taken as a whole, the evidence establishes guilt beyond a reasonable doubt. The State is not required to disprove every hypothesis but that of guilt. State v. Patterson 686

Civil Rights.

1. An appeal to the District Court from an order or decision of the human rights commission of a city of the primary class in an employment discrimination case is heard as in equity and without a jury. American Stores v. Jordan 213
2. To sustain a charge of discrimination in employment

where there is no charge of a universal discriminatory practice or system, complainant, in the record, must establish that the employer intentionally engaged in acts that discriminated against complainant in violation of the statutory prohibitions. American Stores v. Jordan 213

Claims.

An appeal from the disallowance of a claim against a city of the primary class is perfected by filing a notice of appeal and bond as provided in Neb. Rev. Stat. § 15-841 (Reissue 1977). Cole Investment Co. v. City of Lincoln 422

Class Actions.

A petition which contains no facts from which it can be concluded that it is impracticable to bring all of the parties before the court fails to state a necessary predicate for a class action. Roadrunner Development v. Sims 649

Collateral Attack.

1. A judgment which is not void is not subject to collateral attack, but a void judgment may be attacked at any time in any proceeding. Lammers Land & Cattle Co. v. Hans 243
2. A sale of real estate to satisfy a dormant judgment is, as to the judgment debtor, voidable only and cannot be attacked in collateral proceedings. Lammers Land & Cattle Co. v. Hans 243
3. At an enhancement proceeding, a defendant's objection to the reception in evidence of a transcript of a former conviction which fails to show on its face that counsel was afforded or the right waived does not constitute a collateral attack on such prior conviction. To the extent that *State v. Orosco*, 199 Neb. 532, 260 N.W.2d 303 (1977), and *State v. Voight*, 206 Neb. 829, 295 N.W.2d 112 (1980), conflict with this holding, they are overruled. State v. Smith 446
4. Where the physical facts are such that real property was not and could not be specially benefited by an improvement project, the assessment levied to pay for such improvement may be held to be arbitrary, constructively fraudulent, and therefore void and subject to collateral attack. Reiser v. Hartzler 802
5. To sustain a collateral attack on a special assessment, it is necessary that the evidence support a determination that in fact the property in question was not and

could not be specially benefited by the particular improvement. Reiser v. Hartzler 802
6. Mere excessiveness of a special assessment may not be corrected in a collateral attack upon the assessment. Reiser v. Hartzler 802

Collateral Estoppel.
1. The principle of collateral estoppel may bar a party from raising a defense he might otherwise have. Lammers Land & Cattle Co. v. Hans 243
2. It is now generally held that collateral estoppel may be applied if the identical issue was decided in a prior action, there was a judgment on the merits which was final, the party against whom the rule is to be applied was a party or in privity with a party to the prior action, and there was an opportunity to fully and fairly litigate the issue in the prior action. Cedars Corp. v. Sun Valley Development Co. 622

Colleges and Universities.
In the absence of some evidence of arbitrary behavior or bad faith, courts will not substitute their judgment for the necessarily discretionary judgment of a school or university as to a student's educational performance. State ex rel. Mercurio v. Board of Regents 251

Comprehensive Development Plans.
A comprehensive development plan is merely a policy statement that may be implemented by a zoning resolution. It is the zoning resolution which has the force of law. If there is a conflict between a comprehensive plan and a zoning ordinance, the zoning ordinance contains the controlling provisions when questions of a citizen's property rights are at issue. Omaha Fish & Wildlife v. Community Refuse 234

Confessions.
1. Voluntary statements made while an individual is in custody but which are not the product of police interrogation are admissible at trial. State v. Parsons 349
2. Generally, statements made in a conversation initiated by the accused are not the results of interrogation and are admissible. State v. Lamb 498
3. Intoxication is not conclusive on the issue of the voluntariness of a statement. State v. Lamb 498
4. A determination by the trial court that a statement was made voluntarily will not be disturbed on appeal unless clearly wrong. State v. Lamb 498

5. Spontaneous statements made by the defendant, even after counsel has been requested, if not induced by the police or if made during conversations not initiated by the officers, are not "interrogation." The defendant must be subjected to "interrogation" in order for the right to counsel to come into play. State v. Lamb 498

Conspiracy.

1. In determining whether a conspiratorial agreement exists, the defendant's conduct subsequent to the agreement and the circumstances surrounding the agreement may be considered by the jury. State v. John ... 76
2. The function of the overt act in a charge of conspiracy is simply to manifest that the conspiracy is still at work. State v. John 76
3. Under the provisions of Neb. Rev. Stat. § 28-202 (Reissue 1979), a person may be convicted of a conspiracy to solicit the commission of murder even though the person with whom he conspired feigned agreement and at no time intended to go through with the plan. State v. John 76
4. Under the provisions of Neb. Rev. Stat. § 28-202 (Reissue 1979), an overt act done is an outward act done in pursuance of the conspiracy and manifests an intent or design looking toward the accomplishment of the crime. It need not of itself have a tendency to accomplish the object of the conspiracy and need not be an act which is criminal in itself. State v. John 76

Constitutional Law.

1. Ordinances and statutes are presumed to be constitutional, and their unconstitutionality must be clearly established. State v. Davison 173
2. A classification having some reasonable basis does not offend against the equal protection clause of the fourteenth amendment merely because it is not made with mathematical nicety or because in practice it results in some inequality. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. State v. Davison 173
3. Under the U.S. Constitution, one must first establish a property interest in a position in order to establish procedural due process rights in a dismissal from employment. Heinzman v. County of Hall 268
4. The establishment of a property interest in employment requires a legitimate claim of entitlement to it that stems from an independent source such as state

law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. Heinzman v. County of Hall 268
5. There is no constitutional prohibition against the assessment of a governmental subdivision for special benefits conferred upon its realty as the result of improvements created by an appropriate governing authority. Easley v. City of Lincoln 450
6. A statute proscribing otherwise free speech activity which "harasses" others, without setting forth standards comprising such harassment, is constitutionally infirm as vague because it impermissibly delegates to others, indiscriminately, the resolution, on an ad hoc and subjective basis, of the meaning of such term. Fowler v. Neb. Account. and Disclosure Comm. 462
7. The constitutional requirement that statutory language must be reasonably certain or be held void for vagueness is satisfied by the use of ordinary terms which find adequate interpretation in common usage and understanding. Roth v. School Dist. of Scottsbluff 545
8. A person to whom a statute may be constitutionally applied will not be heard to challenge the statute on the ground that it might conceivably be applied unconstitutionally to others in situations not before the court. State v. Sprague 581
9. The general rule regarding prosecutorial discretion in law enforcement is that, unless there is proof that a particular prosecution was motivated by an unjustifiable standard based, for example, on race or religion, the use of such discretion does not violate constitutional protections. State v. Sprague 581
10. The Legislature may authorize an agency to make rules and regulations for the operation and enforcement of a law, such to be limited to rules within the express legislative purpose of the act and to be administered in accordance with standards expressed in the act. State v. Sprague 581
11. No unconstitutional delegation of authority occurs when the Legislature defines a crime and sets a penalty therefor, but delegates the implementation of details to an administrative agency. State v. Sprague 581
12. The manner and method of enforcing a law may be delegated, since of necessity this must be left to the reasonable discretion of administrative officers. State v. Sprague 581
13. That a statute may discriminate in favor of a certain class does not render it arbitrary if the discrimination

is founded upon a reasonable distinction or difference in state policy. State v. Sprague 581
14. It has long been settled that a classification, though discriminatory, is not arbitrary nor violative of the equal protection clause of the fourteenth amendment if any state of facts reasonably can be conceived that would sustain it. State v. Sprague 581
15. Equal protection does not require that all persons be treated identically. It only requires that a distinction drawn by the Legislature between individuals has some relevance to the purpose for which the classification is made. State v. Simants 638
16. There is a rational basis for treating mentally ill dangerous persons who have been acquitted of a crime by reason of insanity differently than other mentally ill dangerous persons who have not. State v. Simants 638
17. Neb. Rev. Stat. §§ 29-3701 et seq. (Cum. Supp. 1982), insofar as they apply only to persons acquitted of crime by reason of insanity, are constitutional and do not violate the constitutional right of equal protection of the laws. State v. Simants 638
18. Delaying the right of appeal beyond a commitment for evaluation under Neb. Rev. Stat. § 83-1,105(3) (Reissue 1981) and until a final sentence is pronounced does not violate article I, § 23, of the Nebraska Constitution, which grants to everyone in a felony case the right to appeal to the Supreme Court. Kaba v. Fox 656
19. A delay in sentencing of 90 days pending a court-imposed evaluation under Neb. Rev. Stat. § 83-1,105(3) (Reissue 1981) is not such a delay as to be violative of the sixth amendment right to a speedy trial. Kaba v. Fox 656
20. The accused may waive his right of confrontation, and the waiver of this right may be accomplished by the accused's counsel as a matter of trial tactics or strategy. State v. Bromwich 827
21. Counsel in a criminal case may waive his client's fourteenth amendment right of the U.S. Constitution of confrontation by stipulating to the admission of evidence as a legitimate trial tactic. State v. Bromwich 827

Construction Contracts.

In general, where a construction contractor follows plans and specifications supplied by the owner which later prove to be defective or insufficient, he is not responsible to the owner for loss or damage resulting therefrom as a consequence of the defectiveness or insufficiency

of such plans and specifications. Langel Chevrolet-Cadillac v. Midwest Bridge 283

Contempt.

In a contempt proceeding for disobedience of an order, language of duty in the order is not expandable beyond a reasonable interpretation in light of the purposes for which the order was entered. General Motors Acceptance Corp. v. Fritz 760

Contracts.

1. Where it appears that the vendor is unable to make a complete or perfect title, or that there is a deficiency in the quantity of land contracted to be sold, the general rule is that the vendee, if he so elects, is entitled to have the contract specifically performed to the extent of the vendor's ability to comply therewith and at the same time have a just abatement out of the purchase price for the deficiency of title, quantity, or quality of the estate to compensate for the vendor's failure to perform the contract in full. The measure of abatement should be such portion of the purchase price as the relative value of the land lost bears to the purchase price of the whole tract. Kuhlman v. Grimminger 64
2. Contracts of insurance, like other contracts, are to be construed according to the meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms will be taken and understood in plain, ordinary, and popular sense. Johnsen v. Harper 145
3. A party seeking specific performance of an oral contract upon the basis of part performance must prove an oral contract, the terms of which are clear, satisfactory, and unequivocal, and that the acts done in part performance were referable solely to the contract sought to be enforced, and not such as might be referable to some other or different contract, and further that nonperformance by the other party would amount to a fraud upon the party seeking specific performance. Yates v. Grosh 164
4. A written contract may be waived in whole or in part, either directly or inferentially, and the waiver may be proved by express declarations manifesting the intent not to claim the advantage, or by so neglecting and failing to act as to induce the belief that it was the intention to waive. Pearce v. ELIC Corp. 193
5. Conditions precedent in a contract may be waived. Pearce v. ELIC Corp. 193
6. A provision in a written contract that a waiver of the

conditions and terms of the agreement must be in writing may be waived by acts or conduct. Pearce v. ELIC Corp. 193

7. The general rule is that the assertion of the invalidity of a contract is nullified by the subsequent acceptance of benefits growing out of the contract claimed to have been breached. Pearce v. ELIC Corp. 193

8. Where a contracting party, with knowledge of a breach by the other party, receives money in the performance of the contract, he will be held to have waived the breach. Pearce v. ELIC Corp. 193

9. A written executory contract may be modified by the parties thereto at any time after its execution and before a breach has occurred, without any new consideration; and the terms of a written executory contract may be changed by a subsequent parol agreement before a breach thereof. Pearce v. ELIC Corp. 193

10. The parol evidence rule relates only to agreements made prior to or contemporaneous with the written agreement and does not apply to parol agreements made after a written agreement. Pearce v. ELIC Corp. 193

11. Generally, control, or the right of control, is the chief criterion in determining whether someone acts as an independent contractor. Maricle v. Spiegel 223

12. Words used in a contract must be given their plain and ordinary meaning as ordinary, average, or reasonable persons would understand them. Bass v. Dalton 360

13. A contract must be viewed as a whole. Bass v. Dalton 360

14. Courts are not free to interpret contracts which are couched in clear and unambiguous language; parties are bound by the terms of a contract even though their intent may be different from that expressed by the agreement. Bass v. Dalton 360

15. The essential elements required to sustain an action for damages as the result of fraud are that a representation was made as a statement of fact, which was untrue and known to be untrue by the party making it, or else was made recklessly; that the misrepresentation was made with the intent to deceive and for the purpose of inducing the other party to act upon it; and that such party did, in fact, rely upon the misrepresentation and was induced thereby to act to his injury or damage. Flakus v. Schug 491

16. A disclaimer clause is relevant in determining whether a claimant relied on the false representation disclaimed in the clause; however, the disclaimer is ineffective to preclude the trier of fact from considering

whether fraud induced formation of the bargain. Flakus v. Schug 491
17. Generally, where there has been a misrepresentation in the sale of real estate, the measure of damages is the cost of placing the property conveyed in the condition represented, not exceeding the difference in value of the property conveyed and the value of the property if it had been as represented. Flakus v. Schug 491
18. If a construction contract is substantially performed, the damage which the owner suffers because of defective workmanship or unsuitable materials used is measured by the reasonable cost of remedying the defects. Nekuda v. Vincent 527
19. If 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 its value as constructed and what its value would have been if built according to the contract. Nekuda v. Vincent 527
20. Parol evidence is not admissible to add to, contradict, or vary the terms of a written contract. Silverman v. Arbor Street Partnership 628
21. Where negotiations between the parties result in an agreement which is reduced to writing, the written agreement is the only competent evidence of the contract in the absence of fraud, mistake, or ambiguity. Silverman v. Arbor Street Partnership 628
22. The "estimated cost" of a building is its reasonable cost, erected in accordance with plans and specifications, and is not necessarily the amount agreed upon by the parties nor an offer to be accepted; it does not imply absolute calculation, but precludes accuracy. Ruzicka v. Petersen 642
23. Where services are furnished to a party and knowingly accepted by him, the law implies a promise to pay their reasonable value. Ruzicka v. Petersen 642
24. A provision of a contract is ambiguous when, considered with other pertinent provisions as a whole, it is capable of being understood in more senses than one. Quinn v. Godfather's Investments 665
25. In interpreting a written contract, the meaning of which is in doubt and dispute, evidence of prior or contemporaneous negotiations or understandings is admissible to discover the meaning which each party had reason to know would be given to the words by the other party. Quinn v. Godfather's Investments 665
26. If it can be plainly seen from all the provisions of the instrument taken together that the obligation in ques-

tion was within the contemplation of the parties when making their contracts or is necessary to carry their intention into effect, the law will imply the obligation and enforce it. Quinn v. Godfather's Investments 665

27. The general measure of damages for a breach of contract to convey land is the market value at the time of breach less the contract price. Kerrey Constr. Co. v. Hunt 776

28. Where it appears that special damages have also arisen from the breach, the damages recoverable are such as may fairly and reasonably be supposed to have been in the contemplation of the parties at the time the contract was made. Kerrey Constr. Co. v. Hunt 776

29. Under the provisions of Neb. Rev. Stat. § 81-885.24(14) (Reissue 1981), a real estate broker or salesperson will be considered to know of a prior listing contract if he has actual knowledge of it or if he had actual knowledge of facts that would cause a reasonably prudent person to believe such a contract existed. Hancock v. State ex rel. Real Estate Comm. 807

30. A finding that a real estate salesperson "should have known that there was a possibility" of a prior listing contract does not meet the standard of knowledge required by Neb. Rev. Stat. § 81-885.24(14) (Reissue 1981). Hancock v. State ex rel. Real Estate Comm. 807

Conveyances.

An action in the form of a creditor's bill or to set aside a conveyance in fraud of creditors cannot generally be founded upon a dormant judgment. Lammers Land & Cattle Co. v. Hans 243

Convictions.

A conviction will not be reversed because of the admission of evidence not prejudicial to the defendant. State v. Lamb 498

Corporations.

1. Under the venue statutes, a nonresident defendant corporation "may be found" in any county within the state in which proper service can be had upon its agent. Mittelstadt v. Rouzer 178

2. Jurisdiction over a foreign corporation may be exercised by consent of such corporation. Mittelstadt v. Rouzer 178

3. By designating an agent upon whom process may be served within this state, a defendant has consented to

the jurisdiction in personam by the proper court. Mittelstadt v. Rouzer 178

4. The validity of service under the Motor Carrier Act, 49 U.S.C. § 321(c) (1976) (now 49 U.S.C. § 10330(b) (Supp. IV 1980)), is not limited to causes of action arising out of commerce transacted by a foreign corporation within the state because the act deals with jurisdiction of the person. Mittelstadt v. Rouzer 178
5. By appointing a resident agent for service as required by the Motor Carrier Act, 49 U.S.C. § 321(c) (1976) (now 49 U.S.C. § 10330(b) (Supp. IV 1980)), a nonresident corporation has consented to jurisdiction within this state at least as to any cause of action arising out of its activities as a motor carrier in interstate commerce. Mittelstadt v. Rouzer 178
6. Generally, "book value" of the stock in a corporation means the figure obtained by dividing the difference between assets and liabilities by the number of outstanding shares of stock. Smith v. Fettin Roofing Co. . 184
7. Generally, there is a presumption that the acts of corporate officers pertaining to ordinary business transactions are authorized by the corporation. This presumption does not apply when an officer diverts or pledges corporate property as security for a personal debt. Val-U Constr. Co. v. Contractors, Inc. 291
8. When a corporate officer acts outside the scope of ordinary business, no presumption of authority arises and the other party to the transaction must make an inquiry into the officer's authority. Val-U Constr. Co. v. Contractors, Inc. 291

Costs.

1. Where each party obtains judgment against the other, each party should pay the costs of the other. Langel Chevrolet-Cadillac v. Midwest Bridge 283
2. The allowance of a guardian ad litem's fees and costs is discretionary and depends upon a consideration of all the facts and circumstances. Nye v. Nye 364
3. Ordinarily, the successful party is entitled to an award of costs, and it necessarily follows in such cases that payment of the same will be taxed to the unsuccessful party. Nye v. Nye 364

Courts.

1. Courts of general jurisdiction will not take judicial notice of municipal ordinances not present in the record, nor will the Supreme Court. Andrews v. City of Fremont 148

2. Courts will not review or inquire into the legislative acts of municipal boards concerning matters within their power as to whether they acted expediently, wisely, or necessarily. Such are matters of pure legislative function, and not of judicial concern. Morrow v. City of Ogallala 414

Criminal Attempt.

1. Proof of the actual commission of an offense is sufficient to sustain a conviction for attempt. State v. Hohnstein 296
2. Attempted murder requires proof of conduct amounting to a substantial step toward commission of the crime and which is strongly corroborative of the necessary criminal intent. State v. Manchester 670
3. Solicitation of an innocent agent to kill the victim may be proof of conduct amounting to a substantial step toward commission of attempted murder. State v. Manchester 670
4. Proof that the defendant made plans for the murder, solicited a killer, discussed the contract price and set the money aside in his billfold, arranged for a weapon, and showed the killer the victim, his residence, and his place of work is sufficient evidence of conduct amounting to a substantial step toward commission of attempted murder in the first degree, and will support a finding of guilty. State v. Manchester 670
5. Abandonment is not a defense to criminal attempt in Nebraska. State v. Manchester 670
6. The value of goods stolen under Neb. Rev. Stat. §§ 28-510 et seq. (Reissue 1979) is a material or essential element of the crime of attempted theft in order to establish the gradation of the offense, and it must be proven beyond a reasonable doubt. State v. Redding .. 887
7. If the uncontroverted evidence supports a finding beyond a reasonable doubt of the attempted theft of but one item of property consisting of cash of a stated amount, the fact that a jury returns a verdict of guilty based upon instructions which failed to include specific value as a material element of the crime is harmless error. State v. Redding 887

Criminal Law.

