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STATE OF NEBRASKA, DEPARTMENT OF CORRECTIONAL SERVICES, APPELLANT AND CROSS-APPELLEE, V. ROBERT GALLAGHER, APPELLEE AND CROSS-APPELLANT.

334 N.W.2d 458

Filed May 27, 1983. No. 82-644.

1. **Public Officers and Employees: Immunity.** When public employees are compelled to testify by threat that otherwise they will be removed from office, the testimony that they give cannot be used against them in a subsequent prosecution.
2. _____: _____. Public employees may be required to answer even potentially incriminating questions if they have not been required to surrender their constitutional immunity.
3. _____: _____. A public employee's refusal to answer questions where there has been no requested surrender of protected rights is a ground for his dismissal.
4. _____: _____. Public employees are not entitled to an affirmative tender of immunity before they may be required to answer questions specifically, directly, and narrowly related to the performance of the employee's public duties.

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

Paul L. Douglas, Attorney General, and J. Kirk Brown, for appellant.

Steven E. Achelpohl and Gregg H. Coffman of Dwyer, O'Leary & Martin, P.C., for appellee.

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

MCCOWN, J.

This is an appeal from an order of the District Court affirming an order of the State Personnel Board reinstating appellee, Robert Gallagher, to his employment as a parole officer with the Department of Correctional Services, and denying a request for backpay. The State has appealed from the order of reinstatement, and the appellee has cross-appealed from that portion of the order denying him backpay.

On December 6, 1980, Robert Gallagher, a parole

officer with the State Department of Correctional Services, was arrested at his home in Omaha and booked on two counts of third degree gambling and one count of possession of gambling records.

Items confiscated from his home included parlay sheets, payoff records, and betting sheets. The search warrant for Gallagher's residence was based on information obtained from a wiretap placed on Gallagher's phone pursuant to an application to the District Court on October 22, 1980, and an order entered on that application. The affidavit supporting the application showed that by investigation and surveillance the police believed Gallagher was linked with alleged gambling activities in Omaha.

On December 9, 1980, Gallagher was suspended by the Department of Correctional Services pursuant to § 13.14.5 of the rules and regulations of the department, which provides: "Employees who are under investigation for or charged with criminal activity may, following a meeting as prescribed in paragraph 13.11.2 be indefinitely suspended pending outcome of a trial or investigation. Employees who are found guilty shall not be compensated for the suspension and may be dismissed. If they are not found guilty or if no judicial action is taken, they may be restored to their position and granted full pay and service credit for the period of their suspension, if circumstances justify such restoration."

On December 17, 1980, Gallagher was terminated by the department. A few days later the state car previously assigned to Gallagher was cleaned and inventoried by department personnel before returning the car to the state motor pool for reassignment.

While cleaning the car they discovered a package of "harp sheets" in the trunk of the car. The "harp sheets" consisted of typewritten and mimeographed pages which gave team selection information and point spreads on professional football games.

Meanwhile, Gallagher filed a grievance with the director of the Department of Personnel requesting

reinstatement pending the outcome of the criminal charges that had been brought against him. On February 20, 1981, the director reinstated Gallagher to a suspended-without-pay status pending resolution of the charges against him.

On March 13, 1981, the criminal charges against Gallagher were dismissed. The Department of Correctional Services continued to investigate and on April 7, 1981, took Gallagher's deposition. Gallagher was questioned as to his involvement with gambling and drug activities, but refused to answer any such questions on advice of his counsel.

The State then questioned Gallagher about the "harp sheets" found in the state car assigned to him. Gallagher admitted that he wrote, published, and sold the "harp sheets" at $50 per page, and admitted that it was possible that the sheets were found in his state car. On advice of counsel, however, Gallagher refused to respond when he was asked if he had used his state car to transport the "harp sheets," if he had ever taken the sheets to his parole office, if he had ever worked on the sheets at his office, or if he had ever sold such sheets to parolees or to other members of the department.

On April 14, 1981, Gallagher was advised that the circumstances did not justify his reinstatement as a parole officer and he was dismissed from state service. Gallagher again filed a grievance with the director of the Department of Personnel protesting his termination.

On June 2, 1981, the District Court for Douglas County found that the evidence obtained by the wiretap which had supported the search of Gallagher's home in connection with the criminal charges had been in violation of state law, and suppressed all the intercepted wire communications.

On June 26, 1981, the director of the Department of Personnel upheld Gallagher's termination upon the ground that Gallagher's refusal to answer questions about the "harp sheets" at his deposition left

the Department of Correctional Services with insufficient information to determine if circumstances warranted his reinstatement.

Gallagher appealed the director's decision to the Nebraska State Personnel Board, which appointed a hearing officer to hear the case and issue a recommendation to the board. The hearing officer concluded that the department could not rely upon Gallagher's refusal to answer questions about the "harp sheets" found in the trunk of his car because the investigation and inquiry and the discovery of the "harp sheets" would not have occurred but for using the knowledge obtained from the illegal wiretap. The hearing officer determined that the statutory exclusionary rule excluding from evidence the contents of any unlawful wiretap communication and evidence derived therefrom required the conclusion that the discovery of the "harp sheets" was a part of the fruit of the illegal wiretap. The hearing officer therefore recommended that Gallagher be reinstated.

On October 26, 1981, by a 3-to-2 decision, the personnel board held that Gallagher's termination was not supported by competent evidence and ordered him reinstated. The board concluded, however, that Gallagher's lack of cooperation severely and unnecessarily impeded the department's attempts to resolve the situation, and denied Gallagher backpay and benefits.

The Department of Correctional Services appealed the decision of the personnel board to the District Court. The District Court found that the board's decision did not prejudice the substantial rights of the Department of Correctional Services within the meaning of Neb. Rev. Stat. § 84-917(6) (Reissue 1981), and affirmed the decision of the personnel board in all respects.

The Department of Correctional Services has appealed from the order of reinstatement, and Gallagher has cross-appealed from the denial of backpay.

Neb. Rev. Stat. § 86-712 (Reissue 1981) provides: "No part of the contents of any intercepted wire or oral communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a state, or a political subdivision thereof if the disclosure of that information would be in violation of Chapter 86, article 7."

Neb. Rev. Stat. § 86-705(11) (Reissue 1981) provides in part: "Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of this state, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that the communication was unlawfully intercepted, the order of authorization or approval under which it was intercepted is insufficient on its face, or the interception was not made in conformity with the order of authorization or approval. . . . If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of sections 86-701 to 86-707."

On this appeal the State contends that the "harp sheets" discovered in the state-owned car assigned to Gallagher, and Gallagher's refusal to answer questions about those "harp sheets," were not evidence derived from an unlawful police wiretap. The State also contends that the questions about the "harp sheets" which Gallagher refused to answer were specific and directly and narrowly related to the performance of his official duties, that he was not required or requested to waive or surrender immunity, and that his refusal to answer constituted grounds for his dismissal.

Gallagher's position is that the "harp sheets" and the resulting questions about them were derived

from the original unlawful police wiretap of Gallagher's telephone and, consequently, constituted fruit of an illegal wiretap which cannot be used against him in any sort of proceeding. He argues that but for the illegal wiretap the police would not have searched his home, would not have found any evidence, and would not have arrested him. If he had not been arrested, he argues, he would not have been dismissed, the department would not have cleaned out his state car, the "harp sheets" would not have been found, and the department would not have questioned him about the use of state property in connection with the "harp sheets."

In response to a similar argument Justice Frankfurter said: "Sophisticated argument may prove a causal connection between information obtained through illicit wire-tapping and the Government's proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint." *Nardone v. United States*, 308 U.S. 338, 341, 60 S. Ct. 266, 84 L. Ed. 307 (1939).

The U.S. Supreme Court refused to adopt a "but for" rule in such cases. The Court said: "We need not hold all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' " *Wong Sun v. United States*, 371 U.S. 471, 487-88, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

In the case at bar the discovery of the "harp sheets" did not come about as an exploitation of the illegal wiretap. There is no evidence that any information obtained in the wiretap, or any of the items seized in the search of Gallagher's residence, indicated that "harp sheets" were located in Galla-

gher's state-owned car or caused the Department of Correctional Services to examine or check the car. The evidence shows that state cars are automatically cleaned and inventoried when state employees are terminated, regardless of the reason for the termination. The evidence also shows that the department rules and regulations gave the department the right to inspect state-owned vehicles at any time.

If Gallagher's "but for" argument were carried to its ultimate limit, if the State had found a corpse in the trunk of Gallagher's car rather than "harp sheets," the State would be forbidden to ask Gallagher about the body because the State would not have inspected the car but for the original illegal wiretap and the subsequent arrest. Gallagher's argument is simply unsupportable.

The discovery of the "harp sheets" by the Department of Correctional Services during its independent, administratively inspired inventory of Gallagher's state-owned car was sufficiently independent and distinguishable from the police wiretap to purge the "harp sheets" from any taint arising from the wiretap. The "harp sheets" were not evidence derived from an unlawful police wiretap.

Gallagher also contends that the Department of Correctional Services could not discharge him for his refusal to answer questions about the "harp sheets." He argues that his privilege against self-incrimination protects him from a threat of dismissal based upon his refusal to answer such questions.

The U.S. Supreme Court has held that if a public employee refuses to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers in a criminal prosecution against himself, the privilege against self-incrimination will not be a bar to his dismissal. *Gardner v. Broderick*, 392 U.S. 273, 88 S. Ct. 1913, 20 L. Ed. 2d 1082 (1968); *Sanitation*

Men v. Sanitation Comm'r, 392 U.S. 280, 88 S. Ct. 1917, 20 L. Ed. 2d 1089 (1968).

The case of *Gulden v. McCorkle*, 680 F.2d 1070 (5th Cir. 1982), discusses the cases in this area at length and reflects the majority view. That case holds that when public employees are compelled to testify by threat that otherwise they will be removed from office, the testimony that they give cannot be used against them in a subsequent prosecution.

Public employees may be required to answer even potentially incriminating questions if they have not been required to surrender their constitutional immunity.

A public employee's refusal to answer questions where there has been no requested surrender of protected rights is a ground for his dismissal.

Public employees are not entitled to an affirmative tender of immunity before they may be required to answer questions specifically, directly, and narrowly related to the performance of the employee's public duties.

A parole officer, like other law enforcement officers, carries an unusually heavy responsibility to his public employer. His position is such that any personal participation in almost any sort of criminal activity may very well impair or destroy his effectiveness as a parole officer. To say the least, he should be required to answer reasonable questions concerning the performance of his official duties, even if those questions are potentially incriminating, so long as he has not been required to surrender his constitutional immunity. Gallagher's refusal to answer such questions as to the "harp sheets" constituted grounds for his dismissal.

In view of the disposition made of the State's appeal, it is unnecessary to discuss Gallagher's cross-appeal.

The order of the District Court affirming the order of the State Personnel Board reinstating Gallagher to his employment as a parole officer is reversed,

and the cause is remanded to the District Court with directions to enter an order affirming the action of the Department of Correctional Services in terminating Gallagher's employment.

REVERSED AND REMANDED WITH DIRECTIONS.

RICHARD L. MERADITH, APPELLANT, V. RUBY F. MERADITH, APPELLEE.

334 N.W.2d 463

Filed May 27, 1983. No. 82-748.

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

Rex K. Wolstenholm of Brogan, McCluskey & Wolstenholm, for appellant.

No appearance for appellee.

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

PER CURIAM.

Having reviewed the record de novo as we are required to do, we find that the order and judgment of the District Court are correct and are affirmed.

AFFIRMED.

ARLENE DENIS, APPELLEE, V. WOODMEN ACCIDENT AND LIFE COMPANY, A NEBRASKA CORPORATION, APPELLANT.

334 N.W.2d 463

Filed May 27, 1983. No. 82-788.

1. **Insurance.** When uncertainty or ambiguity results from the wording of an insurance policy, a construction favorable to the insured will be adopted.
2. _____. Fair doubt in the meaning of the wording of an insurance

policy will be resolved against the insurer as the drafter of the contract.

3. _____. An ambiguous exclusionary clause in a policy of insurance will be construed in favor of the existence of coverage.

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

Keith A. Prettyman of Woodmen Accident and Life Company, for appellant.

Mark L. Laughlin of Venteicher, Laughlin, Kulig & Lang, for appellee.

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

SHANAHAN, J.

Arlene Denis sued Woodmen Accident and Life Company to recover benefits afforded in a "Major Medical" policy. The District Court granted summary judgment in favor of Arlene, namely, that Arlene's pregnancy and the subsequent childbirth were risks covered by Woodmen's policy, and from such judgment Woodmen appeals. We affirm the District Court's judgment.

The sole question relates to a construction of language in Woodmen's policy. Arlene was not married when Woodmen issued the policy on July 16, 1979. While the policy was in force, Arlene became pregnant but was still not married. Although Arlene married during her pregnancy, her husband was never an insured under the policy. On October 29, 1981, Arlene gave birth to a child through a Caesarean section. The policy excluded "any loss caused by pregnancy, childbirth . . ." unless there was a "complicated pregnancy." A Caesarean section was a "complicated pregnancy" within the terms of the policy. Woodmen's liability depends on the following: "Any pregnancy of the Insured's spouse, or of the Insured, if a woman, that originates while this policy is in force and while the Insured and the Insured's spouse are both insured here-

under, which becomes a Complicated Pregnancy shall be deemed to be an insured sickness and benefits therefor will be payable . . . ." Woodmen denied Arlene's claim, contending that Arlene's pregnancy without her being married was not a loss covered by the policy inasmuch as the foregoing clause required that the "Insured" and the "Insured's spouse" both be insured under the policy. Arlene claims the requirement that "Insured's spouse" be insured under the policy must be fulfilled only if the insured is married at the time the pregnancy occurs. The District Court agreed with Arlene's interpretation of the clause in question and entered judgment that Woodmen pay the applicable benefits under its policy.

The issue in this case is whether a "complicated pregnancy" of an unmarried female insured is excluded from coverage under the policy.

One can fairly interpret the clause in question in more than one way. When this condition admitting of two or more reasonable meanings does exist in an insurance policy, there is ambiguity to be resolved by a court as a matter of law. See *Columbia Heights Motors v. Allstate Ins. Co.*, 275 N.W.2d 32 (Minn. 1979).

It is a long-standing and cardinal rule in Nebraska that when an insurance policy contains uncertainties or ambiguities fairly susceptible of two different constructions, the construction favorable to the insured will prevail and thereby afford coverage. See, *New Masonic Temple Ass'n v. Globe Indemnity Co.*, 134 Neb. 731, 279 N.W. 475 (1938); *Great Plains Ins. Co., Inc. v. Kalhorn*, 203 Neb. 799, 280 N.W.2d 642 (1979).

In resolving any ambiguity in an insurance policy the principle or test is not what the insurer intended the words to mean, but what a reasonable person in the position of the insured would have understood them to mean. Cf., *Kent v. Dairyland Mut. Ins. Co.*, 177 Neb. 709, 131 N.W.2d 146 (1964); *Ehlers v. Colo-*

nial Penn Ins. Co., 81 Wis. 2d 64, 259 N.W.2d 718 (1977).

Here, the construction suggested by Woodmen is plausible in view of the conjunctive language in the questioned clause, and it is understandable that Woodmen requires that the spouse of a married insured also be an insured under the policy. But the fact remains that Woodmen, at the time it issued the policy, knew that Arlene was not married. Likewise, Arlene's construction is nonetheless plausible, because there is no explicit specification that the insured be a married woman at the time the pregnancy occurs. The purpose of the insurance coverage under examination is payment of benefits in the event of a "complicated pregnancy." Only if the female insured is married must there be a spouse also insured before Woodmen is liable on its policy. Such a construction is reasonable in order to bring about the purpose of the policy. See *Chard v. New York Life Ins. Co.*, 145 Neb. 429, 16 N.W.2d 858 (1944).

Insurance companies in drafting their policies formulate language which may either prevent or create ambiguity. In such draftsmanship, precision provides certainty, while the absence of articulation accounts for ambiguity. As expressed in *Peony Park v. Security Ins. Co.*, 137 Neb. 504, 508, 289 N.W. 848, 851 (1940): "It is consistent with both reason and justice that any fair doubt as to the meaning of the words of a policy should be resolved against the one who prepares it, for if the terms of a policy are capable of two meanings, that is, where the true meaning is doubtful, the law favors such construction as will protect the insured, and not avoid the policy." See *Farm Bureau Ins. Co. v. Pedlow*, 3 Mich. App. 478, 142 N.W.2d 877 (1966). Consequently, if the marital status of the female insured is so vital to the risk covered by the policy, Woodmen can make changes in the policy by addition or deletion of

obvious and appropriate wording in order to incorporate its intended interpretation into the policy.

Consistent with the foregoing rules of construction, an ambiguous exclusionary clause in a contract of insurance will be construed in favor of the existence of coverage. 44 C.J.S. *Insurance* § 297 (1945); *Shelby Ins. Co. v. U.S. Fire Ins.*, 12 Mich. App. 145, 162 N.W.2d 676 (1968); *Fawcett House, Inc. v. Great Central Ins. Co.*, 280 Minn. 325, 159 N.W.2d 268 (1968).

The construction placed upon the insurance policy by the District Court is correct, and, therefore, the judgment of the District Court is affirmed. Pursuant to Neb. Rev. Stat. § 44-359 (Reissue 1978) an attorney fee in the amount of $500 is awarded to the appellee regarding proceedings in this court.

AFFIRMED.

BENJAMIN F. FISHER, APPELLANT, V. HOUSING AUTHORITY OF THE CITY OF OMAHA ET AL., APPELLEES.

334 N.W.2d 636

Filed June 3, 1983. No. 81-911.

1. **Pleadings: Demurrer.** In ruling on a demurrer the court must assume that the facts are as alleged, and cannot assume the existence of any facts not alleged, nor find facts in aid of the pleading, nor consider what evidence may be introduced at the trial.
2. **Administrative Law: Appeal and Error.** Appeals under the Administrative Procedures Act, Neb. Rev. Stat. §§ 84-901 et seq. (Reissue 1981), may be taken from actions of agencies of the State of Nebraska.
3. **Governmental Subdivisions.** As a general rule, governmental entities established by municipalities or counties to perform in a wholly local capacity and to deal with local problems on a local basis, and which are independent from any statewide system, are not state agencies within the meaning of the Administrative Procedures Act of Nebraska.
4. _____. Housing authorities created under the authority of the Nebraska Housing Authorities Law, Neb. Rev. Stat. §§ 71-1503, 71-1509, and 71-1518 to 71-1554 (Reissue 1981), are not "agencies" within the meaning of Neb. Rev. Stat. § 84-901(1) (Reissue 1981).

5. **Appeal and Error.** Where no statutory right to review has been provided, proceedings in error afford the only remedy.
6. **Pleadings: Jurisdiction: Appeal and Error.** The failure of a petitioner to timely file in the District Court an authenticated transcript with the petition in error deprives that court of jurisdiction in the matter.
7. **Administrative Law: Judgments: Collateral Attack.** The attempt to raise the same issues in an original action for monetary damages as those employed in an unsuccessful direct appeal from the action of the same agency constitutes a collateral attack on the decision of that agency.
8. _____: _____: _____. A collateral attack upon a judgment will not lie unless the judgment is absolutely void. Where the court or agency has jurisdiction of the parties and the subject matter, its judgment is not subject to collateral attack, because such judgment is only voidable and not void.
9. _____: _____: _____. The rule against collateral impeachment of judicial decisions applies to the determinations of state and county officers or boards of officers, who, although not constituting a court, are called on to act judicially in matters of administration.

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

Ephraim L. Marks and Timothy J. Cuddigan of Marks, Clare, Hopkins, Rauth & Cuddigan, for appellant.

Steven J. Riekes of Richards, Riekes, Brown & Zabin, for appellees.

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

HASTINGS, J.

This action was brought by Benjamin F. Fisher to contest the termination of his employment with the Omaha Housing Authority (OHA).

On March 18, 1981, Fisher was informed by his supervisor, James L. Hanry, that his employment with OHA was terminated, effective April 1, 1981. Fisher appealed his termination by the executive director, Hanry, and hearings on this matter were held before the board of commissioners of OHA on May 1, 26, and 27, and June 10, 1981. At the conclu-

sion of the June 10 hearing the board found this termination to be within Hanry's authority and therefore it was permissible.

Fisher again appealed, filing his first petition in the District Court of Douglas County on June 22, 1981. Defendants, OHA and others, filed a demurrer to this petition on June 23, 1981. A hearing was held on this demurrer on August 10, 1981, and on October 29, 1981, the District Court sustained defendants' demurrer. Fisher filed an amended petition, with a transcript of the hearing before the board, on November 16, 1981. In response to this amended petition defendants filed a demurrer and motion to dismiss. The District Court sustained defendants' demurrer and dismissed plaintiff's petition. After denial of plaintiff's motion for new trial, this appeal followed.

The defendants utilized two bases in support of their demurrer: that the court has no jurisdiction in this matter, and that the amended petition fails to state facts sufficient to constitute a cause of action. When a demurrer such as this has been raised, we have said: "The court must assume that the facts are as alleged, and cannot assume the existence of any facts not alleged, nor find facts in aid of the pleading, nor consider what evidence may be introduced at the trial." *Clark & Enersen, Hamersky, S., B. & T., Inc. v. Schimmel Hotels Corp.*, 194 Neb. 810, 812-13, 235 N.W.2d 870, 872 (1975). Assuming the facts as pleaded are true, we are to determine if the courts have jurisdiction in this matter and if a cause of action has been properly pleaded.

The basic facts underlying this appeal are taken from plaintiff's petition. Plaintiff worked for OHA from 1969 to 1981 and satisfactorily performed his duties. From 1973 on, plaintiff worked as modernization coordinator. Plaintiff's employment with OHA was terminated on March 18, 1981, for gross negligence in the handling of the purchase of some 428 refrigerators, 25 to 90 of which turned up missing.

Plaintiff's petition also stated these additional facts: The defendants are the OHA, its commissioners, and its executive director. The executive director terminated plaintiff, and after a hearing the board affirmed that decision. The board and the executive director were counseled by attorneys from the same firm at that hearing. The OHA has adopted various practice rules that deal with disciplinary actions and appeals taken therefrom. Finally, the defendants issued a press release which implicated plaintiff in these thefts, which release was later retracted.

On the basis of these facts plaintiff claims, in that portion of the appeal taken under Neb. Rev. Stat. § 84-917 (Reissue 1981), that he was improperly terminated; that he was damaged by the above-cited press release; that his rights were somehow prejudiced by the board and executive director having counsel from the same firm; that the board failed to operate under its own adopted procedures; and that the board violated the public meetings law, Neb. Rev. Stat. §§ 84-1408 to 84-1414 (Reissue 1981).

In a separate claim, independent of the appeal from the board's decision taken under § 84-917, plaintiff alleges he has been denied his constitutional rights under the fifth and fourteenth amendments to the U.S. Constitution and article I, § 3, of the Constitution of Nebraska.

The District Court, in a letter to the parties, stated one reason for sustaining this demurrer was because the appeal from the OHA board was improperly brought under the Administrative Procedures Act of Nebraska, in that the OHA is not a state agency. As stated previously, plaintiff appealed the decision of the OHA board under § 84-917.

We have previously held that this statute only applies to appeals taken from agencies of state government. *Harnett v. City of Omaha*, 188 Neb. 449, 197 N.W.2d 375 (1972). Whether or not this present ac-

tion was properly appealed depends upon whether the OHA is a state agency.

The establishment of housing authorities in cities, villages, and counties throughout Nebraska is provided for under the Nebraska Housing Authorities Law, Neb. Rev. Stat. §§ 71-1503, 71-1509, and 71-1518 to 71-1554 (Reissue 1981). This is enabling legislation under which the various localities may, at their option, establish a housing authority for their specific area. See § 71-1523. Also, these housing authorities only have the power to operate within their respective local political subdivision plus 10 miles in the case of cities of the metropolitan class, or 5 miles in the case of cities not in the metropolitan class and villages. See § 71-1522(6). The commissioners of the housing authorities are to be appointed by the local mayor or chairperson of the board of trustees. See § 71-1524(1). A perusal of this entire act indicates that the establishment and operation of these housing authorities is a uniquely local function which must only operate in accordance with general guidelines set forth by the state Legislature in this act. It would seem that housing authorities in Nebraska are units of local government rather than state government.

The parties have cited a number of cases from other jurisdictions on this point. We find the better reasoned and more analogous cases to Nebraska law support the proposition that the housing authorities are local entities and not state agencies. In *Riggins v. Housing Authority*, 87 Wash. 2d 97, 549 P.2d 480 (1976), the Washington Supreme Court was faced with the issue, Is the Seattle Housing Authority a state agency under the provisions of that state's administrative procedures act? The court first examined the definition of "agency" under that act, which is similar to the definition found in Neb. Rev. Stat. § 84-901(1) (Reissue 1981). Also, that court looked to the manner in which these housing authorities are created and the limit of their authority,

those being that a housing authority is only created by resolution of the local government, city or county, and only may operate within the jurisdictional limits of the local governing body plus 5 miles. This is almost identical to the Nebraska provision discussed above.

On the basis of these statutory provisions that court held: "These facts indicate that the appellant performs in a wholly local capacity, deals with local problems on a local basis, and is independent from any statewide system. We conclude, therefore, that the appellant is clearly not the type of agency the legislature intended to be included in RCW 34.04.010(1) and subject to the provisions of WAPA. [Citations omitted.]" *Id.* at 101, 549 P.2d at 483.

Similar conclusions have been reached by other authorities. See, *Housing Authority of City of Asbury Park v. Richardson*, 346 F. Supp. 1027 (D. N.J. 1972); *Fagan Electric Co., Inc. v. The Housing Authority, City of Blytheville*, 216 Ark. 932, 228 S.W.2d 39 (1950); 1 E. McQuillin, Municipal Corporations § 2.29a (3d ed. 1971).

We find this reasoning compelling and adopt it as controlling in this state. Since OHA is not a state agency, plaintiff's appeal under § 84-917 was improper.

There is no provision for appeal from the decision of the board of commissioners of a housing authority in the Nebraska Housing Authorities Law. As previously stated, the appeal procedures of the Administrative Procedures Act do not apply in this case. We have previously stated: "This court has consistently held that where no statutory right to review has been provided, proceedings in error afford the only remedy." *Simpson v. City of Grand Island*, 166 Neb. 393, 396, 89 N.W.2d 117, 120 (1958). The proper method of seeking a judicial review in cases such as this is by petition in error.

In a proceeding by petition in error the plaintiff must file in the District Court, within 1 calendar

month after rendition of the final order complained of, a petition with an authenticated transcript containing that final order. Neb. Rev. Stat. § 25-1931 (Reissue 1979); *Marcotte v. City of Omaha*, 196 Neb. 217, 241 N.W.2d 838 (1976). The failure by the plaintiff to timely file an authenticated transcript with his petition in the District Court deprives that court of jurisdiction in the matter. Neb. Rev. Stat. § 25-1905 (Reissue 1979); *Richardson v. Board of Education*, 206 Neb. 18, 290 N.W.2d 803 (1980).

In this case the board of commissioners decided on June 10, 1981, to uphold the firing of the plaintiff. Plaintiff filed his initial petition on June 22, 1981, but a transcript from the proceedings before the board was not filed with the District Court until November 16, 1981, well after the 1-month deadline had passed. We find the District Court had no jurisdiction over the appeal taken from the decision of the board of commissioners, and the sustaining of the defendants' demurrer to plaintiff's petition on the basis of no jurisdiction is affirmed.

The question remains, Does plaintiff's petition state any valid cause of action which is independent of the appeal from the decision of the board of commissioners? Plaintiff's amended petition, as stated above, raises two causes of action: one with regard to the matter before the board of commissioners, which was properly dismissed, and another which alleged the plaintiff's constitutional rights under the fifth and fourteenth amendments to the U.S. Constitution and article I, § 3, of the Constitution of Nebraska have been violated, by reason whereof the plaintiff suffered substantial monetary damage.

In stating the facts which underlie this second allegation, the plaintiff simply incorporates the facts stated under his first cause of action by reference. No new or additional facts have been pleaded. Plaintiff is simply trying to raise the same issues in an original action which he attempted to raise on direct appeal from the board of commissioners. We

find plaintiff is improperly trying to collaterally attack the decision of the board of commissioners.

In *Richardson v. Board of Education*, *supra*, we were faced with a similar situation. That case involved an order by the State Board of Education which required the school district to pay for the high school education of Richardson's children at a South Dakota high school. No appeal was taken from that order. Richardson filed an action in the District Court of Keya Paha County to enforce this order. In its answer and defense the school district attempted to attack the validity of the state board's decision.

Discussing the merits of such a defense, we stated: "It is clear that the School District took no steps to prosecute an appeal of any nature within 30 days of entry of the State Board's order, as required by Neb. Rev. Stat. §§ 25-1931 (Reissue 1975) and 84-917(2) (Reissue 1976). Rather, it attempted to collaterally attack an order of the State Board which had long before become final. 'A collateral attack upon a judgment will not lie unless the judgment is absolutely void. Where the court has jurisdiction of the parties and the subject matter, its judgment is not subject to collateral attack because the judgment is only voidable and not void.' *State ex rel. Casselman v. Macken*, 194 Neb. 806, 809, 235 N.W.2d 867, 869 (1975). 'The rule against collateral impeachment of judicial decisions applies to the determinations of state and county officers or boards of officers, who, although not constituting a court, are called on to act judicially in matters of administration . . . .' 49 C.J.S. *Judgments* § 407d at 804 (1947). See, also, *City of Phoenix v. Wright*, 61 Ariz. 458, 150 P.2d 93 (1944)." *Id.* at 25-26, 290 N.W.2d at 808-09.

Plaintiff here tries to raise in a collateral action the same issues decided by the board. The same facts and issues of denial of due process are raised. The judgment of the board cannot be said to be void, as this matter was properly brought before it under article XXI of the personnel procedures of OHA. No

proper direct appeal has been taken from the decision of the board. To allow this second cause of action to stand would be to allow the collateral attack of a board's decision, which, under our decision in *Richardson*, is impermissible. As a collateral attack, this allegation is not a proper cause of action.

We find the sustaining of defendants' demurrer to plaintiff's petition for failure to state a cause of action was proper. The District Court correctly dismissed plaintiff's petition, and its judgment is affirmed.

AFFIRMED.

IN RE APPEAL OF CHRIS LEVOS.
CHRIS LEVOS, APPELLANT, V. COLUMBUS CIVIL SERVICE COMMISSION, APPELLEE.

335 N.W.2d 262

Filed June 3, 1983. No. 82-159.

1. **Due Process: Notice.** For procedural due process a notice must reasonably inform a person of the accusation levied and the forum where evidence upon such accusation can be presented.
2. **Administrative Orders: Appeal and Error.** Action of an administrative agency or tribunal must be sustained, if such action is not arbitrary and capricious and is based upon competent evidence.
3. _____: _____. In reviewing the findings and decision of an administrative agency or tribunal, it is not for the Supreme Court to resolve conflicts in the evidence. Credibility of witnesses and the weight to be given to testimony are for the administrative agency or tribunal as the trier of fact.
4. **Due Process: Appeal and Error.** Procedural due process does not require a trial de novo or an additional and independent evaluation of evidence.
5. **Administrative Orders.** Action of a civil service commission is "in good faith for cause" when the findings and decision of such agency are based on competent evidence, neither "arbitrary and capricious" nor the result of "political or religious reasons," and reasonably necessary for effectual and beneficial public service.
6. **Evidence: Appeal and Error.** A litigant on appeal cannot complain about the admission of evidence which favored or benefited the litigant's case.

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

Richard L. Kuhlman, for appellant.

Noyes W. Rogers of Leininger, Grant & Rogers, for appellee.

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

SHANAHAN, J.

This matter involves an appeal from action taken by a civil service commission. The District Court for Platte County, Nebraska, upheld the disciplinary action ordered by the civil service commission for the city of Columbus, Nebraska.

Chris Levos, who had 15 years' experience in the Columbus Police Department, was promoted to captain on June 1, 1980, but with a 6-month term of probation regarding such captaincy.

At approximately 1:30 a.m. on October 17, 1980, police had been summoned to a commotion in downtown Columbus. After the crowd dispersed uneventfully, Roger Cooley, a Columbus police officer in "plain clothes," also started to leave the scene. Present at this time were another policeman, Officer Donald Miller, and two civilians, Jeff Adkisson and Kenny Grape. Adkisson and Grape had been passing by in Grape's car and were attracted by the gathering. The trio of Miller, Adkisson, and Grape observed Bryan J. Timms walk to Cooley's station wagon and slam the door on Cooley's legs as the officer attempted to enter his vehicle.

As Timms began to walk away, Cooley ran after him and tackled Timms from behind. Timms and Cooley fell struggling to the pavement. As Miller went to assist Cooley, another officer, Jimmy Peters, arrived. Cooley was then kneeling on Timms' back, and Miller helped apply handcuffs so that Timms' hands were secured behind his back. At this point Levos arrived. Timms in handcuffs

was to be taken to the police station in Miller's cruiser. Cooley and Levos brought Timms, still shackled, to the passenger's side of the cruiser within view of Peters, Adkisson, and Grape.

As Cooley and Levos were attempting to put Timms into the cruiser, Timms resisted but to no great degree. Levos thereupon grabbed Timms' hair and "banged his head" three times on the top of the cruiser. Timms was then shoved into the cruiser, and, while Timms was lying in the front seat of the cruiser, Levos struck him. According to Levos, what the others had observed to be Levos' striking Timms was in fact an attempt to fasten Timms' seat belt for transportation to the police station. Miller drove Timms to the police station, and the other officers followed in their vehicles.

The police station is in the Hall of Justice where offices of the Platte County sheriff are also located. When Miller's cruiser arrived at the Hall of Justice, it was met by Levos, Trooper Robert Meyer and the jailer, Deputy Kim Wolfe of the sheriff's department, who assisted in removing Timms from Miller's cruiser. Timms still had his hands secured behind his back. Upon entering the Hall of Justice, Timms was taken by Levos and Meyer to the "booking room." As these three were walking to the booking room, Timms spit at Levos. Meyer testified that Levos then doubled his fist and swung at Timms two or three times. Meyer also heard the sound of "flesh on flesh contact" in the course of this fracas. Levos testified that he did not strike Timms but did "push his head down" so that Timms could not spit at Levos while they walked down the hallway.

In the booking room Wolfe and Meyer inventoried Timms' personal effects. Timms was seated in a chair, while Wolfe and Meyer were unlacing the "combat" or military boots worn by Timms. Levos was standing nearby at a filing cabinet and was smoking a cigarette. Both Meyer and Wolfe testi-

fied there was no struggle involving Timms and the situation was "under control." That description was verified by two deputies of the sheriff's department, Gilbert Maschmeier and Kenneth Kildare. In this setting Miller entered the room where Timms was seated with handcuffs still securing his hands behind his back. Although there was no request for assistance, Miller with both his hands pushed Timms' head down on a table located in front of Timms' chair. Maschmeier and Kildare testified that this maneuver was done in such a manner that Timms' neck was forced against the edge of the table and cut off the air supply of Timms, who was "gasping for air."

When Maschmeier asked Miller, "Why don't you let him up?" Levos finally stepped forward and told Miller to "let him up." Miller released Timms who then slipped from the chair to the floor. Kildare unlocked the handcuffs from Timms, and, when Deputy Kildare saw visible signs of injury to Timms, including a swollen nose and fresh blood around the nose and mouth, Kildare told Levos that Timms, as an injured and prospective prisoner, would not be accepted by the sheriff's department for incarceration without medical attention. Any question about medical attention was resolved when Timms signed a "citation" alleging that he had resisted arrest and committed an assault. Timms was then "released" and later obtained medical attention. Evidence regarding intoxication of Timms is in deep dispute, and opinions ranged from "not intoxicated" (Meyer) to "under the influence" (Levos).

Each officer involved in the incident filed a written report with his agency. A preliminary investigation of the incident included statements by three officers, namely, Meyer, Wolfe, and Peters. All written reports, including the sworn statements of the aforenamed officers, were available to Levos

before and during the hearing which Levos requested of the commission.

After written reports had been filed by the officers, Meyer requested hypnosis in order to sharpen his recollection, especially in view of some inconsistencies regarding Meyer's report and the reports filed by some of the other officers. At the hearing before the commission, counsel for Levos objected to the testimony of Meyer because Meyer had been hypnotized relative to his recollection of the incident.

Levos asks review of the following: (1) Fulfillment of procedural due process concerning the notice or accusation against him and the action taken by the commission pursuant to such notice; (2) The elements required in order that any disciplinary action be "in good faith for cause" in compliance with Neb. Rev. Stat. § 19-1808 (Reissue 1977); and (3) The correctness in receiving testimony from a witness previously hypnotized relative to the incident under examination by the commission.

Concerning a review of procedural due process required of an administrative agency or tribunal, the scope of such review is found in 73 C.J.S. *Public Administrative Bodies and Procedure* § 215 at 573 (1951): "It is the function of a court called on to review an order of an administrative agency to determine whether there has been due process of law; and this includes an inquiry into the jurisdiction of the agency, whether there was reasonable notice and an opportunity for fair hearing, and whether the finding was supported by evidence."

Levos has not challenged the jurisdiction of the commission, and so we proceed to the question regarding the notice given. The criterion for a constitutionally sufficient notice is found in *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 314-15, 70 S. Ct. 652, 94 L. Ed. 865 (1950): "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice

reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. . . . The notice must be of such nature as reasonably to convey the required information . . . and it must afford a reasonable time for those interested to make their appearance . . . . But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied." Here the notice delivered by the mayor and city council of Columbus referred to three sworn statements of law enforcement officers (Trooper Meyer, Deputy Wolfe, and Officer Peters) concerning the Timms incident of October 17, 1980, and recited that "there was a willful failure to properly conduct yourself as a police officer and said conduct tended to injure the public service . . . ." The notice then set out the disciplinary action to be taken against Levos and informed him of his right to a hearing before the commission in accordance with Neb. Rev. Stat. §§ 19-1801 et seq. (Reissue 1977).

In *State ex rel. Richey v. Neenah Police & F. Comm.*, 48 Wis. 2d 575, 180 N.W.2d 743 (1970), a city sought to terminate the employment of a police officer on account of conduct "unbecoming a police officer." The officer protested that the complaint lacked sufficient specificity, but the Wisconsin court held: "It is true that the details of the conduct are not set forth. However, it has often been stated that charges in such proceedings need not be technically drawn nor meet the requirements of a criminal indictment. . . ." *Id.* at 582, 180 N.W.2d at 747. Further, in *State ex rel. Messner v. Milw. C. Civil S. Comm.*, 56 Wis. 2d 438, 444, 202 N.W.2d 13, 18 (1972), there is the statement: "The United States Supreme Court in *Cafeteria Workers v. McElroy* (1961), 367 U.S. 886, 895, 81 Sup. Ct. 1743, 6 L. Ed. 2d 1230, stated, 'The very nature of due process negates

any concept of inflexible procedures universally applicable to every imaginable situation.'

"The degree of procedural rigor required in a proceeding varies from one case to another and depends upon the particular facts and upon the weight to be afforded to private interests as contrasted to governmental interests in the circumstances. . . . These general observations are applicable to the notice requirements of due process which 'will vary with circumstances and conditions.' The notice requirement of due process cannot be defined with any 'rigid formula.' "

The city notified Levos of dissatisfaction with the manner in which the Timms incident had been handled. Such dissatisfaction was based on Levos' direct and personal participation and on his failure to act properly in the Timms incident as reflected by the reports of officers, namely, the affidavits incorporated by reference into the notice sent to Levos. Those affidavits provide a detailed description of Levos' involvement, and, therefore, the notice informed Levos of the accusation against him. The proposed disciplinary action and a hearing before the commission are clearly stated in the notice. Consequently, in addition to the accusation, Levos was informed of the forum in which he could present evidence bearing upon such accusation. Although questions about notice and procedural due process usually relate to the sufficiency of notice, the abundance of information in the notice given Levos does not disqualify an otherwise constitutionally adequate notice. We conclude that Levos has been accorded procedural due process with respect to the notice given to him.

Concerning appellate examination of procedural due process which is required in any hearing before an administrative agency or tribunal, Levos has misconceived and therefore misconstrued the role of a court and the standard of review in such cases.

In *Lewis v. City of Omaha*, 153 Neb. 11, 14, 43

N.W.2d 419, 421 (1950), which involved the termination of the employment of a fireman, we held: "If the order made by the council after hearing is not arbitrary or capricious, it will be sustained by the courts. . . . The fact that the evidence is very conflicting does not change the rule."

"Arbitrary and capricious action" in reference to action of an administrative agency was defined in *Indiana Civil Rights Com'n v. Sutherland Lumber*, ____ Ind. App. ____, 394 N.E.2d 949, 957 (1979): "Arbitrary and capricious action by an administrative agency is action taken, in disregard of the facts or circumstances of the case, without some basis which would lead a reasonable and honest person to the same conclusion."

This does not mean that a court can substitute its judgment in matters of evidence such as disputes or conflicts in the evidence and the credibility of witnesses. Rather, the reviewing court must examine the action or decision of the administrative agency or tribunal to ascertain the existence of competent evidence to support the findings and action taken. Determination of the facts and the credibility of witnesses are within the province of the administrative agency or tribunal which is in a better position to evaluate evidence offered at the hearing. 73 C.J.S. *Public Administrative Bodies and Procedure* § 216 (1951); *Williams v. Arnold Cleaners*, 25 Mich. App. 672, 181 N.W.2d 625 (1970); *Kohout v. Civil Service Commission of Chicago*, 28 Ill. App. 2d 388, 171 N.E.2d 683 (1960).

A court's review of action taken by an administrative agency or tribunal is not a trial de novo, and a court in this regard cannot reweigh evidence or make an independent determination of the facts. Neither a trial de novo nor an independent and additional determination of facts is required for procedural due process. The question to be answered by a court is whether the agency or tribunal had before it competent evidence to support its findings

and action in accordance with the appropriate law governing the subject matter within the jurisdiction of the agency or tribunal. Cf., *Harnett v. City of Omaha*, 188 Neb. 449, 197 N.W.2d 375 (1972); *Bruce v. Dept. Registration & Education*, 26 Ill. 2d 612, 187 N.E.2d 711 (1963). As expressed in *Shepherd v. City of Omaha*, 194 Neb. 813, 817, 235 N.W.2d 873, 875 (1975), " 'Competent evidence' means evidence that tends to establish the fact in issue."

The essence of procedural due process is simply that fundamental fairness which a person has the right to expect—even demand—and receive through our system of law. For this reason, in proceedings before an administrative agency or tribunal which has jurisdiction, such as the hearing before the commission in the present case, procedural due process requires the following: notice reasonably calculated to inform one of the accusation levied; identification of the accuser; factual basis for the accusation; reasonable time and opportunity to present evidence concerning the accusation; and a hearing before an impartial board. Cf., *Ferguson v. Thomas*, 430 F.2d 852 (5th Cir. 1970); *Brouillette v. Board of Dir. of Merged Area IX, Etc.*, 519 F.2d 126 (8th Cir. 1975). Under our standard of review, once the record discloses that those elements of due process existed with respect to the findings and action of an administrative agency or tribunal, further judicial action is neither permissible nor required. The elements of due process have been satisfied in all respects relative to the hearing given Levos before the commission.

In previous cases involving the civil service act, we have held that the decisions of the civil service commission and of the District Court on appeal from such commission must be affirmed if the evidence shows that the order of the commission was made in good faith for cause. See, *Sailors v. City of Falls City*, 190 Neb. 103, 206 N.W.2d 566 (1973); *Adkins & Webster v. North Platte Civil Service Comm.*, 206

Neb. 500, 293 N.W.2d 411 (1980). It does not appear, however, that we have interpreted the language of § 19-1808, namely, "The district court shall thereupon proceed to hear and determine such appeal in a summary manner; *Provided*, that such hearing shall be confined to the determination of whether or not the judgment or order of removal, discharge, demotion, or suspension, made by the commission, was made *in good faith for cause*. No appeal to such court shall be taken except upon such ground or grounds." (Emphasis supplied.)

In *Martin v. City of St. Martinville*, 321 So. 2d 532 (La. App. 1975), the chief of police of the city of St. Martinville was dismissed from service, and on appeal from the police civil service board Martin claimed that the decision of such board was not made "in good faith for cause" as required by Louisiana statute. In arriving at the meaning of the phrase "in good faith for cause," the Louisiana court held: "In *Riley v. Board of Police Commissioners of City of Norwalk*, 147 Conn. 113, 157 A. 2d 590 (1960), for instance, the court said, 'Cause implies a reasonable ground of demotion or removal as distinguished from a frivolous or incompetent ground.' The word 'cause' also has been defined as 'some substantial shortcoming which renders the employee's continuance in office in some way detrimental to the discipline and efficiency of the service and which the law and sound public opinion recognize as good cause for his no longer holding the position.' *Coursey v. Board of Fire and Police Commissioners*, 90 Ill.App.2d 31, 234 N.E.2d 339 (1st Dist. 3rd Div. 1967).

"We believe that in order for the dismissal or the disciplining of a tenured police officer to be valid, as being in good faith for cause . . . the dismissal or disciplinary action must be reasonably necessary for the continued efficiency of the service being rendered by the appointing authority. The evidence must show that the failure to dismiss or discipline the of-

ficer would be detrimental to the city or to the service which it is required to perform. The dismissal of such an officer cannot be said to have been made 'in good faith,' if the appointing authority acted arbitrarily or capriciously, or if the action taken was the result of prejudice or political expediency. His dismissal cannot be said to have been 'for cause,' if the evidence fails to show that it was necessary for the discipline and efficiency of the police department, or that it was needed to avoid some detriment to that department or to the city." *Id.* at 535.

For the purpose of § 19-1808, the phrase "in good faith for cause" shall mean a commission's action which is (1) based on competent evidence, (2) neither "arbitrary or capricious" nor the result of "political or religious reasons," and (3) reasonably necessary for effectual and beneficial public service.

As his final assignment of error Levos claims that the testimony of Trooper Meyer should have been excluded from the hearing before the commission in view of the statement in *State v. Palmer*, 210 Neb. 206, 218, 313 N.W.2d 648, 655 (1981): "[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." In his written report shortly after the Timms incident and before his hypnotic interview, Meyer stated that there were five persons walking to the booking room in the Hall of Justice, namely, Timms, Levos, Wolfe, Miller, and Meyer. Also, Meyer's report did not mention Timms' spitting at Levos in the hallway as the group walked to the booking room. After the hypnotic interview and at the hearing before the commission, Meyer testified that Wolfe had remained outside the Hall of Justice and therefore was not included in the group walking to the booking room. At the hearing Meyer testified further that Timms did spit at Levos. Obviously, the officer's testimony at the hearing was favorable to Levos. Timms' spitting at Levos in the hallway

was favorable to Levos as it may have been used in an attempt to establish mitigating circumstances. In any event, Levos' account of the spitting incident was corroborated in part by the testimony of Meyer. As stated in 5A C.J.S. *Appeal & Error* § 1678 at 713 (1958), the general rule is: "In accordance with the universal rule of appellate procedure that a party cannot assign as error that which is not prejudicial to him . . . it is a concomitant rule of universal application that appellant cannot complain of errors which were favorable to himself or operated in his favor." Likewise, as found in 5A C.J.S. *Appeal & Error*, *supra* at 715-17, "Appellant cannot complain of rulings admitting, excluding, or striking evidence, where such rulings operate in his favor or against appellee." Consequently, where evidence adduced was favorable to Levos there has been no prejudice, and Levos cannot complain about error which actually favored or benefited his case. See, *Griess v. Borchers*, 161 Neb. 217, 72 N.W.2d 820 (1955); *Mustard v. St. Paul Fire & Marine Ins. Co.*, 183 Neb. 15, 157 N.W.2d 865 (1968); *Leitelt Iron Works v. De Vries*, 369 Mich. 47, 119 N.W.2d 101 (1963). Under the circumstances Levos cannot complain about the admission of the testimony of Meyer.

Upon a review of the record in these proceedings, there is competent evidence to support the action taken by the Columbus Civil Service Commission, and, consequently, the judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DAVID L. RICE, APPELLANT.

335 N.W.2d 269

Filed June 3, 1983. No. 82-186.

1. **Post Conviction: Appeal and Error.** The defendant has the burden

of establishing a basis for relief in a post conviction proceeding under Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1979), and the findings of the District Court in denying such relief will not be disturbed on appeal unless they are clearly erroneous.

2. **Criminal Law: Witnesses.** The existence of an agreement to testify by a witness under threats or promises of leniency made by the prosecutor is relevant to the credibility of such witness, and failure to bring that to the attention of the jury denies the defendant due process of law.
3. **Post Conviction: Witnesses.** The defendant has the burden of proving the existence of such promises or threats as he does for all bases for relief in a post conviction hearing.
4. **Criminal Law: Witnesses.** An expectation of leniency on the part of a witness, absent evidence of any expressed or implied agreement, need not be revealed to the jury.
5. **Criminal Law: Constitutional Law: Evidence.** The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution.
6. _____: _____: _____. The duty of the prosecution to respond to a general request for obviously exculpatory evidence does not arise simply because there is a mere possibility that an item of undisclosed information might have helped the defense or might have affected the outcome of the trial. The materiality of that evidence in a constitutional sense is not established.
7. _____: _____: _____. If the evidence which the prosecution fails to disclose would have created a reasonable doubt as to the defendant's guilt, constitutional error has been committed. However, if there is no reasonable doubt about guilt, whether or not the additional evidence is considered, there is no justification for a new trial.
8. **Criminal Law: Witnesses: Evidence.** The principle that a state may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, does not cease to apply merely because the false testimony goes only to the credibility of the witness, but for that rule to apply, the evidence withheld must have been false.

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

William C. Cunningham, S.J., for appellant.

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

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

HASTINGS, J.

The defendant brought this action under Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1979), the Post Conviction Act, to set aside and vacate his prior conviction and/or receive a new trial.

This appeal is the culmination of a long history of litigation. The conviction and sentence of David Rice for first degree murder was affirmed by this court in *State v. Rice*, 188 Neb. 728, 199 N.W.2d 480 (1972). The defendant obtained a writ of habeas corpus from the U.S. District Court in *Rice v. Wolff*, 388 F. Supp. 185 (D. Neb. 1974), *aff'd* 513 F.2d 1280 (8th Cir. 1975). On appeal, the U.S. Supreme Court reversed the granting of this writ at 428 U.S. 465, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976).

The defendant filed a petition out of time for a writ of certiorari, which was denied. *Rice v. Nebraska*, 430 U.S. 947, 97 S. Ct. 1584, 51 L. Ed. 2d 795 (1977). The defendant unsuccessfully sought a second writ of habeas corpus in the U.S. District Court. *Rice v. Parratt*, CV78-L-133 (D. Neb. Feb. 14, 1979), *aff'd* 605 F.2d 1091 (8th Cir. 1979). Six of the counts listed in defendant's petition were dismissed for failure to exhaust available state court remedies. This led to the filing of the present action in the District Court for Douglas County, Nebraska.

The District Court found that the defendant raised four grounds which he claims constitute a denial of his constitutional rights, making the judgment against him void or voidable. First, the defendant claimed the State deliberately suppressed requested information material to the defendant's guilt or innocence, which may be exculpatory, that being the recording of a 911 call made by Duane Peak which lured Officer Larry Minard to the scene of his death in August of 1970. Second, it was claimed that a cooperation agreement between the FBI and the Omaha police division was concealed from the defendant. Third, he claims the State failed to disclose alleged promises of leniency or threats made

to Duane Peak inducing his testimony against the defendant. Finally, it is alleged, the State deliberately suppressed specifically requested information material to the issue of defendant's guilt, which may be exculpatory. This claim involves a letter sent by Duane Peak to Olivia Norris while Peak was in the Dodge County jail awaiting trial. The District Court found no merit to these claims by the defendant and denied defendant's motion to vacate and set aside the judgment. We affirm the decision of the District Court.

A brief statement of the facts will aid in the understanding of this case. On August 17, 1970, Officer Larry Minard was killed by a suitcase bomb at 2867 Ohio Street, Omaha, after being summoned there by a 911 emergency call reporting a woman was screaming for help at that address. Duane Peak, David Rice, and Ed Poindexter were arrested and charged with first degree murder as a result of their participation in this matter. Duane Peak, 16 years old, testified for the State, implicating Rice and Poindexter. Peak testified that it was he who placed the suitcase bomb at 2867 Ohio Street, and made out that he was simply following the instructions of David Rice and Ed Poindexter. On the basis of this testimony and other evidence adduced, Rice and Poindexter were convicted of first degree murder. Peak was thereafter tried as a juvenile and declared a juvenile delinquent. His whereabouts are unknown at this time.

Defendant has assigned several errors to the decision of the District Court. We turn now to these assignments. Defendant's initial assignment of error is in regard to the burden of proof in this matter. He claims the trial court erred in failing to recognize that in a post conviction hearing the State may be required to discharge the burden of coming forward with the evidence to rebut a prima facie case made by the petitioner.

As we have said: "The defendant has the burden

of establishing a basis for relief in a post conviction proceeding under Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1979), and the findings of the District Court in denying such relief will not be disturbed on appeal unless they are clearly erroneous." *Marteney v. State*, 210 Neb. 172, 177, 313 N.W.2d 449, 453 (1981).

Assuming arguendo that the burden of coming forward does in fact shift once the prima facie case is made, the burden of proving his case remains on the defendant. This being the proper standard of review and appropriate allocation of the burden of proof, we only need to determine if the District Court applied the appropriate rules of law in this case to findings of fact that are not clearly wrong. As will become apparent from our discussion of the remaining assignments of error, we concluded that it did.

The next several assignments of error deal with the standard of materiality applied by the District Court when determining if certain evidence should have been turned over to the defendant prior to or at trial. The defendant claims the District Court applied an incorrect standard of materiality in three separate instances. First, the defendant argues the trial court failed to distinguish between the standard of materiality in a case where the defendant attempts to discover certain evidence and in a case where the evidence in question bears directly on the credibility of a state witness. It is unclear from reading defendant's brief, but this argument seems to be directed to alleged promises of leniency and/or threats which induced Duane Peak to testify at the original trial, which were not disclosed to the jury.

As a general rule, when an accomplice testifies against a defendant in a criminal prosecution under threats or promises of leniency by the prosecutor, such promises or threats bear on the credibility of said witness. The credibility of such a witness is an important issue at trial. The existence of such an agreement, being relevant to credibility, must be

brought to the attention of the jury, and the failure to do so denies the defendant due process of law. *Giglio v. United States*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972); *Campbell v. Reed*, 594 F.2d 4 (4th Cir. 1979); *United States v. Sutton*, 542 F.2d 1239 (4th Cir. 1976); *Boone v. Paderick*, 541 F.2d 447 (4th Cir. 1976).

It is likewise true that the defendant has the burden of proving the existence of such promises or threats, *Mastrian v. McManus*, 554 F.2d 813, 823 (8th Cir. 1977), as he does for all bases for relief in a post conviction hearing.

The record before us is devoid of any proof of the existence of such an agreement. Duane Peak, testifying at trial and in deposition, indicated he wished to testify because he felt things would go easier for him if he did. At the same time, Peak repeatedly denied any deal had been struck with the prosecution. Peak simply had an expectation of leniency, and, as such, absent evidence of any expressed or implied promise, it need not be revealed to the jury. *Mastrian v. McManus, supra.*

Peak's attorney, Thomas Carey, also testified. Carey's testimony gives rise to some inference that he may have possibly approached the prosecutor and offered to make some sort of deal for his client, but, again, he testified no deal was made prior to Peak giving testimony at trial.

Samuel Cooper, Donald Knowles, and Arthur O'Leary, the prosecuting attorneys in the original trial of David Rice, all testified at the post conviction hearing that no promises were made to Duane Peak in exchange for his testimony. On the basis of this evidence, or lack thereof, the District Court found that the defendant failed to adequately prove the existence of any such agreement. We cannot say such a finding is clearly erroneous. We therefore agree that the defendant failed to establish the existence of such a promise of leniency to induce Peak's testimony.

Since there is not adequate proof in the record to establish the existence of promises or threats made to Peak, the question of whether the District Court applied the proper standard of materiality to such matter becomes moot. Therefore, defendant's argument must fail.

Defendant makes a similar argument with regard to the tape of the 911 phone call which summoned Officer Minard to 2867 Ohio Street. Defendant argues that he has established a prima facie case that this was not the voice of Duane Peak. Therefore, the defendant argues that Peak perjured himself in testifying that he made that call. On this basis defendant argues that this matter goes again to the credibility of the witness and should have been brought out at trial. Since it was not, the defendant was denied due process. As such, it is argued, the District Court should have applied the standard of materiality from veracity or perjury cases as set forth in *Napue v. Illinois*, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959), and *Giglio v. United States*, *supra*, rather than the standard from ordinary discovery cases as set forth in *United States v. Agurs*, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976).

This argument must also fail for lack of proof in the record. Defendant bases his argument on the testimony of David Herzog, who was counsel for Rice at the original trial. Herzog listened to a copy of the original tape of the 911 call on October 24, 1980. It was his opinion that the voice of the caller was not the voice of Duane Peak. Lt. James Perry also testified with regard to this tape. He testified that prior to the arrest of Duane Peak this tape recording was played for a number of Peak's friends and relatives who identified the speaker as Duane Peak. At trial, Peak testified that it was he who made the call and that when he made the call he spoke in a deeper than normal voice.

The District Court found the defendant failed to prove that it was not Duane Peak who made this

call. As the District Court stated in its decision: "With all due respect for Mr. Herzog's considerable skill as a trial attorney, he hardly qualifies as an expert in voice analysis, particularly in view of the fact that, prior to his testimony, he had not heard the voice of Duane Peak, the alleged caller, in the approximately nine years since the defendant's trial." The District Court, as the finder of fact, weighed this evidence and we cannot say it was clearly erroneous in its conclusion. Therefore, we affirm the finding that there is insufficient evidence to support the claim that Duane Peak did not make the call, and thereby committed perjury in claiming that he did. As such, the standard of materiality to be used in veracity or perjury cases, as set forth in *Napue v. Illinois*, *supra*, does not apply.