1. The right of an indigent defendant to have counsel does not give him the right to be represented by counsel of his own choosing, and mere distrust of, or dissatisfaction with, appointed counsel is not enough to secure the appointment of substitute counsel. State v. Jones 1

2. The standard for determining whether or not counsel for defendant in a criminal prosecution has provided adequate representation requires that trial counsel perform at least as well as a lawyer with ordinary training and skill in the criminal law in his area, and that he conscientiously protect the interests of his client. State v. Jones 1
3. In order to be constitutionally adequate, the immunity granted by a state to a witness in a criminal case must afford protection to the witness extending to criminal proceedings by other states, or by the United States. State v. Jones 1
4. Constitutionally adequate statutory immunity must leave the witness and the federal government, or another state government, in substantially the same position as if the witness had claimed his constitutional privilege against self-incrimination, in the absence of a state grant of immunity. State v. Jones 1
5. The true test of the constitutionality of an immunity statute is whether the result under such a statute is the same as if the witness retained his fifth amendment right and did not testify. State v. Jones 1
6. In reviewing criminal cases this court will not set aside the judgment of the trial court if there is sufficient evidence, taking the view most favorable to the State, to support the judgment. State v. Schmidt 126
State v. Hellbusch 894
7. A prison inmate has no absolute constitutional right to be released from prison so that he can be present at a hearing in a civil action. Caynor v. Caynor 143
8. In the absence of a statute there is no authority requiring the appointment of counsel to represent an indigent prison inmate in a private civil matter. Caynor v. Caynor 143
9. The owner of chattels may testify as to their value in a criminal case. State v. Holland 170
10. In a criminal prosecution any testimony, otherwise competent, which tends to dispute the testimony offered on behalf of the accused as to a material fact is proper rebuttal testimony. State v. Miller 274
11. A prisoner serving an Iowa sentence who is transferred to Nebraska pursuant to the Interstate Corrections Compact remains subject to the jurisdiction of Iowa. Falkner v. Neb. Board of Parole 474
12. A Nebraska parole violator who is serving an Iowa sentence imposed for a subsequent offense does not recommence serving his Nebraska sentence until he has been released from custody by Iowa and arrested for the

custody of the Nebraska Board of Parole. Falkner v. Neb. Board of Parole 474
13. To sustain a conviction for a crime, the corpus delicti must be proved beyond a reasonable doubt. State v. Workman 479
14. The test of responsibility for crime is the defendant's capacity to understand the nature of the act alleged to be criminal and the ability to distinguish between right and wrong with respect to the act. State v. Lamb 498
15. Insanity as a defense must be shown to exist at the time of the offense. State v. Lamb 498
16. The fact that a defendant had some form of mental illness or defect does not by itself establish lack of responsibility. State v. Lamb 498
17. Evidence offered by one defendant in a joint trial, if competent, is evidence against other persons charged in the same information. State v. Hilpert 564
18. Where the requisite elements of a crime are committed in different jurisdictions, if an essential element of the crime is committed in this state, jurisdiction to prosecute is present. State v. Hilpert 564
State v. Manchester 670
19. Delaying the right of appeal beyond a commitment for evaluation under Neb. Rev. Stat. § 83-1,105(3) (Reissue 1981) and until a final sentence is pronounced does not violate article I, § 23, of the Nebraska Constitution, which grants to everyone in a felony case the right to appeal to the Supreme Court. Kaba v. Fox 656
20. A delay in sentencing of 90 days pending a court-imposed evaluation under Neb. Rev. Stat. § 83-1,105(3) (Reissue 1981) is not such a delay as to be violative of the sixth amendment right to a speedy trial. Kaba v. Fox 656
21. Absent bad faith and prejudice to the defendant, the action of the trial court with regard to alleged misconduct of the prosecutor will not be deemed an abuse of discretion. State v. Manchester 670
22. Posthypnotic testimony of a victim which relates to matters which such victim was able to recall and relate prior to the hypnosis and as to which there is sufficient reliable recorded evidence to satisfy the court that such facts were known and related by the victim prior to hypnosis is admissible at trial. State v. Levering 715
23. Direct evidence obtained by reason of hypnosis is inadmissible per se. State v. Patterson 686
24. The accused may waive his right of confrontation, and the waiver of this right may be accomplished by the ac-

cused's counsel as a matter of trial tactics or strategy. State v. Bromwich 827
25. Counsel in a criminal case may waive his client's fourteenth amendment right of the U.S. Constitution of confrontation by stipulating to the admission of evidence as a legitimate trial tactic. State v. Bromwich 827
26. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. State v. Bromwich 827

Damages.
1. Failure to plead mitigation of damages waives the defense. Maricle v. Spiegel 223
2. In general, where a construction contractor follows plans and specifications supplied by the owner which later prove to be defective or insufficient, he is not responsible to the owner for loss or damage resulting therefrom as a consequence of the defectiveness or insufficiency of such plans and specifications. Langel Chevrolet-Cadillac v. Midwest Bridge 283
3. Generally, where there has been a misrepresentation in the sale of real estate, the measure of damages is the cost of placing the property conveyed in the condition represented, not exceeding the difference in value of the property conveyed and the value of the property if it had been as represented. Flakus v. Schug 491
4. If a construction contract is substantially performed, the damage which the owner suffers because of defective workmanship or unsuitable materials used is measured by the reasonable cost of remedying the defects. Nekuda v. Vincent 527
5. If 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 its value as constructed and what its value would have been if built according to the contract. Nekuda v. Vincent 527
6. The computing of damages and the finding that a teacher has properly mitigated damages under Neb. Rev. Stat. § 79-1254.07 (Reissue 1981) are factual issues, and the findings of the trial court in this regard will not be set aside unless clearly wrong. Roth v. School Dist. of Scottsbluff 545
7. It is the duty of the District Court to refrain from sub-

mitting to a jury the issue of damages when the evidence is such that it cannot determine such issue except by indulging in speculation and conjecture. Raskin v. Seldin Dev. & Management Co. 729

8. The measure of damages for the loss caused by the negligence of the broker is the amount that would have been due under the policy if it had been obtained by the broker. Nebraska Truck Serv. v. U.S. Fire Ins. Co. ... 755

9. Damages, like any other element of plaintiff's cause of action, must be pled and proved, and the burden is on the plaintiff to offer evidence sufficient to prove plaintiff's alleged damages. Nebraska Truck Serv. v. U.S. Fire Ins. Co. 755

10. It is fundamental that the plaintiff's burden to prove the nature and amount of damages cannot be sustained by evidence which is speculative and conjectural. Nebraska Truck Serv. v. U.S. Fire Ins. Co. 755

11. Damages must be proved with all the certainty the case permits and cannot be left to conjecture, guess, or speculation. Nebraska Truck Serv. v. U.S. Fire Ins. Co. 755

12. The general measure of damages for a breach of contract to convey land is the market value at the time of breach less the contract price. Kerrey Constr. Co. v. Hunt 776

13. Where it appears that special damages have also arisen from the breach, the damages recoverable are such as may fairly and reasonably be supposed to have been in the contemplation of the parties at the time the contract was made. Kerrey Constr. Co. v. Hunt 776

14. The doctrine of strict liability in tort may be used to recover damages to the defective product itself where the damage occurred as a result of a sudden, violent event and not as a result of an inherent defect that reduced the property's value without inflicting physical harm to the product. National Crane Corp. v. Ohio Steel Tube Co. 782

Debtors and Creditors.

An action in the form of a creditor's bill or to set aside a conveyance in fraud of creditors cannot generally be founded upon a dormant judgment. Lammers Land & Cattle Co. v. Hans 243

Decedents' Estates.

1. A challenge to a spouse's statutory election to take against a will is tried in this court de novo on the record. In re Estate of Carman 98

2. The combined effect of the statutory elective share and augmented estate concepts is intended to protect the surviving spouse of a decedent against donative inter vivos transfers by devices which would deprive the survivor of a "fair share" of the decedent's estate and at the same time prevent the surviving spouse from receiving more than such share by allowing the acceptance of certain transfers and insurance proceeds and also yet elect against the will. In re Estate of Carman . 98
3. In the absence of an express contract to compensate a spouse for extra and unusual services, no obligation to do so will be implied. In re Estate of Carman 98
4. A spouse's labor does not, absent a contract, become a contribution "in money's worth" such as to take one-half the value of jointly produced and acquired assets out of the computation of the augmented estate. In re Estate of Carman 98

Declaratory Judgments.

The determination of factual issues in a declaratory judgment action, which would otherwise be an action at law, will be treated in the same manner as if a jury had been waived, and hence a trial court's findings have the effect of a jury verdict and will not be set aside unless clearly wrong. Roth v. School Dist. of Scottsbluff 545
Quinn v. Godfather's Investments 665

Deeds.

The court, in examining the matter of whether a deed was procured by undue influence, is not concerned with the rightness of the conveyance, but only with determining whether it was the voluntary act of the grantor. The fact that the grantor has others who are proper subjects to receive his bounty can be considered by the court only as it bears upon the validity of the conveyance. Craig v. Kile 340

Default Judgments.

1. An order vacating a default judgment is an appealable order. Vacca v. DeJardine 736
2. The matter of the vacation of a default judgment rests in the sound discretion of the trial court, but this discretion is not an arbitrary one and it must be exercised reasonably. Vacca v. DeJardine 736
Lincoln Welding Supply v. Inhalation Plastics 862
3. In addition to the requirements of Neb. Rev. Stat. § 24-537 (Reissue 1979), a party seeking to vacate a default judgment must also tender an answer or other

proof disclosing a meritorious defense. Vacca v. DeJardine 736
4. Before imposing the sanction of entering a default judgment against a party who has failed to serve answers to interrogatories as provided by Neb. Rev. Stat. § 25-1267.44 (Reissue 1979), the court should first issue an order requiring such party to show cause why such default judgment should not be entered. Vacca v. DeJardine 736
5. The determination of whether there has been an abuse of discretion by the trial court in failing to set aside a default judgment must be made in light of the facts and circumstances of each case. Lincoln Welding Supply v. Inhalation Plastics 862
6. Among the factors to be considered in determining whether there has been an abuse of discretion in refusing to set aside a default judgment are those of the promptness of the motion to vacate, the negligence or want of diligence of the party moving to vacate, and the avoidance of unnecessary delays and frivolous proceedings in the administration of justice. Lincoln Welding Supply v. Inhalation Plastics 862

Demurrer.
1. The pendency of another action does not ipso facto require that a demurrer be sustained. Miller v. Miller ... 219
2. Where laches of the plaintiff and the staleness of his claim are apparent from the petition, objection thereto may be taken by demurrer. Roadrunner Development v. Sims 649

Depositions.
If only part of a deposition of a witness is offered in evidence by a party, an adverse party may require him to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts relevant to the issues and not introduced. Omaha Nat. Bank v. Manufacturers Life Ins. Co. 873

Directed Verdict.
1. When, upon a jury trial, a defendant at the conclusion of all the evidence moves for a directed verdict in his favor or for dismissal, such motion must be treated as an admission of the truth of all material and relevant evidence admitted favorable to plaintiffs, and plaintiffs are entitled to the benefit of all proper inferences which

can reasonably be deduced therefrom. Flakus v. Schug 491
Morris v. Laaker 868
2. Following a motion for a directed verdict at the close of the evidence of the State, the introduction of evidence thereafter by the defendant waives any error in the ruling or failure of ruling on the motion, although the defendant is not prevented from questioning the sufficiency of the evidence in the entire record to sustain a conviction. State v. Hilpert 564
State v. Hellbusch 894

Disciplinary Proceedings.
1. It is the obligation of this court in disciplinary proceedings to review the evidence de novo to determine if discipline should be imposed and, if it should, the extent thereof. State ex rel. NSBA v. Matt 123
2. Aiding and abetting criminal dealings in controlled substances, whatever the motivation of an attorney may be, constitutes conduct involving moral turpitude and warrants disciplinary action. State ex rel. NSBA v. Matt 123

Discrimination.
1. An appeal to the District Court from an order or decision of the human rights commission of a city of the primary class in an employment discrimination case is heard as in equity and without a jury. American Stores v. Jordan 213
2. To sustain a charge of discrimination in employment where there is no charge of a universal discriminatory practice or system, complainant, in the record, must establish that the employer intentionally engaged in acts that discriminated against complainant in violation of the statutory prohibitions. American Stores v. Jordan 213
3. The general rule regarding prosecutorial discretion in law enforcement is that, unless there is proof that a particular prosecution was motivated by an unjustifiable standard based, for example, on race or religion, the use of such discretion does not violate constitutional protections. State v. Sprague 581
4. That a statute may discriminate in favor of a certain class does not render it arbitrary if the discrimination is founded upon a reasonable distinction or difference in state policy. State v. Sprague 581
5. It has long been settled that a classification, though discriminatory, is not arbitrary nor violative of the equal

protection clause of the fourteenth amendment if any state of facts reasonably can be conceived that would sustain it. State v. Sprague 581

Drunk Driving.

The record of a conviction used for enhancement purposes in a prosecution for third offense driving while intoxicated must show on its face a voluntary and intelligent waiver of the right to counsel or that the defendant was represented by counsel. State v. Vainiunas 800

Due Process.

Due process requires at a minimum that deprivation of property by adjudication be preceded by notice and the opportunity to be heard as is appropriate to the nature of the case. Masid v. First State Bank 431

Easements.

1. Prescriptive rights are not looked upon with favor and, generally, must be proved by clear, convincing, and satisfactory evidence. Masid v. First State Bank 431
   Biegert v. Dudgeon 617
2. The use and enjoyment which will give title by prescription to an easement is substantially the same in quality and characteristics as the adverse possession which will give title to real estate. It must be exclusive, adverse, under a claim of right, continuous and uninterrupted, and open and notorious for the full prescriptive period. Masid v. First State Bank 431
   Biegert v. Dudgeon 617
3. Where adjoining proprietors lay out an alley between their lands, each devoting a part of his land to that way or alley, which is used for the prescriptive period by the respective owners or their successors in title, neither can obstruct or close that part which is on his own land; and in these circumstances the mutual use of the whole of the alleyway is to be considered to be adverse to a separate and exclusive use by either. Masid v. First State Bank 431
4. Where a claimant has shown open, visible, continuous, and unmolested use for the prescriptive period, the use will be presumed to be under a claim of right. The burden then falls upon the owner of the servient estate to rebut that presumption by showing the use to be permissive. Masid v. First State Bank 431
5. Possession of land is notice to the world of the possessor's rights therein and of all interests which inquiry

of the possessor would have revealed. Masid v. First State Bank 431
6. Where one is put on inquiry, he is charged with notice of all facts as he would have learned by a reasonable inquiry. Masid v. First State Bank 431
7. Due process requires at a minimum that deprivation of property by adjudication be preceded by notice and the opportunity to be heard as is appropriate to the nature of the case. Masid v. First State Bank 431
8. The whereabouts of a possessor of land are known and as such he is entitled to personal notice of any proceeding which may affect his interest in that land. Masid v. First State Bank 431

Effectiveness of Counsel.
1. The standard for determining whether or not counsel for defendant in a criminal prosecution has provided adequate representation requires that trial counsel perform at least as well as a lawyer with ordinary training and skill in the criminal law in his area, and that he conscientiously protect the interests of his client. State v. Jones 1
State v. Pope 645
2. A defendant challenging competency of counsel has the burden to establish it. In addition, defendant must show that he suffered prejudice in the defense of his case as a result of his attorney's actions or inactions. State v. Pope 645
3. Acquiring or permitting a single attorney to represent codefendants, often referred to as joint representation, is not per se violative of the constitutional guarantees of effective assistance of counsel. State v. Pope 645

Eminent Domain.
1. An owner of real property shown to be familiar with the value of such land is a competent witness to testify as to its value for the use to which it is then being put, without additional foundation. However, in order to estimate its value for other purposes, the owner must, as any other witness, be shown to have an acquaintance with the property and be informed as to the state of the market. Langfeld v. Department of Roads 15
2. Evidence of the price at which other lands have been sold is admissible in evidence in condemnation proceedings on the question of damages where such evidence is predicated upon sufficient foundation to furnish a criterion for market or going value of the land condemned. Langfeld v. Department of Roads 15

3. Such lands must be shown to be similar or similarly situated to the land condemned and to have been sold at about the same time as the taking in the condemnation action. Langfeld v. Department of Roads 15
4. Whether the properties the subject of other sales are sufficiently similar to the property condemned to have some bearing on the value under consideration, and to be of any aid to the jury, must necessarily rest largely in the sound discretion of the trial court, which will not be interfered with unless abused. The exact limits, either of similarity or difference, or of nearness or remoteness in point of time, depend upon the location and character of the properties and the circumstances of the case. Langfeld v. Department of Roads 15
5. The measure of the right of the owner of property abutting on a street to access to and from it by way of the street is reasonable ingress and egress under all the circumstances. Langfeld v. Department of Roads 15

Employment Security Law.

1. To the extent that the holding in *A. Borchman Sons v. Carpenter*, 166 Neb. 322, 89 N.W.2d 123 (1958), is understood to provide that both members of nonstriking unions and nonunion employees who may ultimately benefit by reason of a strike called by another union are disqualified from receiving unemployment compensation benefits under the provision of Neb. Rev. Stat. § 48-628(d) (Reissue 1978), even though they are not directly involved in the work stoppage, it is overruled. Gilmore Constr. Co. v. Miller 133
2. Members of nonstriking unions and nonunion employees who are not participating in or financing or directly interested in a labor dispute which caused a work stoppage, and who do not belong to a grade or class of workers who, immediately before the commencement of the stoppage, were members employed at the premises at which the stoppage occurs and are participating in or financing or directly interested in the labor dispute, are not disqualified from receiving benefits under Neb. Rev. Stat. § 48-628(d) (Reissue 1978). Gilmore Constr. Co. v. Miller 133
3. This court reviews cases regarding unemployment benefits de novo on the record and will retry all issues of fact and reach an independent conclusion. Stuart v. Omaha Porkers 838
4. While the term "misconduct" is not specifically defined in Neb. Rev. Stat. § 48-628(b) (Reissue 1978), it has generally been defined to include behavior which evi-

dences (1) wanton and willful disregard of the employer's interests, (2) deliberate violation of rules, (3) disregard of standards of behavior which the employer can rightfully expect from the employee, or (4) negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard of the employer's interests or of the employee's duties and obligations. Stuart v. Omaha Porkers 838

Equal Protection.

1. Equal protection does not require that all persons be treated identically. It only requires that a distinction drawn by the Legislature between individuals has some relevance to the purpose for which the classification is made. State v. Simants 638
2. There is a rational basis for treating mentally ill dangerous persons who have been acquitted of a crime by reason of insanity differently than other mentally ill dangerous persons who have not. State v. Simants 638
3. Neb. Rev. Stat. §§ 29-3701 et seq. (Cum. Supp. 1982), insofar as they apply only to persons acquitted of crime by reason of insanity, are constitutional and do not violate the constitutional right of equal protection of the laws. State v. Simants 638

Equity.

1. In an appeal in an equity action it is the duty of this court to try issues of fact de novo upon the record and to reach an independent conclusion thereon without reference to the findings of the District Court. American Stores v. Jordan 213
2. A case in equity is reviewed in the Nebraska Supreme Court de novo on the record, subject to the rule that where credible evidence is in conflict on material issues of fact, we will consider the fact that the trial court observed the witnesses and accepted one version of the facts over another. Masid v. First State Bank .. 431
3. The review of a collateral attack upon a special assessment is a proceeding in equity, which this court reviews de novo on the record. Reiser v. Hartzler 802

Escape.

1. For the purpose of determining whether one has escaped, work release is but temporary leave within the meaning of Neb. Rev. Stat. § 28-912(1) (Reissue 1979). State v. Coffman 560
2. While on work release, under the provisions of Neb. Rev. Stat. §§ 83-183 and 83-184 (Reissue 1981), a

prisoner remains subject to the supervision, control, and custody of the Nebraska Penal and Correctional Complex. State v. Coffman 560

Estates.

1. It is the general rule that in the absence of a controlling equity, or of an express or implied provision in the will to the contrary, where an estate is given to a person for life with a vested remainder in another, the remainder takes effect in possession whenever the prior gift ceases or fails in whatever manner. In re Testamentary Trust of Criss 379
2. One of the primary incidents of ownership of property in fee simple is the right to convey or encumber it. It is the general rule that a testator may not create a fee simple estate to vest at his death and at the same time restrict its alienation. However, this is not to say that such testator may not, in some situations, create economic incentives in his will encouraging the retention of property, without violating the rule condemning restrictions on alienation. In re Testamentary Trust of Criss 379
3. As a general rule, when an attempted prior interest fails under a will because the person to whom it is limited renounces it, succeeding interests are accelerated, with certain minor exceptions. In re Testamentary Trust of Criss 379
4. A testator is presumed to know that his widow might elect to take her share of his estate as provided for by statute and renounce any interest under his will. In re Testamentary Trust of Criss 379
5. When a widow elects to take her "forced" or statutory share and renounce her interest under her husband's will, she may well be treated as having predeceased her husband, thereby taking no interest under the will. In re Testamentary Trust of Criss 379

Estoppel.

1. An insurer that gives one reason for its conduct and decision as to a matter involved in controversy cannot, after litigation has begun, depend upon another and different ground. Mutual Benefit Life Ins. Co. v. Chisholm 301
2. Equitable estoppel is based upon grounds of public policy and good faith and is interposed to prevent injustice and inequitable consequences. Ordinarily, there must be reliance in good faith upon statements or conduct of the party to be estopped and a change of po-

sition by the party claiming the estoppel to his injury, detriment, or prejudice. Scully v. Scully 857

Evidence.

1. The admission into evidence of gruesome photographs rests in the sound discretion of the trial court, which must determine their relevancy and weigh their probative value against their possible prejudicial effect. State v. Jones 1
2. Evidence of the price at which other lands have been sold is admissible in evidence in condemnation proceedings on the question of damages where such evidence is predicated upon sufficient foundation to furnish a criterion for market or going value of the land condemned. Langfeld v. Department of Roads 15
3. Such lands must be shown to be similar or similarly situated to the land condemned and to have been sold at about the same time as the taking in the condemnation action. Langfeld v. Department of Roads 15
4. Whether the properties the subject of other sales are sufficiently similar to the property condemned to have some bearing on the value under consideration, and to be of any aid to the jury, must necessarily rest largely in the sound discretion of the trial court, which will not be interfered with unless abused. The exact limits, either of similarity or difference, or of nearness or remoteness in point of time, depend upon the location and character of the properties and the circumstances of the case. Langfeld v. Department of Roads 15
5. Where the fact sought to be shown, even though independent of the fact being litigated, has an actual and substantial tendency to establish or disprove such fact, it must be admitted. Evidence is relevant not only when it tends to prove or disprove the precise fact in issue but when it tends to establish a fact from which the existence or nonexistence of the fact in issue can directly be inferred. Langfeld v. Department of Roads 15
6. The relative weight of conflicting evidence is necessarily determined by the credibility of the witnesses, which question is one solely for the jury which saw the witnesses and heard the testimony. State v. Brown ... 68
   Schroll v. Fulton 310
7. The jurors are the judges of the credibility of the witnesses and the weight to be given to the testimony, and they have the right to credit or reject the whole or any part of the testimony in the exercise of their judgment. State v. Brown 68
   Flakus v. Schug 491

8. The owner of chattels may testify as to their value in a criminal case. State v. Holland 170
9. The defendant may not predicate error on the admission of evidence to which no objection was made when adduced. State v. Holland 170
10. Where evidence is conflicting or where reasonable minds may draw different inferences or conclusions from the evidence, it is within the province of the jury to decide the issues of fact, and the Supreme Court will not set aside or direct a verdict in such a situation. Koerner v. Perrella 189
11. Where reasonable minds may draw different conclusions and inferences from the evidence as to the negligence of the defendant and the contributory negligence of the plaintiff and the degree thereof when one is compared with the other, the issues must be submitted to the jury. Holly v. Mitchell 203
12. Generally, a proper objection to the receipt of evidence is required to preserve for review any error in the overruling of a motion in limine. Maricle v. Spiegel 223
13. A defendant can not predicate error on the denial of a motion in limine when his objection to the evidence was sustained. Maricle v. Spiegel 223
14. The admissibility of the speed of a vehicle shortly before a collision rests largely in the discretion of the trial court. Maricle v. Spiegel 223
15. The admission or rejection of photographs in evidence is largely within the discretion of the trial court. In the absence of a showing of an abuse of discretion, error may not be predicated upon such a ruling. Maricle v. Spiegel 223
16. Proof as to the tax consequences of a personal injury damages award is not admissible. Maricle v. Spiegel . 223
17. The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if all originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith. Neb. Rev. Stat. § 27-1004 (Reissue 1979). State ex rel. Mercurio v. Board of Regents 251
18. Secondary evidence of the contents of a writing, the original of which would have been competent evidence, may be admitted into evidence if it is shown by satisfactory proof that the originals have been lost or destroyed in the absence of bad faith, malice, or fraud. State ex rel. Mercurio v. Board of Regents 251
19. In the absence of some evidence of arbitrary behavior or bad faith, courts will not substitute their judgment for the necessarily discretionary judgment of a school

or university as to a student's educational performance. State ex rel. Mercurio v. Board of Regents 251
20. In a criminal prosecution any testimony, otherwise competent, which tends to dispute the testimony offered on behalf of the accused as to a material fact is proper rebuttal testimony. State v. Miller 274
21. A hypothetical question is not improper simply because it includes only a part of the facts testified to. State v. Miller 274
22. A party who objects to testimony on a particular subject may not later claim that it was prejudiced because it had itself foreclosed inquiry into that subject matter. In re Application of ATS Mobile Telephone 403
23. To sustain a conviction for a crime, the corpus delicti must be proved beyond a reasonable doubt. State v. Workman 479
24. In order to establish the corpus delicti in an arson case, it is necessary that the evidence disclose the burning of the property as charged and that the burning was caused by the willful act of some person criminally responsible. State v. Workman 479
25. Uncontroverted testimony need not be accepted as absolute verity, especially when that testimony is opposed to common knowledge or human experience, or is inherently improbable, unreasonable, or unworthy of belief. In re Estate of McCartney 550
26. The trier of fact has a right to test the credibility of a witness by his self-interest and to weigh undisputed testimony against facts and circumstances in evidence from which a conclusion can be drawn that the testimony is not true. In re Estate of McCartney 550
27. Evidence offered by one defendant in a joint trial, if competent, is evidence against other persons charged in the same information. State v. Hilpert 564
28. Where the requisite elements of a crime are committed in different jurisdictions, if an essential element of the crime is committed in this state, jurisdiction to prosecute is present. State v. Hilpert 564
29. Where negotiations between the parties result in an agreement which is reduced to writing, the written agreement is the only competent evidence of the contract in the absence of fraud, mistake, or ambiguity. Silverman v. Arbor Street Partnership 628
30. In interpreting a written contract, the meaning of which is in doubt and dispute, evidence of prior or contemporaneous negotiations or understandings is admissible to discover the meaning which each party had

reason to know would be given to the words by the other party. Quinn v. Godfather's Investments 665
31. If it can be plainly seen from all the provisions of the instrument taken together that the obligation in question was within the contemplation of the parties when making their contracts or is necessary to carry their intention into effect, the law will imply the obligation and enforce it. Quinn v. Godfather's Investments 665
32. Generally, the rule of completeness is concerned with the danger of admitting a statement out of context. When this danger is not present it is not an abuse of discretion to fail to require the production of the remainder or, if it cannot be produced, to exclude all the evidence. State v. Manchester 670
33. The general rule is that the admissibility of physical evidence rests in the discretion of the trial court, and the determination of admissibility will not be overturned unless there is a clear abuse of discretion. State v. Manchester 670
34. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. State v. Bromwich 827
35. The admission of irrelevant evidence is not reversible error unless there is prejudice to the defendant. State v. Bromwich 827

Expert Witnesses.
1. The admission of expert testimony is ordinarily within the trial court's discretion, and its ruling will be upheld in the absence of an abuse of discretion. State v. Jones 1
2. Expert testimony should not be received if it appears the witness is not in possession of such facts as will enable him to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture. Langfeld v. Department of Roads 15
3. The value of an opinion of an expert witness, or any witness, must be dependent upon and is no stronger than the facts upon which it is predicated, and it has no probative force unless the assumptions upon which it was based are shown to be true. Langfeld v. Department of Roads 15
4. An opinion of vehicular speed is proper, provided a sufficient foundation is laid to show the expertise of the

witness, as well as specific knowledge of the underlying facts to deal with the question in issue. State v. Miller 274

5. If a hypothetical question, calling for expert skill or knowledge, is so framed as to fairly and reasonably reflect the facts proved by any of the witnesses in the case, it will be sufficient. Morris v. Laaker 868

Fees.

1. A court has both inherent and statutory authority to appoint a guardian ad litem to protect the interests of a minor child engaged in, or affected by, litigation. Along with such authority goes the authority to award fees for such guardian's services. Nye v. Nye 364
2. The allowance of a guardian ad litem's fees and costs is discretionary and depends upon a consideration of all the facts and circumstances. Nye v. Nye 364

Foreclosure.

1. Sheriff's deeds are specially covered by Neb. Rev. Stat. §§ 77-1901 et seq. (Reissue 1981) and, unlike the provisions for tax certificates, there is no section establishing a presumption regarding service, as is true in the case of a treasurer's deed. Brown v. Glebe 318
2. A decree of foreclosure of a tax lien is of no effect as against the persons who were, at the time of the foreclosure, in actual possession and who were not made parties defendant in the action and had no notice or knowledge of the suit. Brown v. Glebe 318

Foreign Judgments.

Where the party against whom registration of a foreign judgment is sought appears in the proceeding, evidence has been taken, and there is no bill of exceptions, strict compliance with the statutory requirements relative to authentication as to subsequent entries affecting the judgment is not required. Snyder v. Nelson 605

Fraud.

1. The essential elements required to sustain an action for damages as the result of fraud are that a representation was made as a statement of fact, which was untrue and known to be untrue by the party making it, or else was made recklessly; that the misrepresentation was made with the intent to deceive and for the purpose of inducing the other party to act upon it; and that such party did, in fact, rely upon the misrepresentation and was induced thereby to act to his injury or damage. Flakus v. Schug 491

2. A disclaimer clause is relevant in determining whether a claimant relied on the false representation disclaimed in the clause; however, the disclaimer is ineffective to preclude the trier of fact from considering whether fraud induced formation of the bargain. Flakus v. Schug 491
3. As between a vendor and a purchaser, where material facts and information are equally accessible to both, and nothing is said or done which tends to impose on the purchaser or mislead him, the failure of the vendor to disclose such facts does not amount to actionable fraud; however, where such facts are known to the vendor and he knows them to be not within the reach of the attention, observation, and judgment of a reasonably diligent purchaser, and they are such as would readily mislead the purchaser as to the true condition of the property, the vendor is bound to disclose such facts. Flakus v. Schug 491
4. One may make a misrepresentation by conduct as well as by spoken words. Flakus v. Schug 491
5. Generally, where there has been a misrepresentation in the sale of real estate, the measure of damages is the cost of placing the property conveyed in the condition represented, not exceeding the difference in value of the property conveyed and the value of the property if it had been as represented. Flakus v. Schug 491
6. Where one party to a transaction induces the other party to enter into it by willful misrepresentation, he cannot escape liability for his fraud by showing that such party could have investigated the representations made and would then have found that they were untrue. Omaha Nat. Bank v. Manufacturers Life Ins. Co. 873
7. Contributory negligence is generally not a defense to deliberate, active, or willful fraud. Omaha Nat. Bank v. Manufacturers Life Ins. Co. 873
8. A person is justified in relying upon a representation in all cases if it is a positive statement of fact and if an investigation would be required to discover the truth. Omaha Nat. Bank v. Manufacturers Life Ins. Co. 873
9. The fact that inquiries were made elsewhere which did not disclose the falsity of the representations is no defense. Omaha Nat. Bank v. Manufacturers Life Ins. Co. 873
10. An insurer may justifiably rely on the insured's representations unless to do so would be so utterly unreasonable, in the light of the information open to it and of its skill or experience, that its loss is its own responsi-

bility. Omaha Nat. Bank v. Manufacturers Life Ins. Co. 873

Guardians Ad Litem.

1. A court has both inherent and statutory authority to appoint a guardian ad litem to protect the interests of a minor child engaged in, or affected by, litigation. Along with such authority goes the authority to award fees for such guardian's services. Nye v. Nye 364
2. The allowance of a guardian ad litem's fees and costs is discretionary and depends upon a consideration of all the facts and circumstances. Nye v. Nye 364

Habeas Corpus.

1. Habeas corpus is not available to attack mere errors at trial from which a direct appeal could have been taken. Al-Hafeez v. Foster 483
2. Unless the granting of relief in a habeas corpus action will result in the immediate release from custody, the petition for such relief is premature. Al-Hafeez v. Foster 483

Highways.

As a general rule, under its police power, a state may, in the interest of safety and public welfare, restrict the weight of vehicles using its highways by reasonable and nondiscriminatory regulation. State v. Davison .. 173

Homicide.

1. In a homicide case, photographs of the victim, upon proper foundation, may be received for purposes of identification, to show the condition of the body, the nature and extent of the wounds and injuries, and to establish malice or intent. State v. Jones 1
   State v. Lamb 498
   State v. Sims 708
2. A photograph which illustrates or makes clear some controverted issue in a homicide case may be received even if it is gruesome, where a proper foundation has been laid. State v. Jones 1
   State v. Sims 708
3. In order to prove the requisite mental state for murder in the first degree, the State is required to show a condition of the mind which was manifested by intentionally doing a wrongful act without just cause or excuse and which is defined as any willful or corrupt intention of the mind. State v. Lamb 498
4. The effect of a sentence to life imprisonment for second

degree murder is an indeterminate sentence of 10 years to life. State v. Isherwood 592
5. Attempted murder requires proof of conduct amounting to a substantial step toward commission of the crime and which is strongly corroborative of the necessary criminal intent. State v. Manchester 670
6. Solicitation of an innocent agent to kill the victim may be proof of conduct amounting to a substantial step toward commission of attempted murder. State v. Manchester 670
7. Proof that the defendant made plans for the murder, solicited a killer, discussed the contract price and set the money aside in his billfold, arranged for a weapon, and showed the killer the victim, his residence, and his place of work is sufficient evidence of conduct amounting to a substantial step toward commission of attempted murder in the first degree, and will support a finding of guilty. State v. Manchester 670

Hypnosis.
1. Direct evidence obtained by reason of hypnosis is inadmissible per se. State v. Patterson 686
2. A witness will not be rendered incompetent merely because he or she was hypnotized during the investigatory phase of the case; rather, the witness will be permitted to testify with regard to those matters which he or she was able to recall and relate prior to hypnosis, provided that there is sufficient evidence to satisfy the court that the evidence was known and related prior to hypnosis. State v. Patterson 686
State v. Levering 715

Immunity.
1. In order to be constitutionally adequate, the immunity granted by a state to a witness in a criminal case must afford protection to the witness extending to criminal proceedings by other states, or by the United States. State v. Jones 1
2. Constitutionally adequate statutory immunity must leave the witness and the federal government, or another state government, in substantially the same position as if the witness had claimed his constitutional privilege against self-incrimination, in the absence of a state grant of immunity. State v. Jones 1
3. The true test of the constitutionality of an immunity statute is whether the result under such a statute is the same as if the witness retained his fifth amendment right and did not testify. State v. Jones 1

4. Where the defendant has testified in a previous criminal case under a lawful grant of immunity, the sentencing court in a subsequent criminal case cannot consider such testimony or any information directly or indirectly derived from it in determining whether a death sentence should be imposed under the provisions of Neb. Rev. Stat. § 29-2523 (Reissue 1979) and related statutes. State v. Jones 1

Implied Consent Law.

1. Neb. Rev. Stat. § 39-669.09 (Reissue 1978) does not require the officer to inform the person to be tested of his privilege to request an independent test. State v. Miller 274
2. The use of an anticoagulant as a preservative for a blood sample is not a foundational requirement for the admission of evidence relating to test results, and the failure to use an anticoagulant goes only to the weight and credibility of the evidence. State v. Miller 274

Independent Contractor.

Generally, control, or the right of control, is the chief criterion in determining whether someone acts as an independent contractor. Maricle v. Spiegel 223

Indian Child Welfare Act.

Under the provisions of the Indian Child Welfare Act, 25 U.S.C.A. §§ 1901 et seq. (1983), "preadoptive placement" means the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement. In re Interest of Bird Head 741

Indictments and Informations.

An information charging an offense in substantially the words of the statute is generally sufficient. All defects that may be excepted to by a motion to quash are taken to be waived by a defendant pleading the general issue. State v. John 76

Injunction.

In a suit brought to enforce restrictive covenants, the plaintiff is entitled to an injunction without a showing of actual damages or that irreparable injury will result from a continued violation of the restrictive clause. Plumb v. Ruffin 335

Insanity.

1. Insanity as a defense must be shown to exist at the time of the offense. State v. Lamb 498
2. There is a rational basis for treating mentally ill dangerous persons who have been acquitted of a crime by reason of insanity differently than other mentally ill dangerous persons who have not. State v. Simants 638
3. Neb. Rev. Stat. §§ 29-3701 et seq. (Cum. Supp. 1982), insofar as they apply only to persons acquitted of crime by reason of insanity, are constitutional and do not violate the constitutional right of equal protection of the laws. State v. Simants 638

Installment Loans.

1. The exemptions specified in Neb. Rev. Stat. § 45-101.04(2), (3), and (4) (Reissue 1978) exempt the specified transactions from the installment loan act, Neb. Rev. Stat. §§ 8-435 et seq. (Reissue 1977), as well as from the interest rate limitations of § 45-101.03. McCaul v. American Savings Co. 841
2. Under the provisions of Neb. Rev. Stat. § 59-1617 (Reissue 1978) an installment loan by an industrial loan and investment company, regulated by the Nebraska Department of Banking and Finance, is exempt from the Consumer Protection Act, §§ 59-1601 et seq. McCaul v. American Savings Co. 841

Insurance.