The question remains, Should this tape have nonetheless been turned over to the defendant at the original trial under the request made by the defense for discovery? The defendant's motion for discovery prior to his trial read in relevant part as follows: "COMES NOW the Defendant and requests the Court to Order the Prosecuting Attorney to permit this Defendant to inspect, copy or photograph:

"(1) The names, and addresses, of witnesses on whose evidence the charge is based;

"(2) The results and reports of physical or mental examinations, and of scientific tests or experiments made in connection with this particular case or copies thereof; and

"(3) Documents, papers, books, accounts, letters, photographs, objects or other tangible things of whatsoever kind or nature which could be used as evidence by the State."

There is no specific reference to this or any other tape recording in this request. If the recording of the 911 telephone call is to be considered as an item falling within the scope of this request, it can only be said to fit within the general request of "objects or other tangible things."

The basic standard which determines whether evidence in the possession of the prosecution must be turned over to the defense is stated in *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963): "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

The U.S. Supreme Court expanded and clarified this notion in *United States v. Agurs*, *supra*. In *Agurs* the Court pointed out that the rule in *Brady* is applicable to three different situations. The first of these is the situation where the prosecution has used perjured testimony to prove its case, and the fact that such perjured testimony was used has been concealed from the defense. Such a conviction is fundamentally unfair and must be set aside if there is a reasonable likelihood that the false testimony could have affected the judgment of the jury. *Id.* at 103. As pointed out above, the defense has failed to show the existence of any perjury in connection with this tape; therefore, this standard does not apply.

The second situation arises when the defense has made a specific request for evidence and the prosecution fails to turn such evidence over to the defense. This situation is exemplified by *Brady v. Maryland*, *supra*. When a specific request is made for evidence, a request that gives the prosecutor notice of exactly what the defense desires, and the prosecution fails to supply such evidence or submit the problem to the trial court, a new trial must be granted if such evidence might have affected the outcome of the trial. *Agurs* at 104. As pointed out above, the issue of this recording does not involve a specific request. The request made by the defense does not specifically request this tape, and therefore this standard does not apply.

The third situation arises when the defendant

makes a general request for evidence from the prosecution. In such a case the Court stated: "If there is a duty to respond to a general request of that kind, it must derive from the obviously exculpatory character of certain evidence in the hands of the prosecutor." *Id.* at 107.

Stating what is and is not "obviously exculpatory," the Court went on to say: "For a jury's appraisal of a case 'might' be affected by an improper or trivial consideration as well as by evidence giving rise to a legitimate doubt on the issue of guilt. If everything that might influence a jury must be disclosed, the only way a prosecutor could discharge his constitutional duty would be to allow complete discovery of his files as a matter of routine practice." *Id.* at 108-09.

Continuing, the Court said: "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *Id.* at 109-10.

Further, "The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." *Id.* at 112-13.

This third standard was the one applied by the District Court, and we find it is the proper standard to be applied in cases involving a general request

such as we have here. As pointed out above, the evidence in this case with regard to this tape shows that it was Duane Peak who made this call. We find, as did the District Court, that this tape recording is not so obviously exculpatory as to create a reasonable doubt about the defendant's guilt which did not otherwise exist. Therefore, the defendant is not entitled to any relief on the basis of the failure of the prosecutor to turn over a copy of this tape on the basis of defendant's request.

The final objection raised by the defendant, having to do with the standard of materiality applied by the District Court, deals with a letter written to Olivia Norris by Duane Peak while Peak was incarcerated in the Dodge County jail. Peak's letter is in part as follows: "The Lord knows I tried but something happened which forced me to realize that I had no alternative but to say what I said. No matter what anyone says from now on I refuse to call myself a man, or anything close to a man because I did what I did. Even though there was no other way, because they already had enough evidence to convict those other two bloods. I don't know, maybe I sound kind of nutty but that's just the way I feel. Or maybe I'm just trying to get somebody to say that what I did was justifiable, but I know It can't be justified. I not only turned against those two bloods, but I turned against myself and my own people. I could have denied everything and all three of us would have gone up to the chair. And then again if I denied everything one of those other bloods would have gave them a story and sent me and the other dude up. But neither one of those is the reason, I was scared a little but that's not the reason,? I guess I'll never know.? Now I have to wait until my actual trial before I find out whether I get the chair or life?"

The defendant claims that the District Court applied the incorrect standard of materiality when considering whether this evidence should have been

turned over to the defense by the prosecution. It is argued that this letter bears on the credibility of Duane Peak as a witness and, therefore, should have been turned over to the defendant under his above-quoted request if there was any reasonable likelihood that this letter would affect the judgment of the jury. The defendant argues that this letter could have been used to test the credibility of Peak as a witness, and thereby could reasonably have had an effect on the judgment of the jury.

In support of this argument defendant cites *Napue v. Illinois*, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959), and *Giglio v. United States*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972). A careful reading of *Napue* and *Giglio* indicates that they hold, "The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness." *Napue v. Illinois*, *supra* at 269. These cases do not hold, as defendant urges, that any evidence that might be useful to attack the credibility of a witness must be treated under this "could reasonably affect the judgment of the jury" standard of materiality. These cases speak only to the use of false evidence, whether it goes to the credibility of a witness or the guilt of the defendant. Neither this letter nor any other evidence in the record demonstrates that the testimony of Duane Peak at trial was false. As such, the standard of materiality urged by the defendant is inappropriate when considering this letter.

The District Court properly found that this letter fits within the second standard set forth in the *Agurs* case discussed above. As stated above, when a particular piece of evidence is specifically requested by the defendant, it must be turned over, and the failure to do so is prejudicial error if it might have affected the outcome of the trial. Applying this stand-

ard, the District Court found that while this letter indicates that Peak felt remorse in testifying against Rice and Poindexter, it does not cast doubt on the guilt of the defendant. Therefore, the court concluded the defendant was entitled to no relief for the failure of the prosecution to turn this letter over to the defense. We agree.

Defendant also argues that the trial court prevented the jury from knowing that one of the options considered by the State to be given in return for Peak's testimony was that he might be treated as a juvenile. Defendant argues that the jury should have been made aware of this possibility, as it could have influenced its estimate of Peak's credibility. This argument fails in its basic premise, i.e., the prosecution offered Peak something in return for his testimony. As pointed out above, the evidence in this case does not support such a contention. We find no merit to this argument.

Defendant also argues that the granting of the motion to quash defendant's subpoenas duces tecum was error by the District Court. The defendant had these subpoenas issued and served upon the local offices of the FBI and the Bureau of Alcohol, Tobacco, and Firearms of the Department of the Treasury, asking the local special agents in charge to appear in court with certain documents. The U.S. attorney opposed these subpoenas, and moved to have them quashed. The special agents appeared in court and testified that after having conveyed the demand for these materials to their respective superiors, permission to release said material was denied by those superiors. 27 C.F.R. § 71.27 (1982) and 28 C.F.R. § 16.22 (1982) preclude the local special agent in charge from producing any materials requested by subpoena without first gaining authorization from his superiors.

The U.S. Supreme Court, in *Touhy v. Ragen*, 340 U.S. 462, 71 S. Ct. 416, 95 L. Ed. 417 (1951), stated that in cases such as this, where authority to pro-

duce documents has been withheld, the refusal to produce such materials by the local agents is permissible. As such, the motion to quash defendant's subpoenas was properly sustained by the District Court.

Defendant's final assignment of error, raised by the questionable means of an untimely filed brief, is in regard to certain exhibits which were not admitted into evidence at the hearing below. Exhibits 32, 34-41, 43, 44, and 16 are copies of government documents provided to the defendant under the Freedom of Information Act. The District Court found these documents to be genuine and that they fall within the provisions of Neb. Rev. Stat. § 27-901 (Reissue 1979), since they were obtained from a public office. As such, these documents might well be admissible evidence under Neb. Rev. Stat. § 27-1005 (Reissue 1979) as the copies of official records. Under this provision a copy of an official record is admissible if it is certified as correct under Neb. Rev. Stat. § 27-902 (Reissue 1979), or if a person is called and testifies that after comparing the copy with the original, it is correct and accurate. The defendant failed to do this.

These documents do not qualify as self-authenticating documents under § 27-902. Also, no one was called to testify who could state that the documents offered were true and accurate copies of the originals. Since any such testimony fails to appear in the record, we find that the District Court's denial of the admission of these exhibits into evidence was proper.

We find none of the arguments raised by the defendant require the granting of the relief sought. We affirm the findings of the District Court denying defendant's motion to vacate and set aside his conviction.

AFFIRMED.

CHARLES E. FRAHM, APPELLEE, V. DAVID E. CARLSON, APPELLANT.

334 N.W.2d 795

Filed June 3, 1983. No. 82-256.

1. **Directed Verdict.** A motion for directed verdict must be treated as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence.
2. _____. In every case, before the evidence is submitted to the jury there is a preliminary question for the court to decide when properly raised, not whether there is literally no evidence but whether there is any evidence upon which a jury can properly proceed to find a verdict for the party producing it upon whom the burden of proof is imposed.
3. **Insurance: Releases.** Where one who has sustained personal injuries, and with his attention directed to the known injuries, which are trivial in their nature, contracts for the settlement of his damages with reference thereto, in ignorance of other and more serious injuries, both parties at the time believing that the known injuries are all the injuries sustained, then there is a mutual mistake, and the release, although couched in general terms, should be held not to be a bar to an action for the more serious and unknown injuries.

Appeal from the District Court for Burt County: DARVID D. QUIST, Judge. Affirmed.

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

Clarence E. Mock of Johnson & Mock, for appellee.

McCOWN, HASTINGS, and SHANAHAN, JJ., and BRODKEY, J., Retired, and COLWELL, D.J., Retired.

COLWELL, D.J., Retired.

Defendant, David E. Carlson, appeals a $35,000 personal injury jury verdict awarded to plaintiff, Charles E. Frahm, a 43-year-old farmer. The main issue concerns a written release executed by plaintiff containing an "injuries, known and unknown," clause, which plaintiff claimed was void because of mutual mistake. We affirm.

Briefly, the accident occurred on June 22, 1978, in Oakland, Nebraska, when Carlson backed out of a driveway into Frahm's car occupied by his wife, Clara, daughter Debbie, two sons, and Charles. Charles, Clara, and Debbie were examined by Dr. Gayle Petersen, M.D. Frahm struck his forehead on a car doorpost; he complained of a headache, dizziness, and being sick at his stomach. Aspirin was prescribed, and the doctor said his reported symptoms would go away. Frahm's car was totaled; he claimed it was worth $3,500. On July 5, 1978, Frahm executed a release that recited in part, "For The Sole Consideration of Three-thousand-five-hundred-fifty-and-no 100 Dollars, the receipt and sufficiency whereof is hereby acknowledged, the undersigned hereby releases and forever discharges David E. Carlson . . . from any and all claims, demands, damages, actions, causes of action or suits of any kind or nature whatsoever, and particularly on account of *all injuries, known and unknown*, both to person and property, which have resulted or may in the future develop from an accident which occurred on or about the 22nd day of June, 1978 . . . ." (Emphasis supplied.) Frahm's headaches persisted; in September 1978 he began to have pains in his neck and arms, which continued to worsen; December 19, 1978, he again consulted Dr. Petersen, who referred him to Dr. John L. Greene, M.D., a neurological surgeon in Omaha, Nebraska. Dr. Greene diagnosed Frahm's condition as a herniated disc between the 5th and 6th cervical vertebrae. Fusion surgery followed. The neck pain continued, and Frahm received further medical treatment from Dr. Lonnie Mercier, M.D., orthopedic surgeon, and Dr. J. Whitney Kelley, M.D. At the time of trial Frahm continued to have headaches and pain in his neck and arms.

Assigned errors 1 and 2 concern the denial of defendant's motion for directed verdict made at the close of the evidence.

"In every case, before the evidence is submitted to the jury there is a preliminary question for the court to decide when properly raised, not whether there is literally no evidence but whether there is any evidence upon which a jury can properly proceed to find a verdict for the party producing it upon whom the burden of proof is imposed." *Edward Peterson Co. v. Ulysses S. Schlueter Constr. Co.*, 179 Neb. 883, 888-89, 140 N.W.2d 830, 833 (1966).

"A motion for directed verdict must be treated as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence." *Hansen v. Hasenkamp*, 192 Neb. 530, 534, 223 N.W.2d 44, 47 (1974).

First, defendant claims that the release was binding on plaintiff and that he failed to meet his burden to prove that mutual mistake invalidated the release.

It is the majority rule that a release of personal injury claims may be avoided on grounds of mutual mistake as to the nature and extent of the injury sustained. See, Annot., 13 A.L.R.4th 686, 694 (1982); Annot., 71 A.L.R.2d 82 (1960); 66 Am. Jur. 2d *Release* §§ 30, 32 (1973). Nebraska has long followed that rule, as discussed in *Simpson v. Omaha & C. B. Street R. Co.*, 107 Neb. 779, 782-83, 186 N.W. 1001, 1003 (1922): "What we believe to be the true rule is that the mistake must relate to either a present or past fact or facts that are material to the contract of settlement, and not to an opinion as to future conditions as the result of present known facts. . . . [W]here the mistake is as to the extent of the injury due to unknown conditions or relates to injuries that were wholly unknown, then the release may be avoided, unless it further appears that the parties were contracting with respect to possible unknown injuries,

and the releasor intended to relinquish all claims, whether known or unknown. In the latter case there would be no mutual mistake. Where one who has sustained personal injuries, and with his attention directed to the known injuries, which are trivial in their nature, contracts for the settlement of his damages with reference thereto, in ignorance of other and more serious injuries, both parties at the time believing that the known injuries are all the injuries sustained, then there is a mutual mistake, and the release, although couched in general terms, should be held not to be a bar to an action for the more serious and unknown injuries." (Emphasis supplied.)

In *Simpson* claimant fell while boarding a streetcar. The only known personal injuries were skin scratches. The $50 release was for torn clothing. After a few months serious physical and emotional resulting injuries developed. The release recited that the defendant was released " 'from any and all cause or causes of action, costs, charges, claim or demand, of whatever name or nature, in any manner arising or to grow out of an accident occurring . . . .' " *Id.* at 780, 186 N.W. at 1002. The *Simpson* rule was followed in *Collins v. Hughes & Riddle*, 134 Neb. 380, 384, 278 N.W. 888, 891 (1938), where the release contained the term, " 'injuries, known & unknown.' " See, also, *McCamley v. Shockey*, 636 F.2d 256 (8th Cir. 1981).

On this issue, this additional evidence is favorable to plaintiff: Six days after the accident, Ed Hanna, the local agent for State Farm Insurance, Carlson's insurer, sent claim forms to Frahm and asked him to meet at his office on July 5. Frahm obtained two estimates of car repair ($3,200 and $3,700) and met with Hanna and Harold McClellan, a claims adjuster for State Farm Insurance. They discussed settlement of the car claim. Frahm wanted $3,500, and $75 for his out-of-pocket medical expense. McClellan said the highest company book value for the car

was $3,200. A settlement was agreed upon for $3,550, which McClellan coded for company records as $3,200 for the car and $350 for medical expenses. Plaintiff says he only intended to settle for the car loss and the $75 medical expenses then incurred. McClellan prepared a release on a company form and Frahm signed his name and his wife's name after he glanced at it. At the time, Frahm advised McClellan that he had had a stiff neck, that he still had headaches, and that he had received a bruise on the forehead. Frahm said he felt all right, and McClellan testified that Frahm looked all right. There was no other discussion of pain and suffering, loss of work, or of any other injuries. From this record there was a jury question of the intention of the parties and of mutual mistake.

Second, defendant argues that plaintiff's evidence was insufficient to go to the jury on the question of the proximate cause of the neck injuries. His argument is that plaintiff made no complaint of neck pain until several months after the accident and that proof of causation is entirely subjective without supporting medical testimony, citing *Eiting v. Godding*, 191 Neb. 88, 214 N.W.2d 241 (1974). The record shows otherwise. At the time that the release was signed, Frahm complained of headaches and that he had a stiff neck. Following the accident, Frahm had a red bruise mark on his forehead, caused by striking the doorpost. In *Eiting* we held that this would justify an inference of causation. See, also, *Yount v. Seager*, 181 Neb. 665, 150 N.W.2d 245 (1967). Further, there was expert medical testimony by Dr. Greene, Dr. Kelley, and Dr. Mercier, if believed, that establishes proximate cause for the neck injuries.

Defendant's motion for a directed verdict was properly denied.

Next, defendant claims prejudicial error in the giving of jury instruction Nos. 9, 14, 15, and 16, and also the court's refusal to give two offered instructions.

Instruction No. 9: "A release is binding on the one who signed it, where he was of mature age, able to read and write, somewhat experienced in business transactions, and had an opportunity to read the release, unless the Plaintiff proves by a preponderance of the evidence: 1. That the injury for which he seeks damages is not the result of the development of an injury known at the execution of the release, but is an injury that was wholly unknown at the release's signing. 2. That the language of the release which purports to be a release of all known and unknown injuries does not reflect the actual agreement of the parties, but was a result of a mutual mistake of the parties."

This was followed by instruction Nos. 10 and 11 that defined and described mutual mistake. *Instruction No. 15* explained the effect of the jury's findings under instruction No. 9. From a reading of these instructions, along with all the other instructions, there was no prejudice or error. See *Buhrman v. Smollen*, 164 Neb. 655, 83 N.W.2d 386 (1957).

Instruction No. 14: "Language in an insurer-prepared release, such as the one in this case, which indicates that the settlement covers all injuries, 'known and unknown', does not in and of itself conclusively demonstrate the parties' intent to settle claims for unknown injuries."

Defendant objects to the use of the phrase "insurer-prepared release." While generally the use of such a description in a like instruction should be avoided, there is neither error nor prejudice here. In defendant's opening statement counsel said, "This is, of course, given on behalf of Rev. Carlson, or really on behalf of State Farm, which for all practical purposes, is the defendant here. We've indicated that we admit liability. It's just a question of whether the release is good . . . ." The whole record has many references by both parties to State Farm Insurance and its agents; defendant's closing argu-

ment has numerous references to "State Farm" and "bad State Farm."

Instruction No. 16 (NJI 4.01, 4.04, 4.05, and 4.07): Defendant complains that there was no evidence for the jury to consider future pain and suffering, future medical expenses, and loss of future earning capacity. There was expert medical testimony that Frahm had a 15-percent disability and that he would have pain in the future and future medical expenses. Past medical expenses in the record were competent proof on the issue of future medical expense. *Yount v. Seager, supra.* Loss of future earning capacity is an item of general damage shown here by evidence of plaintiff's skills, experience, training, age, and health. See *Baylor v. Tyrrell*, 177 Neb. 812, 131 N.W.2d 393 (1964).

Lastly, defendant complains that the court refused to give two offered instructions, taken from *Swartz v. Topping*, 191 Neb. 41, 213 N.W.2d 718 (1974), in substance, that a party who fails to read a release is barred from claiming the release is not binding, and all persons are presumed to read and understand the terms of their contract. The court correctly refused these two instructions.

There being no error in this record, the judgment is affirmed.

AFFIRMED.

GERARD W. VAN HEEK ET AL., APPELLANTS, V. COUNTY OF KNOX, STATE OF NEBRASKA, A POLITICAL SUBDIVISION, ET AL., APPELLEES.

334 N.W.2d 641

Filed June 3, 1983. No. 82-337.

Political Subdivisions: Appeal and Error. Neb. Rev. Stat. § 23-168.04 (Reissue 1977) relates only to appeals from the boards of adjustment and is not applicable to action taken by the county board of supervisors.

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

William Horneber of Uhlir & Horneber, for appellants.

Steven A. Scholer, Knox County Attorney, and John Thomas, former Knox County Attorney, on briefs, for appellees County of Knox and Board of Supervisors.

Birmingham & Scholer, for appellee Arens.

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

WHITE, J.

This is an appeal from the order of the District Court for Knox County, Nebraska, sustaining appellees' (Knox County, its board of supervisors, and others) motion for summary judgment and dismissing the plaintiffs' action.

The appeal does not present any difficult questions of law; the difficulty is the form of the action.

The county board of Knox County granted the application of one Allan Arens to rezone a 13.737-acre parcel of rural real estate from agricultural to commercial and assented by resolution to the Nebraska Environmental Control Department issuing a license to Arens to operate a sanitary landfill.

Appellants (protestants before the county board) asserted in the District Court, as they do here, that the action filed by them in the District Court was an appeal from the rezoning decision of the Knox County board. They cite as authority for the appeal Neb. Rev. Stat. § 23-168.04 (Reissue 1977), which relates to "appeals" from the decision of the boards of adjustment. The statute is clearly not applicable to the county board of supervisors' action. The statute allows any officer, department, board, or bureau of the county to appeal a decision of the boards of adjustment, in addition to any person aggrieved by the

decision of the boards of adjustment. The statute was not meant to authorize appeals from a county board other than the boards of adjustment.

Appellants acknowledge that the action of the county board in granting the rezoning application was legislative in character, but disregard the square holding in *Copple v. City of Lincoln*, 210 Neb. 504, 315 N.W.2d 628 (1982), and *Scottsbluff Improvement Assn. v. City of Scottsbluff*, 183 Neb. 722, 164 N.W.2d 215 (1969), that no direct appeal lies from the exercise of legislative authority and that the only remedy is by collateral attack. Insofar as the action purports to be an appeal, the District Court did not acquire jurisdiction, nor do we.

As neither the District Court nor this court has jurisdiction over a direct appeal from a legislative decision, we will not discuss the errors assigned relating to alleged deficiencies in the notice of county board meetings, except to note that each of the parties to the original appeal to the District Court was present at the meeting and voiced no objection at that meeting and cannot be heard to complain at a later date. *Alexander v. School Dist. No. 17*, 197 Neb. 251, 248 N.W.2d 335 (1976).

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. STANLEY A. POE, APPELLANT.

334 N.W.2d 642

Filed June 3, 1983. No. 82-699.

1. **Post Conviction.** An evidentiary hearing may be denied if the trial court on examination finds that the proceeding is without foundation or merit. Neb. Rev. Stat. § 29-3001 (Reissue 1979).
2. **Criminal Law: Effectiveness of Counsel.** When trial counsel makes a choice of defenses as a matter of trial strategy, even if that choice proves to be ineffective, it does not without more sustain a finding of ineffective assistance of counsel.

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

Stanley A. Poe, pro se.

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

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

WHITE, J.

The appellant, Stanley A. Poe, was convicted by a jury of robbery and use of a firearm to commit a felony. The conviction and sentence were affirmed by this court without opinion. This post conviction petition followed.

The District Court reviewed the proceedings had at trial and the proceedings from the hearing on the motion for new trial. After admitting in evidence a deposition of trial counsel by court-appointed counsel in the post conviction proceeding, the court denied a further evidentiary hearing and post conviction relief to the appellant. The appellant appealed and assigns as error that (1) the trial court erred when it denied an evidentiary hearing, and (2) the trial court erred when it failed to find that appellant had ineffective assistance of trial counsel. We will discuss the assignments together.

The principal point of dispute in the appeal is the failure of trial counsel to interview and call as a witness one Charles Leroy Smith. The existence of Smith was revealed to trial counsel either shortly before trial or after the trial began. Appellant told his attorney that Smith was in custody charged with three robberies, one of which was the same charge as the appellant was facing. As stated in appellant's brief at 4, "Appellant would submit that Charles Leroy Smith had evidence to prove that appellant was not the actual party who assisted him (Smith) in the robbery, that it was one Bernard Miller . . . . However appellant was advise [sic] by Smith that he

could not testify because of on-going plea negotiations in progress . . . ."

Smith did testify at the motion for new trial, and the evidence was before the trial court. He said that he would not have testified at appellant's trial on advice of counsel, but since the plea bargain dismissing the Hitchin' Post robbery (appellant's charge) was concluded, he admitted that he had participated in the robbery and that another person was with him, but that the other person was not the appellant.

In his deposition trial counsel admits he did not interview Smith and did not call him as a witness. His reasons for not doing so were clearly stated. A witness to the robbery described the robber as clean-shaven, whereas the appellant wore a beard of obvious age that could not have been grown since the robbery. He stated that he was reluctant to bring before the jury a witness who was charged with three robberies and whose credibility could be easily damaged or destroyed. Trial counsel did not list as a reason for failing to interview or call Smith as a witness the fact that Smith had steadfastly refused to testify and would be expected to refuse to answer all questions put to him on the ground of the privilege against self-incrimination, nor does appellant suggest here how an interview or subpoena of Smith would have benefited him or the failure to do so prejudice him.

The facts are undisputed. There was nothing that would have added to the information already before the court that could have helped it in making a decision. The deposition of trial counsel supported the allegations of the post conviction petition, and the appellant's contentions were fully presented to the trial court. No further hearing was necessary.

An evidentiary hearing may be denied if the trial court on examination finds that the proceeding is without foundation or merit. Neb. Rev. Stat. § 29-3001 (Reissue 1979); *State v. Bartlett*, 199 Neb.

471, 259 N.W.2d 917 (1977); *State v. Nokes*, 209 Neb. 293, 307 N.W.2d 521 (1981).

Once the trial court decided that it had all the evidence that was necessary, the question then became whether trial counsel failed to perform as well as a reasonably competent attorney under similar circumstances with ordinary training and skill. See, *Marteney v. State*, 210 Neb. 172, 313 N.W.2d 449 (1981); *Hawkman v. Parratt*, 661 F.2d 1161 (8th Cir. 1981). We conclude that the trial court was correct in finding that trial counsel was not incompetent.

The decision not to interview Smith or call him was a reasonable exercise in trial strategy, and even if defense counsel had called Smith in this case, it would have been a useless gesture. "[W]hen trial counsel makes a choice of defenses as a matter of trial strategy, even if that choice proves to be ineffective, it does not without more sustain a finding of ineffective assistance of counsel." *Drake v. Wyrick*, 640 F.2d 912, 915 (8th Cir. 1981). Not only was the trial court correct in its conclusion that trial counsel was not incompetent, the appellant has failed to demonstrate any claimed prejudice. This is fatal to his claim. *Drake v. Wyrick, supra.*

The judgment of the trial court is affirmed.

AFFIRMED.

BOSLAUGH, J., concurs in the result.

THOMAS CLASSEN, DOING BUSINESS AS CLASSEN MFG., APPELLANT, V. BECTON, DICKINSON AND COMPANY, A CORPORATION, ET AL., APPELLEES.

334 N.W.2d 644

Filed June 3, 1983. No. 82-764.

1. **Prejudgment Interest.** Prejudgment interest may be recovered on claims that are liquidated.
2. _____. A claim is liquidated if the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance upon opinion or discretion.

3. _____. Where a reasonable controversy exists as to the plaintiff's right to recover or as to the amount of such recovery, the claim is generally considered to be unliquidated and prejudgment interest is not allowed.

Appeal from the District Court for Platte County: JOHN M. BROWER, Judge. Remanded with directions.

Thomas H. DeLay of Mueting, DeLay & Stoffer, for appellant.

Mark M. Sipple and Luckey, Sipple & Hansen, for appellee.

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

BOSLAUGH, J.

The sole issue in this case is whether the plaintiff was entitled to prejudgment interest on any part of the judgment recovered against the defendant.

The plaintiff, Thomas Classen, doing business as Classen Mfg., is a supplier of steel for structures. The defendant Roth Construction Co., Inc., is a corporation engaged in contracting and the construction of buildings. In April 1979 the plaintiff agreed to supply the steel to be used in a building being constructed by the defendant. The contract was for $114,995 of steel plus 3 percent Nebraska sales tax.

As the construction proceeded the plaintiff supplied steel to the defendant and the defendant paid invoices amounting to $98,094.38. The defendant refused to pay the invoice dated May 30, 1979, in the amount of $20,350.74 and claimed that it was entitled to damages for delay and misfabrication of steel supplied by the plaintiff.

The plaintiff filed a mechanic's lien on September 25, 1979, and commenced this action on May 1, 1981, to foreclose its lien. The defendant filed an answer and "set off," claiming there was $3,152.01 due it as damages for late delivery and misfabrication of steel.

The trial court found that the plaintiff should recover judgment against the defendant in the amount of $18,973.94, without prejudgment interest, but with interest at the highest legal rate from October 29, 1982, the date of the judgment, and that if the judgment was not paid within 20 days an order of sale should issue. The plaintiff has appealed and contends that the trial court should have awarded prejudgment interest at the rate of 18 percent from 30 days after May 30, 1979, the date of the last invoice which the defendant refused to pay. There is no cross-appeal.

The general rule is that prejudgment interest may be recovered on claims that are liquidated. A claim is liquidated if the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance upon opinion or discretion. *First Data Resources, Inc. v. Omaha Steaks Int., Inc.*, 209 Neb. 327, 307 N.W.2d 790 (1981). Where a reasonable controversy exists as to the plaintiff's right to recover or as to the amount of such recovery, the claim is generally considered to be unliquidated and prejudgment interest is not allowed. *Langel Chevrolet-Cadillac v. Midwest Bridge*, 213 Neb. 283, 329 N.W.2d 97 (1983).

In this case the only dispute between the parties involved the defendant's claim for damages in the amount of $3,152.01 alleged to be caused by the plaintiff's delay in furnishing steel and in misfabricating some of the steel supplied. The defendant pleaded the claim as a setoff to be deducted from the amount due the plaintiff.

The original contract price was for $114,995 plus sales tax. The defendant paid $98,094.38 to the plaintiff. On September 5, the defendant wrote to the plaintiff enclosing a check in the amount of $13,876.54, which the defendant stated would make the plaintiff "paid up in full." The defendant's computation omitted sales tax, misstated the amount paid, and included the disputed credit in the

amount of $3,152.01. The plaintiff treated the letter as an offer to compromise and did not cash the check.

The trial court found that it was agreed by all parties that there was $17,723.94 due the plaintiff; that the plaintiff should recover an additional $1,250; and should recover judgment in the amount of $18,973.94. These findings are not challenged on the appeal.

The record shows that $17,723.94 of the amount due the plaintiff was not disputed and therefore was a liquidated claim. The plaintiff was entitled to interest on that amount at the rate of 18 percent from 30 days after May 30, 1979.

The defendant's objection that the contract rate of 18 percent was usurious is unavailing, since the defendant was a corporation. A corporation may agree to pay any rate of interest by an agreement in writing which sets out the amount or the rate charged. Neb. Rev. Stat. § 45-101.04(2) (Cum. Supp. 1982); *Northland Mortgage Co. v. Royalwood Estates, Inc.*, 190 Neb. 46, 206 N.W.2d 328 (1973).

The judgment should be modified to provide that the plaintiff shall recover interest at the rate of 18 percent per annum on $17,723.94 from 30 days after May 30, 1979. In all other respects the judgment should be affirmed.

The cause is remanded with directions to modify the judgment in conformity with this opinion.

REMANDED WITH DIRECTIONS.

WHITE, J., concurs in the result.

JOHN R. LAURITZEN, APPELLEE AND CROSS-APPELLANT, v. THOMAS L. DAVIS AND CAROL DAVIS WELLS, APPELLANTS AND CROSS-APPELLEES, FIRST NATIONAL BANK OF OMAHA ET AL., APPELLEES, RICHARD K. FLORY AND PATRICK M. CONWAY, APPELLEES AND CROSS-APPELLANTS.

335 N.W.2d 520

Filed June 10, 1983. No. 81-754.

1. **Contracts.** In the absence of anything to indicate a contrary intention, instruments executed at the same time by the same parties for the same purpose and in the course of the same transaction are, in the eyes of the law, one instrument and will be read and construed together as if they were as much one in form as they are in substance.
2. _____. Beneficiaries of a contract may recover thereon, though not named as parties, when it appears by express stipulation or by reasonable intendment that rights and interests of such beneficiaries were contemplated and being provided for thereon.
3. _____. The interpretation given to a contract by the parties themselves while engaged in the performance of it is one of the best indications of true intent and should be given great, if not controlling, influence.
4. **Trusts.** A constructive trust is a relationship, with respect to property, subjecting the person who holds title to property to an equitable duty to convey it to another on the ground that his acquisition or retention of the property would constitute unjust enrichment.
5. **Trusts: Equity.** When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain a beneficial interest, equity converts him into a trustee.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Affirmed in part, and in part reversed and remanded.

Joseph K. Meusey and Steven R. Bloch of Fraser, Stryker, Veach, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellants.

Maureen E. McGrath of Kutak Rock & Huie, for appellee Lauritzen.

Mark Laughlin of Venteicher, Laughlin, Kulig & Lang, for appellees Flory and Conway.

Michael G. Helms of Schmid, Ford, Mooney & Frederick, for appellee First National Bank of Omaha.

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

KRIVOSHA, C.J.

The appellee, John R. Lauritzen, commenced this action by filing a suit for declaratory judgment in the District Court for Douglas County, Nebraska, seeking a determination of his right to acquire 1,085.54 shares of the common stock of the First West Side Bank of Omaha. All of the other shareholders of the bank, including the executrix of the estate of Stanley J. Bednar, one of the selling shareholders, were joined as defendants. Following trial, the trial court held that Lauritzen held good title to 1,071.28 shares of the First West Side stock which he had earlier purchased from the estate of Stanley J. Bednar. The trial court further held that Richard K. Flory and Patrick M. Conway were not "stockholders" within the meaning of a certain agreement which granted to stockholders the right to purchase proportionate shares of stock of First West Side Bank in the event of a sale. Defendants Thomas L. Davis and Carol Davis Wells, surviving children of John F. Davis, have appealed, assigning as error the trial court's determination that Lauritzen holds good title to the 1,071.28 shares of First West Side Bank stock. The appellee Lauritzen has filed a cross-appeal on behalf of himself, Richard Flory, and Patrick Conway, contending that Flory and Conway did have a right to purchase stock. We believe that the decision of the trial court must be reversed in part and in part affirmed.

First West Side Bank was incorporated on February 16, 1954. The capital stock consisted of 1,000 shares with a par value of $100 each, for a total authorized capital of $100,000. With the exception of 30 shares that were issued to three qualifying directors,

the remainder of the stock was owned one-third each by John R. Lauritzen, his brother-in-law, John F. Davis, and his father-in-law, T. L. Davis. John Davis and John Lauritzen exercised joint control over the bank's affairs through their combined voting power and were both actively engaged in the management of the bank. The record clearly discloses that all significant decisions concerning the bank were made by Davis and Lauritzen and carried out under their direction by the officers of First West Side.

In February of 1955 T. L. Davis died and Lauritzen and Davis sold 40 percent of the bank's outstanding shares in order to acquire sufficient funds to pay the estate tax. The stock was sold to Stanley J. Bednar, Ernest T. Tanner, E. N. Solomon, Sr., and Donald W. Ryan. In December of 1956 Ryan sold his stock back, one-half each, to Lauritzen and Davis.

In October of 1955 James A. Irving was hired as president of First West Side, and Lauritzen and Davis each sold to Irving 40 shares of their own stock.

In 1960 First West Side applied for membership in the Federal Deposit Insurance Corporation and was required to increase its paid-in capital to qualify for membership. At a special meeting of stockholders held on October 13, 1960, the stockholders of First West Side voted to amend the bank's articles of incorporation to increase the capital stock to $500,000, to be represented by 25,000 shares of common stock having a par value of $20 per share. The increase was to be accomplished by the cancellation of all outstanding shares, the issuance of five new shares for each canceled share, the declaration of a 100-percent stock dividend, and the investment of $100,000 new capital by the sale of 5,000 newly authorized shares. These 5,000 shares were then offered proportionately to all of the shareholders. Stanley Bednar, Ernest and Josephine Tanner, E. N. Solomon, Sr., and E. N. Solomon, Jr., each invested

additional money and purchased a total of 1,500 shares. Irving also invested additional money at this time. The remaining shares were purchased equally by Davis and Lauritzen. After the capitalization Davis owned 7,750 shares. Lauritzen and corporations controlled by him also owned 7,750. This represented 62 percent of the outstanding stock. Irving held 2,000 shares representing 8 percent of the stock, and the other minority stockholders together held a total of 7,500 shares representing 30 percent of the stock.

At the time of the reorganization and recapitalization, on October 13, 1960, three agreements were executed. Lauritzen and Davis entered into an agreement (Davis agreement) which provided that during their joint lives they would offer to sell their own stock to each other before offering it to anyone else. If the other failed to purchase the stock, it was then to be offered to the minority stockholders before being offered to anyone outside the bank. Lauritzen and Davis could sell, transfer, or give shares of stock to their respective wives, children, or corporations in which they alone, or together with their wives and/or children, owned a controlling interest without first offering the stock to the other. However, any stock transferred to a wife, child, or controlled corporation was still subject to the agreement entered into between Lauritzen and Davis. Furthermore, the provisions of the Davis agreement were binding upon the executors, administrators, heirs, or assigns of the parties.

A second agreement was executed between Lauritzen and Davis, on the one hand, and Irving, on the other (Irving agreement). This was also done on October 13, 1960. The Irving agreement provided that in the event Irving wished to sell or transfer any stock, he must first offer to sell the stock to Lauritzen and Davis in equal amounts. Furthermore, if Irving should retire or his active participation in the bank's management be terminated, he was required

to offer to sell all of his stock to Lauritzen and Davis in equal amounts. Only in the event that either Lauritzen or Davis declined to purchase the half of the stock offered to him could the other buy the entire amount of the stock offered. The Irving agreement further provided that its benefits should inure to the personal representatives, heirs, or assigns of Lauritzen and Davis.

The third stock restriction agreement was executed by Stanley Bednar, Ernest and Josephine Tanner, E. N. Solomon, Sr., and E. N. Solomon, Jr. (Bednar agreement). This agreement was likewise executed on October 13, 1960. According to the agreement the minority stockholders agreed to first offer their shares to "all persons who are then stockholders" if they wished to sell or transfer stock or in the event their active participation in the bank should terminate. Any unsold shares must then be offered to Lauritzen and Davis on an equal basis. If either Lauritzen or Davis declined to purchase the stock, then the other could purchase the entire amount of stock offered. Only in the event that neither Lauritzen nor Davis purchased the stock was the minority stockholder free to sell his stock to whomever he pleased. This agreement further provided that its provisions were binding upon and would inure to the benefit of the executors, administrators, personal representatives, heirs, or successors of the parties.

Davis died on March 23, 1972, and all of his First West Side Bank stock passed into a marital trust for the benefit of his widow. Under the terms of the trust Mrs. Davis was free to withdraw the stock and sell it at any time or to appoint it by her will to anyone she desired. She later withdrew the stock from the marital trust and made a gift of one-half of those shares to her daughter, Carol Davis Wells, and the other half in trust for the benefit of her son, Thomas Davis. Mrs. Davis died on June 2, 1976.

On August 15, 1976, Stanley Bednar died. At the

time of his death he was the last signatory of the Bednar agreement still holding First West Side Bank stock. All the other signatories to the agreement had sold their shares, one-half to Lauritzen and one-half to Davis, prior to the death of John Davis. Bednar's daughter, Kay Bednar Neef, was appointed executrix of his estate.

In September of 1976 Neef sent a letter to each of the stockholders of record of First West Side Bank offering each a proportionate share of her father's 9,375 shares in accordance with what she believed to be the terms of the Bednar agreement. A total of 4,144.78 shares was offered to Lauritzen and corporations owned and controlled by him. Carol Davis Wells and Thomas Davis were each offered 2,072.34 shares. James Irving was offered 1,071.28 shares and Richard Flory and Patrick Conway were each offered 7.13 shares.

Lauritzen notified Neef that he wished to exercise his right to purchase all shares, both offered to him and those not acquired by other stockholders in accordance with the terms of the Bednar agreement.

James Irving declined to purchase the 1,071.28 shares offered and notified Neef of his decision on September 28, 1976. On September 29, 1976, Lauritzen notified Robert Johnson, vice president in charge of the First National Bank Trust Department and agent for the collection of sales proceeds and transfer of Bednar's stock, that he, Lauritzen, wished to exercise his right to purchase those unsold shares, and tendered full payment. The shares offered to Irving and declined were then transferred to Lauritzen on the stock records of the First West Side Bank.

Richard Flory and Patrick Conway both chose to purchase the 7.13 shares offered by the Bednar estate. In 1972 and in 1975, respectively, Conway and Flory had each been given 50 shares of stock by Lauritzen and Davis in order to qualify them as directors of First West Side Bank pursuant to the pro-

visions of Neb. Rev. Stat. § 8-126 (Reissue 1977), and the bank's corporate articles. These shares were subject to a restrictive agreement which stated that the transfer was necessary so that the donee would be the owner in his own name and right of the donated shares and that the stock certificates would be held in an escrow account at First National Bank subject to the direction of the donor only. While these shares were registered in Flory's and Conway's names on the stock record books and were voted by them at stockholders' meetings, until at least 1977 Conway always endorsed dividend checks received on the stock back to Lauritzen and to Davis' estate. On July 6, 1977, Lauritzen purchased the 14.26 shares from Flory and Conway.

In March of 1977 Carol Davis Wells and Thomas Davis made demand on Neef, as executrix of the Bednar estate, and on her agent, First National Bank, to sell them each one-fourth of the 9,375 shares offered by the estate. Apparently, their view was that because Irving, Flory, and Conway had not purchased proportionate shares of the stock offered by the Bednar estate, the Davis-Wells interest was entitled to purchase half of the shares pursuant to the agreements earlier signed by various of the parties.

Thereafter, on January 18, 1978, Lauritzen filed the declaratory judgment action involved in this case, seeking to have the Bednar agreement interpreted and to determine his rights in the 1,071.28 shares purchased from the Bednar estate as a result of Irving's declination, and his rights to the 14.26 shares purchased from Flory and Conway. As we have already noted, the trial court determined that Lauritzen held good title to the 1,071.28 shares which he had purchased from the Bednar estate by reason of the Irving declination. The basis of the court's ruling was that the rights given to Davis under the Bednar agreement to purchase one-half of any unsold stock were personal to him and therefore did

not survive his death. The trial court also found, however, that neither Flory nor Conway was entitled to purchase the 7.13 shares and ordered that half of the 14.26 shares be delivered to Wells and Davis and half to Lauritzen.

A number of errors are assigned by the various parties. In reality, however, but a single issue is involved. That issue requires the proper interpretation of the three agreements executed on October 13, 1960, by the various parties and the single question as to whether the rights granted to Davis under the Bednar agreement survived his death and passed to his heirs.

The relevant portion of the Bednar agreement provided in part as follows: "WHEREAS, it is the desire of the parties to assure the continuation of present stock ownership and management to the exclusion of possible investors or investment interests whose policies might not be to the best interests of the Bank . . .

. . . .

"1. In the event that any of the foregoing stockholders desire to transfer by sale or otherwise any of the shares of capital stock of the First West Side Bank or if for any reason their active participation in the Bank should terminate, such stockholder shall promptly give written notice constituting an offer to sell said stock to all persons who are then stockholders, and the stockholders to whom the offer is made shall have the right to purchase such stock at any time within six months after the offer is made. The offer to sell shall be applicable to all of the shares of capital stock of the First West Side Bank then held by the offering stockholder including the shares of stock held as of the date of this agreement as well as all other shares which may hereafter be acquired. Each stockholder, except the seller, shall have the right to purchase a proportion of such stock equal to the ratio of the number of shares owned by him to the total shares owned by the remaining

stockholders, excluding the seller, and if a stockholder is unable, unwilling, or neglects to buy the proportion of stock allotted to him then the selling stockholder must offer in writing to sell any unsold shares to John F. Davis and John R. Lauritzen on the basis of one half of the unsold shares to each or all of the unsold shares to either, should one of them decline to purchase said stock, and each of them shall have thirty days in addition to the six month period, above provided, to purchase said stock.

"2. Should none of the stockholders of the First West Side Bank desire to purchase the shares of stock of the selling shareholder and should both John F. Davis and John R. Lauritzen decline to purchase said stock, then all restrictions as to the sale of said stock shall no longer be binding upon the selling stockholder.

. . . .

"6. The provisions of this agreement are binding upon and shall inure to the benefit of the executors, administrators, personal representatives, heirs or successors of the parties to this agreement. The representative of the estate of any party to this agreement shall offer to sell such stock to the surviving stockholders in strict compliance with the foregoing terms of this agreement."

Relying upon our decision in *Schupack v. McDonald's Systems, Inc.*, 200 Neb. 485, 264 N.W.2d 827 (1978), Lauritzen contends that the right to purchase any unsold shares under the terms of the Bednar agreement was personal to Davis and did not survive his death. Wells and Davis argue, on the other hand, that the provisions of the Bednar agreement, when read in light of the Irving agreement and the Davis agreement, make it clear that the rights under the Bednar agreement were not personal and descended to the heirs of John Davis. Our reading of the three agreements makes it clear to us, in reviewing the appeal de novo as we are required to do, that the right granted to John Davis was not per-

sonal to him and did not terminate upon his death. The general rule has often been stated that, in the absence of anything to indicate a contrary intention, instruments executed at the same time by the same parties for the same purpose and in the course of the same transaction are, in the eyes of the law, one instrument and will be read and construed together as if they were as much one in form as they are in substance. See, *Bando v. Cole*, 197 Neb. 722, 250 N.W.2d 651 (1977); *Cedars Corp. v. H. Krasne & Son, Inc.*, 189 Neb. 220, 202 N.W.2d 205 (1972).

An examination of the three agreements executed on October 13, 1960, by the various parties indicates a common purpose, to wit, to place restrictions upon the sale or transfer of First West Side Bank stock in order to maintain joint control between the Davis and Lauritzen families and to insure that each family would have the opportunity to retain control of 50 percent of the stock of First West Side Bank in the event that other holders of minority interest desired to sell their interest in the bank or were otherwise terminated.

Under the terms of the Davis agreement each agreed that he would not sell any stock without first offering it to the other. However, during their lifetimes, they could transfer stock to wives, children, or companies controlled by them. Moreover, at the death of one of the parties, the executor, administrator, heirs, or assigns would be bound by the terms of the Davis agreement, and the survivor was assured that he would either own all of the stock or that the decedent's successors would be coowners. In essence, this agreement resulted in a guarantee of joint control between the Lauritzen family and the Davis family that would survive the death of either.

Likewise, the Irving agreement provided that before Irving could otherwise voluntarily dispose of his holdings or in the event of his termination of employment, he must offer his stock to Lauritzen and Davis in equal amounts. The benefits of the Irving agree-

ment expressly inure to the benefit of Lauritzen's and Davis' personal representatives, heirs, or assigns. The Irving agreement, therefore, likewise assured Lauritzen and Davis that their respective families could maintain joint control of First West Side Bank by equally acquiring shares otherwise held by Irving.

The Bednar agreement was simply the third leg of this stool. By requiring the minority shareholders to offer their stock in equal amounts to Lauritzen and Davis, the Bednar agreement assured that all the stock would eventually be returned to the Davis and Lauritzen families in equal amounts. Absent such an agreement, any one stockholder covered by the Bednar agreement could band with either Lauritzen or Davis and disrupt the careful formula otherwise provided for in both the Davis agreement and the Irving agreement. We cannot believe that such was the intention of the parties.

While it is true that neither Davis nor Lauritzen was a signatory to the Bednar agreement, they were unquestionably "parties" to the agreement. It seems clear beyond argument that Davis and Lauritzen were third-party beneficiaries of the Bednar agreement and were parties within its meaning in paragraph 6 of the Bednar agreement. Beneficiaries of a contract may recover thereon, though not named as parties, when it appears by express stipulation or by reasonable intendment that rights and interests of such beneficiaries were contemplated and being provided for thereon. See *Dworak v. Michals*, 211 Neb. 716, 320 N.W.2d 485 (1982).

Lauritzen's argument that the Bednar agreement was executed by the various parties for the benefit of the minority stockholders is simply not persuasive. It seems clear that the agreement was signed by the parties at the direction of and for the benefit of John F. Davis and John R. Lauritzen. The document itself was drafted by the bank's attorney

at Lauritzen's request and imposed restrictions on the sale or transfer of the shares held by the minority stockholders that would be beneficial to only Lauritzen and Davis. Paragraph 5 of the Bednar agreement makes that clear. Regardless of what anyone might offer to minority stockholders for the shares of the bank, Davis and Lauritzen were entitled to purchase the stock in accordance with a formula determined by virtually taking the book value of the stock rather than its market value. Rarely are bank stocks sold to disinterested third parties at book value. The minority stockholders who were parties to the Bednar agreement could not benefit by the provisions of paragraph 5; only Lauritzen and Davis could. We believe, therefore, that the rights of John Davis survived his death and passed to his heirs, who were entitled to acquire one-half of the shares not otherwise purchased by Irving, plus one-half of the remaining shares, for a total of 2,343.75 shares.

Having thus disposed of that issue, we now turn to the cross-appeal filed by Lauritzen, Flory, and Conway. Cross-appellants' principal complaint is that the trial court erred in admitting evidence of prior practical constructions of the Bednar agreement. We believe that their position is not correct. This court has often stated that a provision or term 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. See, *Lovelace v. Stern*, 207 Neb. 174, 297 N.W.2d 160 (1980); *Smith v. Wrehe*, 199 Neb. 753, 261 N.W.2d 620 (1978). Whether the parties to the Bednar agreement intended to include persons simply holding bare legal title to shares of stock for the sole purpose of qualifying them as directors within the class of persons identified as stockholders entitled to purchase stock is not clear from the instrument itself. As a result of this ambiguity, the instrument is open

to construction. *Pawnee Plastics, Inc. v. American Savings Co.*, 210 Neb. 131, 313 N.W.2d 262 (1981).

Furthermore, in interpreting a written contract, the meaning of which is in doubt and in dispute, the court, in order to determine its meaning, will consider all the facts and circumstances leading up to and attending its execution, and will consider the relation of the parties, the nature and situation of the subject matter, and the apparent purpose of making the contract. *Younker Brothers, Inc. v. Westroads, Inc.*, 196 Neb. 168, 241 N.W.2d 679 (1976). In construing an ambiguous contract the court must determine the intent of the parties and resolve the ambiguity to give effect to that intent. *Pawnee Plastics, Inc. v. American Savings Co., supra*; *Standard Meat Co. v. Feerhusen*, 204 Neb. 325, 282 N.W.2d 34 (1979).

As we have already observed, the Bednar agreement was one of three components of Davis' and Lauritzen's comprehensive plan to maintain joint control of the bank between their two families and to insure that *all* the stock then held by minority stockholders would eventually be returned to the families in equal amounts. The Flory and Conway stock was subject to an agreement other and different than the three documents in question. Their certificates, though issued in their names, were held in escrow, subject to the following terms: "That said First National Bank of Omaha shall hold said stock subject to the direction in writing of only the Donor [Lauritzen and Davis] as to the disposition thereof, including the delivery thereof to the Donor, and such direction shall be completely determinative of Donee's rights in such stock." Nothing is said with regard to any future stock. Therefore, if qualifying directors were allowed to purchase stock under the terms of the Bednar agreement, this stock would not be subject to any restrictions whatsoever on subsequent sales and transfers and, in effect, would defeat the very careful plan otherwise set out in the three

agreements. This could not have been the intended purpose of these agreements.

Its intended effect is instead reflected in the manner in which prior sales by other signatories to the Bednar agreement were conducted. The evidence is undisputed that persons who held stock solely for the purpose of qualifying them as directors were never considered "stockholders" within the meaning of the Bednar agreement and were never offered shares of stock. The interpretation given to a contract by the parties themselves while engaged in the performance of it is one of the best indications of true intent and should be given great, if not controlling, influence. *Strayer v. City of Omaha*, 209 Neb. 734, 311 N.W.2d 510 (1981); *D. K. Meyer Corp. v. Bevco, Inc.*, 206 Neb. 318, 292 N.W.2d 773 (1980).

After properly considering the past practices of the parties and the objectives of the stock restriction agreements, the trial court correctly found that Flory and Conway should not have been extended offers to purchase stock by the Bednar estate. Conway and Flory were not entitled to purchase stock from the Bednar estate, and, instead, shares offered to them should have been offered equally one-half to the heirs of John Davis and the other to Lauritzen and his various corporations.

Having thus purchased shares to which they were not entitled, a constructive trust was created. We have said that a constructive trust is a relationship, with respect to property, subjecting the person who holds title to property to an equitable duty to convey it to another on the ground that his acquisition or retention of the property would constitute unjust enrichment. *Nemaha Nat. Resources Dist. v. Neeman*, 210 Neb. 442, 315 N.W.2d 619 (1982). When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain a beneficial interest, equity converts him into a trustee. *Kuhlman v. Cargile*, 200 Neb. 150, 262 N.W.2d 454 (1978). The instant factual situation was

an appropriate one for the imposition of a constructive trust. The ownership of these 14.26 shares was sufficient to tip the balance of control and thereby disrupt the intent of the parties as evidenced by the three agreements.

For these reasons, therefore, the judgment of the trial court is in part reversed and remanded with directions and in part affirmed.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

CAPORALE, J., not participating.

McCOWN, J., dissenting.

The majority opinion interprets a written contract executed by experienced, knowledgeable businessmen, and drawn by capable counsel, as having intended to include as third-party beneficiaries not only the two individuals named in the contract but an unknown number of unidentified heirs, devisees, or subsequent transferees of the two named individuals, even when no third-party beneficiary was a party to, or signer of, the agreement, and no signer of the agreement is a party to this lawsuit.

In my opinion the contract means exactly what it says, and the language of the detailed and extended decree of the trial court effectively sets out the reasons for that opinion.

"[T]he Court finds, both from the express language of the Bednar Agreement and from the circumstances attending its execution, that the rights which were given to John F. Davis to purchase half of any FWSB stock not purchased by other stockholders were personal to him and, as such, did not survive his death and are not held by any of the Defendants. This finding is based upon, but not limited to, the following facts:

"(a) The Bednar Agreement expressly covers the subject of who is entitled to purchase any unsold shares that are not purchased by 'John F. Davis'. The Agreement expressly gives that right to John R. Lauritzen by stating that the right to purchase all

unsold shares belongs to 'John F. Davis and John R. Lauritzen' in equal amounts, but that 'all' such shares could be purchased by 'either', should 'one *of them*' decline to purchase. It is clear, therefore, that if 'one of them' (i.e., Davis) does not purchase his half, the other 'of them' (i.e., Lauritzen) is entitled under the contract to purchase all such shares. No third person, such as a Davis heir, can, therefore, claim entitlement to purchase in advance of Lauritzen should John F. Davis fail to personally take his half.

"(b) The Agreement expresses the intent that the right to purchase unsold shares must be *personally* exercised by Davis and Lauritzen. The Agreement identifies Davis and Lauritzen by name and provides that each '*of them*' would have the right to purchase any shares not purchased by the other and that 'each *of them*' would have an additional 30 days to exercise that right. The Agreement further provides that it is not mandatory that any shares 'must be purchased by . . . John F. Davis and John R. Lauritzen' and if 'both John F. Davis and John R. Lauritzen decline to purchase' then the restrictions imposed by the Agreement are no longer binding on the seller.

"(c) By providing that John R. Lauritzen should have the right to purchase stock not purchased by John F. Davis, the Bednar Agreement expressly precluded Davis from transferring his right to purchase unsold shares to his heirs or devisees since such a transfer would defeat Lauritzen's alternate contractual right to purchase such shares.

"(d) Although the Agreement expressly names Davis and Lauritzen as third party beneficiaries, it does not provide for their heirs or executors, as do the Davis-Lauritzen Agreement and the Irving Agreement; instead, it provides *only* for the heirs and executors 'of the parties' in identifying who shall receive the benefits of the Agreement in the event of death. Since death was an event contem-

plated by the Agreement and since Lauritzen and Davis are not 'parties' to the Agreement, it is evident that their heirs and executors were excluded, for whatever reason, from succeeding to the benefits of the Agreement.

"(e) The circumstances surrounding the execution of the Bednar Agreement indicate the rights given to Davis and Lauritzen, or either of them, to purchase unsold stock were intended to be personal to them. The Agreement was executed by persons who were minority stockholders of FWSB with no power of control. In spite of their inability to control the Bank, these persons were, nevertheless, investing additional funds of their own into the capital of the Bank. These minority shareholders had placed their total confidence in John F. Davis and Lauritzen's personal abilities, banking expertise and management skills and were looking to John F. Davis and Lauritzen to utilize those personal abilities and skills to assure and safeguard the continued value of the minority investment. It is apparent that John F. Davis and Lauritzen were personally named in the Agreement as the two individuals who would have the last opportunity (either jointly or severally) to purchase any unsold stock because the minority wanted the protection of having any unsold stock offered first to the active overseeing managers of the Bank in whom they had placed their confidence before the restrictions of the Agreement lapsed and the shares could be offered to outside investors.

"(f) There is no evidence whatsoever that in executing the Agreement the minority stockholders had any intention of, or gave any thought to, conferring any benefits on the heirs, wives or children of either John F. Davis or Lauritzen, who admit they were never active in the management of the Bank. In fact, the testimony of the surviving signatories of the Agreement is that they had no such intention.

"(g) If the Court were to adopt the position urged

by the Defendants and find that the rights given to 'John F. Davis' to purchase unsold shares were intended to extend to his personal representatives, successors and heirs so that, upon a failure of John F. Davis to personally exercise his right, those persons could purchase ahead of Lauritzen, the Court would have to expand the express restrictions imposed by the Agreement both in scope and in time by enlarging the beneficiary class from the two named beneficiaries to a class consisting of those two individuals plus an unknown number of unidentified heirs, devisees or subsequent transferees of those two individuals, all of whom would have been unidentifiable by the signatory parties at the time the Agreement was executed. This form of contract construction would not only be contrary to the purposes expressed in the Agreement, but it would also be contrary to the rule that stock restriction agreements (which are restraints on alienation) are to be strictly construed and are not to be expanded in scope or increased in extent beyond their plain meaning. 12 Fletcher *Cyclopedia of Corporations* §5461.6, p. 215. Such a construction would also require the Court to find, without any supporting evidence and therefore, contrary to Nebraska law (*Swift Lumber & Fuel v. Hock*, 124 Neb. 30, 345 N.W.2d [sic] 3 (1932)), that the Defendants Thomas L. Davis and Carol Davis Wells and the Davis Executors and Trustees, although not identified as beneficiaries in the Agreement either by name or as a class, were *intended* third party beneficiaries of the Agreement. The Court rejects these suggested methods of construction as unsound and erroneous.

"40. Accordingly, the Court finds that at the time of the death of Stanley J. Bednar, John F. Davis being previously deceased, Plaintiff John R. Lauritzen was the sole surviving third party beneficiary of the Bednar Agreement who had any right to purchase the 1,071.28 shares of stock which James Irving declined to buy, and the Court further finds that

Plaintiff Lauritzen holds good title to those 1,071.28 shares. The claims which the Defendants have asserted to one-half of those shares are, therefore, held to be without merit and unenforceable herein."

I find no legal or equitable justification for rewriting a detailed and carefully drawn written contract between minority shareholders simply because it did not contain a provision which was included in two other majority shareholder agreements executed by different parties. There is simply no basis for holding that the parties to the Bednar agreement actually intended to say something different than what they actually said. In my view the decree of the trial court was eminently correct and should have been affirmed.

NANCY KAY WHITNEY, APPELLEE, V. HARRY W. WHITNEY, APPELLANT.

334 N.W.2d 799

Filed June 10, 1983. No. 82-287.

1. **Property Division.** The rules for determining division of property in an action for dissolution of marriage provide no mathematical formula by which such awards can be precisely determined; they are to be determined by the facts in each case.
2. _____. Generally speaking, awards in cases of this kind vary from one-third to one-half the value of the property involved, depending upon the facts and circumstances of the particular case, and particularly so when the marriage is of long duration and the parties are the parents of the children involved.
3. **Alimony.** In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is one of reasonableness.
4. **Divorce: Attorney Fees.** There is no rule that requires the trial court to necessarily award attorney fees in accordance with the value of services in a divorce case. The award of attorney fees is discretionary with the trial court and depends upon a variety of factors, including all the circumstances, such as the amount of the division of property and alimony awarded, the earning capacity of the parties, and the general equities of the situation.
5. **Child Support.** In determining the amount of child support to be

awarded, the status, character, and situation of the parties and attendant circumstances must be considered; the financial position of the husband as well as estimated costs to support the children must be taken into account.

Appeal from the District Court for Sarpy County: GEORGE H. STANLEY, Judge. Affirmed as modified.

Sally Millet Rau and Betty L. Egan of Walsh, Walentine, Miles, Fullenkamp & O'Toole, for appellant.

L. William Gallup, for appellee.

BOSLAUGH, WHITE, and CAPORALE, JJ., and BURKHARD and FINN, D. JJ.

FINN, D.J.

This appeal involves the reasonableness of the decree of the District Court of Sarpy County, Nebraska, dissolving the marriage of the parties hereto as it pertains to child support, alimony, division of property, and award of an attorney fee.

The decree entered in this case by the District Court required the respondent to make the following monthly payments: child support for three children in the amount of $175 per month per child for a total of $525; half the mortgage payment on the residence of the parties in the amount of $192; half of a lease payment in the amount of $30; half of the house insurance payment in the amount of $30; half of the real and personal property taxes in the amount of $91.66; alimony payments in the amount of $500 per month for 60 months; life insurance obligations in the amount of $253 per month; and payment of a $7,500 lien imposed on "Harry's On Broadway" in the amount of $125 per month until the lien is paid off; all for a total monthly obligation of $1,746.66. The court also awarded a $750 attorney fee for the petitioner's attorney.

This is a marriage of approximately 18 years, and there were three children born of this marriage.

The parties have certain life insurance policies on

their respective lives, and the record would indicate that the respondent has a cash value on his policies of approximately $19,000 and the petitioner has a cash value on her policies of approximately $4,000. The parties acquired a residence, which has an approximate fair market value of $64,000 and is encumbered with a $41,000 mortgage; a one-half interest in the "18th Amendment Lounge," with an equity of approximately $25,000; ownership of "Harry's On Broadway," which is a bar having an equity of approximately $10,000; a shore station having an approximate value of $1,400; a boat which was purchased for $9,300 and is presently valued at $6,000, with an encumbrance thereon of $3,000; 1975 and 1979 Gremlin automobiles having a value of approximately $3,200; and a 1975 Cadillac having a value of approximately $2,000. It would appear from the record that the parties have accumulated a net worth of approximately $90,600 in the aforementioned properties.

The only indication in the record of the respondent's past earnings and present and future ability for earnings would indicate that the respondent has the capability through his bar of earning between $1,000 and $1,250 per month. The petitioner, even though presently unemployed, except for a part-time job as a busdriver, was earning $600 per month as a bartender and is presently earning approximately $160 per month as a part-time busdriver. Petitioner is a licensed cosmetologist and perhaps could pursue this vocation. Both parties, however, on the record, indicated that there was a certain amount of "skimming" in the bar business. However, the record is not reflective of how much "skimming" was actually taking place. Perhaps some idea of the extent of the "skimming" could be gleaned from the fact that the parties accumulated a net worth of approximately $90,600 during an 18-year marriage, and exhibit 2, offered and received into evidence, would indicate that the monthly living expenses for peti-

tioner and the minor children is $2,005.05 per month. The earnings of the parties, at least during the latter part of their marriage, consisted of a $1,000 draw from the bar by the respondent, $600-per-month earnings of the wife bartending, and $160-per-month earnings of the wife as a busdriver, for a total of $1,760 per month. This means that the parties were $245.05 short of meeting their necessary living expenses if one were to use the estimates set forth on exhibit 2.

The allowance of alimony in the amount of $500 per month for 60 months and child support of $175 per child per month for a total of $525 per month, together with the other monthly payments which the respondent was ordered to pay as previously set forth herein, all of which total $1,746.66, are beyond the reach and capacity of the respondent and is an abuse of the court's discretion, in that the record would indicate that the respondent at the present time only has earnings of $1,000 to $1,250 per month, plus an undetermined amount of "skim" from which to make these payments.

We have considered the statutory criteria for allowances of alimony, child support, and division of property, Neb. Rev. Stat. § 42-364 (Reissue 1978) and Neb. Rev. Stat. § 42-365 (Cum. Supp. 1982), and prior decisions of this court, relative to appropriate allowances and divisions of property. See, *Johnson v. Johnson*, 209 Neb. 317, 307 N.W.2d 783 (1981); *Watkins v. Watkins*, 209 Neb. 14, 305 N.W.2d 894 (1981); *Amen v. Amen*, 207 Neb. 694, 301 N.W.2d 74 (1981); *Harb v. Harb*, 209 Neb. 875, 312 N.W.2d 279 (1981).

Applying the same to the facts of this case, we find the decree herein should be modified in the following respects: (1) The family home of the parties, located at 8505 Molokai Drive, Omaha, Nebraska, and the boat shore station shall be the sole and separate property of the petitioner, subject to any encumbrances thereon and any lease, house insurance, real and personal property tax payments, and any

maintenance costs. (2) The petitioner is awarded alimony of $200 per month, commencing March 1, 1982, and continuing for a period of 63 months (for a total alimony award of $12,600). (3) The life insurance policies owned by petitioner and respondent shall be the sole and separate property of the respective parties, and each shall be responsible for his or her policy premium payments. (4) Petitioner shall not be awarded the $7,500 lien on the bar and building in Council Bluffs, Iowa, as set forth in paragraph 12 of the court's decree. (5) The decision of the District Court allowing petitioner's attorney, J. William Gallup, an attorney fee in the amount of $750 is reversed, and the parties hereto are required to pay their own attorney fees.

This cause is remanded to the trial court for modification as herein provided. The decree of the trial court as so modified is affirmed.

AFFIRMED AS MODIFIED.

BURKHARD, D.J., dissenting in part.

I dissent from the majority opinion only as regards the disallowance of the attorney fee to petitioner's attorney. There is nothing in the record to indicate that this amount is not fair and reasonable or that there was an abuse of discretion by the trial court in allowing it. The amount is certainly not unconscionable per se. I would allow the attorney fee of $750.

CARGILL LEASING CORPORATION, A DELAWARE CORPORATION, APPELLEE, V. MERLE MUELLER, DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLANT, CIRCLE 8 FARMING, INC., ET AL., THIRD-PARTY DEFENDANTS, APPELLEES.

335 N.W.2d 277

Filed June 10, 1983. No. 82-355.

Principal and Agent. An agent who contracts on behalf of a disclosed

principal, in the absence of some other agreement to the contrary or other circumstances showing that the agent has expressly or impliedly incurred or intended to incur personal responsibility, is not liable to the other contracting party.

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

Donn K. Bieber of Otradovsky & Bieber, for appellant.

John K. Green and Nelson & Harding, for appellee James Irwin.

KRIVOSHA, C.J., WHITE, CAPORALE, and SHANAHAN, JJ., and EMPSON, D.J.

EMPSON, D.J.

James Irwin was in the business of selling machinery on consignment, doing business as Consignment Sales Association. He obtained some farm machinery for sale on consignment from Circle 8 Farms, Inc.

Merle Mueller answered a newspaper advertisement placed by Irwin by calling the telephone number given. In that telephone conversation Irwin informed Mueller that he was selling equipment for Circle 8 and that some of the equipment was leased by Circle 8 from its owner, Cargill Leasing Corporation. The two men agreed to meet in Neligh to view the machinery.

On his way to Neligh, Mueller stopped to visit an attorney employed at Mueller's bank. His object was to get advice concerning how to protect himself if he decided to buy leased machinery.

Upon examining the equipment Mueller selected a combine and cornhead which were owned by Cargill and leased by Circle 8. After the price was negotiated Mueller required Irwin to obtain "a written contract assuring that the owner of the combine would be paid . . . ."

Irwin and Mueller met again a few days later to complete the deal. Irwin presented to Mueller an

unsigned copy of a letter directed to Mueller bearing the names and titles of Glenn Williams, director, Marlin Krohn, secretary, and Robert Hughes, treasurer; all of "Circle 8 Farming, Inc." The letter reads: "Dear Mr. Mueller: This letter is your confirmation that you have purchased a Cargill leased combine and this letter will also confirm to you that the monies paid on the combine will be applied to the payoff of the combine to Cargill Leasing." Irwin represented to Mueller that the original of the letter was "on its way" to Mueller.

Mueller was satisfied with the copy of the letter and with Irwin's representation and wrote Irwin a check for the agreed price of the combine and cornhead. On the copy of the letter from Circle 8, Irwin wrote, over his signature, a receipt for payment, which reads: "Received Payment Full for $44,000.00 for 1460 Combine & 863 Corn Head - C.S.A." Mueller took the copy of the letter and drove the combine away. Mueller, later that same day, received in the mail the original letter from Circle 8, signed by the persons named.

Irwin deposited Mueller's check, retained his commission, and delivered the balance of the purchase price to Circle 8. Contrary to the promises made in the letter, Circle 8 did not pay Cargill. Eventually, Cargill replevied the combine and cornhead.

Mueller impleaded Irwin, among others, in that lawsuit, and obtained judgment by default against Circle 8, Williams, Krohn, and Hughes.

After trial to the court Mueller's third-party petition was ordered dismissed as to Irwin, and Mueller appeals.

Since Irwin, from the outset, revealed to Mueller that he was selling machinery for Circle 8, Irwin was the agent of a disclosed principal. None of Irwin's conduct was consistent with an intention to incur personal liability. Further, there is no question of fraud here on the part of Irwin. Mueller knew everything Irwin knew about the status of the

machinery. Irwin did exactly what he represented to Mueller he would do—he paid Circle 8. "It is a fundamental rule that an agent who contracts on behalf of a disclosed principal, in the absence of some other agreement to the contrary or other circumstances showing that the agent has expressly or impliedly incurred or intended to incur personal responsibility, is not liable to the other contracting party." *Koperski v. Husker Dodge, Inc.*, 208 Neb. 29, 48, 302 N.W.2d 655, 665 (1981).

There is no theory of law under which Irwin can be held liable for Circle 8's failure to pay Cargill.

AFFIRMED.

WHITEHOUSE ENERGY SAVERS, INC., APPELLEE, V. JOHN HANLON, COMMISSIONER OF LABOR, APPELLANT.

334 N.W.2d 802

Filed June 10, 1983. No. 82-422.

1. **Appeal and Error: Jurisdiction.** Parties to litigation cannot confer subject matter jurisdiction on a judicial tribunal by either acquiescence or consent.
2. **Employment Security Law: Jurisdiction: Appeal and Error.** Judicial review of the allowance or disallowance of claims under the Employment Security Law, Neb. Rev. Stat. §§ 48-601 et seq. (Reissue 1978), shall be taken to the District Court of the county in which the claimant was last employed or in which the claimant resides, or to any District Court of the state upon which the parties may agree, but the rate of contribution or the liability for contribution of an employer under the act shall be judicially reviewed by the District Court of Lancaster County only.
3. **Appeal and Error: Jurisdiction.** The right of appeal is statutory and the requirements of the statute are mandatory and must be complied with before the appellate court acquires jurisdiction of the subject matter of the action.
4. _____: _____. It is fundamental that want of jurisdiction of the subject matter of the action is a defect which requires the court to proceed by dismissal of the case or other suitable action.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Reversed and remanded with directions to dismiss.

Pamela A. Mattson, for appellant.

No appearance for appellee.

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

HASTINGS, J.

This action arose as a result of a determination by the chief of contributions of the Nebraska Department of Labor, Division of Employment, that the plaintiff, Whitehouse Energy Savers, Inc., as an employer, was liable for contributions to the Unemployment Compensation Fund on account of wages it had paid to the installers of siding which had been sold by the plaintiff to homeowners. That decision was appealed to the Nebraska Appeal Tribunal, which, following a hearing, upheld the administrative decision.

The plaintiff then filed a petition in the District Court of Douglas County, seeking a reversal of the decision of the appeal tribunal. The District Court did in fact enter an order reversing that decision and remanding the cause for further proceedings. The Commissioner of Labor has appealed to this court, but the plaintiff has failed to file a brief or otherwise appear.

At the outset we are faced with a question as to jurisdiction. Although raised by neither party, we feel compelled to consider the issue because the parties cannot confer subject matter jurisdiction on a judicial tribunal by either acquiescence or consent. *Bd. of Ed. of Keya Paha County v. State Board of Education*, 212 Neb. 448, 323 N.W.2d 89 (1982). Stated somewhat differently, the mere fact that the parties appeared in the District Court of Douglas County and tried the cause without raising the question of jurisdiction is immaterial, since consent of the parties cannot confer upon a court jurisdiction of the subject matter and the judgment of the " 'district court from which this error proceeding had been

prosecuted is *coram non judice.*' " *Schmidt v. Henderson*, 148 Neb. 343, 356, 27 N.W.2d 396, 403 (1947).

The Employment Security Law is found in Neb. Rev. Stat. §§ 48-601 et seq. (Reissue 1978). In that act appeals are provided for in two different areas. Beginning at § 48-623, provisions are made for the payment to employees of unemployment benefits in varying amounts under different circumstances. Section 48-630 states that "A determination upon a claim filed . . . shall be made promptly by a representative designated by the commissioner, hereinafter referred to as a deputy . . . ." Section 48-632 provides that "Notice of a determination upon a claim shall be promptly given to the claimant . . . [and] in the same manner to any employer . . . ." In order "(1) To hear and decide disputed claims, the commissioner shall appoint one or more impartial appeal tribunals . . . ." § 48-633. Finally, "Within ten days after a decision of an appeal tribunal has become final, the commissioner, or any party to the proceedings before the appeal tribunal, may obtain judicial review thereof by filing (1) in the district court of the county in which the individual claiming benefits claims to have been last employed or in which such claimant resides or (2) in any district court of this state upon which the parties may agree, a petition for review of such decision." § 48-638.

It should be pointed out that although the filing of a claim by one who asserted that he was an employee of the plaintiff prompted the action taken by the commissioner in this case, i.e., an investigation and determination as to whether the plaintiff was subject to the Nebraska Employment Security Law, it was not a proceeding to determine benefits for a specific employee, nor was any claim allowed or denied.

Beginning at § 48-648, provision is made for the payment of contributions by an employer. At § 48-650 it is provided that "The commissioner shall

promptly notify each employer of his rate of contributions . . . . Such determination shall become conclusive . . . unless . . . the employer files an application for review . . . but no employer shall have standing, in any proceeding involving his rate of contributions *or contribution liability,* to contest the chargeability to his account . . . except upon the ground that the services on the basis of which such benefits were found to be chargeable did not constitute services performed in employment for him . . . which shall become final unless . . . a petition for judicial review is filed *in the district court of Lancaster County.*" (Emphasis supplied.)

It seems to us that the proceedings involved herein relate to the "contribution liability" of the plaintiff, not to the awarding of benefits to a claimant, and are governed by § 48-650.

Perhaps a reference to the statutes of two of our sister states will help to illustrate our position. In the State of Washington, Wash. Rev. Code Ann. § 50.32.020 (1962) provides for the review by an appeal tribunal of the determination of any claim for benefits; § 50.32.030 (1962) prescribes the steps to be taken in petitioning the appeal tribunal as to any order of assessment, denial of refund, or a disputed experience ruling; and, ultimately, at § 50.32.120 (Supp. 1983), "Judicial review of a decision of the commissioner involving the review of an appeals tribunal decision may be had only in accordance with . . . RCW 34.04.130." Section 34.04.130 (Supp. 1983) provides that review proceedings "shall be instituted by filing a petition in the superior court, at the petitioner's option, for (a) Thurston county, (b) the county of the petitioner's residence or principal place of business, or (c) in any county where the property owned by the petitioner and affected by the contested decision is located."

In Wisconsin, benefit appeals are also separated from an appeal as to other issues. Wis. Stat. Ann. § 108.09(4) (West Supp. 1982) provides for appeal

tribunals to hear and decide disputed claims, and § 108.09(7) grants the right of "judicial review of a decision of the commission." Section 108.10 (West Supp. 1982) sets forth the steps required for "[s]ettlement of issues other than benefit claims." Under subsection (2), "Any hearing duly requested shall be held before an appeal tribunal established as provided by s. 108.09(4)"; and at subsection (4), "The department or the employer may commence action for the judicial review of a commission decision . . . and the manner thereof insofar as applicable, shall be the same as that provided in s. 108.09(7)."

The point, of course, is that both Washington and Wisconsin, although recognizing that the allowance of benefit claims and the determination of liability of an employer under the act are two different proceedings, provide for judicial review in the same manner, whereas in Nebraska provision is made for two entirely different and distinct avenues of appeal.

The right of appeal is statutory and the requirements of the statute are mandatory and must be complied with before the appellate court acquires jurisdiction of the subject matter of the action. *Bd. of Ed. of Keya Paha County v. State Board of Education*, 212 Neb. 448, 323 N.W.2d 89 (1982). The plaintiff, in the first instance, failed to comply with the provisions of § 48-650, as it was required to do.

"It is fundamental that want of jurisdiction of the subject matter of the action is a defect which requires the court to proceed by dismissal of the case or other suitable action." *Catania v. The University of Nebraska*, 204 Neb. 305, 315-16, 282 N.W.2d 27, 33 (1979).

The District Court acquired no jurisdiction over these proceedings. Accordingly, its judgment is reversed and the cause remanded with directions to dismiss the appeal from the appeal tribunal.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

Cite as 214 Neb. 577

STATE OF NEBRASKA, APPELLEE, V. PHILLIP DEAN JIPP, APPELLANT.

334 N.W.2d 805

Filed June 10, 1983. No. 82-506.

Pleas. A defendant will be allowed to withdraw his plea of guilty or nolo contendere upon timely motion if he proves that withdrawal is necessary to correct a manifest injustice. In the absence of proof by the defendant of such manifest injustice, the defendant should not be permitted to withdraw his plea.

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

Bennett G. Hornstein, for appellant.

Paul L. Douglas, Attorney General, and Frank J. Hutfless, for appellee.

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

PER CURIAM.

The defendant was charged with and pled guilty to, in the District Court for Douglas County, Nebraska, a violation of Neb. Rev. Stat. § 28-416(2)(a) (Cum. Supp. 1982), dispensing an extrahazardous drug. The plea was accepted and he was sentenced to a term of 1 year's imprisonment in the Nebraska Penal and Correctional Complex. Only one error is discussed herein. We affirm.

Prior to entry and acceptance of the defendant's guilty plea at his arraignment on May 13, 1982, the following exchange took place between the district judge and the defendant in the presence of counsel. "THE COURT: Do you further know and understand that the penalty for this charge is not less than one nor more than twenty years, or a $25,000 fine, or both such fine and imprisonment? THE DEFENDANT: Yes." The error relates to that dialogue.

Prior to a 1980 amendment, dispensing of cocaine was a Class III felony; however, in 1980 cocaine was reclassified as an exceptionally hazardous drug and

the penalty was increased to that of a Class II felony carrying limits of 1 year to 50 years' imprisonment. Neb. Rev. Stat. §§ 28-401(35) and 28-416(2)(a) (Cum. Supp. 1982). The trial judge therefore was mistaken when he advised the defendant of the maximum possible penalty.

This case is controlled by *State v. Rouse*, 206 Neb. 371, 293 N.W.2d 83 (1980). In *Rouse* the defendant pled guilty to second degree murder. The court accepted the plea and sentenced him to a term of not more than 20 years. The assigned error in that case was "[t]hat his rights to due process and equal protection were violated when the trial court accepted his plea of guilty and entered judgment thereon without advising the defendant of the statutory minimum and maximum penalties for second degree murder . . . ." After an extensive review of the authorities, we said at 375, 293 N.W.2d at 86: "It should be noted that the constitutional requirement is that the plea be voluntary and intelligent and that the determination of that fact be reliably established. *State v. Lewis*, 192 Neb. 518, 222 N.W.2d 815 (1974). The criterion is whether or not the defendant understands the relevant factors involved in pleading guilty. We have stated that, before accepting such a plea, the judge is expected to sufficiently examine the defendant to determine whether he understands the nature of the charge, the *possible penalty*, and the *effect of his plea*." We further said in *Rouse* at 375, 293 N.W.2d at 86: " 'The standards recommend that a defendant be allowed to withdraw his plea of guilty or nolo contendere upon timely motion if he proves that withdrawal is necessary to correct a manifest injustice. . . . In the absence of proof by the defendant of such manifest injustice, the defendant should not be permitted to withdraw her plea,' " quoting *State v. Lewis*, 192 Neb. 518, 222 N.W.2d 815 (1974).

We find the above language from *Rouse* is pertinent to this case. The defendant does not allege that

if he had not been so informed by the trial court, he would not have pled guilty. The allegation is of a technical failure of the trial court to comply with the minimum standards that we have adopted for the acceptance of guilty pleas. The defendant must allege and prove that such omission has resulted in prejudice to him, constituting a manifest injustice that would require this court to give him the opportunity to withdraw the plea. On the face of it in this case, the defendant was advised that the minimum penalty was 1 year. He was sentenced to 1 year. The effect of *Rouse* was to hold that if a defendant was sentenced within the term described by the trial court, prejudice is not then apparent on the face of the record. The case is to be distinguished from *State v. McMahon*, 213 Neb. 897, 331 N.W.2d 818 (1983). In *McMahon* the defendant pled guilty to the crime of delivering marijuana, Neb. Rev. Stat. §§ 28-416(1)(a) and (2)(b) and 28-405, Schedule I (c)(10) (Cum. Supp. 1982). Defendant was sentenced to a term of imprisonment of not less than 3 years nor more than 5 years. The defendant there assigned as error that the District Court misinformed him as to the possible penalty of the crime, that it included imprisonment of up to 5 years or a $10,000 fine, or both such fine and imprisonment. 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. While, as in *Rouse*, the penalty imposed was lawful under the crime to which the defendant pled, we noted in *McMahon* that the minimum sentence would have violated the statutory one-third of the maximum allowed by law if the penalty was as the court advised, and reversed and remanded the case. We, in effect, held that manifest injustice was demonstrated when the penalty imposed was actually greater than the law would have permitted had the defendant pled guilty to the crime with the penalty as described by the District Court. Having

failed to demonstrate any manifest injustice in the instant case, the defendant will not be permitted to withdraw his plea, and the judgment and sentence of the trial court are affirmed.

AFFIRMED.

WHITE, J., dissenting.

I dissent for the reasons stated in my dissent in *State v. Rouse*, 206 Neb. 371, 293 N.W.2d 83 (1980).

STATE OF NEBRASKA, APPELLEE, V. MARTY R. TOMRDLE, APPELLANT.

335 N.W.2d 279

Filed June 10, 1983. No. 82-584.

1. **Directed Verdict.** A directed verdict is granted when there is no evidence to justify a finding that the accused is guilty of the charge contained in the complaint or information filed in the proceedings.
2. **Burglary: Proof.** A conviction of burglary can be based on circumstantial evidence.
3. **Burglary: Intent.** Nocturnal entry into a building known to contain property is a circumstance from which an intent to steal may be inferred.
4. **Pleadings.** A motion in limine is a step preliminary to the introduction of evidence.
5. **Evidence: Appeal and Error.** An objection to the adduced evidence must appear in the record for preservation of a question to be reviewed on appeal.
6. **Plea in Abatement: Appeal and Error.** Rejection of a plea in abatement will not be reversed after a verdict of guilty which is based on sufficient evidence that a crime has been committed.

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

Avis R. Andrews, for appellant.

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

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

SHANAHAN, J.

Marty R. Tomrdle was charged with burglary, Neb. Rev. Stat. § 28-507 (Reissue 1979), convicted, and sentenced to 5 to 10 years for the commission of that offense. Tomrdle assigns errors of the District Court as follows: (1) Failing to direct a verdict in favor of Tomrdle at the conclusion of the State's case; (2) Overruling a motion in limine; (3) Overruling a plea in abatement; and (4) Abuse of discretion regarding the sentence imposed. The proceedings and judgment in the District Court are affirmed.

After drinking beers throughout the late hours of November 4, 1981, Ricky Marsoun, Kenneth Burger, and Tomrdle were riding around Fremont in Marsoun's van. They had heard that a 1955 or 1957 Thunderbird, a vintage automobile, was stored in the barn on the "Diers place" approximately 1 mile outside Fremont. Sometime after midnight, the trio drove to the Diers place. Marsoun testified that there was then a possibility that parts would be taken from the Thunderbird. Marsoun parked the van on a public road near the Diers place, and, under cover of fog, the trio walked to the barn. Neither Tomrdle nor his companions had permission to be on the Diers place. On arrival at the barn Burger pushed open a door; Tomrdle and his companions entered the barn through the opened door; and there they found the disassembled Thunderbird. When the three departed 15 minutes later, they carried out the "hard top" and the "soft top" of the Thunderbird and, additionally, its tires, fender skirts, wheel rims, and hood. The threesome loaded the parts in Marsoun's van and left. Tomrdle was dropped at his place in Fremont. Marsoun and Burger then drove to Snyder, Nebraska, and stored the parts in Marsoun's garage. Marsoun later shipped the Thunderbird parts to Texas for sale; the parts were sold; and Marsoun received and cashed a check as payment for the parts.

The first error assigned relates to the trial court's overruling a motion for acquittal or dismissal of the charge so that the question of guilt was thereby submitted to the jury. In Nebraska the rule concerning an accused's right to a directed verdict was stated in *Wanzer v. State*, 41 Neb. 238, 242, 59 N.W. 909, 910 (1894), as follows: "It is only when there is a total want of proof to support a material allegation of the information, or where the testimony in a criminal case is of so weak or doubtful a character that a conviction based thereon could not be sustained, that a court will be justified in directing a verdict of not guilty." A motion for a directed verdict of acquittal can be sustained only if there is no substantial evidence reasonably tending to support the charge against the accused. Cf. *State v. McClelland*, 162 N.W.2d 457 (Iowa 1968).

Tomrdle claims that he was entitled to the directed verdict of acquittal at the end of the State's case because there was no evidence that he intended to steal any property located in the barn. Intent is a subjective element of a crime, that is, it exists in the mind of the perpetrator. In crimes of burglary it is the exceptional case in which there is direct evidence that the accused possessed the felonious intent which must be established beyond a reasonable doubt in order to sustain a conviction of burglary. Most recognize that burglars usually do not publicize or declare their intent concerning any breaking and entering. Therefore, the felonious intent necessary for a conviction of burglary may be proved by circumstantial evidence. *State v. Rich*, 183 Neb. 128, 158 N.W.2d 533 (1968). There is no categorical condemnation that circumstantial evidence is so worthless and untrustworthy that such evidence cannot be the basis for a conviction of a crime. Cf. *Oseman v. State*, 32 Wis. 2d 523, 145 N.W.2d 766 (1966).

Applying these rules to the evidence which existed at the conclusion of the State's case, we must see whether there was sufficient evidence to warrant

submitting the case to the jury. We have a situation where Tomrdle and his companions on a foggy night went to the barn which they knew contained a valuable, vintage automobile. After 15 minutes inside the barn they methodically removed those parts which could most easily be transported in the van which was parked at some distance from the barn. When considered together, the foggy weather, the lateness of the hour, and the location of the parked van were circumstances from which a jury could reasonably infer that the trio did not want anyone to observe their activities at the Diers place. Nocturnal entry into a building known to contain property is a circumstance from which a jury may infer an intent to steal. In *Hebb v. State*, 10 Md. App. 145, 149, 268 A.2d 578, 581 (1970), the Maryland court held: "[T]he evidence was sufficient to convict . . . . The attempt by the appellants to enter a storehouse (which they knew carried a substantial inventory) in the nighttime . . . was sufficient to support a rational inference that they intended to steal everything of value that they could find and carry away."

Likewise, in *Mirich v. State*, 593 P.2d 590, 593 (Wyo. 1979), facts similar to the present case justified a conviction of burglary under the statement: "The law is well settled and widespread that where one breaks into the property of another in the nighttime, an inference may be drawn that he did so with the intent to commit larceny. A reasonable mind recognizes that people do not usually break into and enter the building of another under the shroud of darkness with innocent intent and that the most usual intent is to steal. . . . Defendant had been in the building and knew its contents. Knowledge of what a structure contains, coupled with an attempt to enter it, supports a rational inference of intent to steal whatever is of value within the building." See, also, *State v. Allnutt*, 261 Iowa 897, 156 N.W.2d 266 (1968).

The automobile parts removed from the barn were

shipped to Texas and sold. Such disposition after the burglary is a circumstance from which larcenous intent can be inferred. In this respect Tomrdle's situation is much like *People v. Rollins*, 119 Ill. App. 2d 116, 255 N.E.2d 471 (1970), where the defendant helped carry away a television set and an accomplice later attempted to sell the stolen television. As expressed by the Illinois court: "Indeed, what could be more probative of an intent to commit theft here than the removal of the television set from the owner's house to the apartment whence defendants had just come and, so, too, proof of the television's ultimate disposition—sale? Proof of an intent to deprive an owner of a given article would include proof of the article's sale and anything in between." *Id.* at 126-27, 255 N.E.2d at 475. In *Simmons v. State*, 493 S.W.2d 937 (Tex. Crim. 1973), there was testimony from an accomplice that the defendant and he had committed the burglary; had stored the goods at the defendant's house; and had tried to sell part of the goods. Such evidence was permissible in support of a conviction of burglary with intent to commit theft.

Tomrdle contends that under the circumstances presented to the jury the State was not able to rule out every hypothesis of innocence. It may be open to question that any reasonable hypothesis other than guilt might be extracted from a midnight prowl in the fog of rural Dodge County, which culminates in an unauthorized entry into a building from which valuable automobile parts are taken. Nonetheless, as expressed in *State v. Buchanan*, 210 Neb. 20, 28, 312 N.W.2d 684, 689 (1981): "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." The evidence presented by the State, when considered as a whole, raises more than just a suspicion that Tomrdle's unauthorized entry was

made with the intent to commit theft, and the evidence was sufficient to submit the case to a jury for its verdict. Cf. *State v. Witte*, 280 Minn. 116, 158 N.W.2d 266 (1968). The trial court was correct in overruling Tomrdle's motion for a directed verdict.

As the next error, Tomrdle asserts that the District Court should have sustained the motion in limine, which sought to prohibit the State from adducing evidence about the transportation and sale of the stolen property.

A motion in limine is a procedural step to prevent prejudicial evidence from reaching the jury. Cf. *State v. Bennett*, ____ R.I. ____, 405 A.2d 1181 (1979). As explained in *Lagenour v. State*, 268 Ind. 441, 450, 376 N.E.2d 475, 481 (1978): "[I]t is not the office of a motion *in limine* to obtain a final ruling upon the ultimate admissibility of evidence . . . but is rather to prevent the proponent of potentially prejudicial matter from displaying it to the jury, making statements about it before the jury, or presenting the matter to a jury in any manner until the trial court has ruled upon its admissibility in the context of the trial itself." As noted in *Twyford v. Weber*, 220 N.W.2d 919, 923 (Iowa 1974): "It [the motion in limine] serves the useful purpose of raising and pointing out before trial certain evidentiary rulings the court may be called upon to make during the course of trial. . . . It is not a ruling on evidence and should not, except on a clear showing, be used to reject evidence. It adds a procedural step to the offer of evidence."

In the present case, as the trial progressed, the witness for the State was asked about the transportation and sale of the stolen property, but there was no objection by Tomrdle. As clearly pointed out in *State v. Garrett*, 183 N.W.2d 652, 655 (Iowa 1971): "[T]he very purpose of the motion in limine is to receive an advance ruling on anticipated objectionable material . . . . [A] denial of a motion in limine . . . cannot, in and of itself, constitute reversible error

. . . . The reason is simple. The objectionable material has not yet reached the jury's ears. It may never reach the jury." In the same mode is the ruling in *Twyford v. Weber*, *supra* at 924, that "where the motion is denied and opposing counsel attempts to ask the questions challenged in the motion . . . a proper objection at that time is necessary to preserve the right to complain on appeal . . . . Stated otherwise, where the motion is denied the movant must base his complaint on the trial record."

When the trial court in this case overruled the motion in limine, it was incumbent upon Tomrdle to make an objection to the particular evidence sought to be adduced or offered by the State. But there was no such objection. A defendant cannot predicate error on the admission of evidence to which no objection was made at the time the evidence was adduced. Cf., *State v. Weiland*, 186 Neb. 325, 183 N.W.2d 244 (1971); *State v. Holloman*, 197 Neb. 139, 248 N.W.2d 15 (1976). Consequently, because there is no objection in the record, there is no question to be examined on appeal to this court. Also, the District Court's ruling, that is, the denial of the motion in limine in this case, is not an appealable order.

The third assignment of error is assigned to the trial court's overruling a plea in abatement. In *State v. Franklin*, 194 Neb. 630, 638, 234 N.W.2d 610, 615 (1975), it was held: "We further hold that after trial and conviction in the District Court any error in the ruling of the District Court on the plea in abatement is cured if the evidence at trial is sufficient to permit the jury to find guilt beyond a reasonable doubt." There was such evidence from which a jury could and did draw the reasonable inference of Tomrdle's guilt beyond a reasonable doubt. As stated in 24A C.J.S. *Criminal Law* § 1889 at 903 (1962): "Proceedings before Trial in General. Error in proceedings before trial which does not prejudice the rights of the accused or result in a denial of justice does not constitute a ground for re-

versal." See, also, *State v. Minamyer*, 12 Ohio St. 2d 67, 232 N.E.2d 401 (1967); *The People v. Petruso*, 35 Ill. 2d 578, 221 N.E.2d 276 (1966). Tomrdle does not state in what manner there has been any substantial prejudice to him or how any rights or defenses have been denied as a result of overruling the plea in abatement. Consistent with our holding in *State v. Franklin*, *supra*, in the absence of demonstrated prejudice to the accused and in view of the jury's verdict based on sufficient evidence, the trial court's rejection of a plea in abatement will not be reversed by this court.

In his final assignment of error Tomrdle claims that the sentence of 5 to 10 years is excessive. The trial court did not have information about the disposition of proceedings against any of Tomrdle's accomplices. There are no comparative sentences available regarding Tomrdle's accomplices. The information in the presentence report informed the court that Tomrdle was 23 years old at the time of the offense; that he was convicted of several misdemeanors in the recent past; that he was not married; that in April 1978 he was convicted of burglary and placed on probation for 18 months; and that, therefore, the offense of which he is now convicted occurred approximately 3½ years from the time of his last conviction for burglary and approximately 2 years from completion of probation. In view of the rather short interval between completion of probation and commission of the current offense, another term of probation appears to be futile. The sentence under the circumstances is in order. Cf. *State v. Tweedy*, 197 Neb. 851, 251 N.W.2d 380 (1977).

Having reviewed the record and finding no error and having considered the sentence imposed to be reasonable under the circumstances, the judgment of the trial court is in all respects affirmed.

AFFIRMED.

JANET KAE HICKS, APPELLANT, V. CHARLES K. HICKS III, APPELLEE.

334 N.W.2d 807

Filed June 10, 1983. No. 82-597.

1. **Child Custody.** In a dissolution proceeding no preference as to custody of children may be given to either parent based upon the sex of the parent.
2. _____. The moral fitness and conduct of the parties, along with other matters, are of great significance in determining questions of custody.

Appeal from the District Court for Cass County: RAYMOND J. CASE, Judge. Affirmed.

Fraser, Stryker, Veach, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellant.

McCormack, Cooney, Mooney & Hillman, for appellee.

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

BOSLAUGH, J.

This is an appeal in a proceeding for dissolution of a marriage. The trial court dissolved the marriage; divided the marital property; awarded alimony to the petitioner wife; and awarded custody of the minor child of the parties, Leigh Anne, born June 27, 1979, to the respondent husband, with "liberal" visitation rights in the petitioner.

The petitioner wife has appealed, and the principal issue upon the appeal is the award of custody to the respondent. The petitioner contends that custody of their daughter should have been awarded to her.

The review in this court of proceedings for dissolution of a marriage is de novo upon the record. Although we are required to reach a determination of the issues independent of that made by the District Court, where the evidence is in conflict we consider that the District Court saw and heard the witnesses and accepted one version of the facts.

The parties were married in 1972. The respondent is 30 years of age and employed in the Federal Land Bank National Data Processing Center. The petitioner is 30 years of age, has been employed part-time as a babysitter and as a teacher at a preschool. She also gives piano and organ lessons. She is qualified as an elementary schoolteacher and plans to return to full-time teaching in approximately 2 years.

In January 1981 the petitioner obtained a part-time job as organist at St. Luke's Episcopal Church in Plattsmouth, Nebraska. At that time she met and became acquainted with the rector of the parish, Howard Allen Schoech. According to Schoech, the petitioner came to see him in February 1981 for counseling. In May 1981 the petitioner and Schoech commenced an adulterous relationship that continued, with brief interruptions, until the time of trial in the District Court.

In June of 1981 the petitioner told the respondent that she wanted out of the marriage. According to the respondent the petitioner stated that "she felt like she wanted to run from the whole thing, from me, from the farm, her family, Leigh Anne." Nevertheless, the parties continued to live together until November.

In November 1981, Judy Schoech, the wife of Howard, called the petitioner and inquired about the relationship between the petitioner and Schoech. The parties separated on the following day.

The petitioner's argument, reduced to its simplest terms, is that she feels she would be a better custodial parent for Leigh Anne than the respondent. We believe the record does not support that conclusion.

Under the present statute no preference may be given to either parent based upon the sex of the parent. There is no presumption that either parent is more fit to have custody of the children than the other. Neb. Rev. Stat. § 42-364(2) (Reissue 1978).

The respondent is a fit parent and there is no evidence to the contrary.

It is apparent from the record that under any arrangement the child would be away from the custodial parent during much of the day. The respondent has suitable living accommodations and has made arrangements with his sister to assist him in caring for his daughter. The arrangements which the respondent proposes to carry into effect seem to be entirely suitable under the facts and circumstances in this case.

The petitioner argues that in determining matters of child custody, adultery may be a relevant consideration but is not necessarily determinative. While it may be conceded that adultery does not, as a matter of law, deprive a parent of custody in every case, it is hardly a recommendation tending to prove fitness. Of necessity, the moral fitness and conduct of the parties, along with other matters, are of great significance in determining questions of custody. *Koch v. Koch*, 209 Neb. 896, 312 N.W.2d 294 (1981).

The relationship between the petitioner and Schoech was of a frequent and almost continuous nature. Yet the petitioner testified that she has no plans to marry Schoech. This is a matter to be taken into consideration in determining which parent should be given custody of the minor child. See *Batenhorst v. Batenhorst*, 205 Neb. 601, 288 N.W.2d 740 (1980).

As we view the record it was not error to award custody to the respondent. We find no basis upon which to disturb the order of the trial court in that regard.

The respondent offered the testimony of Schoech by deposition. The petitioner's objection on the ground that the testimony was hearsay and its probative value did not outweigh the prejudicial value was overruled. The petitioner now complains that the attendance of Schoech could have been com-

pelled because he lived within 100 miles of Plattsmouth, Nebraska.

The petitioner had stipulated that a subpoena issued for Schoech would be returned "not found." Neb. Rev. Stat. § 25-1267.04 (Reissue 1979) (repealed as of January 1, 1983) permitted the use of the deposition of a witness if the witness was out of the county of the place of trial or hearing, or if the party offering the deposition has been unable to procure the attendance of the witness by subpoena. See, also, *Haith v. Prudential Ins. Co.*, 171 Neb. 281, 106 N.W.2d 169 (1960).

There was no error in overruling the petitioner's objection to the offer of the deposition.

It is unnecessary to consider the other assignment of error.

The judgment is affirmed.

AFFIRMED.

KRIVOSHA, C.J., dissenting.

I regret that I must respectfully dissent in this case. I believe that we have imposed an improper double standard in this case. While I may not condone the actions of the appellant in this case, I do not believe that they are sufficient grounds upon which to deny to her the custody of her minor daughter.

The majority begins by acknowledging that under present statute no preference may be given to either parent based upon the sex of the parent and that there is no presumption that either parent is more fit to have custody of the children than the other. Having said that, we then proceed to determine that the mother should not have custody of the child because of her relationship with a male companion. I doubt we would take such action if the situation were reversed. It appears to me that we have imposed a double standard, which I had thought we had earlier eliminated from the law. I would have reversed the decision of the trial court and granted custody to appellant, who might raise her daughter as a natural

mother would, rather than having entered an order which will result in the child in effect being raised by her paternal aunt.

MICHAEL L. SORTINO, APPELLANT, V. STEVEN MILLER AND CABLEVISION OF PLATTSMOUTH, INC., A NEBRASKA CORPORATION, APPELLEES.

335 N.W.2d 284

Filed June 10, 1983. No. 82-609.

1. **Workmen's Compensation: Appeal and Error.** Findings of fact made by the Nebraska Workmen's Compensation Court after rehearing shall have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong.
2. _____: _____. In determining the sufficiency of evidence necessary to sustain an award of the Nebraska Workmen's Compensation Court after rehearing, such evidence must be considered most favorably to the successful party, every controverted fact must be resolved in his or her favor, and he or she must receive the benefit of every inference reasonably deducible from it.
3. **Workmen's Compensation: Employer and Employee.** In a workmen's compensation claim, the burden of proof is on the claimant in each case to prove the nature of his employment.
4. **Workmen's Compensation: Employer and Employee: Independent Contractors.** The primary test, when determining for workmen's compensation purposes whether one is an employee or independent contractor, is one of control.
5. **Independent Contractors.** An independent contractor is one who, in the course of an independent occupation or employment, undertakes work subject to the will or control of the person for whom the work is done only as to the result of the work and not as to the methods or means used.
6. _____. One indispensable element to one's character as an independent contractor is that there must have been a contract to do a specific piece of work for a specific price.

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

Alan H. Kirshen, for appellant.

James P. Waldron of Nelson, Morrow & Waldron, for appellee Miller.

Melvin C. Hansen of Hansen, Engles & Locher, P.C., for appellee Cablevision of Plattsmouth.

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

PER CURIAM.

This is an appeal from a finding on rehearing by the Nebraska Workmen's Compensation Court that the plaintiff, Michael L. Sortino, failed to show by a preponderance of the evidence the existence of an employer-employee relationship between himself and the defendants. The compensation court found Sortino was not acting as an employee of the defendants but, rather, more in the character of an independent contractor; therefore, Sortino was not entitled to workmen's compensation benefits from the defendants for injuries he sustained while working. We agree.

Sortino has assigned several errors to the findings of the compensation court. He argues that (1) there is no evidence in the record to support the court's finding that Sortino was able to substitute the services of another for his own; (2) the court erred in finding Sortino is not an employee of Miller, and in making no finding as to Sortino's employment relationship with Cablevision of Plattsmouth, Inc. (Cablevision); (3) it was error for the court to refuse to permit evidence of admission by Cablevision's agent of its employer status; and (4) the court erred in refusing to permit direct evidence about Sortino's reduced earning capacity.

Plaintiff, Michael L. Sortino, has worked installing cable televisions in Plattsmouth, Nebraska, since early 1981. He originally worked through the contract Steve Hunt had with Cablevision. When Hunt lost his contract in the spring of 1981, Sortino attempted to gain a contract of his own with Cablevision. He was unable to obtain such a contract. Steven Miller was awarded a contract to do installations for Cablevision in February or March of 1981.

Soon thereafter, Miller, Sortino, and Cablevision agreed Sortino could work through Miller's contract. Under this arrangement, each day Miller, Sortino, and other installers would simply go to the Cablevision offices and pick up a set of work or installation orders. Each worker would go in his own vehicle and complete those orders, using his own tools.

Each week Sortino would submit an invoice to Miller under the name of "Sortino Cable Contractor." Miller would in turn submit his and Sortino's completed work orders to Cablevision, receive payment, and finally remit to Sortino a check in the name of Sortino Cable Contractor for the work completed that week. No social security or income taxes were deducted from these checks. This was on a piecework basis. That is, for each given task, Sortino would be paid a flat rate. Under this arrangement Sortino worked his own hours and performed his work as he saw fit. Sortino hired a helper on his own initiative and paid the helper out of his own pocket. Miller testified that he exercised no control of any type over Sortino.

On April 10, 1981, while installing cable television outlets in the Nottingham Court apartments, Sortino fell from a ladder, breaking his right ankle. As a result of this injury and subsequent therapy, Sortino was unable to work until August 21, 1981. Sortino now seeks to recover workmen's compensation benefits for the injury, claiming he was acting as an employee of the defendants when he was injured.

In appeals from the Nebraska Workmen's Compensation Court, we are to apply the limited standard of review used in civil jury cases. "Findings of fact made by the Nebraska Workmen's Compensation Court after rehearing shall have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong. . . . In determining the sufficiency of evidence necessary to sustain an award of the Nebraska Workmen's Compensation Court after rehearing, such evidence must be

considered most favorably to the successful party, every controverted fact must be resolved in his or her favor, and he or she must receive the benefit of every inference reasonably deducible from it." *Shaw v. Gooch Feed Mill Corp.*, 210 Neb. 17, 19, 312 N.W.2d 682, 683-84 (1981). See, also, *Renshaw v. Merrigol-Adler Bakery*, 212 Neb. 662, 325 N.W.2d 46 (1982).

The relevant Nebraska statute further limits our review, stating that we may modify, reverse, or set aside a decision of the compensation court for only four reasons: "(1) the court acted without or in excess of its powers, (2) the judgment, order, or award was procured by fraud, (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award, or (4) the findings of fact by the court do not support the order or award." Neb. Rev. Stat. § 48-185 (Reissue 1978). It is in this posture that we review this matter.

When determining the employment status of an individual under the Workmen's Compensation Act, we have uniformly held that no single test is determinative, but rather each case should be decided by the facts presented therein. The burden of proof is on the claimant in each case to prove the nature of his employment. *Williams v. Williams Janitorial Service*, 207 Neb. 344, 299 N.W.2d 160 (1980).

The primary test, when determining if such a relationship exists, is one of control. Determining what constitutes an independent contractor in the past, we have stated: "An independent contractor is one who, in the course of an independent occupation or employment, undertakes work subject to the will or control of the person for whom the work is done only as to the result of the work and not as to the methods or means used. Such a person is not an employee within the meaning of the workmen's compensation statutes." *Stephens v. Celeryvale Transport, Inc.*, 205 Neb. 12, 20, 286 N.W.2d 420, 425 (1979).

"This court has said that an independent contractor is generally distinguished from an employee in that the contractor performs according to his own method, and is not subject to the employer's control except as to the results of the work." *Voycheske v. Osborn*, 196 Neb. 510, 513, 244 N.W.2d 74, 76 (1976).

As stated above, there is evidence in the record supporting the contention that Miller did not exercise any control over Sortino. It seems the only aspect of Sortino's work that the defendants were concerned with was whether or not the final product was acceptable. Such a relationship is not that of employer and employee.

The failure to deduct social security and/or income taxes tends to show the claimant is not an employee. *Voycheske v. Osborn*, *supra*. None was taken from Sortino's pay. Independent contractors usually furnish their own tools and equipment. Sortino supplied his own vehicle and tools. The fact that a worker may substitute his services with that of another also indicates that worker to be an independent contractor. *Stephens v. Celeryvale Transport, Inc.*, *supra*. Sortino hired a helper on his own initiative and paid him out of his own pocket.

We have also held in the past: " 'The one indispensable element to his character as an independent contractor is that he must have contracted to do a specified piece of work for a specific price. . . .' " *Snodgrass v. City of Holdrege*, 166 Neb. 329, 334, 89 N.W.2d 66, 69 (1958). In this case Sortino was doing "piecework," earning a set fee for each task performed.

While there does seem to be some indicia of an employer-employee relationship, there is evidence to support the Nebraska Workmen's Compensation Court's findings that the weight of the evidence and authority gives rise to the conclusion that Sortino acted as an independent contractor and was not the employee of either of the defendants. The compensation court acted within its powers; there is no evi-

dence of fraud; and there is sufficient competent evidence in the record and sufficient findings of fact to support that court's judgment. We cannot say the compensation court is clearly wrong, and therefore we affirm its decision.

As a final matter, plaintiff complains that the court erred in sustaining defendants' objection to testimony concerning a possible admission by Cablevision's insurance agent as to whether Cablevision was in fact Sortino's statutory employer. It is not totally clear in the record, but it seems the statements which were made by the insurance agent were done while negotiating a settlement. As such, the court sustained defendants' objection to such statements under Neb. Rev. Stat. § 27-408 (Reissue 1979), which states in relevant part: "Evidence of conduct or statements made in compromise negotiations is likewise not admissible." This was the correct ruling by that court and was not error, since the statement in question seems to have been made in negotiation of a settlement.

Since we find that Sortino was not the employee of either of the defendants, we need not reach the final assignment of error concerning his diminished earning capacity.

AFFIRMED.

UNITED STATES NATIONAL BANK, APPELLEE, V. ATLAS AUTO BODY, INC., APPELLANT.
335 N.W.2d 288

Filed June 17, 1983. No. 81-738.

1. **Statutes.** In giving effect to the intent of the Legislature in the adoption of legislation, statutes in pari materia must be construed together.
2. **Uniform Commercial Code: Security Interests: Liens.** When a person in the ordinary course of his business furnishes services or materials with respect to goods subject to a security interest, a lien

upon goods in the possession of such person given by statute or rule of law for such materials or services takes priority over a perfected security interest unless the lien is statutory and the statute expressly provides otherwise.

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

Tim J. Kielty of Gast & Kielty, for appellant.

Thomas M. Locher of Hansen, Engles & Locher, P.C., for appellee.

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

KRIVOSHA, C.J.

This replevin action was filed in the municipal court of Omaha, Douglas County, Nebraska, by the United States National Bank (U.S. National) to obtain possession of a 1979 Volkswagen automobile. The bank was the holder of a valid purchase money security interest in that vehicle. The municipal court found that Atlas Auto Body, Inc. (Atlas), by reason of an artisan's possessory lien for labor, materials, and storage, had a superior right to the collateral in question under Neb. U.C.C. § 9-310 (Reissue 1980). On appeal to the District Court the judgment was reversed and the cause remanded to the municipal court with directions to place U.S. National in possession of the collateral and to determine the amount of damages, if any, due and owing the bank for wrongful detention. From that judgment Atlas has appealed to this court. It has assigned two errors. The first assignment claims that the District Court erred in finding that U.S. National has a superior right in the collateral. The second assignment claims that the District Court erred in not permitting Atlas an artisan's lien for storage charges.

The parties have stipulated as to the facts in this case. On March 10, 1979, Thomas L. Sheppard, do-

ing business as T & A Leasing, purchased a 1979 Volkswagen Dasher from Westroads Volkswagen-Mazda (Westroads). On that day Sheppard executed and delivered a written promissory note to Westroads. Westroads in turn assigned all its right, title, and interest to this note to U.S. National. The Volkswagen Dasher was pledged as security for this note. In return for and in reliance on this pledge and note, U.S. National extended Sheppard a loan of $8,919 at an interest rate of 12 percent per annum. This money was given so as to enable Sheppard to purchase this automobile, thus giving U.S. National a valid purchase money security interest in the Dasher. This security interest is noted on the face of the certificate of title to this automobile and is the first such interest noted thereon. This certificate was in the possession of U.S. National.

Sheppard has defaulted on his note, leaving $2,010 plus interest unpaid. As a result of this default, U.S. National, on December 23, 1980, submitted to the clerk of the Douglas County Motor Vehicle Division an affidavit of repossession and the original certificate of title.

On or about February 20, 1980, Sheppard took the Dasher to Atlas for the purpose of having it repaired. After these repairs were made Atlas attempted to but was unable to contact Sheppard. The fair and reasonable cost of these repairs is $350. At the time Atlas took possession of this Dasher, Atlas did not see its certificate of title, but did see the registration for the vehicle, which carried the name of Thomas L. Sheppard.

Both plaintiff and defendant have attempted to but are unable to find or contact Thomas L. Sheppard. They both also remain unpaid. It is agreed that they both have a superior right to this automobile over Sheppard. This collateral remains in the possession of Atlas.

The only question presented by this appeal is, Does a party having a prior lien on a motor vehicle

noted on the vehicle's certificate of title take priority over the subsequent lien of an artisan arising from repairs and services rendered in the artisan's ordinary course of business? In short, who, as between U.S. National and Atlas, has the superior right to this vehicle?

Atlas argues that under the provisions of § 9-310 it has a superior lien over the lien held by U.S. National. Generally, § 9-310 gives parties in the position that Atlas is in here priority over earlier perfected security interests. "When a person in the ordinary course of his business furnishes services or materials with respect to goods subject to a security interest, a lien upon goods in the possession of such person given by statute or rule of law for such materials or services takes priority over a perfected security interest *unless the lien is statutory and the statute expressly provides otherwise.*" (Emphasis supplied.) The purpose behind this statute is stated in the Comments to this section: "To provide that liens securing claims arising from work intended to enhance or preserve the value of the collateral take priority over an earlier security interest even though perfected." § 9-310, Comment 1. Clearly, this statute provides that artisans, who in the ordinary course of business enhance the value of an item by services and materials rendered, have an interest in that item, to the extent of the value of those services and materials, which is superior to other interests even if they be prior perfected security interests.

U.S. National, on the other hand, argues that under the provisions of Neb. Rev. Stat. § 60-110 (Reissue 1978) its lien is prior and therefore superior to the lien of Atlas. While this statute was originally enacted before the Uniform Commercial Code, it has since been amended to read in part as follows: "The provisions of article 9, Uniform Commercial Code, shall never be construed to apply to or to permit or require the deposit, filing or other record whatsoever of a security agreement, conveyance intended

to operate as a mortgage, trust receipt, conditional sales contract, or similar instrument, or any copy of the same covering a motor vehicle. *Any mortgage, conveyance intended to operate as a security agreement as provided by article 9, Uniform Commercial Code*, trust receipt, conditional sales contract or other similar instrument covering a motor vehicle, if such instrument is accompanied by delivery of such manufacturer's or importer's certificate and followed by actual and continued possession of same by the holder of said instrument or, *in the case of a certificate of title, if a notation of same has been made by the county clerk on the face thereof, shall be valid as against the creditors of the debtor, whether armed with process or not, and subsequent purchasers, secured parties and other lienholders or claimants* but otherwise shall not be valid against them, except that during any period in which a motor vehicle is inventory, as defined in subdivision (4) of section 9-109, Uniform Commercial Code, held for sale by a person or corporation who is licensed as provided in Chapter 60, article 14, and is in the business of selling motor vehicles, the filing provisions of article 9, Uniform Commercial Code, as applied to inventory, shall apply to a security interest in such motor vehicle created by such person or corporation as debtor without the notation of lien on the instrument of title." (Emphasis supplied.) Further, U.S. National argues that our decision in *White Motor Credit Corp. v. Sapp Bros. Truck Plaza, Inc.*, 197 Neb. 421, 249 N.W.2d 489 (1977), supports its position in this case. In *White Motor* we found that, under § 60-110, White Motor had a superior interest in these vehicles over that of the artisan, Sapp Brothers. In the *White Motor* case, however, Sapp Brothers did not have a possessory lien under Neb. Rev. Stat. § 52-201 (Reissue 1978), and therefore § 9-310 did not apply. Further, Sapp Brothers did not contest the trial court's holding that White Motor was entitled to possession. It therefore is not authority in this case.

To the extent, however, that *White Motor*, *supra*, is in conflict with our decision herein, it is overruled.

Section 60-110 does not create a lien. Rather, it is what can be described as a recording statute. Absent the specific provisions of § 60-110, one seeking to obtain a lien against a motor vehicle by reason of a security agreement would be compelled to file the security agreement with the county clerk in the county of the debtor's residence, if a resident of this state, or the county clerk of the county where the collateral is located at the time of the execution of the security, if the debtor is a nonresident of this state. See Neb. U.C.C. § 9-401 (Reissue 1980). Section 60-110 specifically provides that notwithstanding the provisions of article 9 of the Uniform Commercial Code, no filing need be made with any county clerk, but, rather, the notation of the lien is to be made upon the certificate of title in the county in which the title was issued. Once that is done, then the secured party has a valid lien as against creditors of the debtor, whether armed with process or not, and *subsequent* purchasers, secured parties, and other lienholders or claimants who would otherwise claim that they were superior by reason of the lienholder's failure to properly file in accordance with article 9 of the Uniform Commercial Code.

What must be kept in mind is that § 60-110 does not create the lien. That is to say, § 60-110 does not create a statutory lien but, rather, only the manner in which a nonstatutory lien, once obtained, may be perfected by filing. A statutory lien, on the other hand, is simply what the name implies—a lien created by an act of the Legislature. Examples of statutory liens would be liens for nonpayment of taxes, or nonpayment of government fees, or matters of similar import. For but a few examples, see Neb. Rev. Stat. §§ 14-557, 15-819, 16-702, 21-323 (Reissue 1977), and §§ 77-203 and 77-208 (Reissue 1981).