1. An insurer is precluded from asserting a forfeiture where, after acquiring knowledge of the facts constituting a breach of condition, it has retained the unearned portion of the premium or has failed to return or tender it back with reasonable promptness, especially where the nature of the breach or ground for forfeiture is of such character as to render the policy void from its inception. Dairyland Ins. Co. v. Kammerer 108
2. Contracts of insurance, like other contracts, are to be construed according to the meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms will be taken and understood in plain, ordinary, and popular sense. Johnsen v. Harper 145
3. The term "private passenger automobile," as used in the "drive other vehicle" coverage section of an automobile liability insurance policy, is clear and unambiguous and does not include a pickup truck. Johnsen v. Harper 145
4. An insurer that gives one reason for its conduct and decision as to a matter involved in controversy cannot,

after litigation has begun, depend upon another and different ground. Mutual Benefit Life Ins. Co. v. Chisholm 301

5. The issuance of a life policy is dependent upon the health of the applicant, and a willful and intentional failure of an application to disclose, in response to direct and clear inquiry, that which the company had the right to know for the purpose of determining the true state of health of the applicant, and whether or not it would accept the risk, cannot be considered other than fraudulent. Mutual Benefit Life Ins. Co. v. Chisholm .. 301
6. The measure of damages for the loss caused by the negligence of the broker is the amount that would have been due under the policy if it had been obtained by the broker. Nebraska Truck Serv. v. U.S. Fire Ins. Co. ... 755
7. An insurer may justifiably rely on the insured's representations unless to do so would be so utterly unreasonable, in the light of the information open to it and of its skill or experience, that its loss is its own responsibility. Omaha Nat. Bank v. Manufacturers Life Ins. Co. 873

Intent.

1. In order to determine when a class should close under a testamentary disposition, it is necessary to try to ascertain the intent of the testator and, if legally possible, give effect to that intent, determined by a viewing of the entire will. In re Testamentary Trust of Criss 379
2. A patent ambiguity must be removed by interpretation according to legal principles, and the intention of the testator must be found in the will. In searching for this intention the court must examine the entire will, consider each of its provisions, give words their generally accepted literal and grammatical meaning, and indulge the presumption that the testator understood the meaning of the words used. In re Testamentary Trust of Criss 379
3. A clause or provision of a will must, if possible, be so construed as to give effect to the intention of the testator. If doubtful or ambiguous words, in their ordinary literal sense, appear to be inconsistent with plain and unambiguous language in the same clause or sentence, such words will be so construed, if reasonably possible, as to render the whole clause or sentence intelligible and consistent. In re Testamentary Trust of Criss 379

Intervention.

An intervenor may not change the issues but must accept the case as the intervenor finds it. Craig v. Kile 340

Joinder.

1. Evidence offered by one defendant in a joint trial, if competent, is evidence against other persons charged in the same information. State v. Hilpert 564
2. Where one of several defendants on trial together voluntarily becomes a witness, he is a witness for all purposes. If he knows facts injurious to a codefendant, they may be brought out either by his own counsel or by the State. State v. Hilpert 564

Judgments.

1. In reviewing criminal cases this court will not set aside the judgment of the trial court if there is sufficient evidence, taking the view most favorable to the State, to support the judgment. State v. Schmidt 126
   State v. Bromwich 827
2. The court, in every stage of an action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect. Lammers Land & Cattle Co. v. Hans 243
3. An action in the form of a creditor's bill or to set aside a conveyance in fraud of creditors cannot generally be founded upon a dormant judgment. Lammers Land & Cattle Co. v. Hans 243
4. A judgment which is not void is not subject to collateral attack, but a void judgment may be attacked at any time in any proceeding. Lammers Land & Cattle Co. v. Hans 243
5. A sale of real estate to satisfy a dormant judgment is, as to the judgment debtor, voidable only and cannot be attacked in collateral proceedings. Lammers Land & Cattle Co. v. Hans 243
6. When a judgment becomes dormant, the lien is lost as to the judgment debtor's grantee and is not revived by the new execution. Lammers Land & Cattle Co. v. Hans 243
7. A judgment of conviction which would have been invalid to support a sentence of imprisonment in the first instance is not valid to enhance the punishment in a subsequent case. State v. Smith 446
8. Where cases are interwoven and interdependent and the controversy involved has already been considered

and determined in a prior proceeding involving one of the parties now before the court, the court has a right to examine its own records and take judicial notice of its own proceedings and judgment in the prior action. Cedars Corp. v. Sun Valley Development Co. 622

Judicial Notice.

1. In an administrative hearing an agency may take notice of judicially cognizable facts and in addition take notice of general, technical, or scientific facts within its specialized knowledge. However, parties to such hearings will be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material so noticed so as to be afforded an opportunity to contest the facts so noticed. In re Application of ATS Mobile Telephone 403
2. An agency may utilize its experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to it during any hearing. In re Application of ATS Mobile Telephone 403
3. Even though the method by which an administrative agency takes notice of facts not presented at the hearing may not be technically correct, if the parties had full and fair opportunity to address that subject by cross-examination or otherwise, they may very well not have been prejudiced or unfairly surprised by the notice of facts taken by the agency. In re Application of ATS Mobile Telephone 403

Judicial Sales.

It is the general rule that confirmation of judicial sales rests largely within the discretion of the trial court, and will not be reviewed except for manifest abuse of such discretion. The discretion to be exercised is not arbitrary, however, but should be one which is sound and equitable in view of all the circumstances. The court must act in the interest of fairness and prudence, and with a regard to the rights of all concerned, and the stability of judicial sales. Nebraska State Bank & Trust Co. v. Wright 822

Juries.

1. The relative weight of conflicting evidence is necessarily determined by the credibility of the witnesses, which question is one solely for the jury which saw the witnesses and heard the testimony. State v. Brown ... 68
2. The jurors are the judges of the credibility of the witnesses and the weight to be given to the testimony, and

they have the right to credit or reject the whole or any part of the testimony in the exercise of their judgment. State v. Brown 68

3. In determining whether the evidence is sufficient to submit the issues of negligence or contributory negligence of an opposing party to the jury, a party is entitled to have all conflicts in the evidence resolved in his favor and to have the benefit of every reasonable inference that may be deduced from the evidence. If reasonable minds might draw different conclusions from the set of facts thus resolved, the issues of negligence or contributory negligence are for a jury. Parmenter v. Johnson 725

Jurisdiction.

1. Jurisdiction over a foreign corporation may be exercised by consent of such corporation. Mittelstadt v. Rouzer 178
2. By designating an agent upon whom process may be served within this state, a defendant has consented to the jurisdiction in personam by the proper court. Mittelstadt v. Rouzer 178
3. By appointing a resident agent for service as required by the Motor Carrier Act, 49 U.S.C. § 321(c) (1976) (now 49 U.S.C. § 10330(b) (Supp. IV 1980)), a nonresident corporation has consented to jurisdiction within this state at least as to any cause of action arising out of its activities as a motor carrier in interstate commerce. Mittelstadt v. Rouzer 178
4. The District Court, sitting without a jury, has exclusive jurisdiction to hear, determine, and render judgment on any suit or tort claim defined in the State Tort Claims Act, Neb. Rev. Stat. §§ 81-8,209 et seq. (Reissue 1981). Catania v. University of Nebraska 418
5. Where the requisite elements of a crime are committed in different jurisdictions, if an essential element of the crime is committed in this state, jurisdiction to prosecute is present. State v. Hilpert 564
   State v. Manchester 670

Jurors.

1. A party who fails to challenge the jurors for disqualification and passes the jurors for cause waives any objection to their selection. Schroll v. Fulton 310
2. A juror who has indicated an inability to fairly and impartially determine guilt may be excused for cause. State v. Lamb 498

Jury Instructions.

1. If an instruction is not sufficiently specific in some respect, it is the duty of counsel to offer requests to supply an omission. Langfeld v. Department of Roads ... 15
2. The giving of an incorrect instruction which may have affected the result unfavorably to the party complaining constitutes reversible error. In re Estate of Flider 153
3. Instructions should be considered together, and if, when considered as a whole, they correctly state the law, error cannot be predicated thereon. Holly v. Mitchell 203
4. It is the duty of the trial court to instruct the jury on the law of the case whether requested to do so or not. Failure to do so constitutes prejudicial error. State v. Lamb 498
   State v. Redding 887
5. Alleged errors in instructions which are not prejudicial to the complaining party are not grounds for reversal of a judgment otherwise correct. State v. Lamb 498
6. The repetition of an instruction is not reversible error unless its effect is to mislead the jury. State v. Andersen 695
7. It is uniform and proper practice in this state that where specific acts of negligence are charged and supported by the evidence, the trial court instructs as to specific acts so alleged and supported. The failure to do so, even though not requested, is error. Enyeart v. Swartz 732
8. Ordinarily, a failure to object to instructions after they have been submitted to counsel for review will preclude raising an objection thereafter. Enyeart v. Swartz 732
9. Noncompliance by counsel with the requirement that he object to a proposed jury instruction when it is submitted to him does not bar this court from opting to consider plain errors in a record indicative of a probable miscarriage of justice. Enyeart v. Swartz 732
10. It is the duty of the trial court, whether requested to do so or not, to submit to and properly instruct the jury on all material issues presented by the pleadings and supported by the evidence. Enyeart v. Swartz 732
11. In instructing a jury, the trial court is not required to define language commonly used and generally understood. Omaha Nat. Bank v. Manufacturers Life Ins. Co. 873
12. The meaning of an instruction and not its phraseology is the important consideration. An inadvertent grammatical error in an instruction is harmless error if it is clear from the instruction itself and the other instruc-

tions given that the jury was not confused or misled by the error. Omaha Nat. Bank v. Manufacturers Life Ins. Co. 873

13. When the trial court does not give verbatim requested instructions but does adequately instruct regarding the issues upon which the requests are made, it is not error to refuse the proffered instructions. Omaha Nat. Bank v. Manufacturers Life Ins. Co. 873

Laches.

1. Where laches of the plaintiff and the staleness of his claim are apparent from the petition, objection thereto may be taken by demurrer. Roadrunner Development v. Sims 649
2. Laches does not grow out of the mere passage of time, but is founded upon the inequity of enforcing a claim where there has been a change in the condition of the property or in the relations of the parties. Roadrunner Development v. Sims 649
3. A plaintiff whose petition shows apparent laches on its face must generally plead and prove an excuse for the delay. Roadrunner Development v. Sims 649

Leases.

Bare lessees cannot be said to represent fee simple ownership, no matter how long the term of the lease. Easley v. City of Lincoln 450

Legislature.

The court, in considering the meaning of a statute, should, if possible, discover the legislative intent from the language of the act and give it effect. Mitchell v. County of Douglas 355

Licenses.

Under the provisions of Neb. Rev. Stat. § 29-2913 (Reissue 1979), an evaluating physician must be licensed to practice medicine in the State of Nebraska. State v. Sell .. 437

Liens.

A decree of foreclosure of a tax lien is of no effect as against the persons who were, at the time of the foreclosure, in actual possession and who were not made parties defendant in the action and had no notice or knowledge of the suit. Brown v. Glebe 318

Liquor Licenses.

1. The failure of a local governing body to approve an ap-

plication for a liquor license does not necessarily constitute a recommendation of denial and, standing alone, is insufficient evidence to support a denial of the application by the Nebraska Liquor Control Commission. Kerrey's, Inc. v. Neb. Liquor Control Comm. 442

2. At a hearing on an application for a liquor license, the burden is upon the applicant to prove its fitness and willingness to provide the service proposed, its ability to conform to the rules of the Nebraska Liquor Control Act, that its management and control exercised over the premises will insure compliance with such rules and regulations, and that the issuance of the license is or will be required by the present or future public convenience and necessity. Kerrey's, Inc. v. Neb. Liquor Control Comm. 442

3. Although the Liquor Control Commission may consider the recommendation of the local governing body in determining whether or not to issue such license, the burden is not on the applicant to provide evidence of such recommendation. Kerrey's, Inc. v. Neb. Liquor Control Comm. 442

Mandamus.

1. Before a writ of mandamus may issue, the relator must show clearly and conclusively that he is entitled to the particular relief requested; that the respondents are legally obligated to act; and the duty to act must be imposed by law and must be clear. State ex rel. Mercurio v. Board of Regents 251

2. A verification which is a part of an affidavit upon which a writ of mandamus is sought must be positively verified, and a verification based upon mere belief is inadequate. State ex rel. Van Cleave v. City of No. Platte .. 426

3. An action to procure the issuance of a writ of mandamus is not begun until a motion and affidavit, or a petition verified positively, is filed in the District Court. State ex rel. Van Cleave v. City of No. Platte 426

Marriage.

1. Marriage is a fact which may be proved by direct or circumstantial evidence, or by documentary or parol evidence. The weight and sufficiency of the evidence to prove marriage is governed by the general rules of evidence. In re Estate of McCartney 550

2. The general rule is that the burden of proof of marriage is upon the party who pleads it. In re Estate of McCartney 550

3. Where the issue is whether a marriage was ever con-

tracted, the burden of proof is on the party asserting its existence. In re Estate of McCartney 550
4. Common-law marriages are not recognized in Nebraska. Cohabitation without a ceremonial marriage is meretricious and is not evidence of marital status in this state. In re Estate of McCartney 550
5. In order to prove a marriage there must be proof that a ceremonial marriage took place. In re Estate of McCartney 550

Mental Competency.
1. In order to set aside an instrument or instruments for want of mental capacity on the part of the person executing such instruments, the burden of proof is upon the party so asserting to establish that the mind of the person executing such instruments was so weak or unbalanced when the instruments were executed that he could not understand and comprehend the purport and effect of what he was doing. Craig v. Kile 340
2. In order to prove the requisite mental state for murder in the first degree, the State is required to show a condition of the mind which was manifested by intentionally doing a wrongful act without just cause or excuse and which is defined as any willful or corrupt intention of the mind. State v. Lamb 498
3. The test of responsibility for crime is the defendant's capacity to understand the nature of the act alleged to be criminal and the ability to distinguish between right and wrong with respect to the act. State v. Lamb 498
4. The fact that a defendant had some form of mental illness or defect does not by itself establish lack of responsibility. State v. Lamb 498

Mental Health.
1. Since 1976, only mentally ill dangerous persons are subject to involuntary commitment. Richards v. Douglas County 313
2. This court will not interfere on appeal with a final order made by the District Court in a mental health commitment proceeding unless the court can say as a matter of law that the order is not supported by clear and convincing proof. State v. Simants 638

Mentally Disordered Sex Offender.
This court will not disturb the District Court finding that an individual is a mentally disordered sex offender presently untreatable unless it can be said that there was no evidence upon which such conclusions could be

based and that such declaration was an abuse of discretion. State v. Sell 437

Miranda Rights.

1. "Custodial interrogation," within the meaning of the *Miranda* rule, means questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. State v. Parsons 349
2. Police officers are not required to administer *Miranda* warnings to everyone whom they question, nor is the requirement of warnings to be imposed simply because questioning takes place in the station house or because the questioned person is one whom police suspect. State v. Parsons 349
3. *Miranda* warnings are required only when there has been such a restriction on a person's freedom as to render him in custody. State v. Parsons 349
4. Interrogation occurs when the subject is placed under a compulsion to speak. State v. Lamb 498
5. Generally, statements made in a conversation initiated by the accused are not the results of interrogation and are admissible. State v. Lamb 498
6. The prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. State v. Andersen 695
7. The admission of statements obtained in violation of *Miranda* may nevertheless be considered harmless error not requiring reversal of an otherwise valid conviction. For the error to be prejudicial and require reversal, the court must find that the jury would have found the State's case significantly less persuasive had the disputed testimony been excluded. State v. Andersen 695

Modification of Decree.

In actions for the modification of dissolution proceedings, it is the duty of this court to review de novo the determination of the District Court with regard to whether a change in circumstances has occurred which justified the modification of the original decree. Albers v. Albers 471

Mortgages.

1. A purchase-money mortgage generally takes precedence over all existing and subsequent claims and liens against the mortgagor as to the property sold. Commerce Savings Lincoln v. Robinson 596
2. A purchase-money mortgage is given for the unpaid purchase money on a sale of land as part of the same transaction as the deed, and its funds are actually used to buy the land. Commerce Savings Lincoln v. Robinson 596
3. A purchase-money mortgage given to secure a particular debt remains valid in equity for that purchase, whatever form the debt might assume, if it can be traced. The lien of a purchase-money mortgage having attached, it will not be displaced by a change in the form of the security. Commerce Savings Lincoln v. Robinson 596
4. An additional debt will discontinue the old mortgage only if the parties intended that it do so. Commerce Savings Lincoln v. Robinson 596
5. As a general rule, the cancellation of a mortgage on the record is not conclusive as to its discharge, or as to the payment of the indebtedness secured thereby. The parties' intention controls and can be shown by extrinsic evidence. Commerce Savings Lincoln v. Robinson 596

Motions for New Trial.

A motion for new trial on the ground of surprise is properly overruled where a request for a continuance for that reason was not made at the trial. Schroll v. Fulton 310

Motions to Strike.

It is not the function of a motion to strike to raise the merits of the cause or defense. However, a motion to strike which embodies the substance of an answer may, by waiver of the opposing party, be treated as an answer. Lammers Land & Cattle Co. v. Hans 243

Motions to Suppress.

Factfindings by the trial court on a motion to suppress will not be overturned on appeal unless clearly wrong. State v. Lamb 498

Motor Carriers.

1. The burden is on the applicant to show that the proposed service is required by public convenience and

necessity. In determining that issue, the controlling questions are whether or not the operation will serve a useful purpose responsive to a public demand or need: whether or not this purpose can or will be served as well by existing carriers; and whether or not it can be served by the applicant in a specified manner without endangering or impairing the operations of existing carriers, contrary to the public interest. In re Application of Crusader Coach Lines 53

2. As a general rule, under its police power, a state may, in the interest of safety and public welfare, restrict the weight of vehicles using its highways by reasonable and nondiscriminatory regulation. State v. Davison .. 173
3. Local regulation which may affect interstate commerce is constitutional only if the local interest is substantial and the police power is reasonably exercised, the burden on interstate commerce is slight, and the regulation does not discriminate against nonresidents or interstate commerce. State v. Davison 173

Motor Vehicles.

1. The admissibility of the speed of a vehicle shortly before a collision rests largely in the discretion of the trial court. Maricle v. Spiegel 223
2. An opinion of vehicular speed is proper, provided a sufficient foundation is laid to show the expertise of the witness, as well as specific knowledge of the underlying facts to deal with the question in issue. State v. Miller 274
3. The negligence of a family-purpose driver is not ordinarily imputed to the family-purpose owner in an action by the owner against a third party for the owner's own injuries or property damage. Paprocki v. Stopak 523
4. The owner of a family-purpose car may not recover from the driver of another car when the negligence of the family-purpose driver is the sole proximate cause of the collision. Paprocki v. Stopak 523
5. A driver approaching an intersection on the right of an oncoming vehicle may not proceed in disregard of the surrounding circumstances and, where necessary to avoid a collision, may be required to yield the right-of-way. Parmenter v. Johnson 725
6. A driver approaching an unprotected intersection where he knows or can observe that his view is obstructed must have his vehicle under such control as will give him a reasonable opportunity to react to a situation he does or could observe. Parmenter v. Johnson 725
7. The driver of a motor vehicle has the duty to keep a

proper lookout and watch where he is driving even though he is rightfully on the highway and has the right-of-way. He must keep a lookout in the direction from which others may be expected to approach. Parmenter v. Johnson 725

8. By the very nature of the passing maneuver it is necessary for the passing vehicle to be in such close proximity to the overtaken vehicle that if the latter suddenly and without warning swerves so as to block the way and slows down precipitously, there may be a collision. The operator of such passing vehicle need not anticipate that a motorist being overtaken will suddenly swerve so as to block the way, nor slow or stop so as to cause the passing vehicle to lose control, and the question of the negligence of either driver is generally a question of fact for the jury. Morris v. Laaker 868

Municipal Corporations.