A reading of § 9-310 makes no exception, and we see no reason why we should read into § 9-310 lan-

guage excluding motor vehicles when such was not the apparent intent of the Legislature. The Comments to § 9-310 support that view. Comment 2 reads in part: "Apart from the Uniform Trust Receipts Act which had a section similar to this one, there was generally no specific statutory rule as to priority between security devices and liens for services or materials. Under chattel mortgage or conditional sales law many decisions made the priority of such liens turn on whether the secured party did or did not have 'title'. This section changes such rules and makes the lien for services or materials prior in *all cases* where they are furnished in the ordinary course of the lienor's business and the goods involved are in the lienor's possession. Some of the statutes creating such liens expressly make the lien subordinate to a prior security interest. This section does not repeal such statutory provisions. If the statute creating the lien is silent, even though it has been construed by decision to make the lien subordinate to the security interest, this section provides a rule of interpretation that the lien should take priority over the security interest." (Emphasis supplied.) We note that the Comments to § 9-310 were adopted by the Legislature at the same time that the act itself was adopted.

Cases in Nebraska which had previously held that the security interest took priority over the chattel mortgage or conditional sales contract were bottomed upon the notion that the conditional vendor or mortgagor did not have "title" to the vehicle. That, of course, is no longer essential in the scheme of things.

A further reason for construing the statutes as we do is a reading of § 52-201, which grants to an artisan a possessory lien for services rendered. Section 52-201 provides: "Any person who makes, alters, repairs or in any way enhances the value of any vehicle, automobile . . . at the request of or with the consent of the owner, or owners thereof, shall have a

lien on such vehicle, automobile . . . while in his possession, for his reasonable or agreed charges for the work done or material furnished, *and shall have the right to retain such property until such charges are paid.*" (Emphasis supplied.) If we were to hold, therefore, that § 60-110 was an exception to § 9-310, we would in effect be repealing the right of a possessory lien on an automobile granted to an artisan under § 52-201, for, obviously, if § 60-110 grants to a secured party superior rights over an artisan claiming under both § 52-201 and § 9-310, then the secured mortgagee would have a right to replevin the vehicle from the artisan, or at least to proceed to foreclose its lien, thereby divesting the artisan of its possessory lien. We find no basis to conclude that the Legislature intended to impart secured parties such authority by virtue of § 60-110. We believe that all of these statutes can be read together and have meaning and effect if we read § 60-110 to be a filing statute and not a statute creating a statutory lien and therefore an exception to § 9-310. The District Court was therefore in error in holding that U.S. National's lien was superior to the artisan's lien held by Atlas.

Our holding, however, as to the prior lien of Atlas is only to the extent of the repairs to the vehicle in the amount of $350 and not to the purported storage charges. In order for Atlas to retain its possessory lien under § 52-201, it is required by law to maintain possession of the vehicle, thereby storing the vehicle until it determines to foreclose on said vehicle. This did nothing to "enhance" the value of the vehicle, as contemplated by § 52-201. It would be inconsistent to grant, on the one hand, the artisan a possessory lien necessary in order to gain superior rights over all other lienholders and then permit the artisan to likewise maintain a lien for storage charges, absent some showing that the artisan was regularly in the business of storing vehicles. See, *Mack Motor Truck Corporation v. Wolfe*, 303 S.W.2d 697 (Mo. App. 1957). We therefore hold that Atlas has a lien

for the repairs in the principal sum of $350, superior to that of U.S. National, but not with regard to its alleged storage lien. The judgment of the District Court is in part affirmed and in part reversed.

AFFIRMED IN PART, AND IN PART REVERSED.

WHITE, J., dissenting.

Faced with an obvious choice between certainty and doubt in the law of priority of liens on motor vehicles, the majority has chosen doubt. However appealing the pleas of the artisan to priority, we should not exclude from our consideration in these matters Lord Coke's observation that the aim of the law ought to be certitude.

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

EVELYN SMITH, APPELLANT, V.
JOHN L. DEWEY, M.D., APPELLEE.
335 N.W.2d 530

Filed June 17, 1983. No. 82-096.

Medical Malpractice: Limitations of Actions. The 10-year statute of repose provided for in Neb. Rev. Stat. § 25-222 (Reissue 1979) begins to run when the physician's treatment, which the patient claims to have constituted malpractice, ceases, as opposed to simply the termination of the physician-patient relationship.

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

Michael G. Goodman of Matthews, Cannon & Riedmann, P.C., for appellant.

John R. Douglas of Cassem, Tierney, Adams, Gotch & Douglas, for appellee.

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

HASTINGS, J.

The plaintiff, Evelyn Smith, filed a second amended petition in the District Court alleging malpractice

on the part of John L. Dewey, a practicing physician in Omaha and the defendant in this action. The defendant's demurrer to that petition was sustained, and the plaintiff apparently chose to stand on her pleading. Accordingly, the action was ordered dismissed.

The plaintiff on appeal assigns as error, generally, the finding of the trial court that the action was barred by the 10-year statute of repose applicable in professional negligence cases, Neb. Rev. Stat. § 25-222 (Reissue 1979); and, secondly, that the court erred in relying upon Neb. Rev. Stat. § 27-504 (Reissue 1979), the physician-patient privilege, to deny the plaintiff's motion to require the defendant to produce certain of his records relating to the treatment of other patients. Because we sustain the action of the District Court in dismissing the cause of action, we need not address this last-claimed error.

The plaintiff alleged that commencing in 1965 the defendant began a series of treatments of plaintiff's allergy, which included the injection of X-ray radiation particles into the plaintiff's chest, which continued during the years 1966, 1967, and 1970. She further alleged that she was last seen and examined by the defendant on March 2, 1972, and that during a routine physical examination conducted by another physician in November of 1972, it was discovered that she was suffering from a malignancy requiring surgery, which resulted in damages to her. Although this amended petition was filed on January 4, 1982, her original petition was filed on October 15, 1981.

We should observe at the outset that any allegation in the petition of a causal connection between the treatments and the resulting cancer is at best vague. However, utilizing the rule that if, applying a liberal construction, a petition states a cause of action a demurrer should be overruled, we will continue with an examination of the principal issue in

this case. *Dixon v. Reconciliation, Inc.*, 206 Neb. 45, 291 N.W.2d 230 (1980).

Section 25-222 provides as follows: "Any action to recover damages based on alleged professional negligence or upon alleged breach of warranty in rendering or failure to render professional services shall be commenced within two years next after the alleged act or omission in rendering or failure to render professional services providing the basis for such action; *Provided*, if the cause of action is not discovered and could not be reasonably discovered within such two-year period, then the action may be commenced within one year from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier; *and provided further*, that in no event may any action be commenced to recover damages for professional negligence or breach of warranty in rendering or failure to render professional services more than ten years after the date of rendering or failure to render such professional service which provides the basis for the cause of action."

The plaintiff alleged in part that her damages were proximately caused because the "defendant knew or should have known that the said experimental x-ray procedure inevitably would cause cancer," and the "defendant failed to obtain the informed consent of the plaintiff prior to the commencement of said x-ray treatments." As to those allegations, it is readily apparent on the face of the petition that both the failure to warn and the treatments themselves would date back, at the latest, to the year 1970, when the last treatments were given. Thus, alleged negligent acts causing plaintiff's harm, which occurred more than 10 years before bringing suit, form no basis for recovery. *Colton v. Dewey*, 212 Neb. 126, 321 N.W.2d 913 (1982).

The plaintiff again raises the claim that the 10-year statute of repose denies her right to access

to the courts guaranteed by article I, § 13, Constitution of Nebraska. This same objection was raised in *Colton v. Dewey*, *supra*, and answered by this court contrary to the position taken by the plaintiff, and is dispositive of that point.

The final assignment of error which requires discussion is concerned with plaintiff's allegation in her petition that the "defendant knew or should have known of the carcinogenic risk of the x-ray therapy and yet failed to warn the plaintiff at any time while plaintiff was under the defendant's care." Plaintiff argues that the defendant had a continuing duty to warn the plaintiff of the risk of the treatment she was receiving until she last saw her physician, which she claims was on March 2, 1972. Because she brought this action within 10 years of that date, she argues that the statute of repose does not apply. In support of that position she quotes in her brief the following language from *Colton*: " 'The difficulty with this argument is that Appellant would have whatever fiduciary relationship may exist between physician and patient extend beyond the duration of the physician-patient connection itself. We disagree; the wrongful act of which Appellant complains took place no later than when the course of treatment ended in 1965 [the year Appellant was last seen by the Appellee].' " Brief of Appellant at 9. The parenthetical statement is not supported by the record. Reference to the transcript in *Colton* discloses that in that petition it was alleged the "Plaintiff underwent . . . exposure to x-ray in . . . and April of 1965 . . . ." There was no reference to a date of last examination as is present in the instant case.

If we were to apply the date of "when the course of treatment ended" criterion of *Colton*, we would have to hold that such date fell sometime during the year 1970, and the statute of repose would be applicable. However, what the plaintiff is asking us to do, in effect, is to declare that there is a continuing obligation on the part of a physician to warn of the

consequences of prior treatment so long as the physician-patient relationship exists, and for 10 years thereafter.

In support of this argument plaintiff has cited many cases from other jurisdictions. Several of these cases are inapplicable, as they deal with a situation where a doctor has operated on the plaintiff patient and has negligently left a foreign object inside the patient. In such cases the rule regarding the running of the statute of limitations is that the statutory limitation period does not begin to run until the doctor-patient relationship ends. The rationale behind this rule is that in such cases two tortious acts occur. First, the doctor malpractices by leaving the foreign object inside the patient, and, secondly, the doctor malpractices by failing to detect the presence of the foreign object while the patient continues to be under the care of the doctor. See Annot., 70 A.L.R.3d 7 (1976), and the cases cited therein. Such facts are not present in this appeal and therefore these cases do not apply.

Plaintiff also cites authority for the proposition that the statute of limitations on medical malpractice claims does not begin to run until the doctor-patient relationship between the parties is terminated. See *Hundley v. St. Francis Hospital*, 161 Cal. App. 2d 800, 327 P.2d 131 (1958). While this does seem to be the rule in California, and has been adopted by other jurisdictions, we do not feel compelled to adopt it in this jurisdiction. Considering this rule of law in light of the Nebraska 10-year statute of repose, a patient could simply visit a doctor every 9½ years and thereby effectively preclude the statute from ever running. This is contrary to the intent of the Legislature, evidenced by the enactment of this limitation period, and we therefore refuse to adopt such a position.

There is also a third line of cases dealing with this issue. Under this line of cases the statute of limitations does not begin to run until the act complained

of, and any resulting subsequent treatment therefor, is completed. An example of this rule is found in *Williams v. Elias*, 140 Neb. 656, 1 N.W.2d 121 (1941).

The plaintiff in that case sustained certain injuries to his back. He was then examined by the defendant doctor. On the basis of that examination the defendant incorrectly diagnosed plaintiff's condition and treated him according to that diagnosis. Due to this incorrect diagnosis and subsequent treatment, plaintiff suffered further injuries to his back. At issue in that case was when the period of limitations began to run: at the date of diagnosis, which was arguably the point in time at which the malpractice occurred, or at the conclusion of the doctor's treatment of plaintiff's injuries. We held in that case that the statute of limitations did not commence to run until the treatment by the doctors of the *specific injuries* of that patient ended. We held in this fashion even though, at least arguably, it was the diagnosis and not the treatment given thereafter which was the act of malpractice.

The holding in *Williams v. Elias*, *supra*, was based upon decisions from other states, two of which were Ohio and Minnesota. Discussing the reasoning behind this rule, we stated: "The reason for the holdings as appear in the Ohio, Minnesota and other cases, cited in support thereof, is that it is just to the physician and surgeon that he may not be harassed by premature litigation instituted in order to save the right of the patient in the event there should be substantial malpractice. The physician and surgeon must have all reasonable time and opportunity to correct the evils which made the observation and treatment necessary and to correct the ordinary and usual mistakes incident to even skilled surgery. The doctrine announced in the foregoing cases is conducive to that mutual confidence which is highly essential in the relation between surgeon and patient. The treatment and employment should be considered as a whole, and if there occurred therein mal-

practice, the statute of limitations should begin to run *when the treatment ceased.* Especially is this true in a situation, such as presented in the instant case, where plaintiff's condition required treatment, rather than surgery." (Emphasis supplied.) 140 Neb. at 662-63, 1 N.W.2d at 124.

We find this reasoning and this rule to be controlling in the present case. We hold the statute of limitations on the plaintiff's claim began to run at the end of the treatment which plaintiff claims to have been malpractice.

Plaintiff's petition states that the treatments which she contends constituted acts of malpractice occurred in 1965, 1966, 1967, and 1970. These acts clearly occurred more than 10 years prior to the filing of this action. Any claim based solely on any one or all of these acts is time barred. Plaintiff also claims she was last examined by defendant on March 2, 1972. This date falls within the statutory limitation period. If the subsequent examination alleged in the petition was a followup to or a continuation of these previous treatments, under the rule from *Williams v. Elias, supra,* stated above, plaintiff's claim is timely. On the other hand, if this 1972 examination was unrelated to the prior X-ray treatments, then it would not be a continuation of the treatment complained of, and plaintiff's claim would be barred under the statute of limitations.

We believe that the burden is on the plaintiff to make such allegation in "ordinary and concise language." Neb. Rev. Stat. § 25-804 (Reissue 1979). This she has failed to do. The court should not be forced to speculate on the relationship of the alleged examination to the earlier treatments. The plaintiff's claim, on the face of her petition, was barred by the statute of repose. The judgment of the District Court was correct and is affirmed.

AFFIRMED.

WHITE, J., dissenting.

We submit that it is the majority that is neither

clear nor concise, but rather is strained and speculative.

The paragraph the majority holds is not in "ordinary and concise language" is as follows: "Plaintiff in 1965 was 41 years old, a resident of Nebraska and submitted to the care of the defendant John L. Dewey for the treatment of an allergy. In 1965, defendant John L. Dewey ordered and administered therapeutic x-ray treatments upon plaintiff for the purpose of alleviating or curing her allergy. The treatment included the injection of x-ray radiation particles into the plaintiff's chest from the front and rear. Plaintiff underwent three exposures to x-rays a year for the years, 1965, 1966 1967 and 1970. Plaintiff was last seen and examined by defendant on March 2, 1972." The language is, in fact, ordinary and concise. The defendant was engaged to treat an allergy. To suggest that the last treatment was, in fact, for another purpose is not supportable from any reasonable construction of the paragraph.

SHANAHAN, J., joins in this dissent.

ELIZABETH M. HARDT, VERA L. COFFEE, AND LORRAINE V. HANSON, APPELLANTS, V. SHORT-LINE IRRIGATION DISTRICT ET AL., APPELLEES.

335 N.W.2d 292

Filed June 17, 1983. No. 82-102.

1. **Equity: Appeal and Error.** A de novo review in an equity matter requires this court to reach an independent conclusion as to what findings of fact are required under the pleadings and all of the evidence without reference to those reached in the District Court, except, however, that where the credibility of evidence is in conflict, we must give weight to the fact that the trial court saw the witnesses and observed their demeanor while testifying.
2. _____: _____. In reviewing findings of the trial court when it has made an inspection of the premises and has given consideration to the competent and relevant facts revealed thereby, this court must give weight thereto.
3. **Waters: Damages: Proof.** In a cause of action for damage to

land due to seepage, the burden is on the plaintiffs to prove that it was the acts of the defendants in their maintenance and operation of a drain or diversion structure that caused the plaintiffs' injury.

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

Winner, Nichols, Meister, Douglas and Kelly, for appellants.

Rick L. Ediger of Raymond, Olsen, Ediger & Ballew, P.C., for appellees Short-Line Irrigation District et al.

Steven C. Smith of Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, for appellees Farmers Irrigation District et al. and Pathfinder Irrigation District et al.

BOSLAUGH, MCCOWN, and HASTINGS, JJ., and BRODKEY, J., Retired, and COLWELL, D.J., Retired.

HASTINGS, J.

This action was instituted by the plaintiffs in an action to enjoin the defendants' operation of the Nine Mile Drain and an obstruction at the mouth thereof which diverts water into the Short-Line supply canal, and to recover damages. This operation, plaintiffs claim, has waterlogged and thereby damaged their field adjoining this drain.

The District Court for Scotts Bluff County initially dismissed the individuals named as defendants and no appeal was taken from that dismissal. The District Court went on to find that plaintiffs failed to show that the damage sustained by plaintiffs, if any, resulted from any action of the defendants, either in maintenance of Nine Mile Drain or the diversion structure in the mouth of that drain. Finding that plaintiffs failed to prove defendants caused the alleged injury, the District Court dismissed plaintiffs' petition. We affirm.

On appeal plaintiffs argue that the District Court erred in finding that the plaintiffs failed to prove by a preponderance of the evidence that the ground

water level below their land had been changed by acts of the defendants; in finding that the ground water level under plaintiffs' land was affected by the water level in proximity to the Platte River; in failing to enjoin defendants; and in failing to award damages to plaintiffs.

Since 1967 plaintiffs Lorraine V. Hanson and Vera L. Coffee have owned the land described as: "The North Half of the North Half (N½N½), and Lots One (1), Two (2), Three (3), and Four (4), together with all accretions thereto, of Section Twenty-six (26), Township Twenty-one (21) North, Range Fifty-three (53) West of the Sixth (6th) Principal Meridian, containing 268 acres more or less, according to Government survey; and in addition all accretion lands to said described real estate," subject to a life estate of the third plaintiff, Elizabeth M. Hardt.

The land in question is a 93-acre plot of land suited primarily for agricultural purposes, located on the north side of the North Platte River. This land is bordered on the east by the Nine Mile Drain. The Nine Mile Drain intersects with the North Platte River at roughly a 90° angle. Thus, on two sides of plaintiffs' land there are flowing bodies of water.

At the mouth of the Nine Mile Drain a diversion structure has been built and maintained. This diversion structure causes some of the water flowing out of Nine Mile Drain to be channeled into a canal owned by Short-Line Irrigation District instead of flowing totally into the North Platte River.

In 1971 the river was very high, flooding and washing out what existing diversion there was. In 1972 concrete and rock riprap was added to make the diversion more permanent and secure. In 1975 more structural modifications were made. Steel pilings were placed in the mouth of the drain. This created a throat through which the water from Nine Mile Drain could run unchecked into the North Platte River. During irrigation season boards were placed between these pilings, thus diverting water into

Short-Line's canal. When irrigation season was over these boards would be removed, allowing the water to flow freely into the river again. The structure caused the water level in Nine Mile Drain to be raised above the level of the river.

Of plaintiffs' 93 acres of land, a 30-acre triangle, located in the southeast corner of their land, is continually wet, and therefore does not have as high a per-acre yield as the remaining 60 acres in the parcel. Two sides of this triangle are bordered by water, the North Platte River on the south and Nine Mile Drain on the east. Plaintiffs, while admitting this land has never yielded particularly well, claim their per-acre yield from this land has gotten worse since the above-described structural changes were made in the diversion at the mouth of Nine Mile Drain.

In support of their claim plaintiffs adduced the expert testimony of Mr. Wilbur Rogers. He had ample credentials to establish his expertise in the fields of geology and hydrology. He testified on the basis of his experience with underground waterflow in the general area, and on general rules applying to such flows, that the underground water in this area flowed parallel to that of the flow of the river. That is, it flowed in an east-southeasterly direction. He went on to discuss the effect Nine Mile Drain would have as a body of water flowing north to south, cutting across the path of the underground flow.

Mr. Rogers stated that Nine Mile Drain would have the effect of a hydrostatic dam which would hold up the underground flow, causing the underground water table to the west of the drain to rise to the same level as that in Nine Mile Drain itself. Thus, as the level in Nine Mile Drain rises, a rise that might occur due to the diversion structure, the water level under the plaintiffs' property would also rise, causing plaintiffs' land to become wet.

On cross-examination it was brought out that Mr. Rogers' testimony was based on general knowledge

and not specific facts relating to this land. No tests were run on this parcel of land to determine the direction of ground water flow under this specific parcel of land, or to determine the effect Nine Mile Drain had on this land, in support of his opinion.

A Mr. Meredith Schaff, also a well-qualified expert in this area, was called to testify for the defendants. He testified that there is insufficient data on which to base an opinion regarding the cause of plaintiffs' damp land. He stated that in order to make an accurate evaluation an extensive number of test holes would need to be drilled, soil samples taken, and test wells dug to monitor the effect the water level in Nine Mile Drain has on those ground water levels under plaintiffs' land.

Mr. Schaff stated he could not determine whether it was the river or the drain causing this problem on the basis of the available data; rather, only general conclusions could be drawn. He went on to add that these general conclusions could be affected by several factors which were not known at that time. In short, Mr. Schaff simply felt there was insufficient evidence on which to base an opinion in this matter.

While plaintiffs claim this land is wet and thereby damaged due to the water level in Nine Mile Drain, there is also testimony in the record which shows the land east of Nine Mile Drain suffers from the same problem of wet soil. Mr. Alfred Pieper farms the land bordering the river 2 miles east of the plaintiffs. His testimony indicates that the underground water level is very close to the surface, much the same as plaintiffs' land. Mr. Roland Warner owns the land directly east of Nine Mile Drain which borders the river. He testified that his land was much the same as plaintiffs'. He went on to state this land is not good for farming because the water table is too high. This evidence tends to show, if anything, that the damage to plaintiffs' land is not due to the water level in Nine Mile Drain.

It seems plaintiffs' theory is that the ground water

in this area runs in an easterly direction and that this drain acts as a dam, causing the ground water level to rise on the land west of the drain. As this testimony shows, the problems that plaintiffs have with their land are prevalent throughout this area, whether that land be east or west of the drain.

As is apparent from this discussion, there is much conflicting evidence in this case, particularly in the testimony given by the expert witnesses. Also, the trial court viewed the premises in question.

This is an appeal in equity in which we review the record de novo. A de novo review requires us to reach an independent conclusion as to what findings of fact are required under the pleadings and all the evidence without reference to those reached in the District Court, except, however, that where the credibility of evidence is in conflict, we must give weight to the fact that the trial court saw the witnesses and observed their demeanor while testifying. *Anderson v. Clemens Mobile Homes*, *ante* p. 283, 333 N.W.2d 900 (1983); Neb. Rev. Stat. § 25-1925 (Reissue 1979).

" 'It is the duty of this court, on review of the findings made by a trial court when it has made an inspection of the premises and has given consideration to the competent and relevant facts revealed thereby, to give weight thereto.' " *Sullivan v. Hoffman*, 207 Neb. 166, 171, 296 N.W.2d 707, 711 (1980).

Plaintiffs' evidence shows only that their land is wet and therefore less productive, and that some structural modifications in the Nine Mile Drain have occurred. Their expert gave an opinion based on general information that this damage was caused by the water in the Nine Mile Drain. This opinion was directly contradicted by the testimony of defendants' expert.

Other than the testimony of this expert, there is no evidence tending to show a causal link between the water level in Nine Mile Drain and any damage to plaintiffs. In fact, there is evidence in the record

tending to show that these lands are not suited for agricultural purposes and the fact that they are not so suited has nothing to do with Nine Mile Drain. The trial court viewed the premises, heard the witnesses, and found the evidence to be insufficient to support plaintiffs' case.

In this case the plaintiffs had the burden of proof. In order to receive the relief they desired, the plaintiffs had to prove, among other things, that it was the acts of the defendants in their maintenance and operation of this drain and diversion structure that caused plaintiffs' injury. We find the testimony of plaintiffs' expert witness inconclusive on the point of causation. As such, plaintiffs have failed in their burden of proof to show defendants caused their injury, and they are therefore entitled to no relief.

After a full review of the record, we find the decision of the District Court to be correct and should therefore be affirmed.

AFFIRMED.

HOWARD T. SCHNEEKLOTH ET AL., APPELLANTS, V. COUNTY OF SARPY, APPELLEE.

335 N.W.2d 296

Filed June 17, 1983. No. 82-104.

1. **Eminent Domain: Fees.** In a condemnation proceeding, if an appeal is taken from the award of the appraisers by the condemnee and the amount of the final judgment in the District Court is less than 15 percent more than the amount of the award of the appraisers, the condemnee is not entitled to an award for attorney and expert witness fees. Neb. Rev. Stat. § 76-720 (Reissue 1981).
2. **Eminent Domain: Damages.** In a condemnation proceeding, in the absence of evidence to the contrary, it will be presumed that the amount of an award of damages by appraisers and the amount of the verdict of the jury for damages on which final judgment was entered were each duly and properly determined according to law.

Appeal from the District Court for Sarpy County: GEORGE H. STANLEY, Judge. Affirmed.

John E. Rice, for appellants.

Patrick Kelly, County Attorney, for appellee.

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

MCCOWN, J.

This is a condemnation proceeding in which the jury verdict for the total damages sustained by the condemnees was $111,151.50. Judgment was entered in that amount and the condemnees' request for allowance of attorney fees and costs was denied.

On March 4, 1980, Sarpy County, as condemnor, filed a condemnation proceeding in the county court to acquire lands for the construction of a road across the condemnees' property. The county sought fee title to the right-of-way and temporary construction easements.

Appraisers were duly appointed, viewed the property, heard the testimony of all interested parties, and on April 11, 1980, filed their return, assessing the condemnees' damages resulting from the taking at $108,750, which amount was deposited in the county court by the condemnor.

On May 8, 1980, the condemnees filed a notice of appeal from the award of the appraisers on the ground that the damages were insufficient.

On June 17, 1980, the condemnor and the condemnees entered into a stipulation which recited in part that as part of the condemnation proceedings the condemnor was required to remove an earthen dam embankment and drain the pond, and that the removal required an engineering design to properly drain the water and replace the dam structure. Such design and construction was to be at the cost of the condemnor. The parties agreed that it would be in the interests of each to allow the condemnees to design and construct the new dam structure so that the entire structure would be on their land. The con-

demnor agreed to pay condemnees the sum of $15,000 as a complete and total allowance for the construction of the replacement dam, which dam was to be designed by and meet the requirements of the Soil Conservation Service. The stipulation then provided that with the $15,000 allowance the condemnees would be completely responsible for the construction without further recourse to the condemnor, and that the stipulation was "without prejudice to the remaining issues involved in the condemnation proceedings, and shall be conclusive only as to the dam replacement." The replacement dam was built by the condemnees and the condemnor paid the agreed amount of $15,000.

On August 25, 1980, the condemnees filed their petition on appeal in the District Court, alleging that the sum assessed by the appraisers was grossly inadequate. Trial of the appeal was had before a jury which returned its verdict on October 27, 1981, finding the total damages sustained by the condemnees to be $111,151.50.

Meanwhile, the stipulation and evidence of the payment of the $15,000 had been filed in the condemnation proceedings, and on November 30, 1981, the condemnees moved the District Court to enter final judgment finding that the total amount due the condemnees as compensation for the taking and damaging of the property was $126,151.50, constituting the sum of the jury verdict plus the $15,000 amount paid under the stipulation.

On December 11, 1981, the condemnor filed its motion to enter final judgment in the amount of the jury verdict, and to deny the condemnees attorney fees and expert witness fees. On January 12, 1982, the District Court found generally in favor of the condemnor county and entered final judgment in favor of the condemnees in the amount of $111,151.50, the amount of the jury verdict, and denied the condemnees' request for allowance of attorney fees and costs.

The condemnees filed a motion for new trial and both parties filed a motion requesting the court to determine the amount of interest owing on the judgment. An evidentiary hearing was held on the motions on February 3, 1982. At the evidentiary hearing the parties reached agreement on the interest issue and that issue was removed. The District Court denied the motion for new trial and the condemnees have appealed.

The basic issue on this appeal is whether the $15,000 paid by the condemnor to the condemnees for the construction of the replacement dam must be added to the jury's verdict to determine the amount of the final judgment to be entered in this proceeding. The issue involves only the allowance of attorney and expert witness fees under the provisions of Neb. Rev. Stat. § 76-720 (Reissue 1981). That statute provides in part: "If an appeal is taken from the award of the appraisers by the condemnee and the amount of the final judgment is greater by fifteen per cent than the amount of the award . . . the court may in its discretion award to the condemnee a reasonable sum for the fees of his or her attorney and for fees necessarily incurred for not more than two expert witnesses."

In the case at bar there is no contention that the jury was improperly instructed, nor that its verdict was invalid for any reason. Neither is there any evidence that the award of the appraisers did not include all elements of damage resulting from the taking. If the $15,000 stipulated payment is added to the jury verdict for purposes of determining a final judgment amount, but not to the award of the appraisers, the final judgment would be 15 percent greater than the award of the appraisers and the condemnees would be entitled to recover reasonable attorney and witness fees. If the $15,000 is added to both the award of the appraisers and the jury verdict, or if the $15,000 is not added to either of them, the amount of the final judgment is not greater by

15 percent and the condemnees are not entitled to attorney or witness fees.

Some additional facts are appropriate. The record indicates that the right-of-way being condemned here crossed the pond on the condemnees' land at a point above the existing dam. The original design plan of construction was that the existing dam would be removed and the pond area drained. The new roadway was to be constructed so that the roadway would create a replacement dam and pond, and a riser was to be installed at the dam location and the surrounding land area cleared, all at the cost of the condemnor. This was the design plan of construction that was presented to the appraisers.

Testimony of one of the original appraisers at the hearing on the motion for new trial indicates that in making their award the appraisers did not award anything for the loss of the existing dam, presumably because they regarded the relocated dam of the roadway as a replacement. He also testified that the award of the appraisers included all the damages suffered by the condemnees by reason of the taking, including the loss of the land, the severance damages, and any other damage.

Following the award of the appraisers it is apparent that both parties agreed that the plan of construction should be changed, as detailed by the stipulation. Instead of the new roadbed being constructed to serve as a dam as well as a roadway at the cost of the condemnor, the revised construction plan placed the location of the dam at the edge of the right-of-way and provided that the condemnees would construct the replacement dam, rather than the condemnor. The agreed-upon amount of $15,000 was the total allowance to the condemnees for the construction of the relocated replacement dam. There is no evidence that the change in construction design and relocation of the replacement dam would either increase or decrease the total damages suffered by the condemnees as a result of the taking.

The evidence is clear that all parties entered into the stipulation agreement openly, voluntarily, and in good faith. There was no concealment or misrepresentation, and all parties fully performed and carried out their obligations under the stipulation.

In the case at bar there can be no question that the award of the appraisers was $108,750, and the verdict of the jury and the final judgment thereon was $111,151.50. In the specific language of § 76-720 the final judgment is not greater by 15 percent than the amount of the award.

The condemnees urge that we look behind the jury verdict and the judgment on it and determine that the jury did not include any element of damage resulting from the relocated replacement dam. We decline to do so.

Under present statutes no record is kept of the proceedings before the board of appraisers, and in the present case no bill of exceptions has been filed showing the evidence presented to the jury in the District Court. The record indicates that the award of the appraisers included all damages suffered by the condemnees by reason of the taking, and there is literally no evidence that the verdict of the jury did not include all damages as well.

The District Court specifically found that if the condemnees' motion to include the $15,000 stipulated sum as additional damages was meritorious, then that amount should be added to the county court appraisers' award and not to the District Court verdict. If the $15,000 cost of relocating and constructing the replacement dam was not considered by either the board of appraisers or by the jury, and that amount was added to both, or to neither, the final judgment would still be less than 15 percent more than the award of the appraisers.

In a condemnation proceeding, if an appeal is taken from the award of the appraisers by the condemnee and the amount of the final judgment in the District Court is less than 15 percent more than the

amount of the award of the appraisers, the condemnee is not entitled to an award for attorney and expert witness fees. § 76-720.

In a condemnation proceeding, in the absence of evidence to the contrary, it will be presumed that the amount of an award of damages by appraisers and the amount of the verdict of the jury for damages on which final judgment was entered were each duly and properly determined according to law.

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

AFFIRMED.

WHITE, J., dissenting.

To acquire the necessary land and right-of-way for their improvements, Sarpy County paid appellants $126,151.50. The appraisers had awarded $108,750. It is obvious that appellants received an increase in the appraisers' award of more than 15 percent, thereby triggering the attorney fee provision of Neb. Rev. Stat. § 76-720 (Reissue 1981). To interpret the words "final judgment" to exclude amounts secured by partial voluntary settlements after the appraisers' award is unrealistic and unwarranted.

KRIVOSHA, C.J., and CAPORALE, J., join in this dissent.

IN RE 1981-82 COUNTY TAX LEVY BY SAUNDERS COUNTY BOARD OF EQUALIZATION.
ERWIN MATULKA, APPELLANT, V. COUNTY BOARD OF EQUALIZATION ET AL., APPELLEES.
IN RE 1981-82 COUNTY TAX LEVY BY DAWES COUNTY BOARD OF EQUALIZATION.
BRUCE T. ISKE, APPELLANT, V. COUNTY BOARD OF EQUALIZATION ET AL., APPELLEES.

335 N.W.2d 299

Filed June 17, 1983. Nos. 82-248, 82-324.

Schools and School Districts: Taxation. A taxpayer objecting to the

setting of a nonresident high school tuition levy pursuant to Neb. Rev. Stat. § 79-436 (Reissue 1981) must give notice of appeal within 10 days after the setting of the levy by the county board of equalization.

Appeal from the District Courts for Saunders and Dawes Counties. BRYCE BARTU and PAUL D. EMPSON, Judges. Affirmed.

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

James B. Gessford of Perry, Perry, Witthoff, Guthery, Haase & Gessford, P.C., for appellees School District of Wahoo et al.

Terrance O. Waite of Smith, King & Waite, for appellee School District of Hay Springs.

H. W. Snyder, for appellee School District of Hemingford.

William L. Howland, Dawes County Attorney, for appellee Dawes County Board of Equalization.

James W. Slavik of Crites, Shaffer & Slavik, for appellee School District of Chadron.

William L. Howland of Bump, Howland & Watson, for appellee School District of Crawford.

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

KRIVOSHA, C.J.

Both of these appeals, which were tried separately, one in the District Court for Saunders County, Nebraska, and the other in the District Court for Dawes County, Nebraska, but argued to this court together, present the single question of whether a taxpayer desiring to appeal the levy of a tax sufficient to pay nonresident high school tuition pursuant to Neb. Rev. Stat. § 79-436 (Reissue 1981) must give notice of appeal within 10 days of the action of the board, or whether the taxpayer has 20 days in which to give notice of intention to appeal. Both trial

courts, deciding the issue separately, determined that a taxpayer desiring to appeal the setting of a tax levy for nonresident high school tuition must do so within 10 days of the board's action and, accordingly, dismissed each of the actions as having been filed untimely. We believe that both of the District Courts were correct and we affirm each of the judgments.

The factual situations in each case are without dispute and, except for the time in which the appeal was perfected, are not of any particular significance to the issues. Briefly stated, in case No. 82-248 the Saunders County Board of Supervisors, sitting as the Saunders County Board of Equalization, set the nonresident high school tuition levy pursuant to § 79-436 on September 16, 1981. On October 5, 1981, Erwin Matulka, a taxpayer owning real estate in Saunders County, filed a notice of appeal, praecipe for transcript, and appeal bond in the District Court for Saunders County, Nebraska, pursuant to Neb. Rev. Stat. § 77-1606 (Reissue 1981). As the dates indicate, the notice of appeal was filed more than 10 days, but less than 20 days, after the action of the board of equalization.

In case No. 82-324 the Dawes County Board of Equalization set the nonresident high school tuition levy on September 15, 1981. On October 5, 1981, Bruce Iske, a taxpayer and owner of property within a nonresident high school district in Dawes County, Nebraska, filed his notice of appeal, praecipe for transcript, and appeal bond in the District Court for Dawes County, Nebraska, pursuant to § 77-1606. As in the Matulka case, the Iske notice of appeal was filed more than 10 days, but less than 20 days, after the action of the board of equalization.

As we indicated at the outset, there is but one narrow legal question presented to us by both of these appeals. If the taxpayer was required to file his notice of appeal within 10 days following the action of the county board, then the failure to do so

was jurisdictional and the District Court was without jurisdiction to hear the appeal. See *Drier v. Knowles Vans, Inc.*, 144 Neb. 619, 14 N.W.2d 222 (1944). See, also, *Taylor Dairy Products Co. v. Owen*, 139 Neb. 603, 298 N.W. 332 (1941). On the other hand, if both Matulka and Iske had 20 days in which to perfect their separate appeals, each trial court was in error in disposing of the cases based upon the parties' failure to timely file their separate notices. One would anticipate that a reading of the statutes would resolve all of these questions. Unfortunately, as is too often the case with regard to appeal statutes, the language of the statutes involved only adds to the confusion.

Section 79-436 imposes upon the county board of equalization the ministerial function of levying a tax for the purpose of paying the cost of nonresident high school tuition. The section provides as follows: "Upon receipt of the proper certificate, the county board of equalization *shall* levy on the actual value of all the taxable property in the said county, except intangible property, a sufficient tax to pay the high school tuition as certified by the county superintendent; *Provided*, the board shall exclude from the levy the actual value of all of the taxable property of any district in which is maintained an approved four year high school, and one half of the actual value of all the taxable property of any district in which is maintained an approved two year high school. *In case a county board of equalization shall fail to make such levy, the county superintendent of each county shall make a suitable levy within five days after the county board shall have adjourned and shall certify the same to the county assessor*, who shall enter upon the tax rolls the levy so made by the county superintendent." (Emphasis supplied.) It is clear from a reading of § 79-436 that the county board of equalization exercises no discretion in this matter. It is required to levy a tax sufficient to raise the money necessary to pay the nonresident

high school tuition as certified by the county superintendent. In fact, if it fails to do so the county superintendent is authorized by statute to take such action. See *Werth v. Buffalo County Board of Equalization*, 187 Neb. 119, 188 N.W.2d 442 (1971).

Section 77-1606, a statute dealing generally with appeals from actions taken by a county board of equalization levying various taxes, including the tax for nonresident high school tuition, then provides in part: "Any taxpayer may appeal from the action of the county board of equalization in making the levy, if in the judgment of such taxpayer the levy is for an unlawful or unnecessary purpose, or in excess of the requirements of a county, *within the same time and in the same manner as appeals are now taken from the action of the county board in the allowance or disallowance of claims against the county. . . .*" (Emphasis supplied.) The fact that § 77-1606 applies to a multitude of taxing actions taken by the county board of equalization and is not limited to the nonresident high school tuition must be kept in mind when looking at its provisions. In view of the language of § 79-436, which imposes a mandatory duty upon the county board, the grounds upon which such appeal may be taken by a taxpayer under § 77-1606 are fairly limited. We need not for purposes of this appeal discuss that aspect further except to note the distinction between the general use of § 77-1606 and its limited application to § 79-436.

The problem becomes more confused when one attempts to follow the requirements of § 77-1606, which provides that the manner and time for taking the appeal shall be "as appeals are now taken from the action of the county board in the allowance or disallowance of claims against the county." That is so because, unfortunately, the manner and time for the taking of appeals from the action of the county board in the *allowance* of a claim is not the same as it is with regard to *disallowance* of a claim. Neb. Rev. Stat. § 23-135 (Reissue 1977) provides in part:

"When the claim of any person against the county is *disallowed* in whole or in part by the county board, *such person* may appeal from the decision of the board to the district court of the same county, by causing a written notice to be served on the county clerk, within *twenty days* after making such decision and executing a bond to such county, with sufficient security, to be approved by the county clerk, conditioned for the faithful prosecution of such appeal, and the payment of all costs that shall be adjudged against the appellant. . . ." (Emphasis supplied.) It should be noted that § 23-135 is limited to appeals where the claim is disallowed. Neb. Rev. Stat. § 23-136 (Reissue 1977), on the other hand, pertains to the *allowance* of claims and reads: "*Any taxpayer* may likewise appeal from the *allowance* of any claim against the county by serving a like notice within *ten days* and giving a bond similar to that provided for in section 23-135." (Emphasis supplied.)

One may ask why the Legislature provided that a claimant whose claim has been disallowed should have 20 days in which to appeal while a taxpayer objecting to the payment of a claim is limited to 10 days in which to appeal. A reading of the statutes in light of what is involved in each case gives some answer to that question. Section 23-135 grants a right to the holder of a claim which has been disallowed. The claimant is being denied specific relief. The county clerk is granted 5 days to notify the claimant of the disallowance. It is reasonable to assume that the Legislature recognized that if the county clerk has 5 days within which to give such notice in writing and several more days may be involved in the individual receiving such notice, then limiting the right of appeal of one about to lose a claim to 10 days would be unfair. Where, however, the county has allowed the claim and wishes to proceed to pay the claim, it seems reasonable that a third person who seeks to object to such payment and thereby prevent

the county from acting should be required to make such objection known as quickly as possible. That is the reason that § 23-135 refers to the appeal being taken by the person whose claim is disallowed while § 23-136 refers to any taxpayer.

It was, in effect, that very distinction which this court made in the case of *Sommerville v. Board of County Commissioners*, 116 Neb. 282, 216 N.W. 815 (1927), *reh'g* 117 Neb. 507, 221 N.W. 433 (1928). The *Sommerville* case is similar to the case at bar. As in the instant case, an appeal was taken from the action of the county board of equalization more than 10 days following the board's action in setting a levy. After noting the difference in the two statutes, one of which required an appeal within 10 days from the allowance of the claim, and the other of which permitted an appeal to be taken within 20 days from the disallowance of the claim, we said at 509-10, 221 N.W. at 433-34: "Thus it will be seen that two kinds of notices are provided for, to wit: Under section 865 [now § 23-135], a claimant (a party having a direct interest in the matter) must serve notice of appeal within twenty days after the board's decision; while under section 866 [now § 23-136], a taxpayer (a party having an indirect interest in the matter) must serve notice of appeal within ten days after the board's decision. As we have seen, Sommerville, the appellant herein, is a taxpayer, having no direct interest in the matter before the board, yet clothed with an indirect interest as such taxpayer, and therefore he was required to serve notice of appeal within ten days from the decision sought to be appealed from, which he did not do. Thus considering section 865 and section 866, we are constrained to conclude that whether such notice shall be one served within twenty days, or one served within ten days, depends upon whether the challenge is made by one having a direct interest as the owner of a claim, or by one having an indirect interest as a taxpayer."

Whether one is viewed as having a direct interest or an indirect interest may not be nearly as important as whether one is viewed as the claimant whose claim is disallowed or, instead, as a taxpayer appealing the allowance of a claim. In view of the mandatory language of § 79-436, we believe that the action by the county board in setting the levy is more like the allowance of a claim than the disallowance of a claim. For that reason, if a taxpayer who is not the person to whom payment is made objects to the setting of the levy and wishes to appeal, the appeal must be viewed as an action taken by a taxpayer to appeal the allowance of a claim under § 23-136 and requires the giving of the notice of appeal within 10 days. To hold otherwise would make no sense at all.

While it may be argued that the language of § 77-1606 could be made clearer, we believe that under the facts as presented to us the trial courts in each of the cases were correct in holding that the taxpayer appealing from the setting of the nonresident tuition levy was required to give such notice within 10 days and, having failed to do so, the District Court was without jurisdiction. The judgment of each of the trial courts is affirmed.

AFFIRMED.

ALAN H. KIRSHEN, APPELLANT, V. SHIRLEY H. KIRSHEN, APPELLEE.

335 N.W.2d 303

Filed June 17, 1983. No. 82-253.

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

Alan H. Kirshen, pro se.

Jerome J. Ortman, for appellee.

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

PER CURIAM.

This is an appeal from a decree of dissolution of marriage.

The court, having reviewed the record in this case de novo, agrees with the result reached by the trial court. The judgment is affirmed. Appellee is allowed the sum of $750 for the services of her attorney in this court.

AFFIRMED.

GURTHA LOUISE NOELL, APPELLANT, V. JACK DALE NOELL, APPELLEE.

335 N.W.2d 303

Filed June 17, 1983. No. 82-276.

1. **Deeds: Reformation.** In order to warrant the reformation of a written instrument in any material respect, the evidence must be clear, convincing, and satisfactory; and until overcome by such proof, the terms of the instrument must stand as evidencing the intention of the parties.
2. **Partition: Appeal and Error.** An action for partition is triable de novo on the record in the Supreme Court.
3. **Decedents' Estates.** Where an ancestor dies intestate his lands descend instantly to his heirs. It does not require settlement of his estate or a probate order declaring heirship to vest his title.

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

James T. Gleason of Swarr, May, Smith, Andersen & Jensen, for appellant.

Robert G. Decker, for appellee.

MCCOWN, HASTINGS, and SHANAHAN, JJ., and BRODKEY, J., Retired, and COLWELL, D.J., Retired.

MCCOWN, J.

This is a proceeding in equity for the reformation

of a deed to a tract of real estate in Sarpy County, Nebraska, and, in the alternative, for partition of the real estate described in the deed. The District Court dismissed plaintiff's cause of action for reformation of the deed, found that the plaintiff and defendant each owned an undivided one-half interest in the real estate, and ordered partition accordingly. The plaintiff has appealed.

The plaintiff, Gurtha Louise Noell, and the defendant, Jack Dale Noell, were married on May 26, 1948. A few months later Gurtha's father, Louis Armbrust, died intestate. At the time of his death he was the owner of the quarter section of land involved here, together with two other parcels of real estate.

The final decree in the estate of Louis Armbrust assigned the real estate one-third to Gurtha S. Armbrust, widow of the decedent; two-ninths to the plaintiff; two-ninths to plaintiff's brother, Sturgeon J. Armbrust; and two-ninths to the plaintiff's sister, Emma Belle Dodson. Thereafter, the widow and her children and their spouses agreed to trade and exchange the various undivided interests of the widow and the three children so that each child would receive one parcel of land in individual ownership rather than an undivided interest in all the real estate parcels. Inequities in the value of the three parcels and the widow's interest in them were settled by cash payments, and deeds were drawn up so that each of the three children would receive one of the three parcels of land.

On August 4, 1949, the deed to the property involved in this proceeding was executed by Gurtha S. Armbrust, the widow of Louis Armbrust, Sturgeon J. Armbrust and LaVada M. Armbrust, his wife, and Emma Belle Dodson and Leo H. Dodson, her husband, conveying to Gurtha Louise Noell and Jack D. Noell, wife and husband, as joint tenants with right of survivorship. The deed described the quarter section of land involved in this proceeding. At approximately the same time the plaintiff and defend-

ant, as wife and husband, joined with the other heirs and their spouses in conveying the remaining two parcels to the other two children and their spouses.

After the 1949 deed was executed the plaintiff and defendant lived on the property involved here until 1956. Some improvements were added and the property has been mortgaged from time to time. Plaintiff and defendant moved off the property in 1956, and since then the property involved here has been rented.

In 1980 a proceeding for dissolution of the marriage between plaintiff and defendant was commenced in the State of Texas. On January 9, 1981, plaintiff filed her petition in this proceeding, seeking to reform the deed of August 4, 1949, to reflect an intention to vest title to the property in the plaintiff individually, rather than in the plaintiff and defendant as joint tenants. In the alternative plaintiff prayed for partition of the real estate. The defendant cross-petitioned for partition on the basis of an undivided one-half interest each.

Trial was had to the court on March 29, 1982. At the conclusion of all the evidence the court dismissed plaintiff's cause of action for reformation, fixed the shares of plaintiff and defendant as an undivided one-half interest each, and ordered partition accordingly. Plaintiff has appealed.

The plaintiff contends that the 1949 deed naming plaintiff and defendant as joint tenants with right of survivorship should be reformed to convey the interests of the grantors to her individually, on the ground of mistake. The plaintiff asserts that the deed represented her aggregated inheritance and that the parties intended that she be the sole owner.

In order to warrant the reformation of a written instrument in any material respect, the evidence must be clear, convincing, and satisfactory; and until overcome by such proof, the terms of the instrument must stand as evidencing the intention of the

parties. *Schweitz v. State Farm Fire & Cas. Co.*, 190 Neb. 400, 208 N.W.2d 664 (1973).

In the case at bar the plaintiff's sister, one of the grantors, testified that the parties intended to transfer title to the real estate involved here to the plaintiff and the plaintiff's husband. The plaintiff herself admitted that she was aware that her husband was to be named as a grantee on the deed and that she accepted the deed as it was. The plaintiff's sister-in-law also testified that she was named as a joint tenant with her husband in one of the deeds executed at the same time as the deed to the plaintiff and her husband.

There is simply no evidence anywhere in the record that any of the parties to the deed of August 4, 1949, were acting under any mistake or intended to execute a deed different than that which they executed. The trial court was correct in dismissing the claim for reformation of the deed.

An action for partition is triable de novo on the record in the Supreme Court. *Malcom v. White*, 210 Neb. 724, 316 N.W.2d 752 (1982).

In the case at bar the plaintiff acquired an undivided two-ninths interest in the quarter section involved here by inheritance from her father prior to the execution of the deed of August 4, 1949. Where an ancestor dies intestate his lands descend instantly to his heirs. It does not require settlement of his estate or a probate order declaring heirship to vest his title. See *Evans v. Evans*, 199 Neb. 480, 260 N.W.2d 188 (1977).

The grantors in the 1949 deed did not and could not convey to plaintiff and defendant the two-ninths interest which plaintiff already owned individually. The grantors in the 1949 deed could and did convey to plaintiff and defendant as joint tenants a seven-ninths interest in the property. Under that deed and on the facts reflected in this record, the plaintiff acquired an undivided seven-eighteenths interest and the defendant acquired an undivided seven-

eighteenths interest in the property by virtue of the deed.

The plaintiff previously owned an undivided four-eighteenths interest, and her present interest is therefore eleven-eighteenths and the defendant's interest is seven-eighteenths. The shares of the parties are confirmed in those proportions and partition should be made accordingly. As so modified the judgment of the District Court is affirmed.

AFFIRMED AS MODIFIED.

JOHN J. PLETTNER AND DORIS E. PLETTNER, HUSBAND AND WIFE, ET AL., APPELLEES, V. EARL W. SULLIVAN, SR., and RUTH E. SULLIVAN, HUSBAND AND WIFE, APPELLANTS.

335 N.W.2d 534

Filed June 17, 1983. No. 82-291.

Adverse Possession: Easements. Adverse possession requires possession of another's land, while a prescriptive right involves only adverse use of another's land.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed in part as modified, and in part reversed.

Lathrop, Albracht & Swenson, and Richard A. Bruckner, for appellants.

E. Terry Sibbernsen of Welsh, Sibbernsen & Roach, for appellees.

MCCOWN, CAPORALE, and SHANAHAN, JJ., and BRODKEY, J., Retired, and COLWELL, D.J., Retired.

SHANAHAN, J.

Defendants, Earl W., Sr., and Ruth E. Sullivan, appeal the decree of the District Court for Douglas County that the plaintiffs, John J. and Doris E. Plettner and Joel A. and Bernice Plettner, through

adverse possession, have acquired title to certain real estate otherwise described in the defendants' deed and, further, have acquired a prescriptive easement in part of the road located in the disputed area. Sullivans claim that Plettners have not satisfied the elements of adverse possession and a prescriptive right. We affirm in part as modified and reverse in part.

Plettners' land, acquired by deed, adjoins Sullivans' land located to the east. Both Plettners and Sullivans have a common grantor, Lehar Valley Farms, which is also known as Fremont Hatchery (Hatchery).

In 1962 Plettners bought their parcel from the Hatchery. From 1962 until 1978 the Plettners and the Hatchery jointly used a road which provided access to the Plettner tract located west of the road. On the east side of this road and on the land owned by the Hatchery, there were buildings designated as "chickenhouse #3" and "chickenhouse #4." Chickenhouse #4 was located near the southwest corner of the Hatchery tract and was some 300 feet in length, running north and south. Attached at the northeast corner of chickenhouse #4 was a fence which, likewise, was attached to the southwest corner of chickenhouse #3 located north of chickenhouse #4. From chickenhouse #3 a fence then ran north to the northern boundary of the property. The road which provided common access for Plettners and the Hatchery ran parallel with and the length of chickenhouse #4.

In 1963 Plettners planted a row of trees 20 feet west of chickenhouse #4 and parallel to the road. In 1972 Plettners improved the road by making it "rock-topped." From 1971 to 1973 the Plettners built three cabins west of the road, for which the only access was the road mentioned. Plettners believed the boundary was located 10 feet west of chickenhouses #3 and #4, respectively. The Hatchery did not conduct any of its activities on any land

lying west of the road. This situation persisted until 1978, when the Hatchery ceased its operations on the tract east of the road.

On July 28, 1979, Sullivans bought their tract from the Hatchery and then obtained a survey for their property. The Sullivan survey disclosed that the true boundary between the Plettner parcel and the tract acquired by the Sullivans was actually 30 feet west of the chickenhouses. Based on the survey, Sullivans erected a fence on August 8, 1979. This fence was located in the road west of the chickenhouses and prevented access to the Plettner parcel from the road. On August 10, 1979, Plettners filed a quiet title action.

The trial court held that Plettners had acquired by adverse possession all land lying west of a line located 10 feet from the chickenhouses. Also, the trial court held that each party acquired a prescriptive easement 10 feet wide on each side of the boundary determined with respect to chickenhouse #4, so that each of the parties acquired a "reciprocal easement" as a result of their adverse possession. Such "reciprocal easement" was restricted to access for land on either side of the road, with the additional restriction on the Sullivan prescriptive easement that it existed for "building maintenance purposes only." As a consequence of such determination by the District Court, Sullivans lost approximately one-half of the road to Plettners through adverse possession but gained a prescriptive easement in that part of the road gained by the Plettners.

On appeal the crucial question relates to exclusive possession on the part of Plettners.

Because this is an equity action there is a trial de novo in this court. However, regarding questions of fact, this court recognizes that the trial court observed the witnesses and their manner of testifying. *Wiedeman v. James E. Simon Co., Inc.*, 209 Neb. 189, 307 N.W.2d 105 (1981).

To establish title by adverse possession the claim-

ant must show by a preponderance of evidence that such claimant has been in actual, open, exclusive, continuous, and adverse possession under a claim of ownership for 10 years. *Wiedeman v. James E. Simon Co., Inc.*, *supra*. To acquire a prescriptive easement a claimant must prove virtually the same elements required for adverse possession, namely, the claimant must show that the use and enjoyment of the land is exclusive, adverse, continuous, open, and under claim of right for 10 years. *Masid v. First State Bank*, 213 Neb. 431, 329 N.W.2d 560 (1983).

Acquisition of a prescriptive easement differs in certain features from the acquisition of title by adverse possession. See, Annot., 27 A.L.R.2d 332, n.5 at 334-35 (1953); *Thompson v. Schappert*, 229 Iowa 360, 294 N.W. 580 (1940). Adverse possession provides the claimant with title to the land, while a prescriptive easement provides the claimant with only a limited use or enjoyment of another's land. 3 Am. Jur. 2d *Adverse Possession* § 4 (1962). See *Elsasser v. Szymanski*, 163 Neb. 65, 77 N.W.2d 815 (1956). Also, the conduct required for adverse possession differs from that required for a prescriptive easement. For adverse possession there must be possession and occupation of the land, which involves acts of dominion by a claimant which will place the owner on notice that the claimant is asserting ownership of the land. 3 Am. Jur. 2d *Adverse Possession*, *supra*; 5 G. Thompson, Commentaries on the Modern Law of Real Property § 2542 at 602 (Repl. 1979). See, also, *Weiss v. Meyer*, 208 Neb. 429, 303 N.W.2d 765 (1981). Such adverse possession must exclude all others, including the true owner. 2 C.J.S. *Adverse Possession* § 55 (1972); see *Hutson v. The Rush Creek Land and Livestock Co.*, 206 Neb. 658, 294 N.W.2d 374 (1980). In contrast, to acquire a prescriptive easement there needs to be only an adverse use for the prescriptive period. 3 Am. Jur. 2d *Adverse Possession*, *supra*; 2 G. Thompson, Commentaries on the Modern Law of Real Property § 335

at 140-44 (Repl. 1980); 5 G. Thompson, Commentaries on the Modern Law of Real Property, *supra*. See, also, *Masid v. First State Bank*, *supra*.

In the present case Plettners occupied the land lying west of the road. The Plettners planted trees at the west edge of that road in 1963. The evidence is clear that Plettners claimed as their own that land west of the road. Plettners demonstrated their dominion over the land west of the road, and their occupancy of the land was to the exclusion of all others. Plettners, by a preponderance of the evidence, have proved the elements of adverse possession regarding the land west of the road. The District Court judge was correct in determining the boundaries, but should have excluded the road from the area acquired by adverse possession. Regarding the road itself, Plettners have failed to prove that they occupied the road, to the exclusion of the Hatchery. The absence of the required exclusivity prevents Plettners' acquisition of title by adverse possession with respect to the road.

The question remains whether Plettners have acquired a prescriptive easement in the jointly used road. One acquires a prescriptive easement through use which is exclusive, adverse, under a claim of right, continuous and uninterrupted, and open and notorious for the full prescriptive period. Cf. *Masid v. First State Bank*, *supra*. Where the claimant-user shows that the use has been open, visible, continuous, and unmolested for the prescriptive period, the use is presumed to be under a claim of right. Cf. *Fischer v. Grinsbergs*, 198 Neb. 329, 252 N.W.2d 619 (1977).

The evidence establishes that Plettners used the road after their purchase of the land in 1962 until their use was prevented by the fence erected by Sullivans in 1979. The Hatchery acknowledged that Plettners had a right to use the road for access to Plettners' land, and certainly such use of the road was viewed by Plettners as vital to the continued

enjoyment of their land west of the road. The common or joint use of the road by the Hatchery and Plettners existed for a period in excess of 16 years, until the Hatchery conveyed the land east of the road to Sullivans in 1979.

Finally, while Plettners lacked exclusive possession to acquire title to the road, they did have exclusive use to gain a prescriptive easement. Whereas the exclusivity required for adverse possession relates to "all others" or to "all the world," the exclusive use for acquisition of a prescriptive right or prescriptive easement is not so comprehensive. The word *exclusive* in reference to a prescriptive easement does not mean that there must be use only by one person but, rather, means that the use cannot be dependent upon a similar right in others, i.e., the user must exclude the public at large. Cf. *Scoville v. Fisher*, 181 Neb. 496, 149 N.W.2d 339 (1967). Exclusion of the owner is not required for acquisition of a prescriptive easement. Cf. 25 Am. Jur. 2d *Easements and Licenses* § 59 (1966). Here, the Plettners' use excluded the public at large.

Consequently, Plettners did acquire a prescriptive easement in the road. Sullivans, as successors to the Hatchery, still own the land on which the road in question is located, but Sullivans' land is subject to the prescriptive easement in the road.

For the reasons given above, the judgment and decree of the District Court is affirmed with respect to the adverse possession of Plettners, except there is no adverse possession of that land on which the road is located. The judgment and decree of the District Court is reversed concerning the reciprocal easements, and the District Court is directed to enter judgment that Plettners have a prescriptive easement regarding the road in question.