1. A petition in error is designed to review the decision of the inferior tribunal. It is not to act as a super legislative or administrative agency to come to an independent conclusion. Andrews v. City of Fremont 148
2. Where a city by its charter is invested with certain powers, or the control and regulation of certain matters, and the charter fails to prescribe or direct the mode of exercise of the power so conferred, the council may act by resolution, and it will be as effectual as would an ordinance passed for the same purpose. Morrow v. City of Ogallala 414
3. Courts will not review or inquire into the legislative acts of municipal boards concerning matters within their power as to whether they acted expediently, wisely, or necessarily. Such are matters of pure legislative function, and not of judicial concern. Morrow v. City of Ogallala 414
4. An appeal from the disallowance of a claim against a city of the primary class is perfected by filing a notice of appeal and bond as provided in Neb. Rev. Stat. § 15-841 (Reissue 1977). Cole Investment Co. v. City of Lincoln 422

Municipal Ordinances.

1. Courts of general jurisdiction will not take judicial notice of municipal ordinances not present in the record, nor will the Supreme Court. Andrews v. City of Fremont 148
2. The existence of a valid ordinance creating the offense

charged will be presumed where the ordinance is not properly set forth in the record. State v. Bruce 661

Negligence.

1. Where reasonable minds may draw different conclusions and inferences from the evidence as to the negligence of the defendant and the contributory negligence of the plaintiff and the degree thereof when one is compared with the other, the issues must be submitted to the jury. Holly v. Mitchell 203
2. Even though a statute grants the right-of-way to a pedestrian crossing a street in the crosswalk, it does not excuse contributory negligence on his part. Holly v. Mitchell 203
3. The doctrine of last clear chance applies where there is negligence of the defendant subsequent to the negligence of the plaintiff, and the defendant's negligence is the proximate cause of the injury. Maricle v. Spiegel 223
4. Last clear chance is applicable only to excuse the contributory negligence of a plaintiff. Maricle v. Spiegel . 223
5. Recovery can not be had for acts of negligence not alleged in the petition. Maricle v. Spiegel 223
6. The negligence of a family-purpose driver is not ordinarily imputed to the family-purpose owner in an action by the owner against a third party for the owner's own injuries or property damage. Paprocki v. Stopak 523
7. The owner of a family-purpose car may not recover from the driver of another car when the negligence of the family-purpose driver is the sole proximate cause of the collision. Paprocki v. Stopak 523
8. In determining whether the evidence is sufficient to submit the issues of negligence or contributory negligence of an opposing party to the jury, a party is entitled to have all conflicts in the evidence resolved in his favor and to have the benefit of every reasonable inference that may be deduced from the evidence. If reasonable minds might draw different conclusions from the set of facts thus resolved, the issues of negligence or contributory negligence are for a jury. Parmenter v. Johnson 725
9. To the extent that *Hawkins Constr. Co. v. Matthews Co., Inc.*, 190 Neb. 546, 209 N.W.2d 643 (1973), held that strict liability in tort may not be used to recover for physical harm to property only, it is disapproved. National Crane Corp. v. Ohio Steel Tube Co. 782
10. The purchaser of a product pursuant to contract cannot recover economic losses from the seller manufacturer on claims in tort based on negligent manufacture or

strict liability in the absence of physical harm to persons or property caused by the defective product. National Crane Corp. v. Ohio Steel Tube Co. 782

11. By the very nature of the passing maneuver it is necessary for the passing vehicle to be in such close proximity to the overtaken vehicle that if the latter suddenly and without warning swerves so as to block the way and slows down precipitously, there may be a collision. The operator of such passing vehicle need not anticipate that a motorist being overtaken will suddenly swerve so as to block the way, nor slow or stop so as to cause the passing vehicle to lose control, and the question of the negligence of either driver is generally a question of fact for the jury. Morris v. Laaker 868

Notice.

1. Possession of land is notice to the world of the possessor's rights therein and of all interests which inquiry of the possessor would have revealed. Masid v. First State Bank 431
2. Where one is put on inquiry, he is charged with notice of all facts as he would have learned by a reasonable inquiry. Masid v. First State Bank 431
3. Due process requires at a minimum that deprivation of property by adjudication be preceded by notice and the opportunity to be heard as is appropriate to the nature of the case. Masid v. First State Bank 431
4. The whereabouts of a possessor of land are known and as such he is entitled to personal notice of any proceeding which may affect his interest in that land. Masid v. First State Bank 431
5. Where one appears before an administrative body and presents evidence or makes argument, the party so appearing cannot thereafter claim a denial of due process solely on the ground that proper notice of the hearing was not given. After appearing at the hearing the party is deemed to have waived any objection with regard to notice. Laubscher v. S.I.D. No. 20 834

Ordinances.

1. Ordinances and statutes are presumed to be constitutional, and their unconstitutionality must be clearly established. State v. Davison 173
2. Local regulation which may affect interstate commerce is constitutional only if the local interest is substantial and the police power is reasonably exercised, the burden on interstate commerce is slight, and the

regulation does not discriminate against nonresidents or interstate commerce. State v. Davison 173

3. A comprehensive development plan is merely a policy statement that may be implemented by a zoning resolution. It is the zoning resolution which has the force of law. If there is a conflict between a comprehensive plan and a zoning ordinance, the zoning ordinance contains the controlling provisions when questions of a citizen's property rights are at issue. Omaha Fish & Wildlife v. Community Refuse 234

4. The operation of a commercial sanitary landfill is not a recognized incidental use to a farming operation so as to be considered an accessory use under zoning ordinances. Omaha Fish & Wildlife v. Community Refuse .. 234

Parental Rights.

An effective forfeiture of parental rights may be effected by the indifference of a parent for a child's welfare over a long period of time. Nye v. Nye 364

Parol Agreement.

A written executory contract may be modified by the parties thereto at any time after its execution and before a breach has occurred, without any new consideration; and the terms of a written executory contract may be changed by a subsequent parol agreement before a breach thereof. Pearce v. ELIC Corp. 193

Parol Evidence.

1. The parol evidence rule relates only to agreements made prior to or contemporaneous with the written agreement and does not apply to parol agreements made after a written agreement. Pearce v. ELIC Corp. 193

2. Parol evidence is not admissible to add to, contradict, or vary the terms of a written contract. Silverman v. Arbor Street Partnership 628

Parties.

1. Where an administrative agency is charged with the responsibility of protecting the public interest as distinguished from determining the rights of two or more individuals in a dispute before such agency, it is a necessary party in any appellate proceeding. Leach v. Dept. of Motor Vehicles 103

2. Making an administrative agency a party defendant in an appeal under the provisions of Neb. Rev. Stat. § 60-420 (Reissue 1978) or § 84-917(2) (Reissue 1981) is

not an action against the State of Nebraska within the meaning of Neb. Rev. Stat. §§ 24-319 et seq. (Reissue 1979) so as to require service of summons upon the Governor and the Attorney General. Leach v. Dept. of Motor Vehicles 103

3. An appellee can not cross-appeal against another appellee. Maricle v. Spiegel 223
4. An intervenor may not change the issues but must accept the case as the intervenor finds it. Craig v. Kile . 340

Partnerships.

1. An action for the dissolution of a partnership and an accounting between partners is one in equity and is reviewed in this court de novo on the record. Bass v. Dalton 360
2. Imposed upon the Nebraska Supreme Court in such a case is the duty to reach an independent conclusion without reference to the findings of the District Court, bearing in mind and according respect and weight to the trial court's superior position as the original finder of fact. Bass v. Dalton 360

Pedestrians.

1. A pedestrian crossing at a regular crosswalk with the right-of-way has a right, until he has notice or knowledge to the contrary, to assume that others will respect his right-of-way. Holly v. Mitchell 203
2. Even though a statute grants the right-of-way to a pedestrian crossing a street in the crosswalk, it does not excuse contributory negligence on his part. Holly v. Mitchell 203

Pensions.

The meaning of the words "salary," as used in Neb. Rev. Stat. § 15-1007.01 (Cum. Supp. 1982), and "regular pay," as employed in § 15-1001 (Cum. Supp. 1982), are the same and include only basic pay without consideration of extra compensation for overtime, college credits, holiday service, etc. Hill v. City of Lincoln ... 517

Perjury.

Witnesses generally are immune from civil liability for damages resulting from testimonial statements, and no civil action lies to recover damages caused by perjury or for conspiracy to commit perjury unless the perjury is but a part of a larger plan or scheme. Stolte v. Blackstone 113

Photographs.

1. In a homicide case, photographs of the victim, upon proper foundation, may be received for purposes of identification, to show the condition of the body, the nature and extent of the wounds and injuries, and to establish malice or intent. State v. Jones 1
   State v. Lamb 498
   State v. Sims 708
2. A photograph which illustrates or makes clear some controverted issue in a homicide case may be received even if it is gruesome, where a proper foundation has been laid. State v. Jones 1
   State v. Sims 708
3. In cases where it is appropriate to admit some gruesome photographs into evidence, no more photographs than absolutely necessary should be used. State v. Jones 1
4. The admission into evidence of a gruesome photograph rests in the sound discretion of the trial court, which must determine its relevancy and weigh its probative value against its possible prejudicial effect. State v. Sims 708

Physicians and Surgeons.

Under the provisions of Neb. Rev. Stat. § 29-2913 (Reissue 1979), an evaluating physician must be licensed to practice medicine in the State of Nebraska. State v. Sell .. 437

Plea in Abatement.

1. Any error by the District Court in ruling on a plea in abatement is cured by a subsequent finding by the "trier of fact" of guilt beyond a reasonable doubt. State v. Schmidt 126
2. Generally, the pendency of a former action for the same cause between the same parties and in the same court constitutes a good plea in abatement. Miller v. Miller 219
3. The general rule that pendency of a prior action between the same parties for the same cause may be pled in abatement of a subsequent action will not be sustained where the prior action is pending in a court of a foreign or different jurisdiction. Miller v. Miller 219

Pleadings.

1. The refusal to permit an amendment which is proposed at an opportune time, and which should be made in the furtherance of justice, is an abuse of discretion on the part of the trial court. The law of amendments should

be liberally construed in order to prevent a failure of justice. Changes in judicial procedure have not altered the rule or indicated any reason for discontinuing its judicial application. Building Systems, Inc. v. Medical Center, Ltd. 49

2. The decision to allow or deny an amendment to the pleadings lies within the discretion of the trial court. Maricle v. Spiegel 223
3. Failure to plead mitigation of damages waives the defense. Maricle v. Spiegel 223
4. Recovery can not be had for acts of negligence not alleged in the petition. Maricle v. Spiegel 223
5. The pleadings frame the issues between the parties, and the evidence must be confined to those issues. Omaha Fish & Wildlife v. Community Refuse 234
6. Under Nebraska statutes, "The pleadings are the written statements by the parties of the facts constituting their respective claims and defenses." Neb. Rev. Stat. § 25-801 (Reissue 1979). "The rules of pleading formerly existing in civil actions are abolished and hereafter the forms of pleading in civil actions in courts of record, and the rules by which their sufficiency may be determined, are those prescribed by this code." Neb. Rev. Stat. § 25-802 (Reissue 1979). "The only pleadings allowed are (1) the petition by the plaintiff; (2) the answer or demurrer by the defendant; (3) the demurrer or reply by the plaintiff; and (4) the demurrer to the reply by the defendant." Neb. Rev. Stat. § 25-803 (Reissue 1979). Lammers Land & Cattle Co. v. Hans 243
7. The court, in every stage of an action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect. Lammers Land & Cattle Co. v. Hans 243
8. The court must accept the facts as set forth in the petition and may not notice or consider extrinsic matters in determining whether a pleading states a cause of action. Heinzman v. County of Hall 268
9. A petition which contains no facts from which it can be concluded that it is impracticable to bring all of the parties before the court fails to state a necessary predicate for a class action. Roadrunner Development v. Sims 649
10. For purposes of determining the sufficiency of a petition to state a cause of action, we must accept as true all facts well pleaded, but we do not accept as true facts not well pleaded, nor do we accept as true conclu-

sions of law or of the pleader. Roadrunner Development v. Sims 649
11. The character of a pleading is determined by its content, not by its caption. Stigge v. Graves 847

Pleas.
1. A plea of nolo contendere must not only be intelligently and voluntarily made to be valid but the record must affirmatively disclose that the plea was entered understandingly and voluntarily. State v. Luther 476
2. A plea of guilty cannot be voluntary if the defendant is unaware of the penal consequences of such plea because of having been misinformed by the trial court, and such plea must be vacated and the defendant rearraigned. State v. McMahon 897

Police Officers and Sheriffs.
1. The office of sheriff and the office of jailer are separate and apart, although the sheriff may, if he elects, act as jailer. State ex rel. Landanger v. Madison County 33
2. If the sheriff performs the duties of jailer in addition to his duties as sheriff, he is entitled not to extra compensation for the performance of his duties as sheriff but to the compensation provided for the performance of the other duties as jailer. State ex rel. Landanger v. Madison County 33

Police Powers.
As a general rule, under its police power, a state may, in the interest of safety and public welfare, restrict the weight of vehicles using its highways by reasonable and nondiscriminatory regulation. State v. Davison .. 173

Political Subdivisions.
1. A distinction is recognized between taxation for general purposes and the levying of assessments on specific property for specific benefits conferred upon it by means of an improvement district created by an appropriate governing authority. Easley v. City of Lincoln 450
2. There is no constitutional prohibition against the assessment of a governmental subdivision for special benefits conferred upon its realty as the result of improvements created by an appropriate governing authority. Easley v. City of Lincoln 450

Political Subdivisions Tort Claims Act.
The findings of fact made by the District Court in an ac-

tion under the Political Subdivisions Tort Claims Act will not be disturbed on appeal unless clearly wrong. Richards v. Douglas County 313

Prejudgment Interest.

1. Generally, a party is not entitled to prejudgment interest where the amount due is not readily determinable by computation from data without reliance on opinion or discretion. Smith v. Fettin Roofing Co. 184
2. Prejudgment interest is allowable only where the amount of the claim is liquidated; conversely, where reasonable controversy exists as to the plaintiff's right to recover or as to the amount of such a recovery, the claim is considered to be unliquidated and prejudgment interest is not allowed. Langel Chevrolet-Cadillac v. Midwest Bridge 283

Presumptions.

1. There is a presumption that a board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action, which presumption remains until there is competent evidence to the contrary. Once there is competent evidence on appeal to the contrary, the presumption disappears and the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon the evidence. Potts v. Board of Equalization 37
   Beynon v. Board of Equalization 488
2. Evidence of sale price alone may not be sufficient to overcome the presumption that the board of equalization has valued the property correctly. But where the evidence discloses the circumstances surrounding the sale and shows that it was an arm's length transaction between a seller who was not under compulsion to sell and a buyer who was not compelled to buy, it should receive strong consideration. Potts v. Board of Equalization 37
3. The presumption that a valuation made by a board of equalization is correct applies to the valuation of railroad property made by the state board. In re Assessment of OL&B Ry. Co. 71
4. Generally, there is a presumption that the acts of corporate officers pertaining to ordinary business transactions are authorized by the corporation. This presumption does not apply when an officer diverts or pledges corporate property as security for a personal debt. Val-U Constr. Co. v. Contractors, Inc. 291

5. When a corporate officer acts outside the scope of ordinary business, no presumption of authority arises and the other party to the transaction must make an inquiry into the officer's authority. Val-U Constr. Co. v. Contractors, Inc. 291
6. Sheriff's deeds are specially covered by Neb. Rev. Stat. §§ 77-1901 et seq. (Reissue 1981) and, unlike the provisions for tax certificates, there is no section establishing a presumption regarding service, as is true in the case of a treasurer's deed. Brown v. Glebe 318
7. Where a claimant has shown open, visible, continuous, and unmolested use for the prescriptive period, the use will be presumed to be under a claim of right. The burden then falls upon the owner of the servient estate to rebut that presumption by showing the use to be permissive. Masid v. First State Bank 431
8. The existence of a valid ordinance creating the offense charged will be presumed where the ordinance is not properly set forth in the record. State v. Bruce 661
9. In the absence of other evidence, proof that the guidelines provided by the Tax Commissioner were applied raises a presumption that the assessment is legally proper. Where, however, evidence which establishes that following the guidelines will violate either the constitutional provisions requiring that property be taxed uniformly and proportionately or the statutory requirement that property be taxed at its actual value is introduced by either party, the guidelines must give way to the evidence. Farmers Co-op Assn. v. Boone County .. 763
Beynon Farm Products v. Bd. of Equalization 815

Prior Convictions.

1. In a proceeding to enhance the punishment because of prior convictions, the burden remains on the State to prove such convictions. State v. Smith 446
2. A judgment of conviction which would have been invalid to support a sentence of imprisonment in the first instance is not valid to enhance the punishment in a subsequent case. State v. Smith 446
3. That defendant's right to counsel was honored in a prior conviction may not be proved by a silent record. State v. Smith 446
4. At an enhancement proceeding, a defendant's objection to the reception in evidence of a transcript of a former conviction which fails to show on its face that counsel was afforded or the right waived does not constitute a collateral attack on such prior conviction. To the extent that *State v. Orosco*, 199 Neb. 532, 260 N.W.2d 303

(1977), and *State v. Voight*, 206 Neb. 829, 295 N.W.2d 112 (1980), conflict with this holding, they are overruled. State v. Smith 446

5. The record of a conviction used for enhancement purposes in a prosecution for third offense driving while intoxicated must show on its face a voluntary and intelligent waiver of the right to counsel or that the defendant was represented by counsel. State v. Vainiunas 800

Probable Cause.

The existence of probable cause must be determined by a practical and not by a technical standard. When objects which are indicative of a criminal offense are within the plain sight of an officer who has the right to be in the position to have such view, a seizure is justified and legal. State v. Jones 1

Proof.

1. The burden is on the applicant to show that the proposed service is required by public convenience and necessity. In determining that issue, the controlling questions are whether or not the operation will serve a useful purpose responsive to a public demand or need; whether or not this purpose can or will be served as well by existing carriers; and whether or not it can be served by the applicant in a specified manner without endangering or impairing the operations of existing carriers, contrary to the public interest. In re Application of Crusader Coach Lines 53
2. A written contract may be waived in whole or in part, either directly or inferentially, and the waiver may be proved by express declarations manifesting the intent not to claim the advantage, or by so neglecting and failing to act as to induce the belief that it was the intention to waive. Pearce v. ELIC Corp. 193
3. Under Neb. Rev. Stat. § 28-502 (Reissue 1979), arson in the first degree does not require proof that some part of the building was ignited. It is sufficient if the evidence shows there was some damage to the building. State v. Hohnstein 296
4. The fact that a building was constructed of nonflammable materials does not prevent proof of first degree arson under Neb. Rev. Stat. § 28-502 (Reissue 1979), since it is only necessary to show that some damage to the building resulted from the fire. State v. Hohnstein 296
5. Proof of the actual commission of an offense is sufficient to sustain a conviction for attempt. State v. Hohnstein 296

6. In order to set aside an instrument or instruments for want of mental capacity on the part of the person executing such instruments, the burden of proof is upon the party so asserting to establish that the mind of the person executing such instruments was so weak or unbalanced when the instruments were executed that he could not understand and comprehend the purport and effect of what he was doing. Craig v. Kile 340
7. The plaintiff bears the burden of establishing a causal relationship between the accident and any disability. Nordby v. Gould, Inc. 372
Caradori v. Frontier Airlines 513
8. Prescriptive rights are not looked upon with favor and, generally, must be proved by clear, convincing, and satisfactory evidence. Masid v. First State Bank 431
9. Abandonment must be pled and proved, the burden of proof being on the party alleging it. Masid v. First State Bank 431
10. In a proceeding to enhance the punishment because of prior convictions, the burden remains on the State to prove such convictions. State v. Smith 446
11. A judgment of conviction which would have been invalid to support a sentence of imprisonment in the first instance is not valid to enhance the punishment in a subsequent case. State v. Smith 446
12. That defendant's right to counsel was honored in a prior conviction may not be proved by a silent record. State v. Smith 446
13. To sustain a conviction for a crime, the corpus delicti must be proved beyond a reasonable doubt. State v. Workman 479
14. In order to establish the corpus delicti in an arson case, it is necessary that the evidence disclose the burning of the property as charged and that the burning was caused by the willful act of some person criminally responsible. State v. Workman 479
15. 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. Caradori v. Frontier Airlines 513
16. Marriage is a fact which may be proved by direct or

circumstantial evidence, or by documentary or parol evidence. The weight and sufficiency of the evidence to prove marriage is governed by the general rules of evidence. In re Estate of McCartney 550
17. The general rule is that the burden of proof of marriage is upon the party who pleads it. In re Estate of McCartney 550
18. Where the issue is whether a marriage was ever contracted, the burden of proof is on the party asserting its existence. In re Estate of McCartney 550
19. Common-law marriages are not recognized in Nebraska. Cohabitation without a ceremonial marriage is meretricious and is not evidence of marital status in this state. In re Estate of McCartney 550
20. In order to prove a marriage there must be proof that a ceremonial marriage took place. In re Estate of McCartney 550
21. The general rule is that payments are presumed to be voluntary, and the party seeking to recover a payment has the burden to prove that it was involuntary. Shanks v. City of South Sioux City 580
22. The party claiming a prescriptive right to an easement must prove that his use and enjoyment was adverse, under a claim of right, continuous and uninterrupted, open and notorious, and exclusive for the full prescriptive period. Biegert v. Dudgeon 617
23. A defendant challenging competency of counsel has the burden to establish it. In addition, defendant must show that he suffered prejudice in the defense of his case as a result of his attorney's actions or inactions. State v. Pope 645
24. A plaintiff whose petition shows apparent laches on its face must generally plead and prove an excuse for the delay. Roadrunner Development v. Sims 649
25. The measure of damages for the loss caused by the negligence of the broker is the amount that would have been due under the policy if it had been obtained by the broker. Nebraska Truck Serv. v. U.S. Fire Ins. Co. ... 755
26. Damages, like any other element of plaintiff's cause of action, must be pled and proved, and the burden is on the plaintiff to offer evidence sufficient to prove plaintiff's alleged damages. Nebraska Truck Serv. v. U.S. Fire Ins. Co. 755
27. It is fundamental that the plaintiff's burden to prove the nature and amount of damages cannot be sustained by evidence which is speculative and conjectural. Nebraska Truck Serv. v. U.S. Fire Ins. Co. 755
28. Damages must be proved with all the certainty the

case permits and cannot be left to conjecture, guess, or speculation. Nebraska Truck Serv. v. U.S. Fire Ins. Co. 755

29. A property owner who attacks a special assessment as void has the burden of establishing its invalidity. Reiser v. Hartzler 802

Property.

One of the primary incidents of ownership of property in fee simple is the right to convey or encumber it. It is the general rule that a testator may not create a fee simple estate to vest at his death and at the same time restrict its alienation. However, this is not to say that such testator may not, in some situations, create economic incentives in his will encouraging the retention of property, without violating the rule condemning restrictions on alienation. In re Testamentary Trust of Criss 379

Property Division.

1. The rules for determining the division of property in an action for dissolution provide no mathematical formula by which such awards can be precisely determined. Such awards are determined by the facts in each case. Lord v. Lord 557
2. How property owned at marriage and acquired by gift or inheritance will be considered in determining division of property or award of alimony depends upon the facts of the particular case and the equities involved. Lord v. Lord 557

Prosecuting Attorneys.

1. Where requisite elements of the completed crime are committed in different jurisdictions, any state in which an essential part of the crime is committed has jurisdiction of the offense. State v. Manchester 670
2. Absent bad faith and prejudice to the defendant, the action of the trial court with regard to alleged misconduct of the prosecutor will not be deemed an abuse of discretion. State v. Manchester 670

Prosecutorial Discretion.

The general rule regarding prosecutorial discretion in law enforcement is that, unless there is proof that a particular prosecution was motivated by an unjustifiable standard based, for example, on race or religion, the use of such discretion does not violate constitutional protections. State v. Sprague 581

Public Officers and Employees.

1. Where the salary or compensation of a public officer is fixed by statute, no judicial action in that respect is required of the board of county commissioners and, in such a case, the provisions of Neb. Rev. Stat. § 23-135 (Reissue 1977) do not apply. Heinzman v. County of Hall 268
2. Under Nebraska law it is a settled principle that government employment, in the absence of legislation, can be revoked at the will of the appointing officer. Heinzman v. County of Hall 268
3. Where a person is employed during the pleasure of two governmental agencies, either one may discharge unless otherwise specified in the contract of employment. Heinzman v. County of Hall 268

Public Property.

Ordinarily, public property is exempt from general purpose taxation. Easley v. City of Lincoln 450

Public Service Commission.

1. Upon an appeal from an order of the Public Service Commission, this court may decide only whether the commission acted within the scope of its authority and whether the order was based on evidence which shows that such order was not unreasonable or arbitrary. In re Application of Crusader Coach Lines 53
2. It is not the province of this court to weigh or resolve conflicts in the evidence or the credibility of witnesses. The Supreme Court does not act as an appellate public service commission, but will sustain the action of the commission if there is evidence in the record to support it. In re Application of Crusader Coach Lines 53
   In re Application of ATS Mobile Telephone 403
3. The issue of public convenience and necessity is ordinarily one of fact, and where there is evidence in the record to sustain the Public Service Commission's order, this court cannot say that it is unreasonable and arbitrary. 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 Public Service Commission. In re Application of Crusader Coach Lines 53
4. The determination by the Public Service Commission as to whether the granting or rejecting of an application for service is within the public interest is a matter peculiarly within its expertise and involves a breadth of judgment and policy determination that will not be dis-

turbed by this court in the absence of a showing that the action of the commission was illegal or arbitrary, capricious, or unreasonable. In re Application of ATS Mobile Telephone 403

5. The striking of the balance between the competing interests of legitimate competition and the protection of the public interest as to the authorization of services regulated by the Public Service Commission are matters of legislative and administrative determination peculiarly resting in the judgment of the commission. The determination of the public interest is one that is peculiarly for the determination of the commission, and if there is evidence to sustain the finding this court cannot intervene. In re Application of ATS Mobile Telephone 403

6. If the record supports a decision by the Public Service Commission that an application for service should not be granted because the area proposed for the service is presently receiving or within a reasonable time will receive reasonably adequate service and that granting the application will create a duplication of facilities and is not in the interest of the public as provided by Neb. Rev. Stat. § 75-604 (Reissue 1981), the mere fact that the commission adds to its findings that to grant the particular application will unnecessarily extend the monopoly of the applicant to another area is not a necessary finding to justify the denial of such application; and although it may be an ill-advised statement, and as such objectionable, it does not constitute reversible error under the circumstances. In re Application of ATS Mobile Telephone 403

Railroads.

1. The review in this court of the assessment of railroad operating property made by the State Board of Equalization and Assessment is de novo on the record. In re Assessment of OL&B Ry. Co. 71
2. There are no infallible rules or criteria for the valuation of railroad property. Approximation is all that reasonably can be expected. In re Assessment of OL&B Ry. Co. 71
3. The presumption that a valuation made by a board of equalization is correct applies to the valuation of railroad property made by the state board. In re Assessment of OL&B Ry. Co. 71
4. The burden of showing the assessment was improper is on the complaining party. In re Assessment of OL&B Ry. Co. 71

5. Although the earnings of a railroad are evidence of importance in determining its value, the earning capacity of the railroad is of greater importance. In re Assessment of OL&B Ry. Co. 71

Real Estate.

A sale of real estate to satisfy a dormant judgment is, as to the judgment debtor, voidable only and cannot be attacked in collateral proceedings. Lammers Land & Cattle Co. v. Hans 243

Rebuttal Evidence.

The admission of rebuttal testimony is largely within the discretion of the trial court. Omaha Nat. Bank v. Manufacturers Life Ins. Co. 873

Records.

1. In the absence of a bill of exceptions it is presumed that the evidence sustained the findings of the trial court. The only issue that can be considered is whether the pleadings support the judgment. Caynor v. Caynor ... 143
   Snyder v. Nelson 605
2. The failure of an administrative agency to prepare and transmit to the court a certified transcript of the proceedings had before it within 15 days after service of the petition, pursuant to Neb. Rev. Stat. § 84-917(4) (Reissue 1981), does not, in and of itself, entitle the party seeking review to have the agency's order set aside. Maurer v. Weaver 157
3. Where appeals are taken from an administrative agency to the District Court, pursuant to the provisions of Neb. Rev. Stat. § 84-917 (Reissue 1981), the certified transcript as prepared by the agency and transmitted to the court shall be considered to be before the court and shall, unless objected to by one of the parties, be considered without the need of either party formally offering the record into evidence. Maurer v. Weaver ... 157
4. Assignments of error requiring an examination of the evidence are not available on appeal in the absence of a bill of exceptions, the bill of exceptions being the only vehicle for bringing evidence to this court. This remains so even though certain evidence has been physically filed in the office of the clerk of the trial court.
   Snyder v. Nelson 605
   State v. Manchester 670
5. Where there is no bill of exceptions, we are limited to an examination of the pleadings; if they are sufficient

to support the judgment, we will not reverse the trial court. Snyder v. Nelson 605
6. Opening and closing statements must appear in the bill of exceptions before alleged errors concerning them can be reviewed. State v. Manchester 670

Res Judicata.
1. The scope of the res judicata bar encompasses not only the issues actually litigated in the prior proceeding but also those issues which could have been raised; any right, fact, or matter in issue and directly adjudicated in a prior proceeding, or necessarily involved in the determination of such action before a competent court in which the judgment or decree was rendered upon the merits, is conclusively settled by such a judgment and may not again be litigated between the parties or their privies, whether the claim, demand, purpose, or subject matter of the two suits would or would not be the same. Pflasterer v. Koliopoulos 330
2. A former action bars all those issues which could have been raised upon the same facts sought to be presented in a subsequent action. Pflasterer v. Koliopoulos 330
3. Where cases are interwoven and interdependent and the controversy involved has already been considered and determined in a prior proceeding involving one of the parties now before the court, the court has a right to examine its own records and take judicial notice of its own proceedings and judgment in the prior action. Cedars Corp. v. Sun Valley Development Co. 622

Restrictive Covenants.
1. Where powers are granted to a committee to approve or disapprove the erection of a fence based on a standard of whether it conforms to the harmony of external design and location in relation to surrounding structures, such a standard, per se, is not ambiguous and, in proper circumstances, it is enforceable, provided that the authority is exercised reasonably within the framework of the covenant purposes. Such rule is to be applied on a case-by-case basis. Normandy Square Assn. v. Ells 60
2. Property owners in a subdivision affected by restrictive covenants are not estopped from preventing a most flagrant violation of those restrictions simply because they had earlier failed to take steps to stop a slight deviation from the strict letter of such restrictions. Plumb v. Ruffin 335
3. In determining whether the character of a neighbor-

hood has so changed that the existing restrictive covenants can no longer be enforced, the test ordinarily is whether the original purpose and intention of the parties creating the restrictions are no longer of substantial benefit to the residents. The question is not whether suitable persons will in the future purchase property in the addition, but whether the restrictions still preserve to the addition its character of a residence district. Plumb v. Ruffin 335
Roadrunner Development v. Sims 649

4. An agreement restricting the use of land in a certain tract, imposed thereon by a common grantor under a general improvement plan, intended for the mutual benefit of all grantees therein, may be enforced in equity by any subsequent grantee in such tract, who purchased with reliance on the general plan, against any other subsequent grantee taking with notice of the restrictions. Plumb v. Ruffin 335
5. In a suit brought to enforce restrictive covenants, the plaintiff is entitled to an injunction without a showing of actual damages or that irreparable injury will result from a continued violation of the restrictive clause. Plumb v. Ruffin 335

Right to Counsel.

1. The right of an indigent defendant to have counsel does not give him the right to be represented by counsel of his own choosing, and mere distrust of, or dissatisfaction with, appointed counsel is not enough to secure the appointment of substitute counsel. State v. Jones 1
2. In the absence of a statute there is no authority requiring the appointment of counsel to represent an indigent prison inmate in a private civil matter. Caynor v. Caynor 143
3. That defendant's right to counsel was honored in a prior conviction may not be proved by a silent record. State v. Smith 446
4. Spontaneous statements made by the defendant, even after counsel has been requested, if not induced by the police or if made during conversations not initiated by the officers, are not "interrogation." The defendant must be subjected to "interrogation" in order for the right to counsel to come into play. State v. Lamb 498
5. The failure of the police to notify counsel, even if aware of such representation, does not violate the defendant's sixth amendment rights to the presence of counsel when the right has been waived voluntarily. State v. Lamb 498

Rules of Evidence.

1. A parent as an informed and concerned lay person is competent to testify as to his or her opinion on "best educative interest." The parents were not testifying as experts, and the evidence was clearly admissible under Neb. Rev. Stat. § 27-701 (Reissue 1979). In re Freeholder Petition 532
   In re Freeholder Petition 633
2. Neb. Rev. Stat. § 27-405 (Reissue 1979) permits evidence of specific instances of conduct where character is an essential element of a defense. State v. Sims 708
3. Neb. Rev. Stat. § 27-401 (Reissue 1979) defines relevance as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. State v. Bromwich 827
4. Generally, in the absence of an offer of proof no error may be predicated upon the court's ruling in excluding testimony. Morris v. Laaker 868

Rules of the Road.

1. A driver approaching an intersection on the right of an oncoming vehicle may not proceed in disregard of the surrounding circumstances and, where necessary to avoid a collision, may be required to yield the right-of-way. Parmenter v. Johnson 725
2. A driver approaching an unprotected intersection where he knows or can observe that his view is obstructed must have his vehicle under such control as will give him a reasonable opportunity to react to a situation he does or could observe. Parmenter v. Johnson 725
3. The driver of a motor vehicle has the duty to keep a proper lookout and watch where he is driving even though he is rightfully on the highway and has the right-of-way. He must keep a lookout in the direction from which others may be expected to approach. Parmenter v. Johnson 725

Schools and School Districts.

1. The action of the board under Neb. Rev. Stat. § 79-403 (Reissue 1981) is an exercise of a quasi-judicial power, equitable in character, and upon appeal from the District Court to this court the cause is triable de novo as in any other equitable action. In re Freeholder Petition 532
2. A freeholder petition must be supported by an adequate

showing that the purposed transfer of land is justified in relation to the controlling educational factors regarding the convenience, necessity, or welfare of the pupil or pupils involved. Such a showing must include a demonstration of significant differences in the class, accreditation, leadership, management, curricula, and/or efficiency of the schools involved. In re Freeholder Petition 532

3. Best educative interest requires a showing that the convenience, necessity, or welfare of the student will be best served by the transfer, and may be demonstrated by proof of the accreditation of the respective schools, educational efficiency of the schools, and/or the leadership, management, and curricula of the schools involved. In re Freeholder Petition 633

Search and Seizure.

The existence of probable cause must be determined by a practical and not by a technical standard. When objects which are indicative of a criminal offense are within the plain sight of an officer who has the right to be in the position to have such view, a seizure is justified and legal. State v. Jones 1

Security Interests.

1. One without authority to encumber the property of another can not grant a valid security interest in such property. Val-U Constr. Co. v. Contractors, Inc. 291
2. When the collateral consists of goods purchased by the debtor, the sales article of the Uniform Commercial Code determines when the debtor has acquired rights in the collateral. First National Bank v. Rose 611
3. A land contract vendee has an equitable interest in the land. First National Bank v. Rose 611

Self-Incrimination.

The general rule is that a defendant's testimony at a former trial is admissible in evidence against him in later proceedings. A defendant who chooses to testify waives his privilege against compulsory self-incrimination with respect to the testimony he gives. State v. Hilpert 564

Sentences.

1. Where the defendant has testified in a previous criminal case under a lawful grant of immunity, the sentencing court in a subsequent criminal case cannot consider such testimony or any information directly or in-

directly derived from it in determining whether a death sentence should be imposed under the provisions of Neb. Rev. Stat. § 29-2523 (Reissue 1979) and related statutes. State v. Jones 1

2. A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion.
State v. Schmidt 126
State v. Komor 376
State v. Hilpert 564
State v. Isherwood 592
State v. Manchester 670
State v. Patterson 686
State v. Sims 708
State v. Christensen 820
State v. Bromwich 827
State v. Hellbusch 894

3. The Nebraska Supreme Court has authority to reduce a sentence when it is excessive and would result in a substantial miscarriage of justice. State v. Komor 376

4. Only a sentence which is clearly excessive is to be reduced by the Nebraska Supreme Court. State v. Komor 376

5. A prisoner serving an Iowa sentence who is transferred to Nebraska pursuant to the Interstate Corrections Compact remains subject to the jurisdiction of Iowa. Falkner v. Neb. Board of Parole 474

6. A Nebraska parole violator who is serving an Iowa sentence imposed for a subsequent offense does not recommence serving his Nebraska sentence until he has been released from custody by Iowa and arrested for the custody of the Nebraska Board of Parole. Falkner v. Neb. Board of Parole 474

7. The effect of a sentence to life imprisonment for second degree murder is an indeterminate sentence of 10 years to life. State v. Isherwood 592

8. Whenever a court considers a sentence for an offender convicted of a felony, the court may withhold a sentence of imprisonment unless, among other things, a lesser sentence will depreciate the seriousness of the crime or promote disrespect for the law. State v. Sims 708

9. When a court considers a sentence for a convicted offender, it shall, among other things, consider the offender's delinquency and criminal history. State v. Christensen 820

Service of Process.

1. Under the venue statutes, a nonresident defendant corporation "may be found" in any county within the state

in which proper service can be had upon its agent. Mittelstadt v. Rouzer 178
2. By designating an agent upon whom process may be served within this state, a defendant has consented to the jurisdiction in personam by the proper court. Mittelstadt v. Rouzer 178
3. The validity of service under the Motor Carrier Act, 49 U.S.C. § 321(c) (1976) (now 49 U.S.C. § 10330(b) (Supp. IV 1980)), is not limited to causes of action arising out of commerce transacted by a foreign corporation within the state because the act deals with jurisdiction of the person. Mittelstadt v. Rouzer 178
4. By appointing a resident agent for service as required by the Motor Carrier Act, 49 U.S.C. § 321(c) (1976) (now 49 U.S.C. § 10330(b) (Supp. IV 1980)), a nonresident corporation has consented to jurisdiction within this state at least as to any cause of action arising out of its activities as a motor carrier in interstate commerce. Mittelstadt v. Rouzer 178

Special Assessments.