AFFIRMED IN PART AS MODIFIED,
AND IN PART REVERSED.

RONALD BICKFORD, APPELLANT, V. BOARD OF EDUCATION OF SCHOOL DISTRICT NO. 82 OF HALL COUNTY, NEBRASKA, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLEE.

336 N.W.2d 73

Filed June 17, 1983. No. 82-313.

1. **Teacher Contracts.** The deliberate disregard by a teacher or guidance counselor of the orders and directions given him by the principal of the school, who was his supervisor, constitutes "neglect of duty," which is a statutory ground for the discharge of the teacher by the school board, and the cancellation of the teacher's contract with the school board.
2. _____. The failure or refusal of a teacher or guidance counselor to comply with or fulfill the duties of his position, as set out in the written guidelines of the school outlining such duties, constitutes "neglect of duty" under the statutory grounds for termination of the teacher.
3. _____. Untruthful statements made by a teacher or guidance counselor to his superior constitutes "unprofessional conduct" and may be the basis for the termination of the teacher's contract by the school board.
4. **Pleadings: Appeal and Error.** The petition filed in error proceedings must specifically set out each of the alleged errors relied upon.

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

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

D. Steven Leininger of Luebs, Dowding, Beltzer, Leininger, Smith & Busick, for appellee.

BOSLAUGH, MCCOWN, and HASTINGS, JJ., and BRODKEY, J., Retired, and COLWELL, D.J., Retired.

BRODKEY, J., Retired.

This is an appeal in a proceeding in error to review an order of the board of education of school district No. 82 of Hall County in which the board terminated appellant Bickford's teaching contracts for the years 1980-81 and 1981-82. Bickford then filed his petition in error in the District Court for Hall County,

and the bill of exceptions containing the testimony before the board of education was received as an exhibit in the hearing before the District Court, as were also the exhibits received in evidence at such hearing. The District Court rendered its decision on February 5, 1982, finding that the plaintiff in error did, in fact, breach the terms of his contracts, for the reasons set out in the journal entry of the judgment, and found that the evidence submitted to the board of education was sufficient as a matter of law to sustain the decision of the board in discharging Bickford from his employment with Northwest High School; and the court therefore found in favor of the defendant on the plaintiff's petition in error and affirmed the decision entered by defendant board of education on July 22, 1981, finding specifically that Bickford had breached the terms of his contracts because of neglect of duty and unprofessional conduct. Bickford then perfected his appeal to this court. We affirm.

At the outset it should be noted that there are two separate and distinct methods by which teaching contracts may be terminated. The first is by virtue of the reasons and for the causes set forth in the applicable statutes of the State of Nebraska dealing with said matters; and the second is by virtue of the provisions of the teaching contract itself. In any event it is the general rule that contracts include applicable statutory provisions, whether specifically mentioned or not, and therefore the grounds for termination in this case would and do include both the statutory provisions and the specific additional contractual provisions, if valid.

We first examine the pertinent provisions of Bickford's contract with the school district, copies of which are contained in the record of this case as exhibits. Said contract contains the following provision, among others: "FOURTH: During a school year covered by this agreement, in the event the Teacher violates any of the provisions of this agree-

ment, or performs any act or does anything which is materially harmful to the employer, or which, substantially inhibits the Teacher's ability to discharge the duties as set forth herein, including, but not limited to (a) becoming legally disqualified to teach in the State of Nebraska; (b) participation in any fraud; (c) causing any intentional damage to property; (d) engaging in any unlawful act; (e) becoming physically or mentally disabled; (f) insubordination; (g) *neglect of duty*; or (h) immorality; then the Teacher may be discharged; provided the Teacher has been given the cause or causes for discharge in writing and has been given an opportunity for and due notice of a hearing before the Board prior to official action being taken. Nothing contained herein shall prevent the suspension of the teacher, with pay, from his/her duties during the pendency of such proceedings." (Emphasis supplied.)

The pertinent statutory provisions applicable to Class VI school districts (which includes Grand Island) during the time frame involved in this case are set out in Neb. Rev. Stat. § 79-1254 (Reissue 1981), which, so far as pertinent to this case, reads as follows: "The original contract of employment with an administrator or a teacher and a board of education of a Class I, II, III, or VI district shall require the sanction of a majority of the members of the board. Except for the first two years of employment under any contract entered into after February 26, 1975, any contract of employment between an administrator or a teacher who holds a certificate which is valid for a term of more than one year and a Class I, II, III, or VI district shall be deemed renewed and shall remain in full force and effect until a majority of the members of the board vote on or before May 15 *to amend or to terminate the contract for just cause* at the close of the contract period. The first two years of the contract shall be a probationary period during which it may be terminated

without just cause. . . . The secretary of the board shall, not later than April 15, notify each administrator or teacher in writing of any conditions of unsatisfactory performance or other conditions because of a reduction in staff members or change of leave of absence policies of the board of education which the board considers may be just cause to either terminate or amend the contract for the ensuing school year." (Emphasis supplied.)

Then follow provisions in said section that any teacher or administrator so notified shall have a right to file, within 5 days of such notice, a request for a hearing before the board, and upon receipt of the request the board shall order the hearing to be held within 10 days and give notice of the time and place of the hearing to the teacher or administrator; and that, at the hearing, evidence shall be presented in support of the reasons given for considering termination or amendment of a contract, and that the teacher or administrator shall be permitted to produce evidence relating thereto.

The section then continues as follows: "The board shall render the decision to amend or terminate a contract based on the evidence produced at the hearing. *As used in this section and section 79-1254.02, the term just cause shall mean incompetency, neglect of duty, unprofessional conduct, insubordination, immorality, physical or mental incapacity, other conduct which interferes substantially with the continued performance of duties* or a change in circumstances necessitating a reduction in the number of administrators or teachers to be employed by the board of education. No member of the board of education may cast a vote in favor of the election of any teacher when such member of the board is related by blood or marriage to such teacher." (Emphasis supplied.)

We point out, in passing, however, that the foregoing § 79-1254 was repealed and § 79-1254.02 was

amended by 1982 Neb. Laws, L.B. 259, which became operative on September 1, 1982.

Section 1(4) of the new law, L.B. 259, provides: "Just cause shall mean: (a) Incompetency; (b) neglect of duty; (c) unprofessional conduct; (d) insubordination; (e) immorality; (f) physical or mental incapacity; (g) failure to give evidence of professional growth as required in section 7 of this act; or (h) other conduct which interferes substantially with the continued performance of duties."

Likewise, § 4 of L.B. 259 provides: "(1) The contract of any certificated employee . . . may be canceled or amended by a majority of the members of the school board during the school year for any of the following reasons: (a) Upon cancellation, termination, revocation, or suspension of a teacher's certificate, by the State Board of Education, or of the Nebraska Administrative and Supervisory Certificate or the Nebraska Professional Administrative and Supervisory Certificate of any certificated employee whose duties require such a certificate; (b) breach of any of the material provisions of the teacher's or administrator's contract; (c) for any of the reasons set forth in the employment contract; (d) incompetency; (e) neglect of duty; (f) unprofessional conduct; (g) insubordination; (h) immorality; or (i) physical or mental incapacity."

In the instant case, however, it appears that all of the acts and conduct referred to occurred prior to September 1, 1982, the effective date of L.B. 259.

In his journal entry made in connection with his judgment affirming the decision of the defendant board of education, the trial judge made certain findings of fact which find support in the record in this case. Among such findings are the following: "1. The plaintiff, Ronald Bickford, was employed as a tenured guidance counselor for Northwest High School and in charge of the juniors and seniors at said school.

"2. A contract of employment for the 1980-81

school year was in place and said contract had been automatically renewed pursuant to § 79-1254.

"3. The contracts are part of the record and provide that certain actions by a teacher may subject the teacher to discharge, which actions include, *but are not limited to*, neglect of duty.

"4. Following certain events which came to the attention of the school administration, and particularly the Principal, Clayton Luther, *after April 15, 1981*, the administration recommended the discharge of the Plaintiff from his then existing 1980-81 contract and the contract for the 1981-82 school year.

"5. The Plaintiff was provided a notice in writing of the causes which constituted grounds for discharge and a hearing was held before the Defendant Board of Education, after notice, on July 13, 1981.

"6. On July 22, 1981, the Board of Education discharged the Plaintiff from his employment under both contracts and made a written finding that the Plaintiff had breached the terms of the contract because of his neglect of duty and his unprofessional conduct.

"7. The record indicates that Ronald Bickford breached the terms of his 1980-81 contract and the terms of his 1981-82 contract because of his neglect of duty and his unprofessional conduct.

"8. In regard to his unprofessional conduct, the Court finds that the Plaintiff was untruthful in conversations with the Principal, Clayton Luther, on May 8 and May 12, 1981. The Court finds that prior to that time, and around April 13, 1981, Luther directed the Plaintiff to determine which students were having difficulty academically and to notify their parents. The Court further finds that Luther again told this to Plaintiff the following week.

"9. The Court finds that Bickford, on May 8, and again on May 12, 1981, told Luther that he had contacted all the parents as he had been directed by Luther to do. In fact, the Plaintiff had not contacted the parents of [names omitted], although those stu-

dents were having academic difficulty which was known by the Plaintiff before May 8 and May 12, 1981.

"10. In regard to his neglect of duty, the Court finds that he did not adequately or properly perform his duties either as required by Principal Luther or as required by the written standards relating to guidance counselors (Exhibit #3) and adopted by the Defendant, which Plaintiff himself helped author. The Court finds that the Plaintiff failed to register senior students for classes which were necessary to meet graduation requirements and to register senior students with sufficient number of hours to meet graduation requirements. These students were [names omitted].

"11. Although not raised in Plaintiff's Petition-in-Error, the Plaintiff in his brief has alleged that his termination was motivated by Plaintiff's exercise of his First Amendment Rights. The Court finds that Plaintiff's argument on this point is not well taken and that any expression of First Amendment Rights by Plaintiff was not the motivating reason for his termination." (Emphasis supplied.)

On the basis of the above findings the District Court affirmed the decision of the board of education in discharging the plaintiff from his employment with Northwest High School.

The record reveals that, as a matter of fact, Bickford had been recommended for renewal and was automatically renewed under the statute because of the absence of notice of nonrenewal. However, the events that occurred and which led to the problems in this appeal all happened after April 15. The administration was suddenly confronted with problems when they learned that there were many students who had serious graduation problems and who were on the list of students not scheduled to graduate. Calls were made to the parents of the children in question, who indicated and testified that they had no knowledge of any problems with their children

and were not contacted by Bickford, although he had been ordered by Principal Luther to contact the parents of the students having problems in graduating on at least four separate occasions. We quote from the record the testimony of Principal Luther: "Q. Let me take you back a bit before May 13. Can you tell the board whether anything transpired during the week of April 13? A. Week of April 13, in passing, I stopped in Mr. Bickford's office and asked him—told him to make sure that he find out which students were having difficulty academically and to notify the parents so that we did not have any problems come graduation. Q. By when was Mr. Bickford to have notified the parents? A. As soon as possible. . . . Q. What happened next, if anything? A. The week of April 20 I again asked Mr. Bickford to contact the parents and basically asked him how it was coming. We had a discussion at that time. He asked me, 'Is this really my responsibility?' And at that time I said that yes, it was his responsibility, that I wanted him to communicate with the parents. That was on the 23rd of April and on the 24th—Q. . . . A. On the 24th, which was a Friday and 27th, which was a Monday, there was a notice in the bulletin, which basically requested that teachers submit a list to the counselors of those students who were having difficulty and the message was the same in both the bulletins. Q. Did you have a conversation with Mr. Bickford after the 27th? A. The week of the 27th—and I do not remember the exact day—Mr. Bickford came to me with a list of students who were having difficulty. The list was a composite of a list from teachers. At that point, I asked if he had, in fact, contacted the parents and he said that he had not. Q. Did you then direct him to contact the parents? A. Yes, I directed him to contact the parents again. . . . Q. Did you have a conversation with Mr. Bickford on May 8? A. Yes, sir. Very early in the morning, approximately 8:05, I met with Mr. Bickford and specifically asked him if

he had contacted the parents of students who were having difficulties academically. Q. What was Mr. Bickford's answer? A. He said, yes, he had contacted all the parents. Q. What happened then? A. May 8 was a Friday. May 12 I had scheduled conferences with both Mr. Beck and Mr. Bickford for the purposes of evaluation. Again, at that time, I—since I knew that both counselors were going to be gone, I wanted to make sure, if there were any unusual circumstances that Mr. Taylor or myself should be aware of, that we would be aware of them, and again I asked him if he contacted all the parents and he said, 'Yes.' "

In addition there was received in evidence a portion of the handbook governing the duties of the teachers, and particularly § 12.034 with regard to the duties of the guidance staff. Paragraph 4 of that document provides that it is the duty of the guidance staff to register all students in appropriate courses of study. Paragraph 7 states that it is the duty of the guidance staff to make students aware of graduation requirements and communicate with parents any problems that may arise. Bickford assisted in drafting this document.

As a result of Principal Luther's conversations with him, it appears that Bickford inserted in the school bulletins dated Friday, April 24, 1981, and Monday, April 27, 1981, the following: "We are down to approximately three weeks left for seniors. If you have any seniors who may not pass, notify the counselors. If you have any seniors whom you know as of now don't have a prayer of passing your class tell the counselors now."

As a result of the notices, Bickford received a list of some of the students who were having graduation difficulties. His independent attitude with reference to the directions of the principal is well illustrated by his testimony in the record as follows: "Q. What was your understanding of what you were supposed to do in reference to students who were having diffi-

culty? Just what was your understanding? A. . . . I didn't have to, I feel, send out a letter to the parents to scare them in regards to graduation problems. He wasn't in a problem area, as far as graduation was concerned. I knew what the teacher had told me. I knew what the student had told me after I got done talking to him and I didn't do any more sending out anything in regards to the parents on this, but I didn't feel that to send out letters to parents telling them that, 'You're not going to graduate because of these particular (kids names)' would have been any different than sending a letter out to every kid because a student handbook says if you're not passing any class second semester that can be considered as a graduation requirement, and if that's the case and that's in the handbook, then I should have sent letters out to every kid we had in the senior class that was ever on the down list and that's ridiculous, so you have to have some common sense and opinion on the kids that are in trouble and that's what I done."

Bickford deliberately disregarded the orders and directions of his supervisor, the principal of the school, and pitted his own judgment against that of the supervisor, which he had no right to do. As previously stated, subsequent checks with the parents of the children having problems revealed that many of them were not, in fact, notified by Mr. Bickford prior to graduation date that their children had any problems with regard thereto. His refusal to do as the principal ordered, and his deliberate lying to the principal, clearly constitutes neglect of duty, which, under the terms of the contract with the school and the applicable statutory provisions, constitutes "just cause" for termination of the teacher because of its significant effect on the students, parents, and the working relationship which ought to exist between a principal of a school and the guidance counselor.

The record also reveals that Bickford had prob-

lems with certain other students because of his failure to keep them advised as to the requirements for graduation, and he did not check to see that they had the requisite number of hours of credit in the proper courses in order to graduate, as required by the duties of a guidance counselor, contained in the record. This also constitutes neglect of duty.

Although it is true that "unprofessional conduct" is not specifically listed as a reason for cancellation of a teacher's contract in the contract that Mr. Bickford had with the school board, nevertheless we believe the term is encompassed within the language of a contract which gives a right of discharge where the teacher performs any act or does anything which is materially harmful to the employer, and within the language in the statute in effect at that time with reference to "other conduct which interferes substantially with the continued performance of duties." We point out that the term "unprofessional conduct" is now specifically included as a ground for discharge under L.B. 259, previously referred to, which became operative in September 1982.

In our opinion appellant's conduct constituted both a neglect of duty and unprofessional conduct, either one of which was sufficient grounds in the instant case to sustain the termination of the appellant from his position with the school.

We briefly comment on appellant's contention that his termination was motivated because he had exercised his first amendment rights by filing grievance procedures and speaking out with reference to certain insurance issues in the school. This issue was not raised or mentioned in any manner whatsoever in the petition in error filed in this case by the appellant. As early as 1898, we held in the case of *Ainsworth v. Taylor*, 53 Neb. 484, 73 N.W. 927 (1898), in discussing petitions in error, that the statutes "require that each alleged error shall be specially set forth in the petition in error. The strictness with which the requirements of specific assignments has

been enforced is amply illustrated in every volume of the reports of the opinions of this court. Not only must the errors be pointed out in the petition in error, but even this is unavailing, if there has been a failure to file a motion for a new trial even in equity cases." *Id.* at 487-88, 73 N.W. at 928.

Likewise, Neb. Rev. Stat. § 25-1903 (Reissue 1979) states in part as follows: "The proceedings to obtain such reversal, vacation or modification shall be by petition entitled petition in error, filed in a court having power to make such reversal, vacation or modification, *setting forth the errors complained of*, and thereupon a summons shall issue and be served, or publication made, as in the commencement of an action." (Emphasis supplied.)

While some of the evidence contained in the record seems to indicate that a certain amount of friction existed between the principal and Bickford, which he denies, it does not in any way show that the motivation of the board of education in terminating his contracts was in any respect due to his exercise of his first amendment right of free speech. The principal, Clayton Luther, denied any such motivation in making his recommendation to the board, and it also appears that Luther had previously recommended renewal of Bickford's contract before knowing all the facts. One might ask why the administration would wait until after April 15 to raise the termination issue if the motivation for such action was Bickford's exercise of his first amendment right. The answer is self-evident. We find this assignment of error to be without merit.

From what we have stated above in this opinion, we conclude that the decision of the District Court affirming the action of the board of education must be, and hereby is, affirmed.

AFFIRMED.

VAN ROBERT SWANSON, A MINOR, BY AND THROUGH HIS MOTHER AND NEXT FRIEND, JEAN R. SWANSON, APPELLEE, V. FIRST FIDELITY LIFE INSURANCE COMPANY, A NEBRASKA CORPORATION, APPELLANT.

335 N.W.2d 538

Filed June 17, 1983. No. 82-389.

1. **Summary Judgment.** Summary judgment may properly be granted where there exists no genuine issue as to any material fact, the ultimate inferences to be drawn from those facts are clear, and the movant is entitled to judgment as a matter of law.
2. **Insurance.** An insurance policy should be construed as any other contract and should be given effect according to the ordinary sense of the terms used; and if those terms are clear, they are to be applied according to their plain and ordinary meaning.
3. _____. Generally, whether a new, distinct, and independent contract results when a policy is issued under the provisions of a conversion option contained in a former policy depends upon the extent to which the terms of the substituted policy differ from the terms of the policy containing the option.

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

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

J. Michael Fitzgerald of Carpenter, Fitzgerald & Coe, P.C., for appellee.

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

CAPORALE, J.

Defendant-appellant, First Fidelity Life Insurance Company (First Fidelity), appeals from the summary judgment entered in favor of the plaintiff-appellee, Van Robert Swanson, a minor, under a policy of life insurance covering plaintiff's father, Robert L. Swanson. We affirm.

First Fidelity issued a $30,000 10-year nonparticipating convertible term policy to Robert L. Swanson on May 26, 1970, which provided: "At any time more than three full years before the Expiry Date on legal surrender while in full force, this Policy may

be exchanged without evidence of insurability for a term policy of the same Amount of Insurance on any plan other than term insurance issued by the Company at the time of such exchange." The expiry date was May 26, 1980. It also issued to Swanson a $15,000 whole life nonparticipating policy dated May 26, 1980. Both the 1970 and 1980 policies provided for a suicide defense in the following language: "If the Insured shall commit suicide while sane or insane within two years from the Policy Date, the liability of the Company under this policy shall be limited to the return of premiums actually paid." Each policy also stated: "This Policy, which includes all of its other pages, riders, endorsements, and the Application, constitutes the entire contract between the parties." The application attached to the 1980 policy recites: "CHANGE PLAN AND/OR AMOUNT, BENEFITS, ETC., TO: [X] Convert to 15,000 Executive Preferred Date Policy 5/26/80 26^{04} PAC." The application for the 1980 policy refers by number to the 1970 policy.

According to First Fidelity, it received a telephone call from Robert Swanson, wherein he indicated he wanted to do something about insurance; on June 30, 1980, First Fidelity's Ron Dodd met with Swanson, at which time Swanson said he wanted a policy of life insurance naming his son as beneficiary, and further indicated that he could afford a policy in the amount of $15,000; an application for such a policy was executed by Swanson on June 30, 1980, but was dated May 26, 1980, because Swanson's birthday was May 27 and this allowed Swanson to get a better premium rate; Dodd, after checking into Swanson's physical condition and finding it satisfactory, inserted the term "convert" on the application so that Swanson would not be required to take a physical examination; and Swanson admitted to Dodd that he, Swanson, understood the whole life policy was a new policy of insurance.

The insured committed suicide on September 16, 1981.

Our task is to determine whether there here exists no genuine issue as to any material fact, the ultimate inferences to be drawn from those facts are clear, and that plaintiff herein is entitled to judgment as a matter of law; for it is only under such circumstances that summary judgment may properly be granted. *Interholzinger v. Estate of Dent*, *ante* p. 264, 333 N.W.2d 895 (1983); *Galyen Petroleum Co. v. Hixson*, 213 Neb. 683, 331 N.W.2d 1 (1983).

First Fidelity relies on the rule that an insurance policy should be construed as any other contract and should be given effect according to the ordinary sense of the terms used; and if those terms are clear, they are to be applied according to their plain and ordinary meaning. *Hemenway v. MFA Life Ins. Co.*, 211 Neb. 193, 318 N.W.2d 70 (1982). It argues that under that rule the language of its "entire contract" clause makes the 1980 policy the only contract between the parties; therefore, the relevant suicide defense period began to run May 26, 1980. The difficulty with that argument, however, is that the entire contract clause itself makes the application for the 1980 policy a part of the contract. The language of that application ties the 1980 policy to the 1970 policy and refers to the transaction as a change in, and conversion of, the 1970 policy. The explanation that the transaction was labeled as a conversion in order to give Swanson the benefit of a lower premium and to make a medical examination unnecessary does not alter the fact that First Fidelity elected to waive the option expiration by treating the transaction as if it were within the conversion period contained within the 1970 policy. It cannot treat it thusly for some purposes and ignore that same character for another purpose. Nor did Swanson's misunderstanding thereof affect the nature of the transaction; it remained what First

Fidelity made it: a conversion of the 1970 policy. Indeed, the clear meaning of the words used in the conversion option requires that it be exercised at least 3 years prior to the policy's expiration date, perhaps to avoid the very problem presented by this case. In any event, for whatever reason, First Fidelity clearly elected to waive the time limitations imposed by the conversion option.

Resolving that issue, however, does not determine the lawsuit. It appears to be the general rule that even where a policy is issued under the provisions of a conversion option, whether a new, distinct, and independent contract results will depend upon the extent to which the terms of the substituted policy differ from the terms of the policy containing the option. 1B J. Appleman, Insurance Law and Practice § 491 at 338 (1981); 9 G. Couch, Cyclopedia of Insurance Law § 40:52 (2d ed. 1962). *Provident Life Ins. Co. v. Kegley*, 199 Va. 273, 99 S.E.2d 601 (1957), held that an endowment life policy issued pursuant to the conversion provisions of a group life and disability policy was a new and separate policy because it contained different terms and covered different risks than had the group policy; therefore, the suicide defense period was to be computed from the date of the new policy, not from the date of the group certificate. Likewise, *Gans v. Aetna Life Ins. Co.*, 214 N.Y. 326, 108 N.E. 443 (1915), reached a similar result upon finding that the rights, privileges, advantages, and obligations under the substituted policy were different than those in the former policy. On the other hand, *Baugh v. Met. Life Ins. Co.*, 173 Tenn. 352, 117 S.W.2d 742 (1938), held that where the substituted individual life insurance policy covered the same risk as the former group policy, the individual policy was not an independent contract, and therefore the time on the suicide defense ran from the date of the group policy. Also, *Founders Life Assurance Co. v. Poe*, 242 Ga. 748, 251 S.E.2d 247 (1978), held that where each renewal of credit life

insurance was issued under and subject to the same terms as the master group credit policy, and each new certificate of insurance was essentially the same as the certificate replaced, the suicide provision of the last policy related back to the original transaction and would be construed as a continuation of the obligations and conditions of the original policy. A number of cases illustrating the rule are collected in Annot., 37 A.L.R.3d 933 § 9 at 951-54 (1971). One of the more significant statements, however, is found in *Commonwealth Life Ins. Co. v. Jackson*, ____ Ind. App. ____, 432 N.E.2d 1382 (1982), which, in holding that an individual policy issued under the conversion option of a family policy was not a new contract, noted that the results reached are not always consistent and depend to a great extent on the unique facts and circumstances of each case.

In *Morse v. General American Life Ins. Co.*, 130 Neb. 37, 263 N.W. 676 (1935), the insured purchased a life policy for $2,000, which was issued on November 6, 1923. Ten years later the insured requested the coverage be reduced to $1,000. The insurer issued a new policy, which was identical to the earlier one, except for the reduced amount of coverage. The insured then committed suicide within the defense period contained in the new policy. We held the suicide clause therein did not constitute a defense; the operative clause was the one contained in the original policy. There are, as First Fidelity points out, factual distinctions between *Morse* and the instant case. In *Morse* the original application was attached to the new policy (there was no new application); the insured's age in the new policy was reflected as being that stated in the old policy; and the premium remained the same for the same amount of insurance. Here, the 1970 policy insured Swanson only for a term of years, whereas the 1980 policy insured Swanson for life; the 1970 policy accrued no nonforfeitable cash values, whereas the 1980 policy did accrue such; and the 1970 policy computed its

premium on the basis the insured was 29 years of age, whereas the 1980 policy computed its premium on the basis the insured was 39 years of age. Notwithstanding those factual distinctions, however, the principal risk insured against in both policies was the same: the death of Swanson from whatever cause. As to that risk, the only thing which changed was the amount of coverage, it being reduced by half. We conclude, therefore, that under the facts and circumstances of this case the 1980 policy was not a separate and distinct contract from the 1970 policy but, rather, could only constitute a continuation of it. Thus, the time on the suicide defense began to run on May 26, 1970.

The trial court was correct in granting a summary judgment for plaintiff and against First Fidelity.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JEFFREY A. SONDAG, APPELLANT.

335 N.W.2d 306

Filed June 17, 1983. No. 82-442.

1. **Right to Counsel.** In the absence of a knowing and intelligent waiver of counsel, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.
2. _____. No defendant can be completely denied the assistance of counsel absent a determination of his ability to retain counsel or his desire to have counsel appointed.

Appeal from the District Court for Sarpy County: GEORGE H. STANLEY, Judge. Reversed and remanded.

David S. Perlman and Gerald W. Pankonin, for appellant.

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

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

MCCOWN, J.

The defendant, acting pro se, was found guilty by a jury of carrying a concealed weapon, and was sentenced to 1 year's imprisonment. The sole question on appeal is whether or not the defendant was denied a right to counsel under the provisions of Neb. Rev. Stat. § 29-1804.07 (Reissue 1979).

On October 26, 1981, the defendant was arrested and charged with carrying a concealed weapon in violation of Neb. Rev. Stat. § 28-1202(1) (Reissue 1979), a Class IV felony. The defendant appeared at five preliminary hearings with privately retained counsel. At an arraignment hearing on February 9, 1982, defendant's counsel appeared but the defendant failed to appear, and the court granted an oral motion for a writ of capias. The defendant's then counsel also entered an oral motion to withdraw from representation of the defendant on the grounds of conflict of interest. The court took that motion under advisement.

Another arraignment hearing was had on February 11, 1982, 2 days later, at which time both the defendant and the counsel appeared. The district judge stated that he would permit defendant's counsel to withdraw following that hearing, but required counsel to remain through the arraignment proceeding. The judge also informed the defendant of his right to be represented by the public defender's office if he wished to have an attorney to represent him and could not afford one. The defendant responded: "Yes, sir, but I'd just like to say I plan on hiring another attorney. I don't want a public defender and I don't feel I know enough about the law to defend myself."

The judge then warned the defendant that the trial was set for March 1, 1982, and would not be continued for the purpose of allowing the defendant to

procure new counsel. The defendant pleaded not guilty and trial was set for March 1, 1982.

On March 1, 1982, the defendant appeared for trial without counsel before a different district judge. The judge stated to the defendant that the court understood that the defendant had previously been advised that he was entitled to an attorney and that the court had offered to appoint an attorney to represent him, but that the defendant had elected and stated to the court that he wished to proceed and represent himself. The judge inquired as to whether that was correct. The defendant responded: "Well, I had an attorney previously to this, and my mistake was that I didn't prepare for this properly. I guess I didn't have enough money to pay for an attorney so I ended up not having an attorney. By the time I wanted the public defender I was informed that he would have to be appointed by the Court but—so I have no choice but to represent myself."

The judge then stated that the previous judge had advised the defendant on February 11 that he was entitled to have an attorney appointed by the court, but that the defendant had declined to have the appointment made, and inquired whether that was a correct statement. The defendant responded: "Correct, but at that time I assumed that I would—I was going to be able to afford an attorney. It was an improper assumption on my behalf."

The judge then asked if the defendant had been informed that the trial would be on March 1, 1982, and if he had had at least 2 weeks' notice of that date. When the defendant acknowledged that he had, the court then proceeded with the trial, with the defendant acting as his own counsel.

The State called only one witness, the arresting officer, and the defendant, representing himself, took the stand and testified on his own behalf. The jury returned a verdict of guilty and this appeal followed.

The defendant's sole contention on this appeal is

that he was denied his constitutional and statutory right to assistance of counsel at trial.

The State contends that the defendant's statement at his arraignment on February 11, 1982, and his appearance at trial without counsel constituted a waiver of his right to counsel at trial.

Section 29-1804.07 provides in part: "At a felony defendant's first appearance before a judge without retained counsel, the judge shall advise him or her of his or her right to court-appointed counsel if such person is indigent. If he or she asserts his or her indigency, the court shall make a reasonable inquiry to determine such person's financial condition, and shall require him or her to execute an affidavit of indigency for filing with the clerk of the court. If the court determines the defendant to be indigent, it shall formally appoint the public defender . . . to represent the indigent felony defendant at all future critical stages of the criminal proceedings against such defendant . . . . A felony defendant who is not indigent at the time of his or her first appearance before a judge may nevertheless assert his or her indigency at any subsequent stage of felony proceedings, at which time the judge shall consider appointing counsel as otherwise provided in this section."

In the case at bar the defendant's first appearance before a judge without retained counsel was at the trial on March 1, 1982. The trial judge, in effect, advised the defendant that the defendant had already waived his right to counsel, and did not make any reasonable inquiry to determine the defendant's financial condition, even after the defendant had stated that he did not have enough money to pay for an attorney.

Even in the absence of the specific statutory language the case at bar is almost a duplicate of the case of *State v. Moore*, 203 Neb. 94, 277 N.W.2d 554 (1979). In that case we said: "Although the defendant had already affirmatively indicated his intention to exercise his constitutional right to counsel by re-

taining private counsel, the court interpreted the defendant's appearance at trial without counsel as an affirmative, intelligent, and understanding waiver of his constitutional right to counsel simply because the defendant had been advised of his right to counsel a month before. Under the circumstances here it was wholly unreasonable to assume that the defendant had conclusively rejected an offer of counsel, much less that he had affirmatively waived his right to counsel." *Id.* at 99, 277 N.W.2d at 557.

Absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial. *Argersinger v. Hamlin*, 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972).

No defendant can be completely denied the assistance of counsel absent a determination of his ability to retain counsel or his desire to have counsel appointed. *State v. Moore*, *supra*.

In view of the presumption against a waiver of the constitutional right to counsel, both the specific statutory language of § 29-1804.07 and case law require the trial court to make a reasonable inquiry into the defendant's ability to retain counsel or his desire to have counsel appointed. Neither inquiry was made here at the defendant's first appearance before a judge without retained counsel.

The conviction of the defendant is reversed and the cause remanded to the District Court.

REVERSED AND REMANDED.

BOSLAUGH, J., dissenting.

The statute, Neb. Rev. Stat. § 29-1804.07 (Reissue 1979), requires only that when an indigent felony defendant appears before a judge without retained counsel, the judge shall advise him of his right to court-appointed counsel. This may be at the first appearance without counsel or at a later appearance *if the defendant was not indigent at the time of his first appearance.*

The record in this case shows that the defendant's first appearance in the trial court without retained counsel was at the hearing on February 11, 1982, following the arraignment. Retained counsel's motion to withdraw, made at the hearing on February 9, 1982, was sustained after the arraignment had been completed.

During the arraignment the following took place: "THE COURT: . . . You have a right to have assistance of counsel at all critical stages of the proceeding. You have a right, if you wish, to represent yourself, act as your own counsel, whether you're an attorney or not. However, if you wish to have an attorney represent you and you cannot afford an attorney and there is an affidavit in support that you're indigent and unable to afford an attorney, then the Court can appoint the Public Defender's Office to represent you. Do you understand your rights to represent yourself and your right to have counsel?

"MR. SONDAG: Yes, sir, but I'd just like to say I plan on hiring another attorney. I don't want a public defender and I don't feel I know enough about the law to defend myself.

"THE COURT: That's fine, you have that right, but I want you to understand again that the trial date will not be continued.

"MR. SONDAG: I understand that."

After the arraignment had been completed and retained counsel's motion to withdraw had been sustained, the following took place: "THE COURT: You understand at the present time you are your counsel of record right now?

"MR. SONDAG: Yes, sir.

"THE COURT: And that will remain that way until such time as another attorney appears before you, and again I want to caution you, and I know I've done it twice and this is the third time, the trial date of March 1st will not be continued for the purpose of procuring other counsel or giving counsel an opportunity to examine the evidence in the case and

prepare for trial. So you must contact other counsel soon. All right, your bond will be continued in full force and effect then. That's all.

"MR. SONDAG: Okay, thank you."

The trial court had advised the defendant of his right to court-appointed counsel *if the defendant was indigent* and the defendant had stated, "I don't want a public defender." It seems to me this was an effective waiver of the right to appointed counsel.

The decision in this case permits the defendant to disrupt the orderly procedure of the court and places the trial court in an impossible situation. The defendant is permitted to refuse appointed counsel before trial, and then secure a delay by requesting appointed counsel on the day of the trial.

A defendant should not be permitted to manipulate his right to counsel so as to obstruct orderly procedure in the administration of justice. *State v. Coleman*, 190 Neb. 441, 208 N.W.2d 690 (1973); *State v. Kirby*, 187 Neb. 380, 191 N.W.2d 162 (1971); *State v. Bratton*, 187 Neb. 460, 191 N.W.2d 612 (1971).

When a defendant has been advised of his right to appointed counsel and has made an effective waiver of that right, there should be some responsibility upon the defendant to advise the court *before the trial is about to commence* if there has been a change in circumstances and the defendant now wants appointed counsel.

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

STATE OF NEBRASKA, APPELLEE, V. DALE A. BROWN, ALSO KNOWN AS DOOBIE BROWN, APPELLANT.

335 N.W.2d 542

Filed June 17, 1983. No. 82-471.

1. **Speedy Trial: Time.** For computation of the time at which a defendant must be brought to trial in compliance with the "6-month rule" prescribed by Neb. Rev. Stat. § 29-1207 (Reissue 1979), the

period pertaining to the final disposition of a pretrial motion for discovery is excluded in computing the date for trial.

2. **Speedy Trial.** An accused's constitutional right to a speedy trial is weighed in a "balancing test," according to *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972).
3. **Criminal Law: Pretrial Motions.** Discovery in criminal cases, as authorized by Neb. Rev. Stat. §§ 29-1912 et seq. (Reissue 1979), is patterned on the Federal Rules of Criminal Procedure.
4. _____: _____. Upon a defendant's proper request through discovery procedure, the State must disclose information which is material to the preparation of a defense to the charge against the defendant.
5. _____: _____. Information obtainable by discovery procedure in criminal cases is material if the requested information may affect the outcome of the trial.
6. _____: _____. In order that the defendant receive a fair trial, requested and material information must be disclosed to the defendant.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Reversed and remanded for a new trial.

Dennis R. Keefe, Lancaster County Public Defender, and Gerald L. Soucie, for appellant.

Paul L. Douglas, Attorney General, and Dale D. Brodkey, for appellee.

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

SHANAHAN, J.

Defendant, Dale A. Brown, was charged in the District Court for Lancaster County with robbery, found guilty by a jury, and sentenced to a term of 5 to 12 years in an institution under the jurisdiction of the Department of Correctional Services. We reverse and remand for a new trial.

In the early morning of April 25, 1981, Ellis Johnston unlocked and entered his trailer house near the Lincoln Gun Club. As Johnston walked down an unlighted hallway he was "hit in the head" and dropped to the floor. Johnston said he was beaten as he lay on the floor. Although he later lost con-

sciousness, Johnston did recall two men in the darkened hallway at the time of the assault. When Johnston regained consciousness he discovered that a large sum of money was missing from his billfold, and he then called the Lincoln Police Department. After a preliminary investigation the police took Johnston to the hospital for medical attention for facial cuts, injury to his right hand, and a broken nose. Also, the police took photographs depicting Johnston's injuries. Johnston was not able to identify his assailants, and he gave the police inconsistent and vague descriptions of the assailants.

Dale Brown was charged with robbing Johnston and was arrested on June 24, 1981. The information charging Brown was filed in the District Court for Lancaster County on July 15, 1981, and on July 16 Brown filed a motion, pursuant to Neb. Rev. Stat. § 29-1912(1)(e) (Reissue 1979), seeking disclosure of "results and reports of physical or mental examinations, and of scientific tests." At arraignment on July 16 the court sustained Brown's motion for discovery. Brown filed an additional motion on July 16, i.e., to take the depositions of three witnesses named on the information. The court, on July 24, authorized those depositions of the prospective witnesses. On August 20 the State filed a "Response to Order for Discovery" and alleged that the State "knows of no results or reports of physical or mental examinations or scientific tests or experiments made in connection with this case." Brown was released on bond on September 1, 1981.

A third motion for discovery was filed by Brown on September 18. This motion was in four parts, namely: sought the written statements of those persons deposed pursuant to Brown's motion of July 16, asked for the description given to the police by Johnston regarding his assailants, inquired about plea agreements extended to any witnesses for the State, and demanded information regarding police informants who assisted in the surveillance of

Brown while he was in jail. This motion lay dormant until October 26, when the existence of such motion was called to the attention of the trial judge during a meeting in chambers with counsel on other aspects of the proceedings. The judge ordered the State to provide Brown with Johnston's description of the assailants but took under advisement the three remaining parts of the motion. On October 26 Brown indicated readiness for trial, but the District Court allowed counsel 7 days to file briefs concerning those aspects of the motion which had been taken under advisement. Also, on October 26 the State supplied Brown with Johnston's description of his assailants. Possessing that description, Brown next filed a motion on November 20 to obtain the deposition of Officer Donald Wiles, a policeman to whom Johnston had described the assailants. By an order entered November 30 the court authorized the deposition of Wiles, which was taken on December 1. Brown never filed any brief concerning the parts of the motion which were taken under advisement, and that motion remained undisposed until December 28, when the court on its own overruled the balance of that motion which had been on file since September 18.

On February 18, 1982, Brown filed a motion to dismiss the proceedings, claiming denial of his right to a speedy trial and, further, claiming a right to dismissal of the proceedings because he had not been brought to trial within 6 months, as required by Neb. Rev. Stat. § 29-1207(1) (Reissue 1979). The motion to dismiss was heard on March 23, taken under advisement, and overruled on March 25. Trial commenced with the selection of a jury on March 29. On April 5 that jury returned a verdict of guilty. Brown filed two motions for new trial. In substance, the first motion for new trial claimed that Brown had been deprived of his right of speedy trial. The second motion alleged newly discovered evidence, inasmuch as Brown had learned from a presentence re-

port that the police possessed information in April 1981 regarding the "results and reports" mentioned in Brown's motion for discovery filed on July 16, 1981. This information included an attempted hypnotic session involving Johnston, a telephonic conference between police and a psychologist who "advised" that the description of Johnston "would fit the description of a pathological liar," and a conference between an officer and a pathologist who expressed an opinion to the effect that Johnston's injuries were inflicted and sustained in a manner different from that described by Johnston. This second motion for new trial alleges that Brown was denied a fair trial because the State withheld information required to be disclosed under the Nebraska and U.S. Constitutions and under the discovery statutes concerning criminal cases.

Among Brown's assignments of error are: (1) The District Court's incorrect exclusion of certain time in determining the date by which Brown must have been brought to trial under the Nebraska "6-month rule"; (2) A denial of the constitutionally guaranteed right of speedy trial; and (3) A denial of a fair trial because the State failed to disclose material requested in a pretrial motion for discovery.

First, we consider whether Brown received a speedy trial in accordance with § 29-1207. Because the information against Brown was filed on July 15, 1981, the last day for commencement of trial was January 15, 1982, that is, assuming no time is excluded from such 6-month period pursuant to § 29-1207(4)(a). Cf. *State v. Jones*, 208 Neb. 641, 305 N.W.2d 355 (1981).

All motions filed by Brown for discovery are pretrial motions, and, as such, "the time from filing until final disposition" must be excluded in computing the last day permissible for trial. There is nothing in the record indicating the nature of the information elicited from the deponents named on the information, but we surmise that Brown did use

such information to prepare for trial or to formulate trial strategy. Consequently, the period of 9 days is excluded from computing the time for trial, namely, from the day Brown filed the motion on July 16 until the trial court authorized the depositions on July 24.

Further, when Brown obtained Johnston's description of his assailants in response to the motion of September 18, Brown embarked on additional discovery, namely, the deposition of Officer Donald Wiles, which the defense used at trial as an attack on Johnston's credibility and as an attempt to erode Johnston's description of his assailants. As matters developed at trial, identification of Brown as an assailant was based on circumstantial evidence. In the trial court's eyes, Brown's deposing Wiles on December 1, 1981, indicated that Brown was still relying upon his motion of September 18 to acquire further information in preparation for trial. Brown's reason for not pursuing the balance of the motion and any explanation for allowing that motion to lie dormant are matters of conjecture and questionable tactics. If Brown did not wish to pursue that motion, he should have immediately contacted the trial court and withdrawn the motion. Excluded from computing the time for trial is the period from filing the motion on September 18 until final disposition of such motion by the trial court by its own action on December 28, that is, 102 days.

Combining the two periods involving the motions for discovery, there are 111 days. Using the method set forth in *State v. Jones*, *supra*, and adding 111 days of exclusions, the last day for commencement of trial was May 6, 1982. Brown was brought to trial well within such 6-month limitation prescribed by § 29-1207, and therefore there was no error in overruling Brown's motion for a new trial in that regard.

Brown relies on *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), in contending that he was denied a speedy trial under the sixth amendment to the U.S. Constitution. *Barker* recites a

"balancing test" which requires courts to approach each case on an ad hoc basis. This "balancing test" involves four factors bearing upon questions of speedy trial, namely, "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Barker* at 530. As further stated in *Barker* at 533: "We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process." According to *Barker*, at 531, prejudice may result from prolonged incarceration or from an inability to prepare for trial.

Applying the "balancing test" of *Barker* to the present case, Brown has not been denied his constitutionally protected right to a speedy trial. Brown was brought to trial a little over 8 months after the information was filed. A substantial part of that time was used for Brown's pretrial motions and his pursuit of discovery. Therefore, any delay was neither inordinate nor unreasonable. Although Brown informed the district judge that he was ready for trial, this statement of readiness was followed by Brown's additional discovery, which was ultimately used as a part of his defense at trial. Such conduct speaks louder than Brown's rather hollow request for a trial of his case. Also, Brown was released from jail on September 1 and remained at liberty until his trial commenced on March 29, 1982. Regarding preparation for trial, we can only infer that Brown was adequately prepared, because 4½ months of the 8 months between the filing of the information and trial were used for discovery by Brown. The trial court was correct in overruling Brown's motion claiming a denial of a speedy trial.

Before addressing the effect of the State's nondis-

closure of requested information, it is necessary to review the origin of §§ 29-1912 et seq., which contain provisions for discovery in criminal proceedings.

Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), dealt with nondisclosure on the part of the prosecutor. *Brady* recognized that due process requires the government to disclose information favorable to the accused, namely, exculpatory material. But *Brady* did not focus on the accused's ability to prepare for trial, because *Brady* was not a rule for discovery. See *United States v. Kaplan*, 554 F.2d 577 (3d Cir. 1977). In the wake of *Brady* the Federal Rules of Criminal Procedure were revised in 1966 so that discovery in criminal cases was broadened and liberalized. See Fed. R. Crim. P. 16.

In the Eightieth Session of the Nebraska Legislature, L.B. 1417 was introduced. 1969 Neb. Laws, Ch. 235, p. 867. That bill is presently §§ 29-1912 et seq., which provide the procedure for discovery in criminal cases. The "Introducer's Statement of Purpose" recites that L.B. 1417 was designed to "implement the Federal Criminal Procedure whereby a defendant in a criminal case may have access to certain records . . . so that both parties will be better prepared for the trial . . . ." Hearings before the Committee on Judiciary of the Legislature developed that L.B. 1417 was based on Rule 16 of the Federal Rules of Criminal Procedure and would "establish in Nebraska, a criminal procedure which is adopted in the federal statutes." The committee statement on L.B. 1417 acknowledged "that defendants have the right of access to evidence in the hands of the prosecuting attorney to enable the defendant to prepare his defense." In 1969 the Nebraska Legislature enacted the present statutes for discovery in criminal cases, with language similar to that found in the Federal Rules of Criminal Procedure.

Under § 29-1912(1)(e) a defendant may request

permission to inspect and copy "[t]he results and reports of physical or mental examinations, and of scientific tests, or experiments made in connection with the particular case . . . ." Brown, by his motion filed July 16, sought such information from the State. The State responded that it had no knowledge of the material.

After his conviction Brown inspected a presentence report which revealed notes of police Detective Splichal concerning his investigation of the incident. Those notes reflected that on April 27, 1981, Detective Splichal and another officer tried to have Johnston hypnotized but that hypnosis was not possible because Johnston was having difficulty breathing. Splichal's notes also recited that on April 29 he conferred by telephone with Dr. Osborne, a psychologist, who "advised that from what I have described him [Johnston] this would fit the description of a pathological liar and that of his patterns." The notes continued: "He [Dr. Osborne] felt the way to deal with the individual [Johnston] would be to stand firm on what had occurred and our feelings and to make it clear to him that we did not feel that the incident had occurred as he stated and that in order for us to help him he would have to tell us the complete truth on what occurred." Later that same day Splichal also conferred with a pathologist, Dr. Harlan Papenfuss, who had examined the photographs depicting Johnston's injuries from the assault. According to Dr. Papenfuss, the wound on Johnston's head was made by a sharp instrument delivered from directly in front of Johnston and the other injuries of Johnston were characteristically those received in a fistfight. In short, Dr. Papenfuss concluded that the injuries were not consistent with Johnston's account of the assault.

James v. Commonwealth, 482 S.W.2d 92 (Ky. 1972), dealt with a prosecutor's failure to disclose information requested under a statute almost identical with § 29-1912(1)(e). The Kentucky court stated

at 94: "A cat and mouse game whereby the Commonwealth is permitted to withhold important information requested by the accused cannot be countenanced. . . . It is said in Wright, Federal Practice and Procedure: 'The second category of materials obtainable virtually as a right under Rule 16(a) is results or reports of physical or mental examinations . . . within the possession, custody, or control of the government . . . .' "

In *State v. Hurd*, 520 S.W.2d 158 (Mo. App. 1975), the defendant requested medical reports, information which the state did not disclose, notwithstanding that a deputy sheriff had knowledge of the findings of an examining physician regarding the path of a fatal bullet. In ordering a new trial the Supreme Court of Missouri held at 164-65: "It is common knowledge and to be presumed that an officer and agent of the law would officially report to the proper authorities the findings of his investigations, tests and examinations relative to the accused's connection with the crime charged. . . .

. . . .

". . . Nondisclosure by the state of a part of the deputy sheriff's knowledge of the chemical tests and of the result of the examining physician's findings was of such a nature that without disclosure the defendant's trial could be viewed as fundamentally unfair." Cf., *Barbee v. Warden, Maryland Penitentiary*, 331 F.2d 842 (4th Cir. 1964) (pertaining to prejudicial effect of prosecutorial nondisclosure of information in the possession of police); *United States v. Beasley*, 576 F.2d 626 (5th Cir. 1978).

Matters affecting the credibility of a critical or major witness are material to the defense in a criminal case. See *United States v. Boffa*, 513 F. Supp. 444 (D. Del. 1980). Information is material in the preparation of a defense if there is a strong indication that such information will play an important role in uncovering admissible evidence, aiding preparation of witnesses, corroborating testimony,

or assisting impeachment or rebuttal. *United States v. Felt*, 491 F. Supp. 179 (D. D.C. 1979). If the information may affect the outcome of the trial, then it is a proper subject for discovery. *Briggs v. Raines*, 652 F.2d 862 (9th Cir. 1981).

As expressed in *United States v. Miller*, 411 F.2d 825, 832 (2d Cir. 1969): "The test, however, is not how the newly discovered evidence . . . would affect the trial judge or ourselves but whether, with the Government's case . . . already subject to serious attack, there was a significant chance that this added item, developed by skilled counsel as it would have been, could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction." See, also, *United States v. Guillette*, 404 F. Supp. 1360 (D. Conn. 1975).

In summary, while *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), imposed a constitutional mandate for disclosure in criminal cases, a statutory design for discovery, such as the Federal Rules of Criminal Procedure or §§ 29-1912 et seq., can exact more than the constitutional minimum, so that courts must focus on information potentially useful to the defense. *United States v. Beasley, supra.*

In the present case Johnston was not hypnotized. The mere attempt to hypnotize Johnston did not constitute an examination, test, or experiment. The State's failure to disclose the abortive session for hypnosis of Johnston was not prejudicial. The information from the psychologist was based upon subjective data supplied by one of the investigating officers, which apparently included the officer's impressions and conclusions concerning Johnston. The response by the psychologist may have been a commentary on the data supplied by the police, but the psychologist's response did not constitute a report of an examination under the circumstances. Nondisclosure of information from the psychologist caused no prejudice to Brown. On the other hand, after his

examination of Johnston's photographs, the pathologist expressed an opinion to the police regarding both the means used and manner in which wounds were inflicted upon the victim, that is, an opinion which contradicted the victim's and eyewitness' version of the assault. The pathologist's opinion concerning causation of the wounds was a report within the purview of § 29-1912(1)(e), and the State should have disclosed those parts of the detective's notes containing the report from the pathologist. The pathologist's report may have caused doubt in Johnston's account of the assault and may have cast doubt on Johnston's inability to identify his assailants. Such information was material to the preparation of Brown's defense, and without the requested information Brown did not receive a fair trial. The District Court was incorrect in denying Brown a new trial on account of the State's nondisclosure of the requested information.

Because we have concluded that Brown must have a new trial, it is not necessary that we consider the other assignments of error.

REVERSED AND REMANDED FOR A NEW TRIAL.

PATRICIA L. GILBERT, APPELLEE, V. JOHN R. HANLON, COMMISSIONER OF LABOR, APPELLANT, MERLE'S FOOD AND DRINK, APPELLEE.

335 N.W.2d 548

Filed June 17, 1983. No. 82-538.

1. **Employment Security Law.** One is disqualified for benefits under Neb. Rev. Stat. § 48-628(a) (Cum. Supp. 1980) if, by leaving work voluntarily without good cause, one thereby makes himself or herself "unemployed."
2. _____. Where more than one job is held concurrently by an employee, a disqualifying termination of one job does not thereby automatically disqualify the employee from benefits based upon other jobs against which no disqualification applies. With regard to disqualification for benefits under Neb. Rev. Stat. § 48-628(a)

(Cum. Supp. 1980), each job should be considered separately and benefits disqualified separately according to the facts relating to the termination of each employment.

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

Pamela A. Mattson, for appellant.

Vincent M. Powers, for appellee Gilbert.

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

KRIVOSHA, C.J.

This appeal presents the question as to whether an employee who voluntarily terminates part-time employment, while being discharged from full-time employment, thereby becomes disqualified for any benefits pursuant to the provisions of Neb. Rev. Stat. § 48-628 (Cum. Supp. 1980). The trial court found that the employee was not disqualified. On appeal we find that the trial court was correct in its conclusion, and affirm.

While there is a dispute as to whether the employee, Patricia L. Gilbert, voluntarily left her part-time employment before being discharged from her full-time employment, the principal issues of fact are without dispute. The evidence establishes without contradiction that from October 1974 to late August 1980, Gilbert was employed full-time as office manager at Central Heating and Air Conditioning. Also, from March of 1980 until late August of 1980, Gilbert worked as a part-time waitress at Merle's Food and Drink. Her part-time employment consisted of working on Thursday evenings and Saturdays between 5 to 11 hours a week at a rate of $3.25 per hour. The record discloses that during each of the last two calendar quarters of 1979 and the first calendar quarter of 1980, Gilbert earned $3,055 each quarter from her employment at Central Heating, and during the second quarter of 1980 Gilbert earned

$3,039.63 from Central Heating and $355.44 from her employment at Merle's. Sometime in July of 1980 she asked that her schedule be changed at Merle's so that she could have Saturdays off. Merle's refused to let her do so, and the record indicates that she voluntarily left her employment at Merle's. Her last day of employment at Merle's appears to be August 28, 1980, though there is some dispute about that fact. There is some confusion as to her last date of work at Central Heating. There is evidence to indicate that on the 28th she was told by Central Heating that she was laid off her full-time job, although she could continue to do bookkeeping 5 to 10 hours a week. Gilbert testified that the 28th was her last day at Merle's, which would be Thursday, but she also said that she worked that Friday, August 29, and that it was on Friday that she was laid off at Central Heating. Her forms seeking unemployment compensation, however, list August 28 as her last date at both Central Heating and Merle's. Regardless of the confusion which may exist as to the last day in which she in fact worked at either Merle's or Central Heating, we believe the record clearly establishes that she gave notice of her intention to voluntarily leave her part-time employment before she was advised that she was being laid off from her full-time employment.

On September 10, 1980, a notice of monetary determination was issued. This is simply a finding as to the maximum benefits Gilbert could receive if she remained eligible during the entire eligibility period as set by statute. Neb. Rev. Stat. § 48-630 (Reissue 1978). Gilbert's weekly benefit was set at $106. The total amount attributable to Central Heating was $2,638 and the total amount attributable to Merle's was $118, for a total maximum amount payable of $2,756. Twelve dollars was reduced on the line for Merle's, leaving Merle's total maximum liability at $106 and fixing the total maximum amount payable at $2,744.

On September 19, 1980, a notice of deputy's determination informed Gilbert that because she left her part-time employment with Merle's "due to personal dissatisfaction with scheduled hours of work and transportation costs" and her reasons for leaving were therefore "without good cause" under the Nebraska Employment Security Law, she was disqualified from receiving benefits for the week ending September 6, 1980, and likewise disqualified for an additional 7 weeks. The period of disqualification was set to end on October 25, 1980. The determination form listed only the account number for Merle's and did not indicate any separation from Central Heating. Gilbert then appealed to the Nebraska Appeal Tribunal and a hearing was held on October 27, 1980. The Nebraska Appeal Tribunal affirmed the determination made by the claims deputy. As we have indicated, on appeal the District Court reversed the determination of the Nebraska Appeal Tribunal and held that Gilbert's leaving of her part-time employment did not disqualify her from receiving benefits which she was otherwise entitled to receive by reason of her having been discharged from her full-time employment.

As we have indicated, the pertinent section involved in this case is § 48-628, which reads in part as follows: "An individual shall be disqualified for benefits: (a) For the week in which he or she has left work voluntarily without good cause, if so found by the Commissioner of Labor, and for not less than seven weeks nor more than ten weeks which immediately follow such week, as determined by the commissioner according to the circumstances in each case . . . ." While the language of § 48-628 appears clear on its face, when applied to the factual situation in this case the conflict becomes readily apparent. Section 48-628 apparently contemplates that an employee will have only one job at any one time, because it does not provide for what is to happen in the event of multiple jobs. Section 48-628

does not say that one is disqualified if he or she leaves "some of his or her work" or if he or she leaves "part of his or her work," or anything of that import. The commissioner advises us in his brief that it is his position that § 48-628(a) must be interpreted to apply to claimants who voluntarily leave *any* job, as the statute makes no distinction between quitting part-time and full-time employment. We believe that such an interpretation would be wholly inappropriate.

We believe that a more appropriate reading of both the language of § 48-628 and the intent and purpose of the Nebraska Employment Security Law (Neb. Rev. Stat. §§ 48-601 to 48-669) is to interpret § 48-628(a) such that one is disqualified for benefits if, by leaving work voluntarily without good cause, one thereby makes himself or herself "unemployed." Other courts which have examined similar provisions have reached similar conclusions.

In the case of *McCarthy v. Iowa Employment Sec. Comm.*, 247 Iowa 760, 76 N.W.2d 201 (1956), the Iowa Supreme Court was presented a case very similar to that presented to us by Gilbert. The claimant in the *McCarthy* case quit a part-time job not long before being laid off his full-time employment. Like the Nebraska statute, the Iowa statute provided in part: "An individual shall be disqualified for [unemployment] benefits . . . if he has left his work voluntarily without good cause attributable to his employer, if so found by the commission." Iowa Code § 96.5 (1954). In holding that the employee's leaving his part-time employment did not disqualify him for benefits which he would otherwise be entitled to from having been discharged from his full-time employment, the Iowa court said at 764, 76 N.W.2d at 203-04: "This subsection does not specify '*all* his work'; but neither does it say '*any* of his work' or '*part* of his work.' It seems not to recognize that there might be more than one 'work' and two or more concurrent employers. Some construction or

interpretation thus becomes necessary of a statute otherwise 'plain and unambiguous.'

". . . The words 'If he has left his work * * *' must be construed to mean 'If he has become unemployed * * *.' Only that interpretation accords with Code section 96.2 which states the very purpose of the legislation to be to require the compulsory setting aside of reserves 'for the benefit of persons *unemployed* through no fault of their own.' " (Emphasis in original.)

And, likewise, the Missouri Court of Appeals, in the case of *Brown v. Labor & Ind. Relations Com'n*, 577 S.W.2d 90 (Mo. App. 1978), made a similar finding under similar circumstances. In the *Brown* case the employees involved each held a part-time employment concurrently with full-time employment. Each voluntarily left the part-time employment and was thereafter terminated from the full-time employment. In allowing benefits for the termination of the full-time employment, the Missouri court said at 93: "The manifold purposes declared by the Employment Security Act are, among others, to relieve against economic distress from involuntary unemployment and to facilitate reemployment.