1. A distinction is recognized between taxation for general purposes and the levying of assessments on specific property for specific benefits conferred upon it by means of an improvement district created by an appropriate governing authority. Easley v. City of Lincoln 450
2. There is no constitutional prohibition against the assessment of a governmental subdivision for special benefits conferred upon its realty as the result of improvements created by an appropriate governing authority. Easley v. City of Lincoln 450
3. The general rule is that payments are presumed to be voluntary, and the party seeking to recover a payment has the burden to prove that it was involuntary. Shanks v. City of South Sioux City 580
4. Where the physical facts are such that real property was not and could not be specially benefited by an improvement project, the assessment levied to pay for such improvement may be held to be arbitrary, constructively fraudulent, and therefore void and subject to collateral attack. Reiser v. Hartzler 802
5. However, to sustain a collateral attack on a special assessment, it is necessary that the evidence support a determination that in fact the property in question was not and could not be specially benefited by the particular improvement. Reiser v. Hartzler 802
6. Mere excessiveness of a special assessment may not be

corrected in a collateral attack upon the assessment. Reiser v. Hartzler 802
7. A property owner who attacks a special assessment as void has the burden of establishing its invalidity. Reiser v. Hartzler 802
8. The review of a collateral attack upon a special assessment is a proceeding in equity, which this court reviews de novo on the record. Reiser v. Hartzler 802

Specific Performance.
1. Where it appears that the vendor is unable to make a complete or perfect title, or that there is a deficiency in the quantity of land contracted to be sold, the general rule is that the vendee, if he so elects, is entitled to have the contract specifically performed to the extent of the vendor's ability to comply therewith and at the same time have a just abatement out of the purchase price for the deficiency of title, quantity, or quality of the estate to compensate for the vendor's failure to perform the contract in full. The measure of abatement should be such portion of the purchase price as the relative value of the land lost bears to the purchase price of the whole tract. Kuhlman v. Grimminger 64
2. A party seeking specific performance of an oral contract upon the basis of part performance must prove an oral contract, the terms of which are clear, satisfactory, and unequivocal, and that the acts done in part performance were referable solely to the contract sought to be enforced, and not such as might be referable to some other or different contract, and further that nonperformance by the other party would amount to a fraud upon the party seeking specific performance. Yates v. Grosh 164

Speedy Trial.
A delay in sentencing of 90 days pending a court-imposed evaluation under Neb. Rev. Stat. § 83-1,105(3) (Reissue 1981) is not such a delay as to be violative of the sixth amendment right to a speedy trial. Kaba v. Fox 656

Statutes.
1. When a statute adopts the general law on a particular subject rather than a specific statute, it adopts not only the existing law but later legislation on the subject as well. Leach v. Dept. of Motor Vehicles 103
2. Ordinances and statutes are presumed to be constitutional, and their unconstitutionality must be clearly established. State v. Davison 173

3. The court, in considering the meaning of a statute, should, if possible, discover the legislative intent from the language of the act and give it effect. Mitchell v. County of Douglas 355
4. In construing a statute, the court must look to the objects to be accomplished, the evils and mischiefs sought to be remedied, or the purpose to be served, and place on the statute a reasonable or liberal construction which will best effect its purpose rather than one which will defeat it. Mitchell v. County of Douglas 355
5. A statute proscribing otherwise free speech activity which "harasses" others, without setting forth standards comprising such harassment, is constitutionally infirm as vague because it impermissibly delegates to others, indiscriminately, the resolution, on an ad hoc and subjective basis, of the meaning of such term. Fowler v. Neb. Account. and Disclosure Comm. 462
6. The portion of Neb. Rev. Stat. § 46-613.01 (Reissue 1978), to wit, "if the state in which the water is to be used grants reciprocal rights to withdraw and transport ground water from that state for use in the State of Nebraska," may be severed from the rest of the statute because it did not constitute an inducement to the passage of § 46-613.01, does not make the act inoperative, and will not frustrate the intent of the Legislature. The remainder of § 46-613.01, after the unconstitutional portion is stricken, remains a viable statute. State ex rel. Douglas v. Sporhase 484
7. Legislative definitions of terms used to adequately express the purpose of a particular legislative act do not change the common meaning of words used in matters disconnected therewith, unless the same are adopted by reference. Hill v. City of Lincoln 517
8. Where words of a statute are plain and unambiguous, no interpretation is needed to ascertain their meaning, and in the absence of anything to indicate the contrary, words will be given their ordinary meaning. Hill v. City of Lincoln 517
9. A sensible construction will be placed upon a statute to effectuate the object of legislation, rather than a literal meaning that would have the effect of defeating the legislative intent. Hill v. City of Lincoln 517
State v. Coffman 560
10. Whether words are ambiguous is a question of law for the court. Hill v. City of Lincoln 517
11. The constitutional requirement that statutory language must be reasonably certain or be held void for vagueness is satisfied by the use of ordinary terms which find

adequate interpretation in common usage and understanding. Roth v. School Dist. of Scottsbluff 545
State v. Sprague 581
12. One to whose conduct a statute clearly applies may not successfully challenge it for vagueness. State v. Sprague 581
13. A person to whom a statute may be constitutionally applied will not be heard to challenge the statute on the ground that it might conceivably be applied unconstitutionally to others in situations not before the court. State v. Sprague 581
14. The test for determining whether a statute is vague is whether it forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. State v. Sprague 581
15. In determining whether a statute is vague and therefore does not give a defendant adequate notice that his conduct is proscribed, the statute must be examined in light of the conduct with which the defendant is charged. State v. Sprague 581
16. The Legislature may authorize an agency to make rules and regulations for the operation and enforcement of a law, such to be limited to rules within the express legislative purpose of the act and to be administered in accordance with standards expressed in the act. State v. Sprague 581
17. No unconstitutional delegation of authority occurs when the Legislature defines a crime and sets a penalty therefor, but delegates the implementation of details to an administrative agency. State v. Sprague 581
18. The manner and method of enforcing a law may be delegated, since of necessity this must be left to the reasonable discretion of administrative officers. State v. Sprague 581
19. That a statute may discriminate in favor of a certain class does not render it arbitrary if the discrimination is founded upon a reasonable distinction or difference in state policy. State v. Sprague 581
20. It has long been settled that a classification, though discriminatory, is not arbitrary nor violative of the equal protection clause of the fourteenth amendment if any state of facts reasonably can be conceived that would sustain it. State v. Sprague 581
21. A penal statute is one by which a forfeiture is imposed for transgressing the provisions of the act and where the extent of liability imposed is not measured or lim-

ited by the damage caused by the act or omission. Hancock v. State ex rel. Real Estate Comm. 807

22. A penal statute is strictly construed, and its import may not be extended by construction to situations not clearly within its provisions. Nothing will be recognized, presumed, or inferred that is not expressed, unless necessarily or unmistakably implied in order to give effect to the statute. Hancock v. State ex rel. Real Estate Comm. 807

23. The meaning of the word "know," when used in a penal statute, varies with the context in which it is used. Hancock v. State ex rel. Real Estate Comm. 807

Stock.

Generally, "book value" of the stock in a corporation means the figure obtained by dividing the difference between assets and liabilities by the number of outstanding shares of stock. Smith v. Fettin Roofing Co. . 184

Strict Liability.

1. The doctrine of strict liability in tort may be used to recover damages to the defective product itself where the damage occurred as a result of a sudden, violent event and not as a result of an inherent defect that reduced the property's value without inflicting physical harm to the product. National Crane Corp. v. Ohio Steel Tube Co. 782

2. To the extent that *Hawkins Constr. Co. v. Matthews Co., Inc.*, 190 Neb. 546, 209 N.W.2d 643 (1973), held that strict liability in tort may not be used to recover for physical harm to property only, it is disapproved. National Crane Corp. v. Ohio Steel Tube Co. 782

3. The purchaser of a product pursuant to contract cannot recover economic losses from the seller manufacturer on claims in tort based on negligent manufacture or strict liability in the absence of physical harm to persons or property caused by the defective product. National Crane Corp. v. Ohio Steel Tube Co. 782

Subrogation.

The doctrine of subrogation includes every instance in which one person pays a debt for which another is primarily liable and which in equity and good conscience should have been discharged by the latter, so long as the payment was made under compulsion or for the protection of some interest of the one making the payment and in discharge of an existing liability. Scott v. Langvardt 854

Summary Judgment.

1. The absence of a genuine issue as to any material fact and entitlement to judgment as a matter of law are prerequisites to a summary judgment. Stolte v. Blackstone 113
2. The purpose of a motion for summary judgment is to pierce the allegations of the pleadings and to show conclusively that the controlling facts are otherwise than as alleged. Stolte v. Blackstone 113
3. 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. Stolte v. Blackstone 113
4. Under Nebraska law the primary purpose of the summary judgment statute, Neb. Rev. Stat. § 25-1332 (Reissue 1979), is to pierce sham pleadings and to dispose of, without the necessity and expense and delay of trial, those cases where there is no genuine claim or defense. Mutual Benefit Life Ins. Co. v. Chisholm 301
   Galyen Petroleum Co. v. Hixson 683
5. Summary judgment should be rendered forthwith if the pleadings, depositions, and admissions are on file, together with the affidavit, if any, showing that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Mutual Benefit Life Ins. Co. v. Chisholm 301
6. Summary judgment may be properly granted where there exists no genuine issue as to any material fact in the case, the ultimate inferences to be drawn from those facts are clear, and the moving party is entitled to judgment as a matter of law. Snyder v. Nelson 605
   First National Bank v. Rose 611

Supersedeas Bonds.

As a rule, a supersedeas or stay does not reverse, annul, or undo what has already been done, or impair the force or pass on the merits of the judgment, order, or decision of the trial court; and the judgment, order, or decree is not vacated or annulled, nor is its validity or effect impaired thereby. Kleeb v. Kleeb 537

Taxation.

1. All tangible property and real property in this state, not expressly exempt therefrom, shall be subject to taxation, and shall be valued at its actual value. Such actual value shall be taken and considered as the taxable value on which the levy shall be made. Neb. Rev.

Stat. § 77-201 (Reissue 1981). Potts v. Board of Equalization 37
Beynon Farm Products v. Bd. of Equalization 815
2. Under the provisions of Neb. Rev. Stat. §§ 77-202.01 and 77-202.02 (Reissue 1981) any person seeking tax exempt status for any real property shall apply for exemption to the county assessor by January 1 of the year following adoption of §§ 77-202.01 to 77-202.07, on forms prescribed by the Tax Commissioner, and a hearing shall be held by the county board of equalization to consider the matter. Potts v. Board of Equalization 37
3. There is a presumption that a board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action, which presumption remains until there is competent evidence to the contrary. Once there is competent evidence on appeal to the contrary, the presumption disappears and the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon the evidence. Potts v. Board of Equalization 37
Beynon v. Board of Equalization 488
4. Evidence of sale price alone may not be sufficient to overcome the presumption that the board of equalization has valued the property correctly. But where the evidence discloses the circumstances surrounding the sale and shows that it was an arm's length transaction between a seller who was not under compulsion to sell and a buyer who was not compelled to buy, it should receive strong consideration. Potts v. Board of Equalization 37
5. The trial of an appeal from a county board of equalization involving the valuation of real estate, both in the District Court and the Supreme Court, is de novo as an equitable proceeding. Potts v. Board of Equalization . 37
Beynon Farm Products v. Bd. of Equalization 815
6. Ordinarily, public property is exempt from general purpose taxation. Easley v. City of Lincoln 450
7. A distinction is recognized between taxation for general purposes and the levying of assessments on specific property for specific benefits conferred upon it by means of an improvement district created by an appropriate governing authority. Easley v. City of Lincoln 450
8. In an appeal from property tax valuations set by a board of equalization, the taxpayer has the burden of proving that the value of his property has been arbitrarily or unlawfully fixed by the board of equalization in an amount greater than its actual value, or that its

value has not been fairly and proportionately equalized with all other property, resulting in a discriminatory, unjust, and unfair assessment. Beynon v. Board of Equalization 488

9. Under the provisions of Neb. Rev. Stat. § 77-1502 (Reissue 1981) the county board of equalization may meet at any time for the purpose of equalizing assessments of any omitted or undervalued property and is not limited in its actions to property which the assessor has adjusted prior to April 1 of the year in question. Farmers Co-op Assn. v. Boone County 763

10. An owner is not deprived of his property without due process of law by means of taxation, if he has an opportunity to question its validity or the amount of such tax or assessment at some stage of the proceedings, either before that amount is finally determined or in subsequent proceedings for its collection. Farmers Co-op Assn. v. Boone County 763

11. In the absence of other evidence, proof that the guidelines provided by the Tax Commissioner were applied raises a presumption that the assessment is legally proper. Where, however, evidence which establishes that following the guidelines will violate either the constitutional provisions requiring that property be taxed uniformly and proportionately or the statutory requirement that property be taxed at its actual value is introduced by either party, the guidelines must give way to the evidence. Farmers Co-op Assn. v. Boone County .. 763
Beynon Farm Products v. Bd. of Equalization 815

12. 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. Approximation of value and uniformity of taxation is all that can be accomplished, and substantial compliance with the requirement of equalization and uniformity of taxation laid down by the Constitution is all that is required. Farmers Co-op Assn. v. Boone County 763
Beynon Farm Products v. Bd. of Equalization 815

13. 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 persuasion 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. Farmers Co-op Assn. v. Boone County 763

14. A landowner is entitled to have his property assessed uniformly and proportionately with other property even though the result may be that it is assessed at less than actual value. Beynon Farm Products v. Bd. of Equalization 815

15. Misclassifying property may result in a lack of uniformity and proportionality; in such an event the taxpayer is entitled to relief. Beynon Farm Products v. Bd. of Equalization 815

Teacher Contracts.

1. A probationary teacher is entitled to none of the termination or rehiring benefits allowed under Neb. Rev. Stat. §§ 79-1254 et seq. (Reissue 1981), including the preferred rights to reemployment under § 79-1254.07. Roth v. School Dist. of Scottsbluff 545

2. "Reduction in force," within the meaning of Neb. Rev. Stat. § 79-1254.07 (Reissue 1981), has a clear meaning in common usage and means terminating a teacher "due to a surplus of staff." Roth v. School Dist. of Scottsbluff 545

3. The question of whether a person has waived a right to recall under Neb. Rev. Stat. § 79-1254.07 (Reissue 1981) is one of fact. Roth v. School Dist. of Scottsbluff 545

4. The computing of damages and the finding that a teacher has properly mitigated damages under Neb. Rev. Stat. § 79-1254.07 (Reissue 1981) are factual issues, and the findings of the trial court in this regard will not be set aside unless clearly wrong. Roth v. School Dist. of Scottsbluff 545

Termination of Employment.

1. Under the U. S. Constitution, one must first establish a property interest in a position in order to establish procedural due process rights in a dismissal from employment. Heinzman v. County of Hall 268

2. The establishment of a property interest in employment requires a legitimate claim of entitlement to it that stems from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. Heinzman v. County of Hall 268

3. Under Nebraska law it is a settled principle that government employment, in the absence of legislation, can

be revoked at the will of the appointing officer. Heinzman v. County of Hall 268
4. Where a person is employed during the pleasure of two governmental agencies, either one may discharge unless otherwise specified in the contract of employment. Heinzman v. County of Hall 268

Theft.
1. The value of goods stolen under Neb. Rev. Stat. §§ 28-510 et seq. (Reissue 1979) is a material or essential element of the crime of attempted theft in order to establish the gradation of the offense, and it must be proven beyond a reasonable doubt. State v. Redding .. 887
2. If the uncontroverted evidence supports a finding beyond a reasonable doubt of the attempted theft of but one item of property consisting of cash of a stated amount, the fact that a jury returns a verdict of guilty based upon instructions which failed to include specific value as a material element of the crime is harmless error. State v. Redding 887

Tort Claims Act.
1. The District Court, sitting without a jury, has exclusive jurisdiction to hear, determine, and render judgment on any suit or tort claim defined in the State Tort Claims Act, Neb. Rev. Stat. §§ 81-8,209 et seq. (Reissue 1981). Catania v. University of Nebraska 418
2. The findings of the District Court under the State Tort Claims Act will not be disturbed on appeal unless clearly wrong. Catania v. University of Nebraska 418
3. Where there is a conflict in the evidence, but there is believable evidence to support the findings of the District Court in a claim of this nature, those findings will be affirmed. Catania v. University of Nebraska 418

Torts.
1. The doctrine of strict liability in tort may be used to recover damages to the defective product itself where the damage occurred as a result of a sudden, violent event and not as a result of an inherent defect that reduced the property's value without inflicting physical harm to the product. National Crane Corp. v. Ohio Steel Tube Co. 782
2. To the extent that *Hawkins Constr. Co. v. Matthews Co., Inc.*, 190 Neb. 546, 209 N.W.2d 643 (1973), held that strict liability in tort may not be used to recover for physical harm to property only, it is disapproved. National Crane Corp. v. Ohio Steel Tube Co. 782

3. The purchaser of a product pursuant to contract cannot recover economic losses from the seller manufacturer on claims in tort based on negligent manufacture or strict liability in the absence of physical harm to persons or property caused by the defective product. National Crane Corp. v. Ohio Steel Tube Co. 782

Trial.

1. A prison inmate has no absolute constitutional right to be released from prison so that he can be present at a hearing in a civil action. Caynor v. Caynor 143
2. Generally, a proper objection to the receipt of evidence is required to preserve for review any error in the overruling of a motion in limine. Maricle v. Spiegel 223
3. A defendant can not predicate error on the denial of a motion in limine when his objection to the evidence was sustained. Maricle v. Spiegel 223
4. When, upon a jury trial, a defendant at the conclusion of all the evidence moves for a directed verdict in his favor or for dismissal, such motion must be treated as an admission of the truth of all material and relevant evidence admitted favorable to plaintiffs, and plaintiffs are entitled to the benefit of all proper inferences which can reasonably be deduced therefrom. Flakus v. Schug 491
5. Generally, the rule of completeness is concerned with the danger of admitting a statement out of context. When this danger is not present it is not an abuse of discretion to fail to require the production of the remainder or, if it cannot be produced, to exclude all the evidence. State v. Manchester 670

Trusts.

An action to construe a trust indenture will be reviewed in this court de novo on the record. In re Testamentary Trust of Criss 379

Undue Influence.

1. The elements necessary to be established to warrant the rejection of a written instrument on the ground of undue influence are: (1) That the person who executed the instrument was subject to undue influence; (2) That there was opportunity to exercise undue influence; (3) That there was a disposition to exercise undue influence for an improper purpose; and (4) That the result was clearly the effect of such undue influence. Craig v. Kile 340
2. It is not mere influence that makes a conveyance un-

lawful but *undue* influence as established in the law. Craig v. Kile 340

3. The court, in examining the matter of whether a deed was procured by undue influence, is not concerned with the rightness of the conveyance, but only with determining whether it was the voluntary act of the grantor. The fact that the grantor has others who are proper subjects to receive his bounty can be considered by the court only as it bears upon the validity of the conveyance. Craig v. Kile 340

Uniform Commercial Code.

1. One without authority to encumber the property of another can not grant a valid security interest in such property. Val-U Constr. Co. v. Contractors, Inc. 291
2. When the collateral consists of goods purchased by the debtor, the sales article of the Uniform Commercial Code determines when the debtor has acquired rights in the collateral. First National Bank v. Rose 611
3. A land contract vendee has an equitable interest in the land. First National Bank v. Rose 611

Valuation.