. . .

". . . The public policy which girds the Employment Security Law that benefits shall be for *persons unemployed through no fault of their own* [citation omitted], therefore, is not infringed by a quittance, voluntary or involuntary, from a part-time employment to retain a full-time employment done without design to give up wage rewards for compensated unemployment." See, also, *Rodriguez v. Florida Dept. of Commerce, Ind. Rel. C.*, 328 So. 2d 24 (Fla. App. 1976); *Stauffer v. Com., Unemp. Comp. Bd. of Review*, 49 Pa. Commw. 284, 410 A.2d 972 (1980).

The commissioner argues that the *McCarthy* and *Brown* cases are not similar to the present case and can be distinguished. We are unable to make those distinctions.

The intent and purpose of the Employment Security Law, as observed by both the Iowa and Missouri courts, have been similarly declared by both our Legislature, in adopting the Employment Security Law, and our courts, in reviewing matters arising thereunder. Neb. Rev. Stat. § 48-627 (Reissue 1978) specifically provides that an unemployed individual shall be eligible to receive benefits with respect to any week only if the commissioner finds that "He is able to work, and is available for work." Obviously, one who is employed at a full-time job, though discharged from a part-time job, may not be eligible for work and, even though otherwise entitled to benefits, could not receive them. A further examination of the Nebraska Employment Security Law makes it clear that the Legislature was attempting to provide for those who were unemployed and therefore under economic distress. This court has made similar observations concerning the act. In *Woodmen of the World Life Ins. Society v. Olsen*, 141 Neb. 776, 778, 4 N.W.2d 923, 924 (1942), we said: "It was a legislative purpose to ameliorate ills growing out of labor troubles and unemployment. Protection of the public from pauperism and from other burdens created by unemployment was also in the minds of the lawmakers. The legislature considered these subjects and acted directly on them." We have likewise held that the purpose of the Employment Security Law is to protect all workmen involuntarily unemployed. See *Wentz Heating & Air Conditioning Co. v. Kiene*, 202 Neb. 202, 274 N.W.2d 547 (1979).

As we have already indicated, were we to take the commissioner's position, one who had worked for years at a full-time job and then took a part-time job selling on Thursday evenings, and who thereafter voluntarily quit the part-time employment in order to devote even more time to his or her full-time employment, might lose all the benefits of the Nebraska Employment Security Law by reason of hav-

ing taken this temporary part-time job. We cannot believe that this can be the purpose of the act, despite the commissioner's rationalization that benefits from the full-time job are only delayed for 8 weeks rather than lost entirely.

In the instant case, because of her employment with Central Heating, Gilbert, absent her employment with Merle's, was qualified for the maximum weekly benefit. Had she never taken the part-time job there would have arisen no doubt at all that she was eligible for full benefits, so long as she remained unemployed and eligible for work. Her part-time employment did not provide for her any greater weekly benefits, though it did add an additional $118 to the total maximum amount payable to her over the course of the benefit year. On the basis of that additional $118, the commissioner would have us deny to Gilbert 7 weeks of unemployment benefits. If the part-time employment had terminated under nondisqualifying circumstances, she would have received the same weekly check as she would otherwise have received, absent the part-time job, though she would have received benefits perhaps for an additional week, unless she otherwise found employment in the meantime. However, if Gilbert had never quit the part-time job and had kept earning at the same rate, approximately $27 per week, then she would have been earning too little each week to have any effect upon her weekly benefit amount or upon her total entitlement. As noted by the California court in *Tomlin v. California Unemployment Ins. Appeals*, 82 Cal. App. 3d 642, 147 Cal. Rptr. 403, 407 (1978): "If the claimant qualifies for full benefits in the absence of part time work, and for at least partial benefits when the claimant has part time work, then it makes no sense that should the optional part time work cease, for any reason, the claimant would become disqualified from any and all benefits." We do not believe that the act requires an all or nothing interpretation as urged by the commissioner.

The weekly benefit amount payable under Neb. Rev. Stat. § 48-624 (Cum. Supp. 1980) is determined by the "total wages paid to such individual for insured work, in that quarter, of his base period, in which such total wages were highest." While the claimant would not be disqualified under § 48-628(a) from all benefits by reason of quitting one of her multiple concurrent jobs, she would be disqualified for the relevant period from receiving those benefits attributed to the job which she quit. And under Neb. Rev. Stat. § 48-626 (Cum. Supp. 1980) "the total benefit amount based on the employment from which he or she was so separated shall be reduced by an amount equal to the number of weeks for which he or she is or would have been disqualified had he or she filed a claim immediately after the separation, multiplied by his or her weekly benefit amount . . . ." But "in no event shall the benefit amount based on employment for any employer be reduced to less than one benefit week where the individual was or could have been determined disqualified" because of a voluntary quit.

To so hold will not do injustice to anyone, including Merle's Food and Drink. It appears clear to us that under the provisions of Neb. Rev. Stat. § 48-652(3)(a) (Cum. Supp. 1980), Merle's Food and Drink would not have its experience account charged for any benefits, including a residual 1 week of benefits because of the disqualifying act of Gilbert. And Central Heating is explicitly charged "only for benefits based upon wages paid by such employer." In light of this mechanism for crediting and charging the experience accounts of different employers separately, it is entirely reasonable to interpret "benefits" under § 48-628(a) in such a way that benefits attributable to separate employers are disqualified separately. Also, the commissioner has within his power the ability to eliminate any perceived injustices to employers. Specifically, § 48-652(3)(a) provides: "The commissioner shall

by general rules prescribe the manner in which benefits shall be charged against the account of several employers for whom an individual performed employment during the same quarter."

We believe the more reasonable interpretation of § 48-628(a) is that where more than one job is held concurrently by an employee, a disqualifying termination of one job does not thereby automatically disqualify the employee from benefits based upon other jobs against which no disqualification applies. With regard to disqualification for benefits under § 48-628(a), each job should be considered separately and benefits disqualified separately according to the facts relating to the termination of each employment. If that is not what the Legislature intended in adopting § 48-628(a), it can say otherwise in the future. For these reasons the judgment of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. PAUL J. ROWE, APPELLANT.

335 N.W.2d 309

Filed June 17, 1983. No. 82-600.

1. **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.
2. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.

Appeal from the District Court for Cass County: ROBERT T. FINN, Judge. Affirmed.

Kirk E. Naylor, Jr., for appellant.

Paul L. Douglas, Attorney General, and Dale D. Brodkey, for appellee.

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

PER CURIAM.

The defendant, Paul J. Rowe, appeals from a jury verdict finding him guilty of murder in the second degree, in violation of Neb. Rev. Stat. § 28-304 (Reissue 1979), on July 21, 1982. Murder in the second degree is a Class 1B felony punishable by imprisonment for a period of not less than 10 years, or life. On July 29, 1982, the court sentenced Rowe to imprisonment for a term of 25 years. This is the second time this case has been before this court. Our first opinion is reported in *State v. Rowe*, 210 Neb. 419, 315 N.W.2d 250 (1982) (*Rowe I*). In *Rowe I*, we reversed the homicide conviction because of the trial court's failure to instruct the jury on the lesser-included offense of manslaughter and remanded for a new trial. We did, however, affirm the arson conviction and sentence which was imposed by the trial court, and that arson conviction is not involved in this appeal.

Rowe has now assigned two errors. He maintains that the trial court erred in failing to sustain his motion to dismiss made at the close of all the evidence for the reason that the evidence was insufficient as a matter of law to support a conviction. He further maintains that the trial court erred in failing to grant his motion for mistrial, necessitated by an alleged prejudicial comment made to the jury by the county attorney during closing argument. For reasons which we shall more particularly detail in this opinion, we believe that both assignments of error must be overruled and the judgment and sentence of the trial court affirmed.

On the early morning of Thursday, May 1, 1980, shortly after daybreak, a fire was discovered at the Cass County farm home owned by Rowe and his

wife, Layne, the victim in this case. Firefighters were called to the scene, and the nude, mutilated body of Layne Rowe was found wrapped in blankets on a bed located in the west second floor bedroom.

An autopsy was conducted on May 1, 1980, by Dr. Daniel Till, a Lincoln pathologist. The autopsy revealed that she had suffered a depressed skull fracture. Dr. Till testified that in his opinion the skull injury was produced by a blunt traumatic force striking the head behind the left ear. Dr. Till believed that an instrument such as the blunt side of a clawhammer similar to one found in the Rowe home would be the type of instrument that could produce the injury observed to the skull. Notwithstanding the injury to the skull, Dr. Till was of the opinion that the immediate cause of death was due to loss of blood. He believed this to be the case because the autopsy disclosed very little blood remaining in the cardiovascular system. Dr. Till testified that although the injuries to the brain were extremely severe and, in his opinion, were lethal in that they would have eventually caused death of and by themselves, the autopsy disclosed that the heart had not stopped beating due to those head injuries at the time that incisions were made in the trunk of the body. Dr. Till believed that had death been from the head injuries, the heart would have stopped immediately and blood would have clotted and remained in the heart.

The autopsy further disclosed a large incision in the trunk of the victim, extending from immediately below the breastbone to the pubic area and into the vagina and the rectum. The right breast was completely absent, having been amputated with a sharp instrument. The left breast was partially incised and torn, but most of the breast appeared to be still attached to the body. The uterus, while still attached to the body by some loose, soft tissue, was freely movable and almost completely cut out of the body. Both ureters were severed and the right iliac

artery had an incision in it. The body further displayed signs of having been burned.

While Dr. Till believed the head injury was caused by a movable object striking the head, on cross-examination he testified that he could not rule out the possibility that the head injury had been caused by a fall, as maintained by Rowe. Nevertheless, he held to his opinion that the injury was caused by a moving object striking the head rather than by a fall.

Appellant Rowe did not testify on his own behalf but did call as part of his case Drs. Fay Whitla and John Baldwin, two psychiatrists practicing in Lincoln, Nebraska. Rowe told both psychiatrists he had made the incision in his wife's body, believing he was going to be able to remove a child which his wife had left for him. He also advised both psychiatrists that he had surgically removed his wife's breast because he believed she wished him to have something to remember her by. Dr. Emmet Kenney, a psychiatrist, was also called by the State; he also testified he had information concerning Rowe's mutilation of his wife's body. Other witnesses were called by both the State and Rowe, but their testimony is not relevant for our examination of the two limited assignments of error filed by Rowe.

In support of Rowe's first assignment of error, that the trial court erred in failing to sustain his motion to dismiss made at the close of all the evidence for the reason that the evidence was insufficient as a matter of law to support a conviction, Rowe argues that where there is a total failure of competent proof in a criminal case to support a material allegation in the information, or where the evidence adduced to support the charge is of so weak or doubtful a character that a conviction based thereon cannot be sustained, the resulting conviction must be set aside. As legal support for that position, Rowe cites to us the case of *State v. Buchanan*, 210

Neb. 20, 312 N.W.2d 684 (1981). We do not believe, however, that our opinion in *State v. Buchanan* supports Rowe's position herein. Specifically, in *Buchanan* we said at 28, 312 N.W.2d at 689: "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." Furthermore, we have often said that on appeal we will not interfere with a conviction 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 a verdict of guilt beyond a reasonable doubt. *State v. French*, 206 Neb. 92, 291 N.W.2d 248 (1980); *State v. Meadows*, 203 Neb. 197, 277 N.W.2d 707 (1979); *State v. Sommers*, 201 Neb. 809, 272 N.W.2d 367 (1978). In the instant case the undisputed testimony was that the cause of death was bleeding, caused by the incisions made in the body of Layne Rowe. The evidence is without dispute that these incisions were made by appellant Rowe, even though he maintains he did not do the acts with the intent to cause his wife's death, but, rather, for other reasons. Nevertheless, if the jury believed that he had in fact made the incisions in her body which resulted in her immediate death, there was sufficient evidence from which the jury could find the defendant guilty of murder in the second degree.

Section 28-304(1) provides: "A person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation." In *State v. Clermont*, 204 Neb. 611, 615, 284 N.W.2d 412, 415 (1979), this court said: "The essential elements in the crime of murder in the second degree are that the killing be done purposely and maliciously." We also said in *State v. Clermont*, *supra* at 616, 284 N.W.2d at 415: "The elements of malice and intent concern the state of mind of the slayer. Malice, in its legal sense, denotes that con-

dition of mind which is manifested by intentionally doing a wrongful act without just cause or excuse . . . ." See, also, *State v. Johnson*, 200 Neb. 760, 266 N.W.2d 193 (1978); *State v. Hardin*, 212 Neb. 774, 326 N.W.2d 38 (1982). Malice means "any willful or corrupt intention of the mind." See *State v. Johnson*, *supra* at 764, 266 N.W.2d at 196. This court has also stated that "malice and intent may be inferred from the evidence relating to the circumstances of the criminal act." *State v. Clermont*, *supra* at 616, 284 N.W.2d at 415.

In *State v. Partee*, 199 Neb. 305, 258 N.W.2d 634 (1977), the defendant was convicted of murder in the second degree. The victim, who was the defendant's wife, had died as a result of a brutal beating. Photographs were taken which indicated that the victim was severely beaten about the head and upper body and that numerous blows would have been required to inflict such a beating. The doctor who performed the autopsy described the victim's injuries, and photographs were introduced. There was evidence indicating that there had been a fight earlier that night. The doctor testified that in his opinion the cause of death was a massive hemorrhage from scalp wounds. In affirming the verdict of the jury we said at 312, 258 N.W.2d at 639: "The evidence in this case was clearly sufficient to support a jury finding that the person who killed the victim acted purposely and maliciously, and with intent to kill. The victim was brutally and relentlessly beaten, and part of her scalp was torn away. The evidence negated any theory that the victim died accidently [sic], or that the perpetrator meant only to injure her and not kill her. Under circumstances such as those presented in this case, the jury could properly infer that the perpetrator acted with malice and intent to kill."

The fact that there was no direct evidence that Rowe intended to kill his wife is of no moment. Certainly, the jury could find from the circumstantial

evidence that Rowe intended to make the incision in his wife's body, thereby causing her death. That was sufficient evidence to require the trial court to submit the case to the triers of fact; to have directed a verdict would have been error. See *State v. Buchanan*, 210 Neb. 20, 312 N.W.2d 684 (1981).

It is not for this court to accept one version of the case over another; that was for the jury. "In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it." *State v. Carter*, 205 Neb. 407, 409, 288 N.W.2d 35, 36 (1980). See, also, *State v. Woodruff*, 205 Neb. 638, 288 N.W.2d 754 (1980); *State v. Sommers*, 201 Neb. 809, 272 N.W.2d 367 (1978).

As a matter of fact, Rowe presented evidence establishing that he had made the deadly incision in his wife's body. He argued, however, that at the time he did so he was not guilty by reason of insanity. The jury chose not to believe his witnesses and, rather, concluded that the acts which admittedly he did were done intentionally and maliciously. We cannot say the jury was wrong. The assignment of error is therefore overruled.

The second assignment of error relates to a statement made by the prosecution during closing argument. During the course of closing argument, after Rowe's counsel had presented argument to the jury, the prosecutor said in part: "And while we're on theories, that I so underhandedly have been supplying you, going back to Dr. Till, *he said* that when you consider everything that he had before him. Well, you know what he said, for I don't have to repeat that to you, but he's considering everything. He's not—as he said: *I* would have expected to see a

pattern bruise, you know, the bruise that rendered the injury. It wasn't there, but that doesn't mean that it didn't happen the way that I believe it to have happened." (Emphasis supplied.) Rowe argues that the prosecutor committed prejudicial error entitling Rowe to a mistrial because the prosecutor told the jury that he, the prosecutor, believed the blow to have been caused by a blunt instrument. However, when one reads the entire closing arguments, it is clear that the prosecutor was not conveying to the jury his view but, rather, was paraphrasing Dr. Till's view. The statement, "but that doesn't mean that it didn't happen the way that I believe it to have happened," referred to Dr. Till's belief and not to a belief of the prosecutor. To attempt to reach any other conclusion would be to do violence to the words of the closing argument. This assignment is likewise without merit.

Having therefore overruled both assignments of error, the judgment and sentence of the trial court are in all respects affirmed.

AFFIRMED.

IN RE INTEREST OF FANT, CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. ETHEL MARLAINA FANT, APPELLANT.

335 N.W.2d 314

Filed June 17, 1983. Nos. 82-622, 82-623.

1. **Juvenile Courts: Appeal and Error.** Although the review in the Supreme Court of an order of a juvenile court is de novo on the record, the findings of the trial court are accorded great weight.
2. **Parental Rights.** Where a parent is unable to discharge parental responsibilities because of mental deficiency, and there are reasonable grounds to believe that such condition will continue for a prolonged and indeterminate period, parental rights may be terminated if such action is in the best interests of the child.

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

Sally Millett Rau of Walsh, Walentine, Miles, Fullenkamp & O'Toole, for appellant.

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

John J. Bedel, guardian ad litem.

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

BOSLAUGH, J.

Ethel Marlaina Fant has appealed from orders of the separate juvenile court of Douglas County, Nebraska, terminating her parental rights to her three children. Case No. 82-622 involves the termination of her parental rights to her daughter born September 8, 1974, and her son born February 25, 1977. Case No. 82-623 involves the termination of her parental rights to her daughter born June 26, 1981.

A petition was filed in case No. 82-622 on January 12, 1978, alleging that on January 9, 1978, the appellant had been sentenced to imprisonment in the Women's Reformatory at York, Nebraska, for 1 to 2 years. On the same day, the trial court ordered that Douglas County Social Services retain possession of the children for temporary placement in a foster home. The first two children of the appellant have remained in foster care continuously since that date.

The petition in case No. 82-623 was filed July 14, 1981. The petition alleged that the appellant had been committed to the Nebraska Psychiatric Institute on April 20, 1981, and prayed that the parental rights of the appellant to her third child be terminated. On the same day, the trial court ordered that Douglas County Social Services retain possession of the child for temporary placement in a foster home. The third child of the appellant has remained in foster care continuously since that date.

Supplemental petitions praying for termination of parental rights were filed in each case on June 25, 1982, by the guardian ad litem of the children. The supplemental petitions alleged that the appellant was afflicted with a chronic form of severe mental illness described as borderline personality disorder; that the illness would continue for a prolonged, indeterminate period; and that the appellant, at times, refuses to take medication prescribed for her in an attempt to control her illness.

Following an evidentiary hearing on July 28, 1982, the trial court found that the evidence was clear and convincing that the appellant's parental rights to her three children should be terminated, and ordered that her parental rights be terminated. The appeals are from these orders. The appeals were consolidated in this court for argument and disposition.

Although the review in this court of an order of a juvenile court is de novo on the record, the findings of the trial court are accorded great weight. *State v. Duran*, 204 Neb. 546, 283 N.W.2d 382 (1979).

The record shows, by clear and convincing evidence, that the appellant is afflicted with a severe mental illness which is incurable and prevents her from taking care of her children.

Dr. Benjamin Graber, a psychiatrist and clinical director of Adult Inpatient Services at the University of Nebraska Medical Center, Nebraska Psychiatric Institute, testified at length at the July 28, 1982, hearing concerning the appellant and her illness. Dr. Graber testified that he had been in contact with the appellant over a period of 48 months and that the appellant suffers from borderline personality disorder, a severe mental disorder characterized by an inability to control one's emotions, impulsiveness, hysterical features, periodic decompensation into psychotic and/or depressive illnesses which require medication, treatment, and/or hospitalization, and frequent suicidal gestures. There is no cure for this illness and it requires lifelong psychiatric care with

intermittent use of medication. Although the appellant's illness may not require continuous long-term hospitalization, it will be necessary to hospitalize her from time to time at irregular intervals and for varying lengths of time. She at times becomes violent and it is impossible to predict when such episodes may occur, although stress may be a factor in precipitating decompensation. Dr. Graber testified that to a reasonable degree of medical certainty he had "a very serious doubt about her ability to parent her children."

During much of the time that the appellant was imprisoned at York, Nebraska, she was kept in "lockup" because of misbehavior and "acting up." While pregnant with her third child she threatened to abort herself on two occasions. There is evidence of attempted suicide on several occasions; assaults upon personnel at the psychiatric institute; and violent outbursts where six or seven aides were required to subdue the appellant. In addition to the possible physical harming of the children, Dr. Graber testified there would be multiple opportunities for emotional trauma to the children if they were in her custody.

Where a parent is unable to discharge parental responsibilities because of mental deficiency, and there are reasonable grounds to believe that such condition will continue for a prolonged and indeterminate period, parental rights may be terminated if such action is in the best interests of the child. Neb. Rev. Stat. § 43-292(5) (Cum. Supp. 1982); *In re Interest of Wanek*, 212 Neb. 394, 322 N.W.2d 803 (1982); *In re Interest of Farmer*, 210 Neb. 500, 315 N.W.2d 454 (1982).

The record in this case establishes by clear and convincing evidence that it is in the best interests of the children that the parental rights of the appellant be terminated. The orders of the juvenile court are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. OWENS HARRINGTON, APPELLANT.

335 N.W.2d 316

Filed June 17, 1983. No. 82-676.

Final Orders: Appeal and Error. Where a notice of appeal is not filed within 1 month from the entry of the final order appealed from as required by Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 1982), this court obtains no jurisdiction to hear the appeal, and the appeal must be dismissed.

Appeal from the District Court for Douglas County: JOHN T. GRANT, Judge. Appeal dismissed.

Owens Harrington, pro se.

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

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

PER CURIAM.

Defendant-appellant, Owens Harrington, appeals from the order of the District Court denying him post conviction relief. We dismiss the appeal.

Defendant filed his petition for post conviction relief on March 16, 1982. On August 31, 1982, the District Court entered its order denying the relief requested. Defendant filed his notice of intent to appeal on October 4, 1982.

Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 1982) requires that proceedings to obtain a reversal, vacation, or modification of final orders made by the District Court shall be by filing in the office of the clerk of the District Court within 1 month after the rendition of such final order, or within 1 month from the overruling of a motion for a new trial, a notice of intention to prosecute such appeal. Defendant filed his notice of intent to appeal more than 1 month after the order denying the relief sought in his petition for post conviction relief. There was no motion for a new trial.

It is the settled law of this state that where a notice of appeal is not filed within 1 month from the entry of the final order appealed from as required by § 25-1912(1), this court obtains no jurisdiction to hear the appeal, and the appeal must be dismissed. *State v. Buss*, 192 Neb. 407, 222 N.W.2d 113 (1974).

Accordingly, the within appeal is dismissed.

APPEAL DISMISSED.

DORIS ELROD, APPELLEE, V. PRAIRIE VALLEY, INC., APPELLANT.

335 N.W.2d 317

Filed June 17, 1983. No. 82-739.

1. **Workmen's Compensation: Appeal and Error.** Findings of fact made by the Nebraska Workmen's Compensation Court after rehearing will not be set aside on appeal unless clearly wrong.
2. **Questions of Law.** This court is obligated to make its own determinations as to questions of law.
3. **Workmen's Compensation: Seasonal Employment.** Seasonal employment refers to occupations which can be carried on only at certain or fairly definite seasons or portions of the year, and does not include such occupations as may be carried on throughout the entire year.

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

Walter E. Zink II and Diane Bevans Carlson of Baylor, Evnen, Curtiss, Grimit & Witt, for appellant.

John A. Wagoner, for appellee.

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

CAPORALE, J.

In this workmen's compensation case the defendant-appellant, Prairie Valley, Inc., urges that the Workmen's Compensation Court erred by failing to find that the plaintiff-appellee, Doris Elrod, was a seasonal employee. We disagree with that contention

and affirm the compensation court's award on rehearing.

On September 28, 1981, the plaintiff suffered injuries as the result of an accident arising out of and in the course of her employment by the defendant. As a consequence of said accident and injury she incurred hospital and medical expenses and suffered disability.

The amount of the disability benefits is dependent upon plaintiff's average weekly wage. Neb. Rev. Stat. § 48-121 (Cum. Supp. 1982). The formula for computing the average weekly wage depends upon whether plaintiff was engaged in an occupation involving seasonal employment or nonseasonal employment. Neb. Rev. Stat. § 48-126 (Reissue 1978). The question is a mixed one of fact and law. To the extent the determination involves the former, findings of fact made by the Nebraska Workmen's Compensation Court after rehearing will not be set aside on appeal unless clearly wrong. *Novotny v. Electric Hose & Rubber Co.*, *ante* p. 216, 333 N.W.2d 406 (1983). On the other hand, to the extent that a question of law is involved, we are obligated to make our own determination. See, *Ranger Division v. Bayne*, *ante* p. 251, 333 N.W.2d 891 (1983); *Phelps County Savings Co. v. Dept. of Banking & Finance*, 211 Neb. 683, 320 N.W.2d 99 (1982); *The 20's, Inc. v. Nebraska Liquor Control Commission*, 190 Neb. 761, 212 N.W.2d 344 (1973).

The defendant engages in the seed corn business throughout the year. Plaintiff obtained her employment by responding to a newspaper advertisement placed by the defendant which read, "TEMPORARY HELP WANTED Applications are now being taken for corn sorters needed during harvest. . . ." Defendant's production manager testified that corn sorters are needed only during the corn harvesting season, roughly the period from September to late October of each year. A sorter basically separates the less desirable or malformed ears from the regu-

lar ones and removes husks from those ears on which that had not been done previously. According to the employer, the job cannot be performed at any other time of year. It must be completed soon after the corn ear has been picked in order that the corn may then be dried and further processed for future sale. Removal of the husks makes drying less expensive.

The law in this state regarding what constitutes seasonal employment was last enunciated in *Hiestand v. Ristau*, 135 Neb. 881, 284 N.W. 756 (1939). Therein we said that seasonal employment refers to occupations which can be carried on only at certain or fairly definite seasons or portions of the year, and does not include such occupations as may be carried on throughout the entire year. That being so, we found that since one could be a carpenter throughout the year, plaintiff was not engaged in "seasonal employment," notwithstanding the fact that he was injured while shingling a farm building. We had held earlier, in *Hogsett v. Cinek Coal & Feed Co.*, 127 Neb. 393, 255 N.W. 546 (1934), that employment for the handling and delivery of retail coal was not seasonal employment. In *Gorham v. Kiewit Sons Co.*, 129 Neb. 277, 261 N.W. 353 (1935), we held that bridge building was not seasonal employment or employment dependent on the weather. In *Lincoln Gas & Electric Light Co. v. Watkins*, 113 Neb. 619, 204 N.W. 391 (1925), we held the fact that the employee intended to return to college at the end of the summer did not make his employment seasonal.

The evidence herein establishes that the employer artificially dries the corn to reduce its moisture content. Although the sorting and husk removal are done before the drying operation, there is nothing to establish that sorting must occur prior to drying. It may be more convenient or more profitable for the employer to sort and husk prior to drying, but it cannot be said that climatic conditions prevailing at any given season dictate that sorting occur only at that

time. The plaintiff is, as the compensation court found, a temporary employee, not a seasonal one. The plaintiff is awarded an attorney fee of $750.

AFFIRMED.

PAULA S. FOUNTAIN, APPELLEE, V. JOHN R. HANLON, COMMISSIONER OF LABOR, APPELLANT, DAGWOOD'S DELI, APPELLEE.

335 N.W.2d 319

Filed June 17, 1983. No. 82-856.

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

Pamela A. Mattson, for appellant.

Marie Ashe, for appellee Fountain.

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

KRIVOSHA, C.J.

The decision in this appeal is controlled by our decision released today in the case of *Gilbert v. Hanlon*, *ante* p. 676, 335 N.W.2d 548 (1983), and presents to the court the identical legal question presented in *Gilbert*. The appellee, Paula S. Fountain, was employed by Square D Company in Lincoln, Nebraska, on a full-time basis from July of 1979 to January 8, 1982. Additionally, Fountain worked on a part-time basis at Dagwood's Deli in Lincoln, Nebraska, from October of 1981 to April 9, 1982. In January of 1982, at the time that Fountain's full-time employment with Square D terminated, her working hours at Dagwood's Deli were reduced to 6½ hours per week. On April 9, 1982, she left Dagwood's Deli to accept part-time employment of approximately 10 hours per week at Dutton's Den, a restaurant located in Lincoln, Nebraska.

In January of 1982, when Fountain was laid off from her full-time job, she began collecting unemployment compensation benefits even though she was still working part-time at Dagwood's Deli. This was because her wages from her part-time employment were not sufficient to disqualify her from receiving full unemployment compensation benefits.

After she left her part-time employment at Dagwood's Deli, a determination was made regarding her right to continue receiving unemployment compensation. On May 14, 1982, a claims deputy from the Department of Labor determined that Ms. Fountain was now disqualified from receiving benefits for the period from April 10, 1982, through June 5, 1982, for the reason that she had left Dagwood's Deli voluntarily and without good cause and therefore was disqualified from receiving benefits pursuant to Neb. Rev. Stat. § 48-628(a) (Cum. Supp. 1980). In addition, the deputy found that the amount of $424 in unemployment compensation which Ms. Fountain had received for the weeks ending April 10, 1982, through May 1, 1982, constituted an overpayment during the period of disqualification. Ms. Fountain was determined to be liable to repay the $424.

She thereafter appealed the disqualification determination to the Nebraska Appeal Tribunal, and on June 3, 1982, the tribunal affirmed the department's determination. Fountain then perfected an appeal to the District Court for Lancaster County, Nebraska, which, on November 24, 1982, reversed the decision of the Nebraska Appeal Tribunal and found that Fountain had been erroneously disqualified from receiving all the benefits to which she was entitled during her unemployment.

For all the reasons more particularly set out in our opinion in *Gilbert v. Hanlon*, *supra*, we believe that the decision of the trial court was correct, and the judgment and order of the trial court are affirmed.

AFFIRMED.

IN RE ESTATE OF ALBERT W. HILL, ALSO KNOWN AS A. W. "BABE" HILL, DECEASED.
W. N. NEFF, PERSONAL REPRESENTATIVE OF THE ESTATE OF ALICE M. HILL, DECEASED, APPELLANT, V. MARILYN HILL SUMMERLEE ET AL., PERSONAL REPRESENTATIVES OF THE ESTATE OF ALBERT W. HILL, DECEASED, APPELLEES.

335 N.W.2d 750

Filed June 24, 1983. No. 82-165.

1. **Trial: Evidence.** A party may, by his acts or omissions, waive, or be estopped to make, objections to the admission or exclusion of evidence. Such waiver or estoppel may arise from failure to object, from acts done or omitted before the evidence is offered, as by failure to object to previous similar evidence, or from some affirmative act done after the ruling on the evidence.
2. **Evidence: Appeal and Error.** Error cannot be predicated on the admission of testimony when testimony of the same nature was previously admitted without objection.
3. **Decedents' Estates: Words and Phrases.** Under Neb. Rev. Stat. § 30-2316 (Reissue 1979) "fair disclosure" contemplates that each spouse should be given information of a general and approximate nature concerning the net worth of the other. "Fair disclosure" is not synonymous with detailed disclosure such as a financial statement of net worth and income.

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

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

Nicholas J. Lamme of Yost, Schafersman, Yost, Lamme & Hillis, for appellees.

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

MCCOWN, J.

This is an appeal from a judgment of the District Court affirming an order of the county court of Dodge County denying a widow's petition to take an elective share of her husband's estate.

Albert W. Hill and Alice Madden were married in November 1977. At the time of the marriage Albert

was 65 and Alice was 64 years old. Albert had been a widower since 1939 and had one living daughter. Alice had been divorced since 1951 and had three living children. Albert and Alice had been going together "as a couple" since the early 1950s. Albert had been active in a number of business activities during his lifetime and had extensive personal investments. Alice had been employed at a bank immediately prior to their marriage and also had assets of her own.

Shortly prior to the marriage Albert and Alice executed a prenuptial agreement in which the parties agreed that "all properties of any name or nature, real, personal or mixed, wherever situated, belonging to the party of the second part [Albert] before the marriage, shall be and remain forever, his personal estate, and this shall include all interest, rents and profits which may in time accrue or result in any manner from increase in value." Virtually the same language was used with respect to the property owned by Alice.

The agreement also provided: "Nothing in this agreement shall prevent either party from providing or giving to the other property of any kind in their Last Will or Codicil to a Will or by trust or by insurance."

The agreement stated: "This agreement is entered into by each party with a full knowledge on the part of each as to the extent and probably [sic] value of the estate of the other, and of all the rights conferred by law upon each in the estate of the other by virtue of such proposed marriage."

Albert died testate on December 7, 1980, leaving an estate valued at approximately $1 million. His will established a testamentary trust of $130,000 for the benefit of Alice and gave her an unrestricted power of appointment of the corpus at her death.

On May 25, 1981, Alice filed a petition to take an elective share of Albert's estate. Four days later Alice died, leaving an estate valued at approxi-

mately $300,000. In her will she exercised the power of appointment given to her in her husband's will and appointed the property to her three children.

The personal representatives of Albert's estate filed objections to Alice's petition to take an elective share, on the ground that the prenuptial agreement constituted a waiver of Alice's right to take an elective share of Albert's estate.

At the hearing in the county court Charles H. Yost testified that he had been the attorney and personal friend of both Albert and Alice for many years. Yost testified that both of them approached him in 1977 before their marriage and requested that he prepare a prenuptial agreement. At the time they were discussing the prenuptial agreement Yost was of the opinion that Albert was worth approximately $1 million and that Alice's personal estate was approximately $50,000. Yost testified that during at least one of the discussions which preceded the execution of the prenuptial agreement, Albert stated in the presence of Alice that he was worth between three-quarters of a million and a million dollars.

Yost testified that he specifically discussed the right of electing against the will and the effect of the prenuptial agreement on such rights. He testified that he discussed with both of them the ramifications of such an election and that, in his opinion, both fully understood. On direct examination by counsel for Alice's estate Yost testified that both Albert and Alice expressed to him on more than one occasion that neither of them wanted their families to have the property of the other and that each of them wanted his or her own property to go to his or her children.

At the conclusion of the hearing the county court found that the prenuptial agreement of November 22, 1977, was valid; that there was fair disclosure of the probable value of the assets of each party; and that Alice voluntarily and knowingly executed the agreement, fully understanding its nature and the

probable value of the assets of the estate of Albert. The county court therefore entered its order and judgment overruling the petition to take an elective share.

The personal representative of Alice's estate appealed to the District Court. On January 11, 1982, the District Court affirmed the judgment and order of the county court and this appeal followed.

The appellant, the personal representative of the estate of Alice Hill, contends that Charles H. Yost should not have been permitted to testify as to the expressed intentions of Albert and Alice, on the ground that such testimony was an attempt to vary the terms of the written agreement in violation of the parol evidence rule. We disagree.

The critical testimony was evidence of the circumstances surrounding the execution of the prenuptial agreement rather than an effort to vary or contradict its terms. In any event, the appellant's counsel himself originally elicited the evidence to which he now objects by inquiring on direct examination of Yost, his own witness, as to what was discussed by Albert and Alice in their meetings with Yost before executing the prenuptial agreement. Counsel only objected to such testimony when it was repeated during cross-examination. The subject matter had already been introduced without objection and there was no valid reason to restrict cross-examination.

A party may, by his acts or omissions, waive, or be estopped to make, objections to the admission or exclusion of evidence. Such waiver or estoppel may arise from failure to object, from acts done or omitted before the evidence is offered, as by failure to object to previous similar evidence, or from some affirmative act done after the ruling on the evidence. *Anson v. Fletcher*, 192 Neb. 317, 220 N.W.2d 371 (1974).

Error cannot be predicated on the admission of testimony when testimony of the same nature was

previously admitted without objection. *Breiner v. Olson*, 195 Neb. 120, 237 N.W.2d 118 (1975).

The appellant cannot now complain of testimony which he elicited and to which he made no objection until the testimony was repeated on cross-examination.

The appellant also argues that the prenuptial agreement is invalid because there was no fair disclosure, and that even if the agreement is valid it does not operate as a waiver of the right to take an elective share.

Neb. Rev. Stat. § 30-2316 (Reissue 1979) provides in relevant part: "The right of election of a surviving spouse and the rights of the surviving spouse to homestead allowance, exempt property and family allowance, or any of them, may be waived, wholly or partially, before or after marriage, by a written contract, agreement or waiver signed by the party waiving after fair disclosure. Unless it provides to the contrary, a waiver of all rights (or equivalent language) in the property or estate of a present or prospective spouse . . . is a waiver of all rights to elective share . . . in the property of the other and a renunciation . . . of all benefits which would otherwise pass to him from the other by intestate succession . . . ."

Although Nebraska has not yet defined what constitutes "fair disclosure" under that section of the Nebraska Probate Code, other states have done so. In *In re Estate of Lopata*, 641 P.2d 952, 955 (Colo. 1982), the court said: "Fair disclosure is not synonymous with detailed disclosure such as a financial statement of net worth and income. The mere fact that detailed disclosure was not made will not necessarily be sufficient to set aside an otherwise properly executed agreement. Where the agreement was freely executed, the fact that one party did not disclose in detail to the other party the nature, extent, and value of his or her property will not alone invalidate the agreement or raise a presumption of fraudu-

lent concealment. [Citations omitted.] Fair disclosure contemplates that each spouse should be given information, of a general and approximate nature, concerning the net worth of the other. Each party has a duty to consider and evaluate the information received before signing an agreement since they are not assumed to have lost their judgmental faculties because of their pending marriage."

The evidence in the case at bar is virtually undisputed and establishes without serious question that the parties made a fair disclosure of the value of their respective properties and each had general knowledge of the nature and extent of the other's property and a full understanding of the nature and effect of the agreement.

Although the prenuptial agreement does not use the word "waiver," the language clearly expresses the intent to bar and waive all rights of each party to the estate of the other. The language specifically authorizing gifts by will, trust, or insurance clearly confirms the intent to waive all rights in the estate of the other. The language is at least "equivalent language" and constitutes a waiver in fact.

The judgment of the District Court affirming the order of the county court was correct and is affirmed.

AFFIRMED.

DAVID SENFTEN, DOING BUSINESS AS METALCRAFTERS HEATING & AIR CONDITIONING, APPELLANT, V. CHURCH OF THE NAZARENE OF COLUMBUS, NEBRASKA, A CORPORATION, DEFENDANT AND THIRD-PARTY PLAINTIFF, AND EQUITABLE SAVINGS AND LOAN ASSOCIATION OF COLUMBUS, NEBRASKA, A CORPORATION, APPELLEES, HELEN L. KRUSE, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF STANLEY H. KRUSE, DECEASED, HELEN L. KRUSE, INDIVIDUALLY, AND RONALD L. KRUSE, THIRD-PARTY DEFENDANTS, APPELLEES.

335 N.W.2d 753

Filed June 24, 1983. No. 82-286.

1. **Mechanics' Liens: Appeal and Error.** A mechanic's lien foreclosure is to be considered by the Supreme Court on appeal de novo on the record, giving credit to the fact that the trial court observed the witnesses and their manner of testifying.
2. **Construction Contracts: Proof.** While it is true that a contract, oral or written, between a subcontractor and a contractor is not binding upon the owner of the property, it is also true that, absent evidence to the contrary, the existence of such a contract does establish the fair and reasonable value of the services.
3. **Mechanics' Liens.** Mechanic's lien statutes are cumulative and remedial in nature and require a liberal construction so as to effectuate their objects and purposes and protect all claimants within their scope as well as to promote substantial justice.
4. **Construction Contracts.** In the absence of a contract to pay a definite sum, the builder is entitled to recover only the reasonable market value for material and labor.

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

Tessendorf, Milbourn, Fehringer & Bothe, P.C., for appellant.

Leininger, Grant & Rogers, for appellee Church.

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

KRIVOSHA, C.J.

This appeal arises from a foreclosure action involving 12 mechanics' liens claimed by as many sub-

contractors and materialmen who furnished labor or materials in the construction of the Church of the Nazarene in Columbus, Nebraska (Church). Six of the liens were released prior to trial and the causes of action representing those liens were dismissed by the lienholders or their assignee. Appellant, David Senften, doing business as Metalcrafters Heating & Air Conditioning (Senften), is the claimant of one of the mechanics' liens and the assignee of five others. Following the trial, the court found in favor of Senften on his third, sixth, and seventh causes of action and ordered a decree of foreclosure. On Senften's first, fifth, and tenth causes of action, the trial court, however, found for the Church and dismissed those causes of action. It is from the action of the trial court in dismissing the first, fifth, and tenth causes of action that this appeal is brought.

With regard to the first and fifth causes of action, the trial court found that Senften had failed to introduce sufficient evidence to prove the reasonable value of the labor performed or material provided. With regard to the tenth cause of action, the trial court found that the evidence introduced to establish the fair and reasonable value of the labor and materials was insufficient and, further, that the time for filing the lien had expired as to part of the work done prior to the date the lien was in fact filed. For reasons more particularly set out in this opinion, we reverse in part and in part affirm.

The basic evidence is not in dispute. In January of 1980 the Church accepted a proposal dated December 22, 1979, submitted by Stanley H. Kruse on behalf of Kruse Construction Company (Kruse) for the construction of a worship and classroom building in Columbus, Nebraska. In connection with the construction of the Church, Senften submitted a written proposal to Ronald L. Kruse, the son of Stanley H. Kruse, for the installation of heaters, air-conditioners, and ductwork in the building. Senften performed the work on the Church beginning on June 20, 1980,

and, except for the installation of some registers on the ductwork, completed his work on October 23, 1980. A mechanic's lien was filed by Senften on January 23, 1981.

On October 7, 1980, M & O Metals, Inc., the materialman involved in the fifth cause of action, sold four door panic devices to Kruse for use in the Church's building. M & O Metals filed a mechanic's lien on January 7, 1981.

In connection with the tenth cause of action, Joe Moore, doing business as Central Insulation & Roofing, at the request of Kruse, tarred the footings of the Church building on April 9, 1980. Then, on October 2 and October 11, Central installed insulation in the attic of the Church building, also at the request of Kruse. The bill submitted for the tarring was the sum of $74, and for the insulation, the sum of $1,470. On January 9, 1981, Moore filed a mechanic's lien in the total amount of $1,544.

A mechanic's lien foreclosure is to be considered by the Supreme Court on appeal de novo on the record, giving credit to the fact that the trial court observed the witnesses and their manner of testifying. See, *Modern Plumbing & Heating, Inc. v. Journey West Campground, Inc.*, 193 Neb. 781, 229 N.W.2d 192 (1975); *Waite Lumber Co., Inc. v. Carpenter*, 205 Neb. 860, 290 N.W.2d 655 (1980). The primary dispute common to all three causes of action is a question of law and whether a subcontractor can foreclose upon a mechanic's lien to recover the reasonable value of labor performed or material furnished by offering in evidence the contract between the subcontractor and the prime contractor. As we have indicated, the trial court held that the subcontractor could not recover on that basis. In that regard we think the trial court was in error.

We should further note, before turning to discuss the various causes of action, that the statutes involved in this appeal are Neb. Rev. Stat. §§ 52-102 and 52-103 (Reissue 1978), which were repealed ef-

fective January 1, 1982. Section 52-102 provided in part: "Any person or subcontractor who shall perform any labor for, or furnish any material, machinery, or fixtures . . . for any of the purposes mentioned in section 52-101, to the contractor, or any subcontractor who shall desire to secure a lien upon any of the structures mentioned in said section, may file a sworn statement of the amount due him from such contractor for such labor, material . . . together with a description of the land upon which the same was done or used, within four months from the performing of such labor or furnishing such material . . . with the register of deeds of the county wherein said land is situated."

Section 52-103, after first describing the manner in which the lien is to be prepared and filed, concluded as follows: "*Provided*, nothing herein contained shall be taken to prevent the ascertainment by proceeding at law, or otherwise, of the amount actually due for such labor and material, and such lien shall be for no larger sum than the amount actually due therefor."

Senften argues that he met his burden of proof as to his own lien by showing the existence of an oral contract entered into between Senften and the prime contractor, while the Church argues that evidence of a contract between the subcontractor and the prime contractor is not binding on the owner. While it is true that a contract, oral or written, between a subcontractor and a contractor is not binding upon the owner of the property, it is also true that, absent evidence to the contrary, the existence of such a contract does establish the fair and reasonable value of the services. Specifically, in the supplemental opinion in the case of *Rosebud Lumber and Coal Company v. Holms*, 155 Neb. 688, 689, 53 N.W.2d 82, 83 (1952), this court said: "[A]n owner may not be compelled to pay more than the reasonable value of labor or materials furnished, and is not bound by the agreed prices between the contractor and the lien

claimant, but such agreed prices may be taken as prima facie correct." In the *Rosebud Lumber* case the subcontractor was found to have established the reasonable cost of material furnished the contractor merely by offering in evidence an itemized list of materials furnished the contractor and the charges made upon them. In approving such action this court, in the original opinion at 155 Neb. 459, 52 N.W.2d 313, said at 470, 52 N.W.2d at 319: "There was no objection to the showing that the prices set forth in the list were not correct, or that the items for profit or the discounts allowed were not reasonable and fair. The evidence shows prima facie what the reasonable cost of the material was and is not controverted." In support of the claim Senften offered in evidence a written proposal submitted by Senften to Kruse, wherein Senften agreed to provide the entire heating and air-conditioning for the price of $8,839. No evidence was offered in the present case by the Church to show that the price agreed upon between the contractor and the subcontractor did not reflect the fair and reasonable cost of the labor and material furnished. We find it difficult to imagine what better evidence exists as to the fair and reasonable value of a job than what the prime contractor has agreed to pay, absent some evidence to show that the contract price was not legitimate.

The Church further argues that acceptance by Ronald Kruse, the son of the prime contractor, was not acceptance by the contractor, and therefore not evidence of the contract between the prime contractor and Senften. The evidence is clear that the son was acting as agent for his father and was authorized to accept the bid submitted by Senften. The proposal prepared by Senften shows on its face that it is submitted to "Kruse Const" for the "Church of the Nazarene," and specifically recites that "We Propose hereby to furnish material and labor — complete in accordance with above specifications, for the sum of: _____ dollars

($8,839.00)." To argue that this proposal was not submitted to Kruse Construction or accepted by it for a definite sum is to attempt to ignore the facts of the matter as presented to the trial court and to deny to the subcontractor the rights accorded him under mechanic's lien laws. As we noted in *Chicago Lumber Co. v. Horner*, 210 Neb. 833, 836, 317 N.W.2d 87, 89-90 (1982): "[M]echanic's lien statutes are cumulative and remedial in nature and require a liberal construction so as to effectuate their objects and purposes and protect all claimants within their scope as well as to promote substantial justice." Absent any evidence to show that Senften's agreement to provide labor and material for the sum of $8,839, which obviously was accepted by Kruse and provided to the Church, was not fair and reasonable as against the owner, the trial court should have granted the relief sought by Senften on the first cause of action.

What we have said with regard to the first cause of action is likewise applicable under the facts to the fifth cause of action. The materialman involved in the fifth cause of action was M & O Metals, owned by Alvin Fuchs. The evidence discloses that Stanley Kruse ordered three door panic devices for the front and rear doors of the Church. Exhibit 26 is a sales ticket, dated October 7, 1980, from M & O Metals for "Kruse Const.," listing two devices of one type and one of another type. The amount listed for the two is $187.20, and the price for the third device is listed as $560.96. Written on the sales ticket below is the word "Church." Also attached to the sales ticket is a handwritten note, which Fuchs testified was written by Stanley Kruse himself, which simply says, "2 for the 3' door's" "1 for double door in front," and with the word "Church" also written on the note. Further, Fuchs testified that Kruse took with him the two devices for the rear doors and that the other item had to be ordered. Exhibit 27 is an altered copy of exhibit 26. On it, the quantity for the third

device was changed to "2," and a note, with the words, "picked up 10/8/80." Fuchs testified that a Kruse employee came into the store on October 8 to pick up the third device and said two were needed rather than one, and that these items were installed on the front door of the Church. An examination of exhibits 26 and 27, plus the testimony of Fuchs, uncontradicted by any other evidence, clearly established that four items were sold to Kruse for installation at the Church at a total agreed price of $748.16. Absent any evidence to the contrary, this evidence established a prima facie showing of reasonable value, and the trial court should have entered judgment of foreclosure for Senften and against the Church in that amount on the fifth cause of action.

The situation with regard to the tenth cause of action is different. The tenth cause of action involved labor and material provided by Joe Moore as the owner of Central Insulation & Roofing. He testified that Kruse told him to tar the footings of the Church and that he did so on April 9, 1980, charging $.10 per square foot, for a total cost of $74. There is no testimony that Moore advised Kruse in advance as to what the charge would be or that Kruse agreed to such sum. Then, in October of 1980, Kruse told Moore that the building was ready to receive the attic insulation. Moore performed those services on October 2 and October 11 of 1980. The price he charged for the insulation was calculated by multiplying the number of square feet by $.40 per square foot, for a total of $1,470. Moore again testified that there had been no discussion with Kruse in advance as to what he would charge for the insulation. Moore filed a mechanic's lien on January 9, 1981. Although the mechanic's lien filed by Moore indicated that the last day of work was November 9, 1980, Moore testified that the date had no basis in fact and that the last date was October 11, 1980. On the basis of the testimony presented by Moore, it cannot be said that Moore and Kruse had arrived at

a set contract price before the work was done. In the absence of a contract to pay a definite sum, the builder is entitled to recover only the reasonable market value for material and labor. *Patterson v. Spelts Lumber Co.*, 166 Neb. 692, 90 N.W.2d 283 (1958). Having failed to establish that there was any agreed price for the labor or materials, and further failing to introduce evidence as to the fair and reasonable value of the labor and materials, Moore failed to make a prima facie case and the trial court was correct in denying Moore's lien.

One further issue which we might comment on is a matter raised by the Church at trial. It maintained that the notice required by § 52-103 was not mailed to the Church within 5 days of the filing of the M & O Metals lien. The evidence discloses that while it was not filed within 5 days of the filing of the lien, the notice was mailed within 5 days *after* the last date for the *filing* of such lien. This was in compliance with the provisions of § 52-103, which specifically provides that a person filing a lien "shall within five days after the last day for filing of such lien" send notice of the filing to the registered owners of the property. The filing of the notice was in all respects correct.

For the reasons therefor set out in this opinion, the judgment of the trial court as to the first and fifth causes of action is reversed and remanded with directions, and judgment with regard to the tenth cause of action is affirmed.

AFFIRMED IN PART, AND IN PART REVERSED.

DANIEL R. HEGARTY, JR., APPELLANT AND CROSS-APPELLEE, V. CAMPBELL SOUP COMPANY, A NEW JERSEY CORPORATION, ET AL., APPELLEES AND CROSS-APPELLANTS.

335 N.W.2d 758

Filed June 24, 1983. No. 82-341.

1. **Motions for New Trial: Appeal and Error.** The standard of review of an order granting a new trial is whether the trial court abused its discretion. This court will not disturb an order granting a new trial unless it clearly appears that no tenable grounds existed therefor.
2. **Motions for New Trial: Verdicts.** A motion for new trial should be granted only where there is error prejudicial to the rights of the unsuccessful party. Unless such error appears, a party who has sustained the burden and expense of trial, and who has succeeded in securing a verdict on the facts in issue, has a right to keep the benefit of that verdict.
3. **Proximate Cause.** The proximate cause of an injury is that cause which, in natural and continuous sequence, unaccompanied by any efficient, intervening cause, produces the injury, and without which the result would not have occurred.
4. _____. Although the question of proximate cause is ordinarily for the determination of the jury, where, upon the evidence produced, only one inference can be drawn, it is for the court to decide whether a given act or series of acts is the proximate cause of the injury.
5. **Liability: Directed Verdict.** Where a verdict should have been directed on the issue of liability, no prejudice can result from any error in instructions on the issue of liability.
6. **Expert Witnesses.** Expert testimony is permitted even in areas where laymen have competence to determine the facts testified to by the expert where a trial court may feel the opinion would assist them.
7. **Witnesses.** A party has the right to cross-examine the witnesses produced by his adversary touching every relation tending to show their interest or bias.
8. **Witnesses: Appeal and Error.** A party has the right to cross-examine a witness with regard to an interest which affects credibility. Failure to permit such inquiry constitutes reversible error if prejudice results to the complaining party.
9. **Witnesses: Evidence.** Evidence relating to a "Mary Carter" agreement should be admitted where the agreement bears upon the bias and credibility of witnesses employed by a party to the agreement.
10. **Motions for New Trial: Liability: Damages.** When the issue of liability has been determined and there has been error in the de-

termination of damages such that the verdict must be set aside, a new trial may be limited to the issue of damages.

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

Peter J. Hoagland, Warren C. Schrempp and Steven Lefler of Schrempp & Lefler, for appellant.

Larry E. Welch and David M. Woodke of Gross, Welch, Vinardi, Kauffman & Day, P.C., for appellees.

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

BOSLAUGH, J.

This action arose out of a truck-train collision which occurred at about 3 a.m. on December 21, 1978, just east of the intersection of 12th Street and Capitol Avenue in Omaha, Nebraska. The plaintiff, Dan Hegarty, an engine foreman or foreman of a switch crew employed by the Union Pacific Railroad Company, was injured when a truck leased by Campbell Soup Company and driven by its employee, Lynn Peterson, collided with a boxcar upon which the plaintiff was riding. This suit was brought against Campbell Soup Company, Rapid Ways Truck Leasing, Inc., and Peterson, to recover damages for the injuries sustained by the plaintiff in the accident. Peterson was subsequently dismissed as a defendant.

The evidence shows that the plaintiff was serving as "point" man on the railroad switch crew which was delivering boxcars to industries in downtown Omaha. The train, which was approximately 250 feet long, consisted of four boxcars which were being pushed in a westerly direction by a switch engine. The track ran along the south side of Capitol Avenue and ended near 13th Street where the World-Herald building is situated. Of the cars in the train, one car was to be delivered to the World-

Herald building, two cars to Capitol Liquors, and one car to Beebe & Runyan Furniture.

The plaintiff was riding on a ladder on the north side at the west end of the first boxcar, which was the car that was to be delivered to the World-Herald. The plaintiff was responsible for guiding the train through intersections, since the engineer could not see from his position in the switch engine at the rear of the train. The plaintiff communicated with the engineer by using his radio and his railroad lantern.

As the train proceeded west on Capitol Avenue it passed an Allied Van Lines parking lot west of 11th Street. Trailers which were parked there obscured the plaintiff's view to the south of the 12th and Capitol intersection for a time. As the train approached the intersection of 12th Street and Capitol Avenue, the plaintiff observed the truck operated by Peterson traveling in a northerly direction on 12th Street, so he advised the engineer to go slowly. The plaintiff estimated the speed of the train to be about 2.5 m.p.h. at that time. When the train was still east of the 12th Street intersection, the truck stopped at the stop sign on the south side of Capitol Avenue which is set back approximately 33 feet from the intersection. The truck then proceeded into the intersection, making a right turn onto Capitol Avenue. The plaintiff assumed that, because the intersection was well lighted, the truckdriver saw the train. However, when it became apparent to the plaintiff that the driver did not see the train, the plaintiff advised the engineer to stop the train, swung his right foot around to the front of the boxcar, and shined the bright light of his lantern into the windshield of the truck. The truck was about 15 feet away at the time the plaintiff shined the lantern at the truck. The truck did not stop or turn aside, and the right side of the truck collided with the boxcar. The impact occurred just east of the intersection.

The plaintiff sustained a severe injury to his pelvis and was hospitalized for 9 weeks. Due to a resulting

loss of nerve function, he has a permanent partial loss of use of his left leg and wears a brace to aid in walking. He is unable to stand for long periods of time or to do any climbing.

On the date of the accident the plaintiff was employed as a switchman-brakeman, a union position. He had a seniority date of June 10, 1965. Seniority is an important factor in determining salary and promotions, and also determines whether a railroad employee may be subject to a layoff. The plaintiff's injury prevents him from returning to work as a switchman-brakeman. He is presently employed by the Union Pacific as a terminal trainmaster, a nonunion management position which in his case is basically a "desk job." Some adjustments have been made in the basic job description to accommodate his physical condition. At his present job the plaintiff earns $2,900 a month. In 1978 he had earned approximately $24,000, until the date of the accident.

Issues of negligence, contributory negligence, and assumption of risk were submitted to the jury which returned a verdict in favor of the plaintiff in the amount of $519,257. The defendants then filed a motion for a new trial which was sustained. The plaintiff has appealed from the order granting the new trial. The defendants raise three assignments of error on their cross-appeal.

One of the principal issues in dispute was whether an ordinance of the city of Omaha was applicable to the facts in this case. The ordinance, No. 33.08.040, provides as follows: "FLAGMEN AND WATCHMEN - When switching is being done over highway or street railway crossing by yard or trainmen, a man must be stationed at that crossing to act as flagman.

"The watchmen herein provided for shall be stationed at their respective places from date of passage of this chapter.

"The City Council may at any time by concurrent

resolution, designate other and additional crossings where watchmen or other forms of crossing protection are to be provided.

"A watchman stationed at any of the crossings provided for in this chapter, who shall fail or neglect to warn any person about to cross any railroad track at such crossings of the approach of any locomotive, tender or car upon such track, shall be guilty of a misdemeanor, and on conviction thereof shall be punished as hereinafter provided (Ord. 14924 Sec. 47-2.1 Part; May 13, 1941.)"

It is undisputed that a flagman was not stationed at the intersection of 12th Street and Capitol Avenue at the time of the accident. The plaintiff was riding on the boxcar at the time of the impact, and the train had not entered the intersection when the collision occurred.

The defendants' theory of the case was that the plaintiff was engaged in a "switching" operation at the time of the accident and the ordinance was relevant on the issue of contributory negligence. The plaintiff denied that he was engaged in a switching operation. The trial court refused to admit the ordinance into evidence and refused to instruct the jury as to the ordinance. Later, the trial court determined that the ordinance was relevant and sustained the defendants' motion for new trial on the ground that it was error to refuse to admit the ordinance into evidence and instruct the jury concerning it.

The standard of review of an order granting a new trial is whether the trial court abused its discretion. This court will not disturb an order granting a new trial unless it clearly appears that no tenable grounds existed therefor. *Shreves v. D. R. Anderson Constructors, Inc.*, 206 Neb. 433, 293 N.W.2d 106 (1980); *County of Hall ex rel. Wisely v. McDermott*, 204 Neb. 589, 284 N.W.2d 287 (1979). A motion for new trial should be granted only where there is error prejudicial to the rights of the unsuccessful party.

Unless such error appears, a party who has sustained the burden and expense of trial, and who has succeeded in securing a verdict on the facts in issue, has a right to keep the benefit of that verdict. *Shreves, supra*; *County of Hall ex rel. Wisely, supra.*

From our review of the record we have concluded that the evidence shows as a matter of law that the sole proximate cause of the collision was the negligence of the driver Peterson, and a verdict on the issue of liability should have been directed in favor of the plaintiff. Thus, any error in failing to admit or instruct upon the ordinance was harmless error. *McClellen v. Dobberstein*, 189 Neb. 669, 204 N.W.2d 559 (1973); *Leichner v. First Trust Co.*, 133 Neb. 170, 274 N.W. 475 (1937).

Failure to comply with the directives of the ordinance could only be evidence of contributory negligence to be considered by the jury in connection with other evidence bearing upon the issue. A failure to comply with the ordinance would not constitute contributory negligence per se. *Clark Bilt, Inc. v. Wells Dairy Co.*, 200 Neb. 20, 261 N.W.2d 772 (1978); *Krehnke v. Farmers Union Co-Op. Assn.*, 199 Neb. 632, 260 N.W.2d 601 (1977).

The evidence shows that, at the time of the accident, the night was clear and the intersection was well lighted. Peterson, the driver of the truck, admitted that he was familiar with the intersection, having driven through it every work night for 3 years. He knew it was customary for trains to be on that track early in the morning. Peterson testified that while stopped at the stop sign he "did not spend no time looking to see if there was a railroad train in the area." Although Peterson had an unobstructed view for a considerable distance to the east had he looked in that direction, he never looked to the east after stopping at the stop sign. He testified that he did not see the train until he collided with it.

The evidence is that the train's bell was ringing and the whistle blowing. The plaintiff shined his

railroad lantern directly into the truck's windshield when the truck was about 15 feet away from the boxcar, but the truck failed to stop or turn aside.

No other conclusion can be reached from a review of the evidence but that Peterson's negligence was the proximate cause of the accident. Any contributory negligence on the part of the plaintiff was not a proximate cause of the collision. A directed verdict should have been granted in favor of Hegarty.

The applicable rule was stated in *Starlin v. Burlington Northern, Inc.*, 193 Neb. 619, 228 N.W.2d 597 (1975). In *Starlin* the passenger in an automobile sued the railroad for damages resulting from the collision of the car with a train. This court reversed the judgment for the plaintiff, finding that the negligence of the driver in failing to see the train was the sole proximate cause of the accident. We said at 623, 228 N.W.2d at 600: "The law in Nebraska is well settled that if the operator of a motor vehicle is familiar with a railroad crossing and the surroundings, it is his duty to look and listen at a time and place where looking and listening will be effective even though vision of the tracks is restricted, a failure to do so is less than the exercise of due or ordinary care and no recovery can be had for damages resulting from collision with a passing train. It is the duty of the driver of the automobile to have his car under such control that, when it comes to a place where it is possible to see and to hear an approaching train, he can stop and avoid a collision. Loudy v. Union P. R.R. Co., 146 Neb. 676, 21 N.W.2d 431; Kennedy v. Chicago, R. I. & P. R.R. Co., 156 Neb. 345, 56 N.W.2d 446.

"The proximate cause of an injury is that cause which, in natural and continuous sequence, unaccompanied by any efficient, intervening cause, [produces the injury,] and without which the result would not have occurred. *Although the question of proximate cause is ordinarily for the determination*

of the jury, where, upon the evidence produced, only one inference can be drawn, it is for the court to decide whether a given act or series of acts is the proximate cause of the injury. Ecker v. Union P. R.R. Co., 164 Neb. 744, 83 N.W.2d 551." (Emphasis supplied.)

We think it is clear from the evidence in this case that Peterson's negligence was the sole proximate cause of the accident. No tenable reason exists to support the order granting a new trial on the issue of liability. It is, therefore, unnecessary to decide the applicability of the ordinance to the facts of this case.

On their cross-appeal the defendants have raised issues regarding certain instructions given and refused on the issue of liability. Because the case is one in which a verdict should have been directed on the issue of liability, no prejudice resulted from any error in instructions on the issue of liability. See *Snyder v. Fort Kearney Hotel Co., Inc.*, 185 Neb. 476, 176 N.W.2d 686 (1970).

The defendants contend that testimony by an economist, called as an expert witness by the plaintiff, with regard to the amount of lost wages the plaintiff would suffer if he became unable to work in the future was based upon speculation and conjecture and should not have been admitted. The economist merely multiplied the plaintiff's present salary by the number of years remaining until he becomes 65 years of age.

The evidence shows that the plaintiff is presently able to work and, in fact, was given a substantial merit raise shortly before trial. It also shows that the plaintiff now does not have as much job security as he had before the accident and that he performs his present job with certain limitations.

The evidence was properly admitted. The evidence shows there is a possibility that the plaintiff could lose his job, a possibility which the jury could consider and was free to accept or reject. The testi-

mony of the economist did not compel the jury to reach any conclusion with regard to the issue. Neb. Rev. Stat. § 27-702 (Reissue 1979) permits an expert to testify if his specialized knowledge would be helpful to the trier of fact. In *Christensen v. City of Tekamah*, 201 Neb. 344, 351, 268 N.W.2d 93, 98 (1978), we said: "Expert testimony is permitted even in areas where laymen have competence to determine the facts testified to by the expert where a trial court may feel the opinion would assist them. However, the trier of fact is not bound by the testimony of an expert witness. Here, we believe the facts are capable of proper consideration by laymen." The testimony was properly admitted as it was helpful to the jury in determining damages.

The defendants contend that it was error to exclude evidence of a "Mary Carter" agreement entered into by the plaintiff and the railroad. That agreement provided that the Union Pacific would pay the plaintiff $162,500 if he did not recover damages in this action. It further provided that if the plaintiff received a verdict for more than that amount, the Union Pacific would pay nothing to the plaintiff. If the plaintiff recovered less than $162,500 in this action, the Union Pacific would pay him the difference. Campbell Soup Company argues that the agreement gave the Union Pacific an interest in this action which affected the credibility of witnesses employed by the railroad who testified for the plaintiff. Specifically, Campbell Soup argues that the agreement should have been made known to the jury so that the jury could properly evaluate such witnesses' testimony.

Witnesses employed by the railroad testified with regard to such matters as seniority, employees' salaries, and employees' benefits. These were matters which had a bearing on the amount of damages the plaintiff had suffered because he was no longer able to work as a switchman-brakeman.

The "Mary Carter" agreement created an interest

on the part of the Union Pacific in the amount of damages recovered by the plaintiff in this litigation. An employer's interest in the litigation affects the credibility of an employee who testifies in the action upon issues affecting the employer's interest. See 98 C.J.S. *Witnesses* § 551 b. (1957). In *Gleason v. Baack*, 137 Neb. 272, 289 N.W. 349 (1939), we said with regard to a witness whose principal, an insurer, is interested in the outcome of an action: "In the case of *Moy Quon v. Furuya Co.*, 81 Wash. 526, 143 Pac. 99, the claim agent called on the injured man in the hospital, and propounded to him carefully written questions, and subsequently the claim agent was called for the purpose of discrediting the injured person's testimony. On cross-examination, it developed that this witness was a claim agent from the casualty company which carried appellant's liability insurance. The court referred to the general rule and made this statement: 'This rule [regarding the admissibility of liability insurance], however, was never intended to override the equally positive and salutary principle that a party has the right to cross-examine the witnesses produced by his adversary touching every relation tending to show their interest or bias. * * * When a party offers a witness, the relations of that witness to the thing in issue and his interest in the result become material as affecting his credibility. It is universally held that these things may be developed on cross-examination.' They may be likewise developed on redirect examination when a statement is taken by a representative of the defendant and a witness interrogated in reference thereto by defendant's counsel.

. . . .

". . . See, also, *Webb v. Hoover-Guernsey Dairy Co.*, 138 Or. 24, 4 Pac. (2d) 631, wherein it was said: 'When parties interested, either directly or indirectly, in the result of litigation, send their agents to interview witnesses and prepare statements for such witnesses to sign, the jury has not only the right to

know who such agents are, but whom such agents represent, when a discrepancy arises between the testimony given by the witness on the stand and the statement prepared by such agent.' " *Id.* at 282-83, 289 N.W. at 355-56.

A party has the right to cross-examine a witness with regard to an interest which affects credibility. *Eden v. Klaas*, 166 Neb. 354, 89 N.W.2d 74 (1958). Failure to permit such inquiry constitutes reversible error if prejudice results to the complaining party. See *State v. Matejka*, 186 Neb. 454, 183 N.W.2d 917 (1971).

Other jurisdictions have held that it is prejudicial error to prohibit inquiry into the existence of a "Mary Carter" agreement. In *General Motors Corp. v. Lahocki*, 286 Md. 714, 728, 410 A.2d 1039, 1046 (1980), the court said: "The majority view as embodied in cases such as *Maule Industries v. Rountree, supra*; *Ward v. Ochoa, supra*; *Reese v. Chicago, B. & Q. R.R.*, 55 Ill.2d 356, 303 N.E.2d 382 (1973); *Bristol-Myers Co. v. Gonzales*, 561 S.W.2d 801 (Tex. 1978); and *General Motors Corp. v. Simmons*, 558 S.W.2d 855 (Tex. 1977), is that such agreements are not bad generally, but prejudice is shown warranting a new trial if they have not been disclosed upon proper motion and admitted into evidence. The reason for this is that in judging the credibility of a witness the jury is entitled to know of his interest in the outcome." See, also, Annot., 65 A.L.R.3d 602 (1975).

When the issue of liability has been determined and there has been error in the determination of damages such that the verdict must be set aside, a new trial may be limited to the issue of damages. *Schaffer v. Bolz*, 181 Neb. 509, 149 N.W.2d 334 (1967).

We conclude that the order of the trial court granting a new trial should be affirmed, but the new trial should be limited to the issue of damages only. The

cause is remanded with directions to limit the new trial to the issue of damages only.

AFFIRMED AND REMANDED WITH DIRECTIONS.

LOWELL PAASCH AND RODNEY T. PAASCH, APPELLANTS, V. DONALD P. FELLER ET AL., APPELLEES.

335 N.W.2d 553

Filed June 24, 1983. No. 82-362.

Appeal from the District Court for Douglas County: JOHN T. GRANT, Judge. Affirmed.

Garvey, Nye, Crawford, Kirchner & Moylan, and Fogarty, Lund & Gross, for appellants.

Jeffrey B. Farnham and Thomas R. Wolff, for appellees.

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

PER CURIAM.

The court, having reviewed the record, finds that all assignments of error should be overruled. The judgment of the trial court, based upon the verdict of the jury, is affirmed.

AFFIRMED.

GLORIA M. ORR, APPELLEE AND CROSS-APPELLANT, V. G. WILLIAM ORR, APPELLANT AND CROSS-APPELLEE.

335 N.W.2d 554

Filed June 24, 1983. No. 82-394.

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

Lawrence I. Batt of Garber & Batt, for appellant.

J. Joseph McQuillan and Betty L. Egan of Walsh, Walentine, Miles, Fullenkamp & O'Toole, for appellee.

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

PER CURIAM.

This is an appeal from a decree of dissolution of marriage wherein the respondent husband has appealed from the decree of the District Court with respect to the distribution of property. The petitioner wife has cross-appealed on that issue and because of the trial court's failure to award her an attorney fee.

This court, having reviewed the record de novo as it is required to do, agrees with the result reached by the trial court. The decree is affirmed in all respects. The petitioner wife is allowed the sum of $2,000 to be applied to the fee of her attorneys for services rendered to her in this court.

AFFIRMED.

F. GARY LILYHORN, APPELLANT, V.
JOHN E. DIER, APPELLEE.

335 N.W.2d 554

Filed June 24, 1983. No. 82-458.

1. **Attorney and Client.** As a general rule the duty to exercise reasonable care and skill which a lawyer owes his client ordinarily does not extend to third parties.
2. **Judgments: Appeal and Error.** The fact that this court arrives at the same conclusion as the District Court, but for a different reason, is no cause to reverse the judgment.

Appeal from the District Court for Phelps County: ORVILLE L. COADY, Judge. Affirmed.

Herbert J. Friedman and James E. Dunlevey of Friedman Law Offices, for appellant.

Knudsen, Berkheimer, Richardson & Endacott, and William H. Sherwood, for appellee.

BOSLAUGH, MCCOWN, WHITE, HASTINGS, CAPORALE, and SHANAHAN, JJ.

HASTINGS, J.

F. Gary Lilyhorn, the plaintiff, has appealed from an order of the District Court sustaining the motion for summary judgment filed by John E. Dier, defendant, and dismissing plaintiff's action. We affirm.

Plaintiff was the son and one of four heirs of Luella M. Lilyhorn, deceased. He alleges in his petition that the defendant, an attorney, drafted a will for his mother which purported to devise to the plaintiff 240 acres located in Phelps County, although at the time his mother owned but a life estate in that property, which fact was known to the defendant.

The plaintiff goes on to allege that said will made specific bequests to the plaintiff's two sisters, but specifically neglected to make any provision for a brother of the plaintiff. His petition concludes by alleging that the defendant was guilty of legal malpractice in drafting a will that he knew could not be given effect, as a result of which, he claims, plaintiff received a lesser share of his mother's estate than she had intended.

In the plaintiff's deposition, submitted in support of the motion for summary judgment, the plaintiff admitted that he had known since he was a boy that all his mother owned in the particular land was a life estate. However, he insisted that his mother had told him that she had made out a will in which she left the entire farm to him.

In granting summary judgment in favor of the defendant the trial court gave as a reason that the claim of the plaintiff was barred by the statute of limitations, Neb. Rev. Stat. § 25-222 (Reissue 1979). The parties argue in their briefs whether the statute begins to run at the time of the drafting of the will or at the time of the testatrix's death, and whether

such action may be brought within 1 year of the discovery of facts by the plaintiff establishing that the defendant knowingly drafted an ineffective will.

However, we need not resolve those issues. In his answer the defendant alleged, in defense of the plaintiff's claim, that no attorney-client relationship existed between the defendant and the plaintiff with respect to the drafting or execution of Luella M. Lilyhorn's will, which allegation was specifically admitted by the plaintiff in his reply. In *St. Mary's Church v. Tomek*, 212 Neb. 728, 325 N.W.2d 164 (1982), we said that as a general rule the duty to exercise reasonable care and skill which a lawyer owes his client ordinarily does not extend to third parties. Such is the case here, and is sufficient reason to support the action taken by the trial court.

The mere fact that this is a different reason than the one upon which the District Court relied, the merits of which we do not decide, is no cause to reverse the judgment. *Strauss v. Square D Co.*, 201 Neb. 571, 270 N.W.2d 917 (1978). The judgment was correct and is affirmed.

AFFIRMED.

KRIVOSHA, C.J., participating on briefs.

ARCHIE A. WARNER, APPELLEE, V. BOARD OF EQUALIZATION OF LINCOLN COUNTY, NEBRASKA, AND LINCOLN COUNTY, NEBRASKA, APPELLANTS.

335 N.W.2d 556

Filed June 24, 1983. No. 82-460.

1. **Taxation: Valuation.** 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.
2. _____: _____. Real property taxes may not be equalized by merely classifying property and then arbitrarily applying a given value to all properties of that classification.

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

Charles A. Kandt, Lincoln County Attorney, for appellants.

Patrick B. Hays of Clough & Hays, for appellee.

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

KRIVOSHA, C.J.

The Board of Equalization of Lincoln County, Nebraska (Board of Equalization), appeals from a judgment entered by the District Court for Lincoln County finding that the Board of Equalization disproportionately and unequally assessed real estate owned by appellee, Archie A. Warner. We believe that the trial court was correct in its determination and affirm the judgment.

At the outset we note that this is not a case of property being valued in excess of its actual value in violation of Neb. Rev. Stat. § 77-201 (Reissue 1981) but, rather, as we have noted, property being valued in violation of Neb. Const. art. VIII, § 1, which provides in part that taxes shall be levied by valuation uniformly and proportionately. This, of course, the state may not do. As we noted in *Konicek v. Board of Equalization*, 212 Neb. 648, 324 N.W.2d 815 (1982), 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. See, also, *Sioux City Bridge v. Dakota County*, 260 U.S. 441, 446, 43 S. Ct. 190, 67 L. Ed. 340 (1923), wherein the U.S. Supreme Court said: "This Court holds that the right of the taxpayer whose property alone is taxed at 100 per cent. of its true value is to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of statute. The conclusion is based on the principle that where it is impossible to secure both

the standards of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law."

The evidence produced at trial disclosed that Warner was the owner of a tract of land located in the west half of the northwest quarter and a part of the northwest quarter of the southwest quarter of Section 15, Township 14 North, Range 30 West of the 6th P.M., Lincoln County, Nebraska, consisting of 14.9 acres. The land is located 2½ miles north of the city of North Platte, Nebraska, on Highway 83. Warner has lived on this property for some 32 years. Originally, he owned approximately 25.9 acres, but in 1966 he sold 10 acres to a neighbor. Testimony adduced by both Warner and by the county assessor established the fact that there was no difference between Warner's property and land located either directly across the road or land located within a quarter of a mile of Warner's property, except as to size. Yet Warner's property was valued at $850 an acre while property across the road and down the road was valued at $80 an acre.

The assessor testified that for the year in question she determined that property having less than 21 acres of land was not agricultural land but, rather, land held for "sites." She conceded that she considered nothing except size in selecting 21 acres as the cutoff, and applied valuations to Warner's land based solely upon the number of acres he owned. The assessor testified that she had prepared a standard formula in which 1-acre tracts were valued at $2,000; 2- to 5-acre tracts, at $1,500 per acre; 6- to 10-acre tracts, at $1,000 per acre; 11- to 20-acre tracts, at $850 per acre. She further testified that if the holdings were 21 acres or more and the land classified as 3R, which was similar to the land owned by Warner, it would be valued at $80 per acre.

Examples of the manner in which land in the immediate area was valued were disclosed by the

assessor's further testimony. She conceded that there were no changes in the use of the Warner land. She further testified that a tract of land located directly east of Warner's was valued at $80 per acre. While the land was the same in character, it consisted of 116.53 acres. She further testified that a tract of land located some 800 feet north and east across the road from Warner, consisting of 32.51 acres, was also valued at $80 an acre. The only apparent difference between the Warner property and this property was its size.

A further example of the manner in which the formula used by the county assessor resulted in nonuniform and disproportionate valuation was made apparent by testimony concerning the property located immediately north of the Warner property. The property owner owned 21.99 acres, of which 11.94 acres were located on one side of the highway and 10.05 acres on the other side. The assessor testified that if the road did not bisect the property the entire tract would be valued at $80 an acre, but because the road bisected the property, thereby making a tract of less than 21 acres, the property was valued at $850 an acre. The assessor further testified that if the property in question was not classified as a site because of its size, it would have been valued at $80 an acre.

Real property taxes may not be equalized by merely classifying property and then arbitrarily applying a given value to all properties of that classification. See, *Konicek v. Board of Equalization*, 212 Neb. 648, 324 N.W.2d 815 (1982); *Beynon Farm Products v. Bd. of Equalization*, 213 Neb. 815, 331 N.W.2d 531 (1983). The mere fact that a formula is devised, by which property is nonuniformly and disproportionately assessed, does not satisfy the constitutional requirement. The size of the tract may be significant, but that fact, standing alone, cannot be controlling. 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." When these various factors are considered, it is apparent that the assessor, in the first instance, and the Board of Equalization, thereafter, in assessing Warner's property at $850 an acre acted arbitrarily and capriciously. The action of the trial court in reducing the value to $80 an acre was proper.

In concluding, we should note here, as we did in *Gradoville v. Board of Equalization*, 207 Neb. 615, 626, 301 N.W.2d 62, 68 (1981), that "it is not improper for the county, in attempting to arrive at values, to use formulas. Nor is it improper for counties, in arriving at values, to use comparable lands or sales. All of those factors, however, must be part and parcel of an overall evaluation and must, in some manner, be supported by the facts." The judgment of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. KENNETH E. BRENNEN, APPELLEE.

336 N.W.2d 79

Filed June 24, 1983. No. 83-276.

1. **Wiretaps.** The showing required to permit the interception of wire or oral communications under the provisions of Neb. Rev. Stat. § 86-703 (Reissue 1981) must be such as to provide a judge with a substantial basis to conclude, under the totality of the circumstances, that probable cause exists to find that one was committing, had committed, or was about to commit one of the crimes enumerated therein.

2. _____. The interception of wire or oral communications may not be the initial step in a criminal investigation. Its employment may not be indiscriminate but, rather, must be with great care; however, the telecommunications statute does not require an exhaustion of all other possible, or even all other reasonable, avenues of investigation prior to the interception of telephonic communications. The affidavit must be such as to satisfy a judge either that other methods have been tried and failed or that other procedures are unlikely to succeed or are too dangerous.
3. **Motions to Suppress.** No evidence may be suppressed because of technical irregularities not affecting the substantial rights of the accused.
4. **Wiretaps.** The ultimate burden of showing an unlawful interception of telephonic communications rests upon the party against whom the fruits of the electronic surveillance are offered.
5. **Search and Seizure: Motions to Suppress.** One who seeks to suppress evidence seized pursuant to a warrant regular on its face has the burden of establishing that the warrant was invalid.

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

Donald L. Knowles, Douglas County Attorney, and Robert G. Sigler, for appellant.

James Martin Davis and Anthony Troia, for appellee.

CAPORALE, J.

The State has appealed, pursuant to the provisions of Neb. Rev. Stat. § 29-824 (Reissue 1979), from an order of the Honorable Samuel P. Caniglia, a judge of the Nebraska Fourth Judicial District Court, Douglas County. That order sustained defendant Kenneth E. Brennen's motion to suppress evidence obtained by the interception of certain telephone conversations and to quash a search warrant.

On February 19, 1982, the Douglas County attorney sought, under the provisions of Neb. Rev. Stat. §§ 86-701 through 86-712 (Reissue 1981), an order to intercept conversations over eight telephones. The request was contained in a document entitled "Application and Affidavit" and was sworn to by the Douglas County attorney before the Honorable John T. Grant, another judge of the aforesaid District

Court. Five of the telephones were at an Omaha restaurant-bar, and included two pay telephones; two were at another Omaha bar, and included one pay telephone; the remaining telephone was located at defendant's residence. The document before Judge Grant on February 19, 1982, listed both citizen and other confidential police informants, at least some of whom had provided reliable information in the past. Although the document does not specifically state when the information was obtained from the informants, it is nonetheless reflective of an ongoing situation, and its general tenor does make it clear that the defendant was currently engaged as an active supplier of cocaine. The affidavit further recites that defendant had been seen using telephones for the purpose of engaging in drug sales.

Some of the information received from certain confidential sources corroborated that received from other confidental sources, so that the entire document tends to be self-correlating. The affidavit recites that defendant's activities had been under investigation since August of 1981, and detailed certain surveillance activities conducted from December 18, 1981, through February 11, 1982. The surveillance revealed nothing of significance except perhaps that defendant frequented the restaurant-bar and bar at which the telephones in question were located. The affidavit further recites that seldom has surveillance enabled officers to gather sufficient evidence to arrest individuals engaged in illegal drug operations, because many police officers are known to drug dealers and the dealers are suspicious of persons they do not know and are therefore unlikely to commit overt acts in the presence of unknown undercover agents. Moreover, extensive surveillance of the defendant's residence was even more difficult than it might otherwise have been by virtue of an earlier homicide in the area which had made the residents in the area very sensitive to strange ve-

hicles either driving through or parking in the neighborhood. On February 19, 1982, Judge Grant found there was probable cause to believe that defendant and certain other named individuals had committed and were about to commit illegal drug activities from the establishments and residence at which the communications were to be intercepted and that there was probable cause to believe that particular communications concerning those illegal activities might be obtained if interception of telephone conversations were authorized. He further found that other police investigative methods had been attempted and were unsuccessful and reasonably appeared to be unlikely to succeed in the future. Accordingly, he authorized certain members of the Omaha Police Department and officers of the Douglas County sheriff's office to intercept the oral communications of defendant and others named, together with those of persons as yet unknown and unidentified, for a period of 30 days. The order required that the Douglas County attorney make interim reports every 10 days concerning the number and nature of calls intercepted, and further ordered that the process be conducted in such a manner as to minimize interceptions not relating to the offense enumerated in the order. On March 9, 1982, Judge Grant entered an order terminating the authorization to intercept conversations over the five telephones located at the restaurant-bar. On March 12, 1982, the Douglas County attorney presented an "Amendment for [sic] Application and Affidavit" to Judge Grant, seeking a modification of the prior order so as to allow, for the remainder of the original 30 days, the full-time interception of the oral communications of Kenneth Brennen over the three remaining telephones, and to "allow the gathering of evidence in which to show a conspiracy between party Kenneth BRENNEN and other individuals mentioned in this affidavit, both named and unnamed." That document also recited that approxi-

mately 51 criminal calls had been intercepted relating to illegal drug transactions since February 20, 1982, the first day on which interceptions occurred. Judge Grant entered an amended order permitting full-time interception over the three remaining telephones and also over an additional one over which Brennen had talked to one John Larson, a defendant in a related case. Although, as pointed out by Brennen, the application as amended did not request authority to intercept calls over the Larson telephone by number, authority to do so was sought by the language of the applications seeking to intercept conversations between Brennen and unnamed others. The amended order required adherence to "strict minimization standards."

In his brief defendant argues that the affidavit and its amendment were not sufficient to establish probable cause that he was committing, had committed, or was about to commit a crime enumerated by § 86-703. One of the enumerated crimes in that section is "dealing in narcotic or other dangerous drugs." Contrary to the defendant's claim in this regard, the affidavit and its amendment set forth the underlying circumstances in sufficient detail so as to have permitted Judge Grant to make an independent judgment as to the validity of both the facts upon which informants based their conclusions and also the bases upon which the police rested their conclusion that the informants were reliable. The affidavit and its amendment were sufficiently specific and detailed so as to meet the two-pronged test set forth in *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969), and *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964), of (1) revealing the basis of the informant's knowledge and (2) providing sufficient facts to establish either the informant's veracity or the reliability of his report. See, also, *State v. Lozano*, 209 Neb. 772, 311 N.W.2d 529 (1981). Moreover, that two-pronged test was specifically abandoned in *Illinois*

v. Gates, 51 U.S.L.W. 4709, decided June 8, 1983, which held that the task of a magistrate issuing a warrant is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, there is a fair probability that contraband or evidence of a crime will be found in a particular place. Therein, the U.S. Supreme Court ruled that the judge issuing the warrant leading to the discovery of contraband could, under the totality of the circumstances, rely upon an anonymous informant's letter which had been corroborated by independent police investigation. In *Gates* the U.S. Supreme Court reviewed a number of its prior decisions, including *Brinegar v. United States*, 338 U.S. 160, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949), and *United States v. Cortez*, 449 U.S. 411, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981), and pointed out that probable cause is a fluid concept which turns upon the assessment of probabilities, not hard certainties, in particular factual contexts which do not readily or usefully reduce to a "neat set of legal rules." *Id.* at 4714. As part of the probable cause argument, defendant points out that neither the affidavit nor its amendment states when the informants made their revelations to the police, and thus the information was too stale. It would have been a more careful and better practice to have recited in the affidavit when those revelations took place. The fact remains, however, that the affidavits made clear the investigation had been proceeding since August of 1981 and continued to and through the request for the authority to intercept the telephone conversations at issue. The original affidavit recites the defendant was currently engaged in illegal narcotics traffic. In *State v. Lozano*, *supra*, we quoted with approval from *United States v. Hyde*, 574 F.2d 856 (5th Cir. 1978), the rule that the question of staleness must be decided on the particular facts of each case. In view of the totality of the circumstances, as reflected in the affidavit and its amendment, it cannot

be concluded that the failure to cite the dates of the revelations defeats the showing of probable cause justifying a belief that defendant was dealing in narcotic or dangerous drugs and using the telephones for that purpose at the facilities at which the interceptions were to take place. There can be no question that under the analysis delineated in *Illinois v. Gates, supra*, Judge Grant had a substantial basis for concluding that defendant was committing, had committed, or was about to commit one of the crimes enumerated in § 86-703.

Next, defendant urges that the affidavit and its amendment are deficient in failing to establish that other investigative methods had been tried and failed or that other procedures were unlikely to succeed or were too dangerous. Defendant is correct in arguing that the interception of telephonic communications may not be the initial step in a criminal investigation and that its employment may not be indiscriminate but, rather, must be with great care. *State v. DiMauro and Kessler*, 205 Neb. 275, 287 N.W.2d 74 (1980). It is also true, however, that the telecommunications statute does not require an exhaustion of all other possible, or even all other reasonable, avenues of investigation prior to the interception of telephonic communications. It is, however, required that the affidavit satisfy the judge either that other methods have been tried and failed or that other procedures are unlikely to succeed or are too dangerous. *State v. Holmes and Beardslee*, 208 Neb. 114, 302 N.W.2d 382 (1981). The affidavit and its amendment establish that the defendant floats from one public house to another, that it is difficult to infiltrate into his group, and that surveillance at his residence is unworkable. The affidavit and its amendment meet the requisite standard in this regard.

Defendant contends that Judge Grant's order violated § 86-705(6), which requires that every order shall contain a provision that the authorization shall

be conducted in such a way so as to avoid and prevent interception of confidential communications to and from newsmen, spouses, attorneys, physicians, and ministers or priests. It is true the order contains no such language. The fact is, however, that we find no evidence in the record before us, nor has any been pointed out to us, which demonstrates that any such calls were in fact improperly intercepted. In fact, the record does show a number of attorney calls, all of which were minimized at their inception. It is the rule that no evidence may be suppressed because of technical irregularities not affecting the substantial rights of the accused. Neb. Rev. Stat. § 29-823 (Reissue 1979); *State v. Kohout*, 198 Neb. 90, 251 N.W.2d 723 (1977). The omission of the statutory language has not been shown to have affected any substantial right of the defendant.

Defendant also complains that the order did not contain language required by § 86-705(6) that the process "shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under sections 86-701 to 86-707 . . . ." Although it is again true that the order and amended order do not contain that precise language, the orders do nonetheless contain language conveying essentially the same admonition. Once again, the irregularity is a technical one and is not shown to have affected a substantial right of the defendant.

Lastly, defendant points out that the county attorney failed to make the 10-day interim reports required by the orders. This is true, except to the extent that the "Amendment for [sic] Application and Affidavit" of March 12, 1982, constituted a partial progress report. Interim reports are not required by the statute and, although it would seem to be a desirable practice to require such, the failure to insist upon them does not render the order illegal. See *State v. Kohout*, *supra*, wherein we refused to find

that a failure to provide interim reports rendered the interceptions unlawful.

From the record before us it appears that Judge Caniglia suppressed the fruits of the search warrant only because he found the order and amended order permitting the interception of telephonic communications to be faulty. Defendant alleges no specific defect in the warrant.

The ultimate burden of showing an unlawful interception rests upon the party against whom the fruits of the electronic surveillance are offered. *United States v. Phillips*, 540 F.2d 319 (8th Cir. 1976), *cert. denied* 429 U.S. 1000, 97 S. Ct. 530, 50 L. Ed. 2d 611 (interpreting the federal wire interception and interception of oral communications provisions of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510 et seq. (1976), on which our telephonic communications act is patterned). It is also the rule that one who seeks to suppress evidence seized pursuant to a warrant regular on its face has the burden of establishing that the warrant was invalid. *State v. Kohout*, *supra*. The defendant has failed to meet those burdens.

The order appealed from herein is reversed.

REVERSED.

STATE OF NEBRASKA, APPELLANT, V. JOHN D. LARSON, APPELLEE.

336 N.W.2d 84

Filed June 24, 1983. No. 83-277.

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

Donald L. Knowles, Douglas County Attorney, and Robert C. Sigler, for appellant.

Barbara Thielen, for appellee.

CAPORALE, J.

The State has appealed from an order sustaining defendant John D. Larson's motion to suppress evidence obtained by the interception of certain telephone conversations. This case is a companion to the case of *State v. Brennen*, *ante* p. 734, 336 N.W.2d 84 (1983), decided today. It arises out of the same orders authorizing the interception of telephone conversations discussed therein. Defendant Larson was not mentioned in the affidavit or amendment thereto but, rather, was discovered through the interceptions authorized by the orders discussed in *Brennen, supra*. Having determined that the orders in *Brennen* were lawful, it follows that the interception of defendant Larson's conversations under those orders was also lawful.

Accordingly, the order suppressing the evidence obtained from the interceptions is reversed.

REVERSED.

STATE OF NEBRASKA, APPELLANT, V. THOMAS L. ABRAHAM, APPELLEE.

336 N.W.2d 85

Filed June 24, 1983. No. 83-275.

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

Donald L. Knowles, Douglas County Attorney, and Robert C. Sigler, for appellant.

James Martin Davis and Anthony Troia, for appellee.

CAPORALE, J.

The State has appealed from an order sustaining defendant Thomas L. Abraham's motion to suppress evidence obtained by the interception of certain telephone conversations. This case is a companion to

the cases of *State v. Brennen*, *ante* p. 734, 336 N.W.2d 79 (1983), and *State v. Larson*, *ante* p. 742, 336 N.W.2d 84 (1983), decided today. Like *Larson*, it arises out of the same orders authorizing the interception of telephone conversations discussed therein. Defendant Abraham was not mentioned in the affidavit or amendment thereto but, rather, was discovered through the interceptions authorized by the orders discussed in *Brennen*, *supra*. Having determined that the orders in *Brennen* were lawful, it follows that the interception of Abraham's conversations under those orders was also lawful.

Accordingly, the order suppressing the evidence obtained from the interceptions is reversed.

REVERSED.

LINDA SHEPARD, APPELLANT, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLEE.

336 N.W.2d 85

Filed July 1, 1983. No. 82-274.

1. **Tort Claims Act: Jurisdiction.** Under the State Tort Claims Act the District Court, sitting without a jury, has exclusive jurisdiction to hear, determine, and render judgment on any suit or tort claim under the act. Neb. Rev. Stat. § 81-8,214 (Reissue 1981).
2. **Highways.** It is the duty of the state to use reasonable and ordinary care in the construction, maintenance, and repair of its highways and bridges so that they will be reasonably safe for the traveler using them while in the exercise of reasonable and ordinary care and prudence.
3. **Tort Claims Act: Appeal and Error.** On an appeal to this court of an action under the State Tort Claims Act, the findings of the trial court will not be disturbed unless clearly wrong.

Appeal from the District Court for Jefferson County: WILLIAM B. RIST, Judge. Affirmed.

A. James McArthur and Douglas McArthur, for appellant.

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

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

MCCOWN, J.

This is an action under the provisions of the State Tort Claims Act for personal injuries suffered by plaintiff in an automobile accident allegedly resulting from negligent maintenance of a highway. The District Court found that the defendant was not negligent and dismissed plaintiff's petition.

On January 3, 1978, at approximately 6:45 a.m., the plaintiff, Linda Shepard, was driving her automobile westbound on U.S. Highway 136 a short distance west of Harbine, Nebraska. She encountered a rutted, icy patch on the highway which caused her car to skid broadside into the opposite lane of traffic where it was struck by an oncoming truck. The plaintiff was thrown from her vehicle and suffered severe injuries.

The accident site was bordered on the south by an 800-foot-long shelterbelt of trees which shaded the highway in the winter months. For approximately 15 miles to the east the highway was clear, but in the area sheltered by the trees the highway was icy in patches which had ruts or irregularities in them. The evidence indicated that the accident site tended to ice up more quickly and stay frozen longer than other areas of the highway.

The icy patch at the accident site was the result of a winter storm that had occurred on December 31, 1977. The storm began with freezing rain which turned to snow. At 7 a.m. on December 31, 1977, a mixture of sand, salt, and calcium chloride was applied to Highway 136, including an extra heavy application in the area of the accident site. The maintenance supervisor continued to monitor the highway on January 1, 1978, and noted that the snow and ice on most areas of the highway had melted by the

early afternoon of that day, but the roadway at the accident site was still covered with packed snow and ice. The supervisor then ordered the maintenance crew to scrape off all the ice they could and then had applied three relatively heavy applications of the sand and salt mixture in the accident area. When the maintenance crew left the site on the afternoon of January 1, they observed that the ice was beginning to melt and that there were two drivable tracks in both lanes of traffic melted down to the pavement surface.

No further action was taken at the accident site on January 2, 1978, which was a holiday. No precipitation fell that day and the temperature reached the melting range during the daylight hours of January 2.

At the time of the accident on the morning of January 3, 1978, there were tracks melted to the pavement surface in each lane of traffic running through patchy ice in the area of the accident site, and traces of sand from the January 1 application were still present.

After the accident the plaintiff filed a claim with the State Claims Board pursuant to Neb. Rev. Stat. §§ 81-8,209 et seq. (Reissue 1981). The claim was denied by the board on August 14, 1979.

Plaintiff filed her petition in the District Court on October 25, 1979, alleging that defendant was negligent in failing to post warning signs and in failing to reasonably maintain the highway at the accident site. Following trial to the court without a jury, the District Court found that the defendant had exercised reasonable care in the maintenance of the highway in the area of the accident and was not negligent. The court also found that, given all the circumstances reflected by the evidence, defendant had reasonable grounds to believe that its action would be sufficient to provide reasonable highway conditions for travelers using the highway while exercising reasonable and ordinary care. The District

Court therefore dismissed plaintiff's petition and this appeal followed.

Plaintiff contends on appeal that defendant was negligent as a matter of law in failing to remove or alleviate accumulations of ice and snow on the highway or in failing to warn the public of that condition.

Under the State Tort Claims Act the District Court, sitting without a jury, has exclusive jurisdiction to hear, determine, and render judgment on any suit or tort claim under the act. § 81-8,214.

It is the duty of the state to use reasonable and ordinary care in the construction, maintenance, and repair of its highways and bridges so that they will be reasonably safe for the traveler using them while in the exercise of reasonable and ordinary care and prudence. *Hendrickson v. City of Kearney*, 210 Neb. 8, 312 N.W.2d 677 (1981).

On an appeal to this court of an action under the State Tort Claims Act, the findings of the trial court will not be disturbed unless clearly wrong. *Wakenight v. State*, 212 Neb. 798, 326 N.W.2d 52 (1982).

The evidence in the case at bar fully supports the findings and judgment of the District Court. The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RICHARD JAMES ELLEFSON, APPELLANT.

336 N.W.2d 88

Filed July 1, 1983. No. 82-414.

1. **Confessions.** To be admissible, a statement or confession must be free and voluntary. It must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.
2. **Confessions: Miranda Rights.** The applicable standard to determine the admissibility of statements made by an accused during a custodial interrogation is whether the accused intelligently, know-

ingly, and voluntarily waived his right to remain silent and his right to have counsel present at that time.

3. **Confessions.** In determining whether the State has shown the admissibility of custodial statements by the requisite degree of proof, this court will accept the factual determination and credibility choices made by the trial judge unless they are clearly erroneous, and in so doing we will look to the totality of the circumstances.
4. **Sentences.** It is well settled that the test of whether consecutive sentences may be imposed under two or more counts charging separate offenses, arising out of the same transaction or the same chain of events, is whether the offense charged in one count involves any different elements than an offense charged in another count. The test is whether some additional evidence is required to prove one of the offenses than is necessary to prove one of the other offenses.
5. **Sentences: Appeal and Error.** In the absence of an abuse of discretion by the trial court, we will not disturb on appeal a sentence imposed within the statutory limits.

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

Gregory M. Neuhaus and Leo M. Williams, for appellant.

Paul L. Douglas, Attorney General, and Bernard L. Packett, for appellee.

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

HASTINGS, J.

This is an appeal taken from convictions by jury verdict of the defendant, Richard James Ellefson, in the District Court for Knox County, for burglary and first degree sexual assault. For these two offenses the defendant was sentenced to consecutive terms of not less than 5 nor more than 10 years for burglary, and not less than 15 nor more than 25 years for first degree sexual assault, to be served in the Nebraska Penal and Correctional Complex.

On appeal the defendant assigns basically three errors. He claims the admission into evidence of his oral admissions and written confession was improper, due to promises and threats made which in-

duced this confession, and because he received incomplete *Miranda* advice; that the imposition of consecutive sentences was improper under the law; and that the sentences were excessive. As set out in detail below, we find no merit to these assignments and affirm the defendant's convictions and sentences.

A short summary of the relevant facts will aid in the understanding of this decision. In the early morning hours of August 11, 1981, the home of a local housewife was broken into. This woman lives in a rural area of Knox County and was alone in her home. She was attacked by a man while she lay in her bed, and was raped at knife point. Also, $50 in cash was stolen from her purse. During the course of the attack, the victim was able to observe certain characteristics of her attacker, even though the room was dark. She gave a description which fit the defendant.

The attack on the victim lasted about an hour. When her attacker left, she observed a vehicle back out of her lane and drive away. The sheriff was thereafter notified, and she was treated at a nearby hospital.

This matter was investigated by then Deputy Sheriff Dean Wavrunek, who, by his investigation, determined that the person who broke into the victim's home gained entry by cutting a window screen and climbing through the window. This person also left footprints around the house, which roughly matched the boots that the defendant wore. Also, tire tracks which were left in the lane to the house matched those of a truck which the defendant was driving on the night in question.

The defendant had been working on a crew that was repairing waterlines near the victim's home on August 10, 1981. The victim testified that she spoke to members of this crew when she returned to her home early in the evening on August 10, and had seen the defendant then.

At the time of this assault the defendant was on parole from the South Dakota state penitentiary. He had been convicted in 1978 of second degree rape and sentenced to 10 years in prison. The defendant received probation in 1980, and as a condition thereof was not to drink alcoholic beverages. On the evening of August 10, 1981, and at other times prior to that date, the defendant had consumed alcoholic beverages.

On August 11, 1981, defendant was summoned to the police station in Yankton, South Dakota, by his South Dakota parole officer, Russell Craig, to discuss his parole violations, i.e., drinking alcoholic beverages, and to discuss the rape-burglary.

The defendant, who was 34 years of age at the time, arrived at the police station shortly after 10 p.m. on August 11, accompanied by his parents. Deputy Wavrunek, from Knox County, Nebraska, and Russell Craig were there and began questioning the defendant. Initially, the defendant's parents were allowed to sit in during the questioning, but they were asked to leave when the subject of the questioning changed from the defendant's drinking in violation of his parole, which he readily admitted, to the rape-burglary incident.

During the course of the questioning, the defendant initially denied the rape, but he eventually, after about 2½ hours, confessed orally and signed a confession written by Deputy Wavrunek at the defendant's instruction. Prior to the beginning of any questioning, the defendant was fully advised of his fifth and sixth amendment *Miranda* rights and was again so advised prior to Deputy Wavrunek's writing down the confession. The defendant was not again advised of his rights before he signed the statement 55 minutes later. On appeal the defendant claims that he was coerced into making this confession.

We discussed the admissibility of confessions in two recent cases. We stated: "To be admissible, a statement or confession must be free and voluntary.

It must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence." *State v. Teater*, 209 Neb. 127, 132, 306 N.W.2d 596, 599 (1981).

" 'The applicable standard to determine the admissibility of statements made by an accused during a custodial interrogation is whether the accused intelligently, knowingly, and voluntarily waived his right to remain silent and his right to have counsel present at that time.' " *State v. Strickland*, 209 Neb. 133, 138, 306 N.W.2d 600, 603 (1981).

The defendant claims in his brief, and testified at trial, that Craig threatened him with being returned to the South Dakota penitentiary to serve out the remainder of his term for violating his parole because of drinking. The defendant claims that, as an alternative, Wavrunek pointed out that in *State v. Almarez*, a case tried by the District Court of Madison County, Nebraska, the defendant was not sentenced to the penitentiary for murdering her children but, rather, was committed to a state hospital for treatment. See *Almarez v. Hartmann*, 211 Neb. 243, 318 N.W.2d 98 (1982). Wavrunek, defendant claims, stated that such treatment was possible for defendant if he confessed and was convicted for this crime in Nebraska and that Wavrunek had influence and could get him this treatment. The defendant also claims he wished to see an attorney before he signed the confession but was not allowed to do so.

Russell Craig testified that the defendant arrived at the Yankton police station at about 10:30 p.m. on August 11. Craig advised the defendant of why he was summoned and of his fifth and sixth amendment rights. The defendant waived those rights. Craig testified he did tell the defendant that if he was found to be in violation of the conditions of his parole, he could be sent back to the South Dakota penitentiary. Craig testified he told the defendant that if he was tried for a sex offense in Nebraska, he would

be evaluated by a psychiatrist. Craig went on to testify that the defendant was not forced to choose between signing this confession or being returned to the South Dakota penitentiary and that he did not ask to see an attorney before signing the confession.

Deputy Wavrunek testified similarly. He stated he advised the defendant of his rights to counsel and against self-incrimination before the written confession was prepared and that the defendant waived these rights. Wavrunek testified that he wrote out a confession as the defendant dictated to him, that Wavrunek read the statement back to the defendant, and that the defendant signed it thereafter.

While Deputy Wavrunek testified that there was some discussion of the Nebraska sex offender law and possible mental health treatment under that law, he denied having made any mention of the *Almarez* case. At one point on cross-examination, Wavrunek was asked if the option of signing the confession and getting the same treatment as Almarez, that of being placed in a state hospital for 6 months to 1 year, or returning to the South Dakota penitentiary, was put to the defendant, to which Wavrunek responded, "No." Wavrunek also stated the defendant did not ask for an attorney before signing the confession.

There is no evidence in the record, other than the defendant's testimony, showing the defendant was coerced into signing this confession by threats of returning him to the South Dakota penitentiary. There is also no evidence of any promises of treatment in Nebraska, other than defendant's testimony. The State refutes these claims with the testimony of two witnesses.

When a factual conflict develops as to whether custodial statements are admissible, we have stated: "In determining whether the State has shown the admissibility of custodial statements by the requisite degree of proof, this court will accept the factual determination and credibility choices

made by the trial judge unless they are clearly erroneous, and in so doing we will look to the totality of the circumstances." *State v. Teater*, *supra* at 131, 306 N.W.2d at 598-99. The trial court obviously accepted the State's version of the facts on whether this confession was induced by threats or promises. We cannot say that the court's determination on this point is clearly wrong. As such, we hold that this confession was not induced by threats or promises and therefore was properly admitted at trial.

As to the defendant's claim that he was not properly advised of his *Miranda* rights, we find nothing in the record to support such claim. The defendant was twice advised of his rights during the course of the evening in question, and both times he chose to waive these rights. The only basis for defendant's claim is his own testimony that he asked to see an attorney before signing his confession, which was disputed by two witnesses for the State. The court chose to believe the testimony of the State's witnesses as to the fact of whether an attorney was requested. Such belief cannot be said to be clearly wrong. We find the defendant was properly advised of his constitutional rights in this case.

Defendant also claims his being sentenced to consecutive sentences was improper. As conceded in defendant's brief, the test for determining whether consecutive sentences were improperly imposed is set forth in *State v. Chapple*, 197 Neb. 4, 8, 246 N.W.2d 714, 716-17 (1976): " 'It is well settled that the test of whether consecutive sentences may be imposed under two or more counts charging separate offenses, arising out of the same transaction or the same chain of events, is whether the offense charged in one count involves any different elements than an offense charged in another count. The test is whether some additional evidence is required to prove one of the offenses than is necessary to prove one of the other offenses.' "

The defendant was charged with and convicted of

two offenses. First, the defendant was charged with and convicted of burglary under Neb. Rev. Stat. § 28-507(1) (Reissue 1979): "A person commits burglary if such person willfully, maliciously, and forcibly breaks and enters any real estate or any improvements erected thereon with the intent to commit any felony or with intent to steal property of any value." To convict of such an offense the State must prove the defendant broke and entered the property with the requisite felonious intent.

The second offense was first degree sexual assault under Neb. Rev. Stat. § 28-319(1)(a) (Reissue 1979): "(1) Any person who subjects another person to sexual penetration and (a) overcomes the victim by force, threats of force, express or implied, coercion, or deception . . . ." To convict of this offense it must be proven that the actual act of sexual assault was committed, more than simply an intent. Clearly, these two offenses have different elements and require separate proof. Therefore, the trial court could properly impose consecutive sentences for them.

Finally, the defendant argues his sentences are excessive. First degree sexual assault under § 28-319 is a Class II felony, carrying a maximum 50-year, minimum 1-year, sentence. Burglary is a Class III felony, carrying a maximum 20-year sentence or $25,000 fine, or both; minimum 1-year sentence. See Neb. Rev. Stat. § 28-105 (Reissue 1979). The sentences imposed by the trial court are clearly within these statutory guidelines.

As we have said: "In the absence of an abuse of discretion by the trial court we will not disturb on appeal a sentence imposed within the statutory limits." *State v. Parks*, 212 Neb. 635, 643, 324 N.W.2d 673, 679 (1982). No abuse of discretion is evident in this case.

In light of the foregoing, we affirm the convictions and sentences of the defendant imposed by the District Court.

AFFIRMED.

Cite as 214 Neb. 755

DAVID SANDERS, APPELLEE, V. MAY BROADCASTING CO., A CORPORATION, DOING BUSINESS AS "KMTV 3," APPELLANT.

336 N.W.2d 92

Filed July 1, 1983. No. 82-433.

1. **Employment Contracts: Termination of Employment.** When an employee contracts to fill a particular position, any material change in duties or significant reduction in rank will constitute a constructive discharge which, if unjustified, is a breach of contract.
2. _____: _____. The doctrine of constructive discharge is applied when an employer deliberately renders an employee's working conditions intolerable, thus forcing him to quit his job.
3. **Jury Instructions: Appeal and Error.** Ordinarily, the failure to object to instructions after they have been submitted to counsel for review precludes raising an objection on appeal.

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

Thomas C. Lauritsen and Soren S. Jensen of Swarr, May, Smith, Andersen & Jensen, for appellant.

Martin A. Cannon of Matthews, Cannon & Riedmann, P.C., for appellee.

BOSLAUGH, MCCOWN, WHITE, HASTINGS, CAPORALE, and SHANAHAN, JJ.

BOSLAUGH, J.

This appeal arises out of a controversy concerning a contract of employment between the plaintiff, David Sanders, and May Broadcasting Co. (KMTV). The plaintiff claimed that he had been constructively discharged without justification from his position as sports director at KMTV. The jury returned a verdict for the plaintiff and awarded damages pursuant to a liquidated damages clause in the contract. KMTV appeals.

On June 2, 1980, Sanders accepted the position as sports director and sports announcer for KMTV. The contract described the responsibilities of the po-

sition as follows: "2. During the term of the agreement, you will be employed as sports director and sports anchor announcer and you will also be assigned other duties in addition to being but not limited to co-producer and on-the-air announcer of the Tom Osborne Show, KMTV Golf Tournament, and Creighton Basketball, and other such similar programs which may be appropriate considering your background and experience and you agree to undertake such responsibilities as may be assigned to you by the news director in this connection. Your main responsibility will be to act as sports director and sports announcer for prime-time newscasts. You will report to the news director of KMTV. As indicated, during your term of employment you may be required to perform duties and assist in promotion of programming in such way as is befitting your status, compensation and abilities."

The term of the agreement was 24 months. The contract included a clause which permitted either party to terminate the contract voluntarily by payment of an amount equal to 6 months' salary to the other party.

On April 15, 1981, Keith Nichols, the news director and the immediate supervisor of the plaintiff, sent the following memorandum to Sanders: "The purpose of this communication is to inform you of our expectations of you as Sports Director.

"We expect you to accomplish these goals during the next 30 days, ending no later than May 18th, 1981.

"In addition, I will expect a *written* report on your progress on a weekly basis.

"We expect the following:

"1. You are to make personal contact with all Class A High School, UNO, and Creighton coaches as soon as possible, along with their assistants.

"2. You are to do at least one remote sportscast per week.

"3. You are to accept as many speaking and/or sports dinner invitations as possible, and provide

a list of all invitations received either orally or in writing.

"4. You are to act as Sports Director as that pertains to assigning and staffing Terry and Ann in conjunction with the desk, as well as the smooth and efficient operation of the Sports Department.

"5. You are to cover at least one story daily.

"6. As Sports Director, you are expected to cover major sports events of the region, working Saturdays and/or Sundays.

"7. You are being paid to appear on the air, you are expected to *be on* the shows you are assigned.

"If the goals are not reached in the prescribed time, we will consider that to be a breach of contract and you will be terminated without compensation. If any part of this memo is not clear, please discuss it with Roger or myself immediately."

The plaintiff, through his counsel, replied to this memorandum, stating that he considered it a constructive discharge from the 1980 contract. Sanders stated that the memorandum constituted an offer of new, more burdensome employment without an increase in compensation. Sanders then requested payment of liquidated damages as provided in the contract. KMTV responded that it considered this communication to be a resignation.

This action was brought to recover the liquidated damages, alleging that the plaintiff had been constructively discharged. KMTV filed a counterclaim for damages, alleging that Sanders had breached the contract.

At trial, the contract, memorandum, and Sanders' response were received in evidence. Sanders testified that the demands made in the memorandum were nearly impossible to accomplish in the 30-day time span and were otherwise unreasonable. The jury returned a verdict for Sanders in the amount of $17,996.

On appeal KMTV contends that a verdict should

have been directed in its favor on the issue of constructive discharge.

The evidence relating to the issue of constructive discharge was largely documentary, consisting of the contract and the memorandum from Nichols dated April 15, 1981. This evidence, together with the testimony of the plaintiff, was sufficient to sustain a finding that he had been constructively discharged by the defendant.

In *Brock v. Mutual Reports, Inc.*, 397 A.2d 149, 152 (D.C. App. 1979), the court defined constructive discharge as follows: "[W]hen an employee contracts to fill a particular position any material change in duties or significant reduction in rank will constitute a constructive discharge which, *if unjustified*, is a breach of contract." The employee bears the burden of showing such a discharge; the employer must prove that the discharge is justified. *Id.*

The federal courts have defined constructive discharge as it is used in labor and civil rights litigation. "The doctrine of constructive discharge is applied when an employer deliberately renders an employee's working conditions intolerable, thus forcing him to quit his job." *Johnson v. Nordstrom-Larpenteur Agcy., Inc.*, 623 F.2d 1279, 1281 (8th Cir. 1980), *cert. denied* 449 U.S. 1042, 101 S. Ct. 622, 66 L. Ed. 2d 504; *Coe v. Yellow Freight System, Inc.*, 646 F.2d 444 (10th Cir. 1981).

A factual situation similar to that in the present case was presented in *Mair v. Southern Minnesota Broadcasting Co.*, 226 Minn. 137, 137-41, 32 N.W.2d 177, 177-79 (1948): "On August 1, 1945, defendant employed plaintiff as its general manager for a term of five years, at a fixed salary per year, with a bonus, depending upon the increased profits of the business. The contract is in writing. It states that the duties to be performed by the general manager are those which usually appertain to such employment. After more than a year's operation of the business under plaintiff's management, the board of

directors of the company was dissatisfied. The net income had decreased. The directors felt that the operating expenses were too high and that the income from the business was less than it should have been. On September 26, 1946, plaintiff received the following written order from the management:

" 'To Lester A. Mair:

" '*The Board* of Directors *directs you to* appoint Maxine Jacobs, Assistant Manager of the Southern Minnesota Broadcasting Company, immediately, and *until further notice issue all orders through her* and contract for no expenditures without her approval. You are further directed to post notice of her appointment and authority as to execution of your orders on the bulletin board forthwith.

" 'Mrs. G. P. Gentling,
Chairman, Board of Directors,
Southern Minnesota Broadcasting
Co.' (Italics supplied.)

"Upon receipt of this order, plaintiff refused to continue with his work as long as the order was in effect. Defendant thereupon discharged him.

"The trial court held that as a matter of law the order was unreasonable and directed a verdict as stated.

. . . .

"The question, then, for determination is whether the order given plaintiff on September 26, 1946, was a reasonable order. If reasonable, it was his duty to obey, and his refusal to do so would justify defendant in discharging him. If unreasonable and inconsistent with the contract, his refusal to obey would be no justification for discharge. . . .

. . . .

"In 35 Am.Jur., Master and Servant, § 35, the rule is stated:

" 'When an employee is engaged to fill a particular position in the service of his employer, any reduction of the rank or a material change in the duties of the employee is, in the absence of anything to

justify the employer in so acting, a violation of the contract of employment and will form the basis of an action by the employee for damages for breach of contract.'

"In the instant case, plaintiff was permitted to retain the name of manager, but his authority and prestige were taken away from him. It is fair to assume that no one in the position of plaintiff would have accepted the employment with such restrictions.

. . . .

"So in this case there is no issue of fact for the jury. As to the reasonableness of the order, reasonable minds can come to but one conclusion. If so, it was for the trial court to determine as a matter of law. In making the determination that the order in question was unreasonable, it is our opinion that the trial court was clearly right." See, also, Annot., 63 A.L.R.3d 539 (1975). For Nebraska cases which find a constructive discharge when an employer refuses to allow the employee to perform, see, *Schlueter v. School Dist. No. 42*, 168 Neb. 443, 96 N.W.2d 203 (1959); *Lee v. Ralston School Dist.*, 180 Neb. 784, 145 N.W.2d 919 (1966).

In the present case the demands made upon Sanders in the April 15 memorandum materially changed the duties of the position. While no one item listed in the memorandum seems clearly outside the scope of his duties as a sports director, the fact that each was to be accomplished within 30 days was a substantial change from the original contract. No justification for these demands was proffered by KMTV other than Nichols' statement that Sanders needed to be "hit . . . over the head with a two by four." The fact that the demands were made without regard to whether it was possible to accomplish them in the time allotted warrants a conclusion that the demands were unreasonable and were designed to make working conditions intolerable so that Sanders would quit. The jury could find that Sanders

was entitled to treat the memorandum as a constructive discharge and breach of the employment contract.

The defendant contends that instruction No. 10 was erroneous because it misstated the issues and tended to confuse the jury. The instruction was as follows: "You are instructed that the plaintiff in this case has the obligation to yield obedience to all reasonable rules, orders and instructions of the employer that are within the scope of the contract of employment. On the other hand, the employer may not require an employee to perform duties not required by the contract or not within the scope of the employment terms of the contract and the refusal of the palintiff [sic] to yield obedience to the rules, orders and instructions that are not within the scope of the contract can not be considered as a breach of the terms of the contract of employment by the plaintiff.