1. All tangible property and real property in this state, not expressly exempt therefrom, shall be subject to taxation, and shall be valued at its actual value. Such actual value shall be taken and considered as the taxable value on which the levy shall be made. Neb. Rev. Stat. § 77-201 (Reissue 1981). Potts v. Board of Equalization 37
2. Under the provisions of Neb. Rev. Stat. §§ 77-202.01 and 77-202.02 (Reissue 1981) any person seeking tax exempt status for any real property shall apply for exemption to the county assessor by January 1 of the year following adoption of §§ 77-202.01 to 77-202.07, on forms prescribed by the Tax Commissioner, and a hearing shall be held by the county board of equalization to consider the matter. Potts v. Board of Equalization 37
3. There is a presumption that a board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action, which presumption remains until there is competent evidence to the contrary. Once there is competent evidence on appeal to the contrary, the presumption disappears and the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon the evidence. Potts v. Board of Equalization 37
   Beynon v. Board of Equalization 488

4. Evidence of sale price alone may not be sufficient to overcome the presumption that the board of equalization has valued the property correctly. But where the evidence discloses the circumstances surrounding the sale and shows that it was an arm's length transaction between a seller who was not under compulsion to sell and a buyer who was not compelled to buy, it should receive strong consideration. Potts v. Board of Equalization 37
5. The trial of an appeal from a county board of equalization involving the valuation of real estate, both in the District Court and the Supreme Court, is de novo as an equitable proceeding. Potts v. Board of Equalization . 37
6. There are no infallible rules or criteria for the valuation of railroad property. Approximation is all that reasonably can be expected. In re Assessment of OL&B Ry. Co. 71
7. The presumption that a valuation made by a board of equalization is correct applies to the valuation of railroad property made by the state board. In re Assessment of OL&B Ry. Co. 71
8. The burden of showing the assessment was improper is on the complaining party. In re Assessment of OL&B Ry. Co. 71
9. Although the earnings of a railroad are evidence of importance in determining its value, the earning capacity of the railroad is of greater importance. In re Assessment of OL&B Ry. Co. 71
10. In an appeal from property tax valuations set by a board of equalization, the taxpayer has the burden of proving that the value of his property has been arbitrarily or unlawfully fixed by the board of equalization in an amount greater than its actual value, or that its value has not been fairly and proportionately equalized with all other property, resulting in a discriminatory, unjust, and unfair assessment. Beynon v. Board of Equalization 488
11. 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. Approximation of value and uniformity of taxation is all that can be accomplished, and substantial compliance with the requirement of equalization and uniformity of taxation laid down by the Constitution is all that is required. Farmers Co-op Assn. v. Boone County 763
Beynon Farm Products v. Bd. of Equalization 815

12. 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 persuasion 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 of failure of plain duty, and not mere errors of judgment. Farmers Co-op Assn. v. Boone County 763
13. A landowner is entitled to have his property assessed uniformly and proportionately with other property even though the result may be that it is assessed at less than actual value. Beynon Farm Products v. Bd. of Equalization 815
14. Misclassifying property may result in a lack of uniformity and proportionality; in such an event the taxpayer is entitled to relief. Beynon Farm Products v. Bd. of Equalization 815

Value of Goods.

1. The value of goods stolen under Neb. Rev. Stat. §§ 28-510 et seq. (Reissue 1979) is a material or essential element of the crime of attempted theft in order to establish the gradation of the offense, and it must be proven beyond a reasonable doubt. State v. Redding .. 887
2. If the uncontroverted evidence supports a finding beyond a reasonable doubt of the attempted theft of but one item of property consisting of cash of a stated amount, the fact that a jury returns a verdict of guilty based upon instructions which failed to include specific value as a material element of the crime is harmless error. State v. Redding 887
3. In the absence of evidence to the contrary, cash in the amount of $12,000 must have a value of "over one thousand dollars." State v. Redding 887

Vendor and Vendee.

As between a vendor and a purchaser, where material facts and information are equally accessible to both, and nothing is said or done which tends to impose on the purchaser or mislead him, the failure of the vendor to disclose such facts does not amount to actionable fraud; however, where such facts are known to the vendor and he knows them to be not within the reach of the attention, observation, and judgment of a reasonably diligent purchaser, and they are such as would

readily mislead the purchaser as to the true condition of the property, the vendor is bound to disclose such facts. Flakus v. Schug 491

Venue.

Under the venue statutes, a nonresident defendant corporation "may be found" in any county within the state in which proper service can be had upon its agent. Mittelstadt v. Rouzer 178

Verdicts.

1. This court will not interfere with a jury verdict of guilty 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 guilty beyond a reasonable doubt. State v. Brown 68
   State v. Holland 170
   Maricle v. Spiegel 223
   Schroll v. Fulton 310
   State v. Hilpert 564
2. It is presumed in a jury trial that controverted facts were decided by the jury in favor of the successful party, and its finding based on conflicting evidence will not be disturbed unless clearly wrong. Holly v. Mitchell 203
   Flakus v. Schug 491
3. A verdict will not be set aside unless it is against the weight of the evidence, or appears to have been the result of passion, prejudice, mistake, or disregard of the rules of evidence or the law. Maricle v. Spiegel 223
4. When a party has sustained the burden and expense of trial and has succeeded in securing the decision of a jury on the facts in issue, he has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured. Flakus v. Schug 491

Visitation.

The best interests of the children are the primary concern in the determination of custody and visitation matters. Caynor v. Caynor 143

Waiver.

1. An information charging an offense in substantially the words of the statute is generally sufficient. All defects that may be excepted to by a motion to quash are taken to be waived by a defendant pleading the general issue. State v. John 76

2. An insurer is precluded from asserting a forfeiture where, after acquiring knowledge of the facts constituting a breach of condition, it has retained the unearned portion of the premium or has failed to return or tender it back with reasonable promptness, especially where the nature of the breach or ground for forfeiture is of such character as to render the policy void from its inception. Dairyland Ins. Co. v. Kammerer 108
3. A written contract may be waived in whole or in part, either directly or inferentially, and the waiver may be proved by express declarations manifesting the intent not to claim the advantage, or by so neglecting and failing to act as to induce the belief that it was the intention to waive. Pearce v. ELIC Corp. 193
4. Conditions precedent in a contract may be waived. Pearce v. ELIC Corp. 193
5. A provision in a written contract that a waiver of the conditions and terms of the agreement must be in writing may be waived by acts or conduct. Pearce v. ELIC Corp. 193
6. The general rule is that the assertion of the invalidity of a contract is nullified by the subsequent acceptance of benefits growing out of the contract claimed to have been breached. Pearce v. ELIC Corp. 193
7. Where a contracting party, with knowledge of a breach by the other party, receives money in the performance of the contract, he will be held to have waived the breach. Pearce v. ELIC Corp. 193
8. Failure to plead mitigation of damages waives the defense. Maricle v. Spiegel 223
9. The failure of the police to notify counsel, even if aware of such representation, does not violate the defendant's sixth amendment rights to the presence of counsel when the right has been waived voluntarily. State v. Lamb 498
10. The question of whether a person has waived a right to recall under Neb. Rev. Stat. § 79-1254.07 (Reissue 1981) is one of fact. Roth v. School Dist. of Scottsbluff 545
11. Following a motion for a directed verdict at the close of the evidence of the State, the introduction of evidence thereafter by the defendant waives any error in the ruling or failure of ruling on the motion, although the defendant is not prevented from questioning the sufficiency of the evidence in the entire record to sustain a conviction. State v. Hilpert 564
State v. Hellbusch 894
12. The general rule is that a defendant's testimony at a former trial is admissible in evidence against him in

later proceedings. A defendant who chooses to testify waives his privilege against compulsory self-incrimination with respect to the testimony he gives. State v. Hilpert 564

13. The accused may waive his right of confrontation, and the waiver of this right may be accomplished by the accused's counsel as a matter of trial tactics or strategy. State v. Bromwich 827

14. Counsel in a criminal case may waive his client's fourteenth amendment right of the U.S. Constitution of confrontation by stipulating to the admission of evidence as a legitimate trial tactic. State v. Bromwich 827

15. Where one appears before an administrative body and presents evidence or makes argument, the party so appearing cannot thereafter claim a denial of due process solely on the ground that proper notice of the hearing was not given. After appearing at the hearing the party is deemed to have waived any objection with regard to notice. Laubscher v. S.I.D. No. 20 834

Waters.

The portion of Neb. Rev. Stat. § 46-613.01 (Reissue 1978), to wit, "if the state in which the water is to be used grants reciprocal rights to withdraw and transport ground water from that state for use in the State of Nebraska," may be severed from the rest of the statute because it did not constitute an inducement to the passage of § 46-613.01, does not make the act inoperative, and will not frustrate the intent of the Legislature. The remainder of § 46-613.01, after the unconstitutional portion is stricken, remains a viable statute. State ex rel. Douglas v. Sporhase 484

Wills.

1. A challenge to a spouse's statutory election to take against a will is tried in this court de novo on the record. In re Estate of Carman 98

2. If the will is self-proved, compliance with signature requirements for execution is conclusively presumed and other requirements of execution are presumed, subject to rebuttal. Neb. Rev. Stat. § 30-2430(b) (Reissue 1979). In re Estate of Flider 153

3. The presumption of due execution arising from the acknowledgment of a self-proved will may be attacked by proof of fraud or forgery affecting the acknowledgment or affidavit. Neb. Rev. Stat. § 30-2430(b) (Reissue 1979). In re Estate of Flider 153

4. In the absence of proof that the formalities required by

the statute were not complied with, the presumption of due execution raised by the acknowledgment is conclusive. In re Estate of Flider 153

5. Due execution means the signing of the will by the testator, and the attestation. Testamentary capacity is not a component of due execution under the statute. In re Estate of Flider 153

6. A prior will, executed when the testator's testamentary or mental capacity was and is unquestioned, and as to which the existence of undue influence is not charged, and which conforms substantially as to the results produced to the instrument contested, may be considered as competent evidence for the purpose of refuting charges of undue influence or want of testamentary or mental capacity by showing that the testator had a constant and abiding scheme for the distribution of his property. In re Estate of Flider 153

7. A devise to "issue" or "issue of the body" will be construed as meaning lineal descendants, rather than children, in the absence of qualifying words showing a contrary intent. In re Testamentary Trust of Criss 379

8. In order to determine when a class should close under a testamentary disposition, it is necessary to try to ascertain the intent of the testator and, if legally possible, give effect to that intent, determined by a viewing of the entire will. In re Testamentary Trust of Criss 379

9. Generally speaking, a will speaks as of the date of death of the testator, and in the absence of anything in the will showing a contrary intention, the number of the class will be determined upon the death of the testator. In re Testamentary Trust of Criss 379

10. Whenever the increase in the period of postponement of the closing of a class would render invalid, under the applicable rule against perpetuities, either the disposition of income to the class or part or all of the ultimate disposition of the corpus, then such invalidity is sufficient to prevent the lengthening of the period during which the class can increase in membership. In re Testamentary Trust of Criss 379

11. It is the general rule that in the absence of a controlling equity, or of an express or implied provision in the will to the contrary, where an estate is given to a person for life with a vested remainder in another, the remainder takes effect in possession whenever the prior gift ceases or fails in whatever manner. In re Testamentary Trust of Criss 379

12. A patent ambiguity must be removed by interpretation according to legal principles, and the intention of the

testator must be found in the will. In searching for this intention the court must examine the entire will, consider each of its provisions, give words their generally accepted literal and grammatical meaning, and indulge the presumption that the testator understood the meaning of the words used. In re Testamentary Trust of Criss 379

13. A clause or provision of a will must, if possible, be so construed as to give effect to the intention of the testator. If doubtful or ambiguous words, in their ordinary literal sense, appear to be inconsistent with plain and unambiguous language in the same clause or sentence, such words will be so construed, if reasonably possible, as to render the whole clause or sentence intelligible and consistent. In re Testamentary Trust of Criss 379

14. One of the primary incidents of ownership of property in fee simple is the right to convey or encumber it. It is the general rule that a testator may not create a fee simple estate to vest at his death and at the same time restrict its alienation. However, this is not to say that such testator may not, in some situations, create economic incentives in his will encouraging the retention of property, without violating the rule condemning restrictions on alienation. In re Testamentary Trust of Criss 379

15. As a general rule, when an attempted prior interest fails under a will because the person to whom it is limited renounces it, succeeding interests are accelerated, with certain minor exceptions. In re Testamentary Trust of Criss 379

16. A testator is presumed to know that his widow might elect to take her share of his estate as provided for by statute and renounce any interest under his will. In re Testamentary Trust of Criss 379

17. When a widow elects to take her "forced" or statutory share and renounce her interest under her husband's will, she may well be treated as having predeceased her husband, thereby taking no interest under the will. In re Testamentary Trust of Criss 379

Witnesses.

1. An owner of real property shown to be familiar with the value of such land is a competent witness to testify as to its value for the use to which it is then being put, without additional foundation. However, in order to estimate its value for other purposes, the owner must, as any other witness, be shown to have an acquaintance

with the property and be informed as to the state of the market. Langfeld v. Department of Roads 15
2. The value of an opinion of an expert witness, or any witness, must be dependent upon and is no stronger than the facts upon which it is predicated, and it has no probative force unless the assumptions upon which it was based are shown to be true. Langfeld v. Department of Roads 15
3. The relative weight of conflicting evidence is necessarily determined by the credibility of the witnesses, which question is one solely for the jury which saw the witnesses and heard the testimony. State v. Brown ... 68
4. The jurors are the judges of the credibility of the witnesses and the weight to be given to the testimony, and they have the right to credit or reject the whole or any part of the testimony in the exercise of their judgment. State v. Brown 68
5. Witnesses generally are immune from civil liability for damages resulting from testimonial statements, and no civil action lies to recover damages caused by perjury or for conspiracy to commit perjury unless the perjury is but a part of a larger plan or scheme. Stolte v. Blackstone 113
6. A prison inmate has no absolute constitutional right to be released from prison so that he can be present at a hearing in a civil action. Caynor v. Caynor 143
7. A hypothetical question is not improper simply because it includes only a part of the facts testified to. State v. Miller 274
8. A parent as an informed and concerned lay person is competent to testify as to his or her opinion on "best educative interest." The parents were not testifying as experts, and the evidence was clearly admissible under Neb. Rev. Stat. § 27-701 (Reissue 1979). In re Freeholder Petition 532
In re Freeholder Petition 633
9. Uncontroverted testimony need not be accepted as absolute verity, especially when that testimony is opposed to common knowledge or human experience, or is inherently improbable, unreasonable, or unworthy of belief. In re Estate of McCartney 550
10. The trier of fact has a right to test the credibility of a witness by his self-interest and to weigh undisputed testimony against facts and circumstances in evidence from which a conclusion can be drawn that the testimony is not true. In re Estate of McCartney 550
11. The general rule is that a defendant's testimony at a former trial is admissible in evidence against him in

later proceedings. A defendant who chooses to testify waives his privilege against compulsory self-incrimination with respect to the testimony he gives. State v. Hilpert 564

12. Where one of several defendants on trial together voluntarily becomes a witness, he is a witness for all purposes. If he knows facts injurious to a codefendant, they may be brought out either by his own counsel or by the State. State v. Hilpert 564

13. A witness will not be rendered incompetent merely because he or she was hypnotized during the investigatory phase of the case; rather, the witness will be permitted to testify with regard to those matters which he or she was able to recall and relate prior to hypnosis, provided that there is sufficient evidence to satisfy the court that the evidence was known and related prior to hypnosis. State v. Patterson 686

Words and Phrases.

1. The term "private passenger automobile," as used in the "drive other vehicle" coverage section of an automobile liability insurance policy, is clear and unambiguous and does not include a pickup truck. Johnsen v. Harper 145

2. "Custodial interrogation," within the meaning of the *Miranda* rule, means questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. State v. Parsons 349

3. A devise to "issue" or "issue of the body" will be construed as meaning lineal descendants, rather than children, in the absence of qualifying words showing a contrary intent. In re Testamentary Trust of Criss 379

4. The meaning of the words "salary," as used in Neb. Rev. Stat. § 15-1007.01 (Cum. Supp. 1982), and "regular pay," as employed in § 15-1001 (Cum. Supp. 1982), are the same and include only basic pay without consideration of extra compensation for overtime, college credits, holiday service, etc. Hill v. City of Lincoln ... 517

5. "Reduction in force," within the meaning of Neb. Rev. Stat. § 79-1254.07 (Reissue 1981), has a clear meaning in common usage and means terminating a teacher "due to a surplus of staff." Roth v. School Dist. of Scottsbluff 545

6. The "estimated cost" of a building is its reasonable cost, erected in accordance with plans and specifications, and is not necessarily the amount agreed upon by the parties nor an offer to be accepted; it does not im-

ply absolute calculation, but precludes accuracy. Ruzicka v. Petersen 642

7. Under the provisions of the Indian Child Welfare Act, 25 U.S.C.A. §§ 1901 et seq. (1983), "preadoptive placement" means the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement. In re Interest of Bird Head 741
8. The meaning of the word "know," when used in a penal statute, varies with the context in which it is used. Hancock v. State ex rel. Real Estate Comm. 807
9. While the term "misconduct" is not specifically defined in Neb. Rev. Stat. § 48-628(b) (Reissue 1978), it has generally been defined to include behavior which evidences (1) wanton and willful disregard of the employer's interests, (2) deliberate violation of rules, (3) disregard of standards of behavior which the employer can rightfully expect from the employee, or (4) negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard of the employer's interests or of the employee's duties and obligations. Stuart v. Omaha Porkers 838

Workmen's Compensation.

1. The findings of fact made by the Nebraska Workmen's Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong. The decision of the compensation court after rehearing must be considered in the light most favorable to the successful party, and every controverted fact must be decided in its favor. Noah v. Creighton Omaha Health Care Corp. 169
   Caradori v. Frontier Airlines 513
2. The statutory scheme found in Neb. Rev. Stat. § 48-121 (Reissue 1978) compensates impairments of the body as a whole in terms of employability and loss of earning capacity but compensates impairments of scheduled members on the basis of loss of physical function. Nordby v. Gould, Inc. 372
3. The test for determining whether a disability is to a scheduled member of the body as a whole is not the situs of the injury but, rather, the location of the residual impairment. Nordby v. Gould, Inc. 372
4. The plaintiff bears the burden of establishing a causal relationship between the accident and any disability. Nordby v. Gould, Inc. 372
   Caradori v. Frontier Airlines 513
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. Caradori v. Frontier Airlines 513

6. An award of compensation may not be based on possibilities or speculative evidence. Caradori v. Frontier Airlines 513

Zoning.

1. A comprehensive development plan is merely a policy statement that may be implemented by a zoning resolution. It is the zoning resolution which has the force of law. If there is a conflict between a comprehensive plan and a zoning ordinance, the zoning ordinance contains the controlling provisions when questions of a citizen's property rights are at issue. Omaha Fish & Wildlife v. Community Refuse 234
2. The operation of a commercial sanitary landfill is not a recognized incidental use to a farming operation so as to be considered an accessory use under zoning ordinances. Omaha Fish & Wildlife v. Community Refuse 234
3. In order for an expenditure to have been made in good faith reliance upon improper zoning of a property, it must appear that the expenditures were made before any question as to the validity of the zoning was raised. Omaha Fish & Wildlife v. Community Refuse 234