"If, however, you find that by Exhibit 9, the memorandum of April 15, 1981, the defendant imposed substantial duties upon the plaintiff that were 1.(a) not within the scope of the employment contract; 1.(b) that would result in a significant reduction in rank or material change in duties required by the employment contract (Exhibit 1) or 2. imposed duties upon the plaintiff that were impossible to perform within the time frame if any, as set out in said exhibit, then you may find that plaintiff was constructively discharged by the defendant."

While the instruction may be subject to criticism because it did not state elements 1.(a) and 1.(b) in the disjunctive, we believe it was not prejudicial to the defendant or so confusing as to constitute reversible error.

The objection made by the defendant at the instruction conference referred to the wording of the last four lines of the instruction. No objection was made to that part of the instruction which is now criticized on appeal. Ordinarily, the failure to object to instructions after they have been submitted

to counsel for review precludes raising an objection on appeal. *National Bank of Commerce Trust & Sav. Assn. v. Katleman*, 201 Neb. 165, 266 N.W.2d 736 (1978); *McCready v. Al Eighmy Dodge*, 197 Neb. 684, 250 N.W.2d 640 (1977).

The defendant also contends that the letter of plaintiff's counsel, stating that the plaintiff considered the April 15, 1981, memorandum from Nichols to be a constructive discharge, was improperly admitted into evidence. The letter was relevant because it constituted the plaintiff's reply to the memorandum and stated the plaintiff's claim that he had been discharged. It tended to negative the defendant's contention that the plaintiff had voluntarily terminated his employment.

There being no error, the judgment is affirmed.

AFFIRMED.

KRIVOSHA, C.J., participating on briefs.

HOLT COUNTY COOPERATIVE ASSOCIATION, APPELLEE, V. CORKLE'S, INCORPORATED, APPELLANT.

336 N.W.2d 312

Filed July 1, 1983. No. 82-437.

1. **Appeal and Error.** Errors assigned but not discussed will generally not be considered by this court.
2. **Prejudgment Interest.** Where a reasonable controversy exists as to the plaintiff's right to recover or as to the amount of such recovery, the claim is unliquidated and prejudgment interest is not recoverable.
3. _____. Prejudgment interest is recoverable where the parties have contracted for such; however, when the amount due and the date from which it is due cannot be computed without opinion or discretion, the claim is unliquidated and prejudgment interest is not recoverable.
4. **Attorney Fees.** It is the general practice in this state to allow the recovery of attorney fees and expenses only in those cases as are provided for by statute, or where the uniform course of procedure has been to allow such recovery.
5. **Courts: Jurisdiction.** Courts of general jurisdiction have inherent

power to do all things necessary for the proper administration of justice and equity within the scope of their jurisdiction.

6. **Attorney Fees.** Attorney fees may be shifted to the opponent when there exists and the court specifically finds conduct during the course of litigation which is so vexatious, unfounded, and dilatory as to constitute or be tantamount to bad faith.
7. _____. Such an attorney fee must be limited in amount so as to relate only to that part of the action necessitated by the misconduct.

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

James Widtfeldt, for appellant.

J. Murry Shaeffer, for appellee.

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

CAPORALE, J.

This appeal arises from a suit on an account by the plaintiff-appellee, Holt County Cooperative Association, against the defendant-appellant, Corkle's, Incorporated. Pursuant to the jury's verdict, the trial court entered judgment against the defendant in the sum of $4,056.77, together with prejudgment interest in the amount of $3,369.71. It also awarded the plaintiff an attorney fee of $4,660. We affirm as modified.

Plaintiff's second amended petition alleged that defendant was indebted to plaintiff in the sum of $5,003.11 for goods and supplies furnished by plaintiff to defendant at defendant's specific insistence and request from May 16, 1977, to June 1, 1978. Throughout the course of this litigation defendant filed a multitude of voluminous documents bearing little relationship to the pleading requirements contemplated by our statutes. Nonetheless, the case went to trial on plaintiff's aforesaid petition and the answer portion of defendant's "Amended Answer Recoupment, Counterclaim & Cross-Petition." A fair reading of that 50-paragraph filing, including subparagraphs and 33 incorporated paragraphs which

had been stricken by the court from a prior filing, is that it alleged two defenses: the failure to deliver the goods and supplies and that the charges made were not fair and reasonable. That document, including the aforesaid incorporated paragraphs, also alleged the conclusions that the plaintiff violated its own credit policy in connection with the subject transactions as well as in transactions with nonparties. It further alleged that plaintiff, of which defendant was a member, mismanaged itself, as the consequence of which defendant's stock ownership in plaintiff became worthless, to defendant's damage in the sum of $2,000. The prayer sought discovery orders as well as legal and equitable relief. On plaintiff's motion the trial court struck all of defendant's allegations except those which generally denied the operative allegations of plaintiff's second amended petition and those which alleged failure to deliver and excessiveness of the charges. The trial court then limited the defendant's discovery and presentation of evidence to matters relating only to those two defenses. The case was tried accordingly, and the jury was instructed that plaintiff had the burden of establishing the quantity of merchandise it delivered at defendant's request and the reasonable price at which such was delivered. The court further instructed the jury that "the defendant has denied that some of said merchandise was ever delivered, and if on all the credible evidence, you the jury find by a preponderance of the evidence that certain items of said merchandise were not delivered to the defendant or that some items of merchandise were delivered in smaller quantity than claimed by the plaintiff, then you the jury shall recompute the statement of account between plaintiff and defendant based upon your finding of quantity and price and return a verdict in favor of the plaintiff and against the defendant in the amount for which you find there was delivery to defendant, less credits due defendant."

Continuing the style it had established in the trial court, the defendant in its verbose and largely incomprehensible brief in this court made 54 assignments of error in language which is both redundant and confusing. For whatever reason, it undertook to discuss but 21 of the 54 assignments. The rule is that errors assigned but not discussed will generally not be considered by this court. Neb. Rev. Stat. § 25-1919 (Reissue 1979); *State v. Hochstetler*, *ante* p. 482, 334 N.W.2d 455 (1983); Neb. Ct. R. 9D(1)(d) (Rev. 1982). The remaining 21 purported errors discussed can be summarized as being that the court erred (1) by limiting the defenses which defendant might present and eliminating its counterclaim or setoff, (2) in awarding prejudgment interest, and (3) in awarding an attorney fee.

As to the first assignment of error, the defendant's conclusion that the plaintiff violated its own credit policy stated no recognized legal defense as pled. Defendant's allegations concerning the mismanagement of plaintiff and resultant loss to the defendant, assuming arguendo that they had been properly and separately stated and numbered and had alleged adequate supporting facts, still did not comply with the requirements of Neb. Rev. Stat. § 25-812 (Reissue 1979) that a defense, counterclaim, or setoff "must refer in an intelligible manner to the cause of action which they are intended to answer." Neither did those allegations meet the requirements of Neb. Rev. Stat. § 25-816 (Reissue 1979), which provides: "A set-off can only be pleaded in an action founded on contract, and must be a cause of action arising upon contract, or ascertained by the decision of the court." The trial court was correct in striking those allegations. The trial court correctly limited the defendant to the discovery and presentation of evidence on the only relevant issues Corkle's, Incorporated, had properly pled, and then only by giving it the benefit of a generously favorable reading of its almost unintelligible filings.

Defendant correctly argues in its second assignment of error that in this jurisdiction the rule is generally to the effect that unliquidated demands do not bear interest and that, generally, where a reasonable controversy exists as to the plaintiff's right to recover or as to the amount of such recovery, the claim is unliquidated. *Classen v. Becton, Dickinson & Co.*, *ante* p. 543, 334 N.W.2d 644 (1983); *Langel Chevrolet-Cadillac v. Midwest Bridge*, 213 Neb. 283, 329 N.W.2d 97 (1983). It is also true, however, that the rule is otherwise where the parties have contracted to do otherwise. *Prudential Ins. Co. v. Greco*, 211 Neb. 342, 318 N.W.2d 724 (1982). Thus, in *Prudential* this court allowed prejudgment interest pursuant to the contract between the parties where the plaintiff recovered the exact amount it claimed under the contract. There is evidence in this case which supports the trial court's finding, in its interest computation following the entry of judgment pursuant to the jury's verdict, that the agreement between the parties was that 1 percent per month would be charged on balances remaining unpaid for more than 30 days. Whether the jury discounted the amount plaintiff claimed on the basis that the charges were not fair and reasonable, or that some merchandise claimed to have been delivered was not, is immaterial. For under either circumstance, unlike the situation in *Prudential*, the amount due and the date from which it was due cannot be computed without opinion or discretion. That being so, the claim was not liquidated. See, *Smith v. Fettin Roofing Co.*, 213 Neb. 184, 328 N.W.2d 470 (1982); *Estate of Ruwe v. Ruwe*, 190 Neb. 663, 211 N.W.2d 610 (1973); *Mid States Engineering v. Rohde*, 182 Neb. 590, 156 N.W.2d 149 (1968). It follows then that prejudgment interest is not recoverable under the circumstances of this case.

This brings us to the remaining assignment of error, the assessment of an attorney fee. Defendant correctly states it to be the practice in this state to

allow the recovery of attorney fees and expenses only in such cases as are provided for by statute, or where the uniform course of procedure has been to allow such recovery. *Gates v. Howell*, 211 Neb. 85, 317 N.W.2d 772 (1982). This practice is in keeping with the so-called American rule that a prevailing party may not also recover an attorney fee from his opponent. The generally accepted justification of this rule is that a defendant should not be unduly influenced from vigorously contesting claims made against him. For a general discussion of this rule and its exceptions, see Annot., 31 A.L.R. Fed. 833 (1977).

There is neither a statute nor has there been a uniform course of procedure allowing attorney fees under the circumstances of this case. Nonetheless, courts of general jurisdiction have inherent power to do all things necessary for the proper administration of justice and equity within the scope of their jurisdiction. See *Lippincott v. Lippincott*, 152 Neb. 374, 41 N.W.2d 232 (1950), awarding an attorney fee to the wife, wherein the husband refused to perform and by his own extrajudicial conduct attempted to circumvent the trial court's initial decree by maintaining actions through others against his wife to quiet title in such persons. The rationale was based in part upon the need to protect and enforce the initial decree of the trial court. See, also, *Hoffmeyer v. Hoffmeyer*, 157 Neb. 842, 62 N.W.2d 138 (1954); *Harrington v. Grieser*, 154 Neb. 685, 48 N.W.2d 753 (1951).

A delineated exception to the American rule just mentioned, however, is that attorney fees may be "shifted" to the opponent when there exists conduct during the course of litigation which is vexatious, unfounded, and dilatory, such that it amounts to bad faith. Annot., 31 A.L.R. Fed. 833 (1977) and cases cited therein, including *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 95 S. Ct. 1612, 44 L. Ed. 2d 141 (1975); *Boeing Co. v. Van Gemert*, 444

U.S. 472, 100 S. Ct. 745, 62 L. Ed. 2d 676 (1980); *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 100 S. Ct. 2455, 65 L. Ed. 2d 488 (1980); *Hall v. Cole*, 412 U.S. 1, 93 S. Ct. 1943, 36 L. Ed. 2d 702 (1973); *In Re Boston & Providence Railroad Corporation*, 501 F.2d 545 (1st Cir. 1974).

The conduct of the defendant throughout this litigation, which had its origination in nothing more than a suit on an account, in filing myriad repetitious, irrelevant, supercilious, and pettifogging documents; in employing general tactics of delay by seeking and reseeking to conduct discovery into matters previously ruled to be inappropriate; and in the general tenor and tone in which the defense of this proceeding was carried on, is more than sufficient to establish the bad faith element required to award the plaintiff herein an attorney fee. The defendant herein repeatedly elected to ignore the trial court's rulings and to continually present anew matters which had previously been ruled upon and for which, had those rulings been erroneous, it had full recourse by appropriate appeal to this court.

In so ruling we have no desire to chill vigorous and responsible advocacy. This opinion is not to be read to indicate that attorney fees will be awarded other than under this jurisdiction's previously existing rules or other than in such extraordinary and unusual circumstances as were presented by this case. Because the record before us is abundantly clear, we have approved the attorney fee awarded by the trial court. Should a case such as this present itself in the future, however, the trial court shall, after hearing, make specific findings of fact sufficient to support a conclusion that there existed conduct during the course of litigation which was so vexatious, unfounded, and dilatory as to constitute or be tantamount to bad faith. See *Roadway Express, Inc. v. Piper*, *supra*. Such an attorney fee must further be limited in amount so as to relate only to that part of the action necessitated by the misconduct. See,

Richardson v. Communications Wkrs. of America, 530 F.2d 126, *reh'g and reh'g en banc denied* (8th Cir. 1976), *cert. denied* 429 U.S. 824, 97 S. Ct. 77, 50 L. Ed. 2d 86; *Wright v. Jackson*, 522 F.2d 955 (4th Cir. 1975).

We note in passing that the trial court did not give the foregoing analysis as a basis for its granting of the attorney fee. However, this is of no import. It is the rule in this jurisdiction that although a trial court may give the wrong reason for an action, if it reaches the right result, the result will nonetheless be affirmed on appeal. *Lilyhorn v. Dier*, *ante* p. 728, 335 N.W.2d 554 (1983); *Leo A. Daly Co. v. Omaha-Douglas Public Bldg. Comm.*, 212 Neb. 533, 324 N.W.2d 252 (1982); *Omaha P.P. Dist. v. Darin & Armstrong, Inc.*, 205 Neb. 484, 288 N.W.2d 467 (1980).

The judgment of the trial court is approved except for the award of prejudgment interest.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. MARCIA C. ARNOLD, APPELLANT.

336 N.W.2d 97

Filed July 1, 1983. No. 82-557.

1. **Search Warrants: Probable Cause.** In evaluating the showing of probable cause necessary to support a search warrant, only the probability, and not a prima facie showing, of criminal activity is the standard for determining probable cause.
2. **Search Warrants: Affidavits.** Where some of the underlying circumstances are detailed in the affidavit, where reason for crediting the source of the information is given, and when a magistrate has found probable cause, the court should not invalidate the warrant by interpreting the affidavit in a hypertechnical rather than a commonsense manner.
3. _____: _____. An informant selected by the police, who makes a purchase of controlled substances under the personal direction, supervision, and control of a police officer, and informs the officer of what the informant saw and heard at the time of the purchase, is presumptively reliable.

4. **Search Warrants: Probable Cause.** In determining probable cause for issuance of a search warrant, the issuing magistrate is to make a practical, commonsense decision whether, given the totality of all the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

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

Steven Lefler of Schrempp & Lefler, for appellant.

Paul L. Douglas, Attorney General, and Dale D. Brodkey, for appellee.

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

MCCOWN, J.

After trial to the court without a jury the defendant was found guilty of possession of a controlled substance and sentenced to 2 years' probation, with 30 days to be served in jail as a condition of probation. The defendant has appealed.

The sole assignment of error on appeal is that the District Court erred in denying the defendant's motion to suppress evidence obtained from the execution of a search warrant. The contention is that the affidavit for the search warrant was insufficient.

On January 26, 1982, an affidavit and application for the issuance of the search warrant involved here were filed in the Omaha Municipal Court. The affidavit was executed by Police Officer Nepodal. The affidavit stated that a group of concerned citizens had first contacted police about narcotics activities in the area of 34th and Decatur Streets in Omaha in March of 1981. The concerned citizens gave the police the addresses of two residences from which they believed narcotics were being sold.

An independent police investigation indicated that one of the addresses, 1722 North 34th Street, was rented to a Robert L. Ross, and the utilities at that address were registered in the same name. A ser-

geant in the narcotics unit had received a call in January of 1982 from an unidentified informant who stated that a person named Ross was selling marijuana in the 34th and Decatur Streets area.

In January 1982 Nepodal arranged with an individual identified as informant No. 1 to make a controlled buy of marijuana at 1722 North 34th Street. Nepodal watched the informant enter the residence at 1722 North 34th Street, and the informant returned in a short time with marijuana. The informant told Nepodal that when he went into the residence he talked to a young black man about purchasing marijuana. That individual sold the marijuana to the informant and informed him that he only kept small amounts of marijuana at that residence and that if the informant wanted to purchase additional quantities, the informant would have to contact "Cisco," and gave the informant a telephone number. A police check established that the telephone number given to the informant was listed to Sheryl Ross at 1722 North 34th Street.

The informant also advised Nepodal that a man known as "Cisco" was dealing in marijuana. An independent investigation by the police established that a man known as "Cisco Kid" resided at 1722 North 34th Street.

Sometime later the informant spoke with Cisco about the purchase of a larger quantity of marijuana and was told that Cisco would have to have the money and would have to leave the residence at 1722 North 34th Street and go elsewhere to get the larger quantity of marijuana. Nepodal then arranged for another controlled buy of marijuana at 1722 North 34th Street, to be made under the surveillance of the police. The informant entered the residence, and after a short time police observed a black, heavy-set male leave the residence and drive off in a car registered to Sheryl Ross. Police officers followed the car to a house located at 6915 North 24th Street, where they watched the man they had been follow-

ing enter the residence. After a short time the man left the residence and drove back to 1722 North 34th Street.

A short time after Cisco returned, the informant came out of the house and turned a quantity of marijuana over to Nepodal. The informant also told Nepodal that Cisco had had to leave the house to get the marijuana and that when Cisco returned he took the marijuana out of his coat pocket and gave it to the informant. A check of police department photographs and records indicated that Cisco was Robert Ross and that Ross was the man that police had followed to 6915 North 24th Street.

The affidavit also related that a computer check showed that the defendant in this case, Marcia C. Arnold, resided at 6915 North 24th Street, and Nepodal also stated that he had received information in the past that the defendant was involved in the distribution of controlled substances.

In the 48 hours prior to the filing of the affidavit, the informant was again in contact with Robert Ross, who told the informant that marijuana was ready and the "lady" had the marijuana in her possession. The informant stated that Ross was ready to go and pick up the marijuana so that he could make a delivery. The affidavit concluded with a statement that, based on the foregoing facts, Nepodal had reason to believe that there was a quantity of marijuana concealed at 6915 North 24th Street under the control of the defendant, Marcia C. Arnold.

The application requested a warrant to search 6915 North 24th Street, 1722 North 34th Street, and the vehicles used by Ross for marijuana, and records, money, or other items used in the distribution of controlled substances. The search warrant was issued by the municipal court on January 26, 1982.

Upon issuance of the warrant, police officers placed the house at 6915 North 24th Street under surveillance. They observed Ross drive up, enter

the residence, and leave after approximately 10 minutes. After Ross left, the police served the warrant and searched the residence. They found a purse in the bedroom containing 82 tablets of a substance later determined to be LSD. The police also found $30 that was identified as part of the purchase money from the earlier controlled buys made at 1722 North 34th Street. The defendant, Marcia C. Arnold, was arrested and charged with possession of LSD.

Upon later questioning, the defendant admitted that the LSD belonged to her and that Robert Ross had given her $800 to purchase two pounds of marijuana.

The defendant filed a motion to suppress the evidence flowing from the execution of the search warrant. The motion was denied by the trial court. Trial to the court and sentencing followed. The sole issue on this appeal is whether the information in the affidavit for a search warrant was sufficient.

The rule is well established that in evaluating the showing of probable cause necessary to support a search warrant, only the probability, and not a prima facie showing, of criminal activity is the standard for determining probable cause. *State v. Robish*, *ante* p. 190, 332 N.W.2d 922 (1983).

Affidavits for search warrants must be tested in a commonsense, realistic fashion. Where some of the underlying circumstances are detailed in the affidavit, where reason for crediting the source of the information is given, and when a magistrate has found probable cause, the court should not invalidate the warrant by interpreting the affidavit in a hypertechnical rather than a commonsense manner.

An informant selected by the police, who makes a purchase of controlled substances under the personal direction, supervision, and control of a police officer, and informs the officer of what the informant saw and heard at the time of the purchase, is presumptively reliable. *State v. Payne*, 201 Neb. 665, 271 N.W.2d 350 (1978).

The affidavit in the present case was adequate to support the issuance of a search warrant under the former standards of *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964), and *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969). Its sufficiency is even more obvious under the totality of the circumstances test established by *Illinois v. Gates*, 51 U.S.L.W. 4709, decided June 8, 1983.

Gates holds that the elements under the two-pronged test concerning the informant's veracity, reliability, and basis of knowledge should be understood simply as closely intertwined issues that may usefully illuminate the commonsense, practical question whether there is probable cause to believe that contraband or evidence is located in a particular place. The task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed.

The facts set out in the affidavit in the present case were more than sufficient to ensure that the magistrate had a substantial basis for concluding that probable cause existed to believe that contraband or evidence was located at 6915 North 24th Street in Omaha, Nebraska. The denial of the motion to suppress was correct and the judgment of the District Court is affirmed.

AFFIRMED.

WHITE, J., concurring.

I agree that the affidavit met the test of *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964), and *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969). Having met that

test, any discussion of *Illinois v. Gates*, 51 U.S.L.W. 4709, decided June 8, 1983, is unnecessary.

Gates and, more recently, *United States v. Villamonte-Marquez*, 51 U.S.L.W. 4812, decided June 17, 1983, present the disturbing vision that the bedrock of our federal constitutional rights may only be a mass of shifting sand.

In my view, it is now past time to consider search and seizure cases in light of Neb. Const. art. I, § 7: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized."

" ' "These ([Fourth Amendment rights]), I protest, are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government." *Brinegar v. United States*, 338 U.S. 160, 180 [(1949)] (Jackson, J., dissenting).' *Almeida-Sanchez*, 413 U.S., at 273-274." 51 U.S.L.W. at 4820 (Brennan, J., dissenting).

It, indeed, may be and perhaps is the perception of a majority of the U.S. Supreme Court that the necessities of law enforcement require a more flexible view of the fourth amendment. The result may be a more orderly society. We shall also be a less free society.

In my judgment, as Sir Thomas More is reputed to have told Roper, we have one less tree to shield us from the devil. I propose that rather than blindly allowing the " 'continuing evisceration of Fourth Amendment protection against unreasonable searches and seizures,' " *id.*, we adopt a standard based on

the Nebraska Constitution and offer such protection as we may in the courts of Nebraska.

SHANAHAN, J., joins in this concurrence.

STATE OF NEBRASKA, APPELLEE, V. ROBERT FATICA, APPELLANT.

336 N.W.2d 101

Filed July 1, 1983. No. 82-614.

Speedy Trial: Depositions. The reasonable time used to obtain a deposition requested by a defendant in preparation for trial is excluded in computing the last day permissible for commencement of trial under Neb. Rev. Stat. § 29-1207(1) (Reissue 1979).

Appeal from the District Court for Lancaster County: ROBERT T. FINN, Judge. Affirmed.

Berry, Anderson, Creager & Wittstruck, for appellant.

Paul L. Douglas, Attorney General, and Bernard L. Packett, for appellee.

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

SHANAHAN, J.

Robert Fatica was convicted of "Conspiracy to Commit Arson in the First Degree," Neb. Rev. Stat. §§ 28-202(1), 28-502(1) (Reissue 1979), and was sentenced to a term of 2 to 6 years in the Nebraska Penal and Correctional Complex. We affirm the judgment of the District Court.

The information charging Fatica was filed August 11, 1981, and alleged that Fatica with two others conspired to commit arson in the first degree, i.e., "to intentionally damage the building of the Nebraska Penitentiary trustee dormitory library . . . ." On August 13, 1981, Fatica was arraigned and trial was set for September 14. For some reason undisclosed by the record the trial set for September 14 was

postponed. On October 26 Fatica filed a motion to take depositions, and the District Court authorized Fatica to obtain the depositions. The prospective deponents were later identified as James L. Kuticka and Michael Wittrock. Around December 9 the prosecutor visited with Fatica's attorney who indicated he still desired the depositions. Because the prosecuting attorney was on vacation from December 18 to January 4, 1982, depositions were not scheduled for that period. On January 4 the attorneys scheduled January 15 for the deposition of James L. Kuticka, a deputy state fire marshal. There was some "mixup," and Fatica's attorney canceled the Kuticka deposition scheduled for January 15. On January 18 the prosecutor tried unsuccessfully to schedule the depositions, and it was not until February 2 or 3 that the attorneys next scheduled the Kuticka deposition for February 12. That deposition was canceled by Fatica's attorney because a codefendant's attorney could not attend. From February 22 to March 3 the prosecutor was involved in another trial and was unavailable for depositions. At the prosecutor's request on March 20 the attorneys took Kuticka's deposition on March 25 at the public defender's office. Wittrock's deposition was taken March 26 at the office of Fatica's attorney. The following Monday, March 29, Fatica filed a motion to dismiss the information and claimed that he had been denied a speedy trial required by Neb. Rev. Stat. § 29-1207 (Reissue 1979). On March 29 the District Court overruled the motion to dismiss and set trial for May 3, 1982. In overruling Fatica's motion to dismiss, the trial judge found that the period involved in obtaining the depositions constituted "good cause" for the delay and excluded such time in computing the last day permissible for trial in compliance with § 29-1207. Fatica filed a motion for continuance on April 23. Trial was rescheduled and commenced on June 1. On June 10 the jury returned a verdict of guilty. The District Court overruled

Fatica's motion for new trial and imposed sentence.

Fatica assigns only one error, namely, in determining the last day for trial to commence as required by § 29-1207, the District Court improperly excluded the time used by Fatica to obtain depositions.

Section 29-1207, hereinafter called the "6-month rule," implements the practice and procedure assuring the constitutionally guaranteed speedy trial of a defendant and expedites the administration of criminal justice. The right to the "speedy trial" envisioned within Nebraska's "6-month rule," however, must coexist with the defendant's right to another constitutionally protected right, namely, the right to a fair trial. Contained within the concept of a fair trial is the defendant's opportunity to prepare a defense to the charge levied. Preparation of a defense often includes the discovery process afforded by Neb. Rev. Stat. §§ 29-1912 et seq. (Reissue 1979). Therefore, these statutes, § 29-1912 (discovery) and § 29-1207 ("6-month rule"), are neither mutually exclusive nor contradictory but, rather, allow a defendant the means to prepare a defense as well as to obtain a speedy trial. See *Rubiera v. Dade County ex rel. Benitez*, 305 So. 2d 161 (Fla. 1974).

In the present case Fatica requested depositions of potential witnesses for the State. Throughout the protracted period prior to obtaining the depositions, Fatica expressed his need and desire for the depositions of Kuticka and Wittrock to prepare for trial. Although the State tried to schedule the depositions, Fatica for one reason or another caused postponement of the depositions. On March 29, while the reporter may have been transcribing the depositions requested by Fatica in October but obtained just the week before, Fatica was asking dismissal on account of delay in trial. The delay regarding the depositions was not attributable to any negligence or misconduct on the part of the State. As stated in 21A Am. Jur. 2d *Criminal Law* § 659 (1981), delay attributable to acts, conduct, or condition of defend-

ant: "An accused cannot generally take advantage of a delay in being brought to trial where he was responsible for the delay either by action or inaction."

The trial court ruled that the time involved in the discovery process initiated by Fatica constituted a delay "for good cause" under § 29-1207(4)(f), and, therefore, the court excluded such time in computing the last day permissible for trial under § 29-1207(1). The reasonable delay resulting from the depositions was necessary to comply with Fatica's request for discovery. Under the circumstances Fatica, as any other defendant, must accept a reasonable delay as a consequence of invoking the discovery process in preparation for trial. See, *State of Iowa v. LaPlant*, 244 N.W.2d 240 (Iowa 1976); *Rosenwasser v. Smith*, 308 So. 2d 600 (Fla. App. 1975). Doubtless the deprivation of the depositions would have been decried as a denial of a fair trial in this case. In *State v. Brown*, *ante* p. 665, 335 N.W.2d 542 (1983), we held that the period pertaining to the final disposition of a pretrial motion for discovery is excluded in computing the date for trial under the "6-month rule." Consequently, the reasonable time used in obtaining a deposition requested by a defendant in preparation for trial is likewise excluded in computing the last day on which trial can be commenced under § 29-1207(1). The pretrial motion for discovery was not "finally disposed," within the meaning of § 29-1207(4)(a), until the depositions were taken pursuant to the order authorizing Fatica to obtain the depositions. Any delay in trial was attributable to the depositions, and such delay was for "good cause" under § 29-1207(4)(f), that is, completion of the discovery requested by Fatica in preparation for trial. The District Court was correct in excluding the time used for the depositions requested by Fatica.

In *State v. Jones*, 208 Neb. 641, 305 N.W.2d 355 (1981), we set out the method for computing the last date permissible for trial under § 29-1207. Here, the

information was filed on August 11, 1981. The last day for commencement of Fatica's trial was February 11, 1982, unless there is time to be excluded in accordance with § 29-1207(4). From October 26, i.e., the day on which Fatica filed his motion for the depositions, until March 26, when Fatica took the last deposition, there are 152 days. Fatica is not charged with those periods when the prosecutor was unavailable for the depositions, namely, the prosecutor's vacation (17 days) and the prosecutor's trial time in another case (8 days). Those 25 days are not charged to Fatica in computing the limit for commencement of trial. There still remain 127 days to be excluded in computing the last permissible day for trial. Charging Fatica with the 127 days for the depositions and adding such excluded time to the date of February 11, the last day on which Fatica's trial could have commenced under the "6-month rule" is June 18, 1982. Trial commenced on June 1, and, therefore, Fatica was brought to trial within the time prescribed by the "6-month rule," § 29-1207(1).

Fatica has not been denied a "speedy trial," and the judgment of the District Court is affirmed.

AFFIRMED.

LYNN CURLEY, CONSERVATOR OF THE ESTATE OF DAVID AND GREGORY CURLEY, AND LYNN CURLEY, INDIVIDUALLY, APPELLANT, V. JANICE M. CURLEY, PERSONAL REPRESENTATIVE OF THE ESTATE OF LYLE D. CURLEY, APPELLEE.

336 N.W.2d 103

Filed July 1, 1983. No. 82-817.

Summary Judgment. A motion for summary judgment requires compliance with all statutory requirements.

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

Gregory P. Drew, for appellant.

Frank Roubicek, for appellee.

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

MCCOWN, J.

This is an action for personal injuries sustained by guest passengers as a result of an automobile accident. The District Court sustained a motion for summary judgment on behalf of the driver of the automobile and the passengers have appealed.

The plaintiff, Lynn Curley, brought this action individually and as conservator of the estates of her husband, David Curley, and her son, Gregory Curley. The defendant, Janice M. Curley, is the widow and personal representative of the estate of Lyle D. Curley, the driver of the automobile.

On August 30, 1981, the plaintiff, her husband David, and her son Gregory were riding in an automobile driven by Lyle Curley, David's father. The automobile was in an intersection collision with another automobile which was approaching from the left and ran a stop sign. Lyle Curley was killed in the accident and plaintiff Lynn Curley, her husband, and her son were all severely injured.

On June 3, 1982, the plaintiff filed a petition alleging that at the time of the accident Lyle Curley was guilty of gross negligence in operating the automobile, in that he failed to have the car under proper control and failed to anticipate that the driver of the other car would not yield the right-of-way. The petition also alleged that Lyle Curley was operating the vehicle while under the influence of medication.

On September 16, 1982, the defendant filed a motion for summary judgment on the ground that the pleadings and affidavits showed as a matter of law that Lyle Curley was not guilty of gross negligence. The motion for summary judgment was heard on

September 27, 1982, and the District Court denied the motion without prejudice to file a new motion for summary judgment based upon newly discovered evidence.

The case was set for jury trial on November 22, 1982, and additional interrogatories were filed and depositions taken. Pretrial conference was set for November 12, 1982. On that date the defendant filed a new motion for summary judgment. The court ordered that the motion be heard on that day. Plaintiff's counsel specifically objected on the ground that the motion did not comply with the 10-day notice requirements and that he had received notice of the motion only a short time before it was to be heard. Counsel also informed the court that he had taken depositions the previous day which could be relevant to the motion for summary judgment but that he did not have the depositions with him because he did not know that a motion for summary judgment was to be argued on that day. The trial court directed plaintiff's counsel to give a "synopsis" of the testimony contained in the depositions. At the close of the hearing the court sustained the defendant's motion for summary judgment. This appeal followed.

The plaintiff contends that the District Court erred in hearing the motion for summary judgment on November 12, 1982, in violation of Neb. Rev. Stat. § 25-1332 (Reissue 1979). That statute provides in part: "The motion [for summary judgment] shall be served *at least ten days before* the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits." (Emphasis supplied.)

The evidence in this case is undisputed that the notice provisions of the statute were not complied with and that counsel had no time to present opposing affidavits or evidence. Plaintiff's counsel specifically asserted the statutory provisions in objecting to the immediate hearing on the motion. The hearing and overruling of the previous motion did not re-

move any statutory time requirements for hearing a subsequent motion.

This court has previously noted that the summary judgment procedure is purely statutory and that a motion for summary judgment requires compliance with all the statutory requirements. *Walkenhorst v. Apolius*, 172 Neb. 830, 112 N.W.2d 31 (1961). See, also, *Yunghans v. O'Toole*, 199 Neb. 317, 258 N.W.2d 810 (1977).

In the present case the notice requirements of the statute were not complied with, there was no waiver, and the lack of notice effectively removed the right to present affidavits or evidence. The judgment of the District Court is reversed and the cause is remanded for further proceedings.

REVERSED AND REMANDED.

HAVELOCK BANK OF LINCOLN, A CORPORATION, APPELLANT, V. HOG CONFINEMENT SYSTEMS, INC., A CORPORATION, RALPH B. YOCHUM, AND BOYD C. YOCHUM, APPELLEES.

335 N.W.2d 765

Filed July 1, 1983. No. 82-851.

Social Security: Garnishment. Under the provisions of 42 U.S.C. § 407 (1976), social security payments to a recipient on deposit with a bank are exempt from garnishment under state law.

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

Dana Baker of Barney, Carter & Johnson, P.C., for appellant.

John M. Guthery of Perry, Perry, Witthoff, Guthery, Haase & Gessford, P.C., for appellees.

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

KRIVOSHA, C.J.

The present appeal presents to the court what ap-

pears to be a case of first impression in this state, although not elsewhere in the United States. The question is whether money paid to a recipient by the Social Security Administration and on deposit with a bank may be garnished by a judgment creditor in satisfaction of a judgment. The trial court held that the money on deposit was exempt and not subject to garnishment. We believe the trial court was correct and therefore we affirm.

The facts involved in this case are without dispute. The appellant, Havelock Bank of Lincoln, obtained a judgment in the principal sum of $60,916.61 against Hog Confinement Systems, Inc., a corporation, Ralph B. Yochum, and Boyd C. Yochum, in the District Court for Lancaster County, Nebraska, on the 14th day of June 1982. Thereafter, Havelock filed a praecipe for garnishment summons together with a garnishment affidavit in the District Court for Saunders County, Nebraska, seeking to levy upon money on deposit in the Farmers and Merchants Bank of Ashland, Nebraska, belonging to one of the judgment debtors, Ralph B. Yochum.

It is without dispute that the bank account belonged jointly to Ralph B. Yochum and DeLoris Yochum, his wife, and its contents consisted solely of checks directly deposited by the Social Security Administration. Ralph Yochum thereafter filed a motion to quash, maintaining that because the account consisted only of checks received from the Social Security Administration, the funds were wholly exempt from garnishment.

We believe that a reading of the Social Security Act supports that conclusion. Under 42 U.S.C. § 407 (1976): "The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, *and none of the moneys paid or payable* for rights existing under this subchapter shall be subject to execution, levy, attachment, *garnishment*, or other legal process, or to the operation of any bankruptcy or insolvency

law." (Emphasis supplied.) It appears clear to us, as it did earlier to the U.S. Supreme Court in the case of *Philpott v. Essex County Welfare Board*, 409 U.S. 413, 93 S. Ct. 590, 34 L. Ed. 2d 608 (1973), that money paid by the Social Security Administration under the Social Security Act and on deposit in a bank is wholly exempt from state garnishment proceedings. In the *Philpott* case the State of New Jersey was seeking to obtain funds on deposit in the recipient's account pursuant to an agreement earlier executed by the recipient. In denying recovery the U.S. Supreme Court said in 409 U.S. at 415: "On its face, the Social Security Act in § 407 bars the State of New Jersey from reaching the federal disability payments paid to Wilkes."

Havelock argues, however, that the provisions of § 407 apply only with regard to assignments of future funds and do not apply to money already received and now on deposit in a bank. *Philpott* also disposed of that argument. The Court in *Philpott* said at 416: "The protection afforded by § 407 is to 'moneys paid' and we think the analogy to veterans' benefits exemptions which we reviewed in *Porter v. Aetna Casualty Co.*, 370 U.S. 159, [82 S. Ct. 1231, 8 L. Ed. 2d 407 (1962)], is relevant here. We held in that case that veterans' benefits deposited in a savings and loan association on behalf of a veteran retained the 'quality of moneys' and had not become a permanent investment. *Id.*, at 161-162.

"In the present case, as in *Porter*, the funds on deposit were readily withdrawable and retained the quality of 'moneys' within the purview of § 407."

See, also, *Harris v. Bailey*, 675 F.2d 614 (4th Cir. 1982); *Finberg v. Sullivan*, 634 F.2d 50 (3d Cir. 1980); *Tidwell v. Schweiker*, 677 F.2d 560 (7th Cir. 1982); *Raskin v. Moran*, 684 F.2d 472 (7th Cir. 1982); *Herweg v. Ray*, 619 F.2d 1265 (8th Cir. 1980), *rev'd on other grounds* 455 U.S. 265, 102 S. Ct. 1059, 71 L. Ed. 2d 137 (1982); *Usery v. First Nat. Bank of Arizona*, 586 F.2d 107 (9th Cir. 1978).

We believe the language of § 407 is clear beyond question, and therefore, by reason of the supremacy clause of the U.S. Constitution, we must hold that under the provisions of 42 U.S.C. § 407 (1976), social security payments to a recipient on deposit with a bank are exempt from garnishment under state law. The judgment is affirmed.

AFFIRMED.

PAMELA SUE MINDT, APPELLEE, V. CLARENCE D. SHAVERS, APPELLANT.

337 N.W.2d 97

Filed July 15, 1983. No. 81-720.

1. **Causes of Action: Words and Phrases.** A "cause of action" is the operative facts which give rise to a "right of action" or the remedial right affording redress. Thus, there may be several rights of action arising out of a cause of action.
2. **Causes of Action.** A single cause of action may give rise to more than one theory upon which recovery may be had.
3. **Sexual Assault.** A sexual assault may involve much more than a mere assault and battery.
4. **Service of Process: Jurisdiction.** If service of the summons in a case is, in fact, made on the defendant, that gives the court jurisdiction to render a valid judgment, so far as the service of process is concerned, although the evidence of record, constituting the proof of service, may fail in essential particulars to establish that such service was in fact made. In cases where service was in fact had, the court has jurisdiction and may, after judgment, permit an amendment of the record to supply omissions necessary to show that the service was in fact made.
5. **Trial: Prejudicial Statements.** A statement by counsel in the trial of a civil action relating to race may be, but is not necessarily, improper or prejudicial. The primary considerations are whether the statement in question has any relevancy to or legitimate bearing on the issues in the case and, if not, whether it is calculated or has a tendency to arouse racial prejudice.

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

John R. Doyle, for appellant.

Stanley D. Cohen, for appellee.

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

KRIVOSHA, C.J.

The appellant, Clarence D. Shavers, appeals from a jury verdict finding Shavers liable to the appellee, Pamela Sue Mindt, in the amount of $60,000 for intentionally and recklessly causing severe emotional distress to Mindt. Shavers maintains that the verdict must be reversed because of one of several errors. He first claims that the cause of action was for assault and battery and was therefore barred by the running of the statute of limitations. He also claims that the District Court did not acquire jurisdiction over the person of Shavers due to a defective affidavit of service on the out-of-state summons return, and, finally, that the amount of the verdict was the result of passion and prejudice created by both an improper statement made by Mindt's counsel during opening statements and a voluntary statement made by Mindt during cross-examination. We have reviewed the record and find no such errors. We therefore affirm the judgment.

Shavers did not appear at the trial and offered no testimony; therefore, much of the evidence produced by Mindt is undisputed. The evidence discloses that on February 15, 1979, Mindt was sexually assaulted by Shavers while both were on duty at the Army Reserve headquarters in Lincoln, Nebraska. Shavers was on assignment from Fort Riley, Kansas, in order to instruct Mindt, a Specialist Fourth Class with the Army Reserve, on the use and operation of microfilm for documentation purposes.

The first incident giving rise to the suit occurred in the microfiche room on the lower level of the 162d Medical Battalion building. Mindt testified that without warning Shavers touched her breasts against her will and unzipped her jeans and touched her genitals. Mindt resisted Shavers' advances and

was able to return to the main floor of the building, where she advised her superior officer, a Sergeant Major Entsminger, that she did not want to work with Shavers again.

Shortly thereafter, however, Mindt was directed by Entsminger to accompany Shavers to a Quonset hut in order to locate a technical manual that Shavers had requested. Once inside the Quonset hut, Shavers continued to sexually harass Mindt, both verbally and physically. Over objections and against her will, Shavers again placed his hands on Mindt's body and, after partially removing her jeans, forcibly sexually assaulted her. As she was resisting and pushing Shavers away, he ejaculated on her body and on her clothing. Mindt returned to the main building in an extremely agitated condition and after a few minutes requested permission to leave and go home. Later that day she reported the incident to her sister. She returned to the reserve base the next afternoon and reported the incident to Sergeant Major Entsminger, who documented the event and informed the battalion commander. She then sought medical care. On February 17, 1979, Sergeant Major Entsminger telephoned Shavers at his residence in Fort Riley, Kansas, and confronted him with Mindt's accusations. Initially, Shavers denied all involvement, but after Entsminger told Shavers that he had Mindt's semen-stained clothing, Shavers admitted everything but penetration.

On August 20, 1980, Mindt filed a petition in the District Court for Lancaster County, Nebraska, alleging that Shavers had committed various sexual acts upon her which caused Mindt to suffer severe emotional distress. She further alleged that as a result of this emotional distress she had incurred and would continue to incur medical expenses for necessary care and treatment, and prayed for judgment against Shavers both for special damages and for general damages.

An out-of-state summons was issued to the sher-

iff's department of New Hanover County, North Carolina, for service upon Shavers, who was then residing in North Carolina. On October 6, 1980, a copy of the out-of-state summons, together with an affidavit of service, was filed in the office of the clerk of the District Court for Lancaster County, Nebraska. The affidavit of service was signed by an S. N. Murphy, who was purportedly a deputy sheriff of the New Hanover County, North Carolina, sheriff's department. On the face of the affidavit of service it does not appear that the signature of Murphy was notarized. Thereafter, a special appearance was filed by Shavers, and on November 21, 1980, the trial court sustained the special appearance, though the record does not disclose the basis therefor. On December 10, 1980, a second affidavit of service was filed. The second affidavit of service was obviously a copy of the first affidavit of service except that it contained the name of the deputy sheriff and his signature was now notarized. A subsequent special appearance filed by Shavers was overruled. Thereafter, Shavers, reserving his special appearance, filed an answer in which he denied the allegations of Mindt's petition, and subsequently a trial to the jury was held.

Turning to Shavers' first assignment of error, that the action was barred by the statute of limitations, we believe that Shavers is in error. Shavers' argument is that the actions, if taken by Shavers against Mindt, constituted an assault and battery, and, therefore, any suit pursuant to the provisions of Neb. Rev. Stat. § 25-208 (Reissue 1979) must be filed within 1 year from the date on which the cause of action arose or be thereafter barred. It is conceded that the action was not filed within 1 year but was filed within 4 years, the appropriate time for filing an action for either an intentional tort or negligence. See Neb. Rev. Stat. § 25-207 (Reissue 1979).

The fact that Shavers' touching of Mindt may constitute an action for assault and battery, if so pleaded,

does not thereby preclude any other appropriate action from being brought. As we noted recently in *Interholzinger v. Estate of Dent*, *ante* p. 264, 333 N.W.2d 895 (1983), a "cause of action" is the operative facts which give rise to a "right of action" or the remedial right affording redress. Thus, there may be several rights of action arising out of a cause of action. 1 Am. Jur. 2d *Actions* § 2 (1962). See, also, 1 C.J.S. *Actions* § 8(b) (1936). A single cause of action may give rise to more than one theory upon which recovery may be had. An example is our recent decision of *P. R. Halligan Post 163 v. Schultz*, 212 Neb. 329, 322 N.W.2d 657 (1982), wherein a petition containing two theories was filed against the parents of a 13-year-old boy to recover damages to a building and its contents allegedly caused when the minor set fire to the building. Under the first theory it was alleged that the parents were liable for the willful and intentional acts of their son under the provisions of Neb. Rev. Stat. § 43-801 (Reissue 1978). Under the second theory it was alleged that the parents were negligent in the supervision of their minor son in specified particulars. A demurrer to the first cause of action was sustained and an appeal was taken to this court. We dismissed the appeal on the basis that there was still pending a second cause of action arising out of the same facts for which recovery might be had. In doing so, we said at 331-32, 322 N.W.2d at 658-59: " 'The judicial unit for an appeal is the final determination of the issues arising from a set of facts involved in the same transaction or occurrence, and not the determination of an individual issue not disposing of the action. An order dismissing some of several alternative counts, each stating only one legal theory to recover damages for the same wrong, is not considered an appealable judgment while the other counts remain pending because the counts are concerned with a single fact situation. . . . It is the differing transactions or occur-

rences giving rise to a claim that forms the basis of separate units of judicial action and not the differing legal theories or issues presented for recovery.' "

In the *P. R. Halligan* case we recognized that one set of facts might give rise to both an action for intentional tort and, likewise, an action of negligence, and the bringing of one would not bar the other. Obviously, if the plaintiff in the *P. R. Halligan* case could have brought an action on two legal theories, then obviously it could have selected one or the other legal theory upon which to bring the case.

Furthermore, in the case of *Jones v. Wittenberg University*, 534 F.2d 1203 (6th Cir. 1976), the U.S. Court of Appeals was presented with a case seeking to recover damages for the wrongful death of a student who was shot and killed by a university guard. The university argued that a cause for wrongful death could not exist because the shooting by the guard was an intentional act and therefore could not constitute a negligent act giving rise to a cause of action for wrongful death. In rejecting that argument and affirming the jury verdict, the Court of Appeals said at 1208-09: "Appellant argues that a finding of negligence may not be grounded on a wilful and intentional act. However, this argument overlooks the principle of tort law that an intentional act may be so negligently performed that it results in civil liability for the actor. To a degree all negligent conduct is intentional in that it is *voluntary.* Even though injury may be unintended, the act which lead [sic] to the injury to be actionable negligence must be the product of the actor's will.

. . . .

". . . The voluntary act of firing a pistol is an intentional act, even though harm was not intended, but it may constitute negligence if it was done so carelessly as to result in foreseeable injury."

Applying this principle to the instant case, it is apparent that the facts of the case give rise to two possible theories of recovery, one for assault and bat-

tery and the other for the intentional infliction of severe emotional distress. Although Mindt could have chosen to seek recovery on the theory of assault and battery, if properly pleaded, she is also able to seek recovery on the theory of an intentional infliction of emotional distress, a totally independent tort in the State of Nebraska.

The very nature of the tortious act involved herein, while it does involve elements sufficient to constitute an assault and battery, is uniquely appropriate for a suit based upon a theory of intentional infliction of emotional distress. A sexual assault has been described by one author in the following manner: "They [the victims] experience complete loss of control of the body, complete loss of independence, and the removal of something that is part of them. The inner space is intruded upon and the most sacred and the most private repository of the self has been violated. Forceful access has been into the innermost source of the ego. Rape has been said to be the closest one can come to destroying the ego except for murder. . . . The emotional consequences of sexual assault are acutely disabling and chronically debilitating in many if not most victims." Hicks, *Rape: Sexual Assault*, 137(8) Am. J. of Obstetrics and Gynecology 931, 932-33 (August 15, 1980). A sexual assault may involve much more than a mere assault and battery.

It is clear from both the pleadings and the evidence adduced that Mindt sought and obtained recovery not for the damage resulting from a mere assault and battery of her person but, rather, for severe emotional distress caused by the extreme and outrageous conduct of Shavers. She testified that she suffered fear of pregnancy and had been given "morning after" pills which caused severe nausea and abdominal cramping. Her relationships with men deteriorated and she was unable to continue living with her brother. She became more isolated and experienced shame, humiliation, fear, and a

lowered self-esteem. Preoccupation with the incident resulted in a loss of concentration and a lower scholastic grade average. She changed her major and transferred to a different university. She also changed her service affiliation from the Army Reserve to the Nebraska National Guard. The evidence established that the emotional distress began to manifest itself physically as evidenced by insomnia, weight loss, and a dramatic increase in smoking and alcohol consumption. She suffered from nightmares in which she relived the assault twice weekly for 3 to 4 months after the assault.

Mindt then sought professional counseling at the urging of her sister, who referred her to a Dr. Jack Richman, a certified therapist and psychologist specializing in marriage and family therapy. He testified in great detail about the symptoms Mindt exhibited and formed a diagnosis of adjustment disorder with mixed emotional features. This disorder was an acute reaction to an overwhelming environmental stressor, the sexual assault.

Mindt also sought counseling at the Rape-Spouse Abuse Crisis Center. Its coordinator, Jo Ann Dunn, M.S.W., testified in great detail about the emotional distress suffered by Mindt as a result of the sexual assault.

Shavers offered no evidence to dispute the testimony given on this issue. His contention, therefore, that Mindt offered no medical or psychological evidence to support her claim for damages in an action for severe emotional distress is wholly unsupported. It is clear that the action was pled and tried as one arising out of the intentional tort of causing severe emotional distress and not as an assault and battery. Shavers' contention, therefore, that the suit was barred by the statute of limitations is simply without merit and must be overruled.

Shavers' second contention with regard to the return of service and the court's lack of jurisdiction is likewise without merit. A simple examination of the

return of service makes it abundantly clear that Shavers was properly served. It is not the service which was defective, but only the return of service. We have frequently held that the court does not lose jurisdiction by reason of a defect in the return of service if proper service was made, and the return may, at any time, be amended to reflect the truth of the matter. Specifically, in *State Furniture Co. v. Abrams*, 146 Neb. 342, 346-47, 19 N.W.2d 627, 630 (1945), we said: " 'If service of the summons in a case is, in fact, made on the defendants, that gives the court jurisdiction to render a valid judgment, so far as the service of process is concerned, though the evidence of record, constituting the proof of service, may fail in essential particulars to establish that such service was in fact made. In cases where service was in fact had, the court has jurisdiction, and may after judgment permit an amendment of the record to supply omissions necessary to show that the service was in fact made.' " See, also, *De Lair v. De Lair*, 146 Neb. 771, 21 N.W.2d 498 (1946). Absent any evidence to show that Shavers was not in fact served as set out in the affidavit of service, his contention that the court did not acquire jurisdiction over his person must be overruled.

We then turn to Shavers' final assignment of error, that the verdict was excessive and the result of passion and prejudice. Shavers maintains that the proof of his claim is a statement made by Mindt's counsel in the opening statement wherein counsel, in describing the absent defendant, advised the jury that he was a large black male. Shavers' counsel moved for a mistrial, which the trial court denied. The trial court, however, admonished the parties that if the statement was later shown to be irrelevant he would declare a mistrial at the end of the trial. The relevancy of the evidence was established. During the course of the trial, evidence on several occasions by several witnesses came in describing Shavers as a black male, all without objection.

The question as to whether a reference to a defendant's race was proper or not is, at best, a difficult question to answer. Nor does the mere mention of one's race, standing alone, assist us in answering the question.

A statement by counsel in the trial of a civil action relating to race may be, but is not necessarily, improper or prejudicial. The primary considerations are whether the statement in question has any relevancy to or legitimate bearing on the issues in the case and, if not, whether it is calculated or has a tendency to arouse racial prejudice. It has been recognized that the line between a legitimate reference to race and an appeal to racial prejudice is a fine one. See Annot., 99 A.L.R.2d 1249 (1965).

While we do not suggest for a moment that one may ever refer to a defendant's race if the only possible purpose could be to incite the passion or prejudice of the trier of facts, we likewise do not suggest that there may not be occasions when such reference is legitimate, as, for instance, when the identification of a party is relevant to the case. At a minimum, because of Shavers' absence from trial and his denial that he had committed the act, such a description was relevant to establish that the individual Mindt charged with the assault was in fact Shavers. In addition to the mere description given by counsel in his opening statement, several witnesses described Shavers.

Without objection, Mindt's sister testified that her sister told her, following the attack, that "A Black man sexually assaulted me." Furthermore, Sergeant Major Entsminger testified, without objection, that Shavers was "a six-foot-three-inch, four-inch, very muscular appearing, physically imposing Black American" who weighed "between 230 and 250 pounds."

Further, Mindt introduced evidence, supported by both Dr. Richman and Ms. Dunn, as a component of her proof of damages, that she was no longer able to

work comfortably around blacks and had terminated friendships with blacks after the assault, whereas before the assault she was comfortable with blacks. Shavers' counsel made no objection to this testimony. A fair examination of the record leads one to the conclusion that the evidence of Shavers' race was relevant to several issues in the case, including a description of Mindt's assailant and damages, and was not calculated to arouse racial prejudice, particularly in view of Shavers' absence.

Shavers also argues that the jury was prejudiced by a spontaneous, unresponsive answer given by Mindt during cross-examination. In an effort apparently to show that Mindt had encouraged the assault, Mindt was asked: "And you say you didn't do anything to encourage him to do anything like this?" She responded, "No. And did the other four women either." Shavers' counsel immediately moved to strike the testimony, which motion was granted. He then moved for a mistrial on the ground of prejudice, which was overruled. The trial court, unsure that the jury had even been able to hear the response, instructed the jurors to disregard everything after "No." The appropriate corrective measure was taken and the motion for a mistrial was properly overruled. *Madison Nat. Bank v. Gross*, 98 Neb. 684, 154 N.W. 207 (1915); *Omaha S. R. Co. v. Beeson*, 36 Neb. 361, 54 N.W. 557 (1893).

The evidence in this case simply does not support the contention that the amount of the recovery was excessive or the result of passion or prejudice, and absent such a showing the verdict may not be set aside. *Huskinson v. Vanderheiden*, 197 Neb. 739, 251 N.W.2d 144 (1977). The third assignment of error must therefore be overruled.

Having found no error, the judgment of the trial court is affirmed.

AFFIRMED.

BOSLAUGH, J., concurs in the result.

RONNIE A. FLOOD, APPELLANT, V. HARRY E. KELLER, C. E. BEAL, ROBERT W. BELL, FRANK FROST, DONALD L. KROUPA, THOMAS F. DOWD, LEO J. DWORAK, FRANK P. FOGARTY, JOHN S. MCCOLLISTER, JOSEPH J. CASCIO, SR., AND THE METROPOLITAN UTILITIES DISTRICT, APPELLEES.

336 N.W.2d 549

Filed July 15, 1983. No. 81-804.

1. **Judgments: Appeal and Error.** A judgment of the District Court brought to this court for review is supported by a presumption of correctness, and the burden is upon the party complaining of the action of that court to show by the record that it is erroneous.
2. **Statutes: Words and Phrases.** Generally, the word "may," when used in a statute, suggests discretionary rather than mandatory action.
3. **Appeal and Error.** A review by petition in error is conducted solely on the record made by the tribunal whose action is being reviewed, and no new facts or evidence can enter into the consideration of the court.

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

David J. Cullan of Cullan, Cullan & Morrison, and Harry H. Foulks, for appellant.

Thomas A. Wurtz of W. L. Strong, Randall W. Owens, Thomas A. Wurtz, for appellees.

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

HASTINGS, J.

The plaintiff, Ronnie A. Flood, in his petition in error filed in the District Court, alleged that he had been an employee of the defendant The Metropolitan Utilities District until terminated, because of alleged acts of vandalism on his part, by action of its board of directors consisting of the remaining named defendants. He brought this error proceeding seeking a review and reversal of the board's action, which was taken following a hearing mandated by Neb. Rev. Stat. § 14-1021 (Reissue 1977). Trial was had in

the District Court on the transcribed tape recordings of the proceedings held before the board of directors. The court held "that there exists competent evidence appearing of record to sustain the findings of the tribunal below" and ordered the petition in error dismissed.

Appellant has assigned several errors to the trial court's dismissal of his petition in error. Appellant claims the District Court erred in failing to require a complete transcript and bill of exceptions be made available to Flood by appellees; in its finding that Flood was not denied an adequate hearing by the M.U.D. board; by failing to dismiss the board's order for not being supported by competent evidence; and in its failure to hear additional evidence.

Appellant's first and major complaint raised in this appeal is that he was not given a full and complete transcript and bill of exceptions of the proceedings before the M.U.D. board after repeated requests for such documents. Appellant has been provided with a transcript and two cassette tape recordings of the proceedings before the board. It is claimed that other cassette tape recordings of the hearing are in existence, that they are relevant to appellant's case, but that M.U.D. has failed to produce them. In an effort to add these materials to the record presented to the District Court on appeal from the board's dismissal of Flood, a motion in re diminution of the record was made.

The record shows that a hearing was had on this motion by the District Court and that appellant's motion was denied. Appellant argues the denial of this motion was incorrect and these additional tapes should be produced by appellees.

There is no bill of exceptions setting forth the proceedings and evidence before the court at that hearing. We have no record of what occurred before the court with regard to this motion, except that the motion was made, a hearing was had, and the motion was denied. In the absence of a certified bill of

exceptions, review of a lower court's ruling on appeal is limited to whether the pleadings support the judgment entered by that lower court. *Blaha GMC-Jeep, Inc. v. Frerichs*, 211 Neb. 103, 317 N.W.2d 894 (1982). The pleadings in the matter of this motion simply indicate that a motion was made and denied. Such pleadings would allow for a granting or denial of the motion. The evidence on which this ruling was based has not been preserved and presented to this court on appeal. Without more, we cannot determine any basis for reversing the court's ruling on this motion.

" 'A judgment of the district court brought to this court for review is supported by a presumption of correctness, and the burden is upon the party complaining of the action of the district court to show by the record that it is erroneous. . . .' " *Scarpello v. Continental Assur. Co.*, 187 Neb. 395, 397, 191 N.W.2d 444, 446 (1971).

Appellant also claims he was not given an appropriate hearing before the M.U.D. board. He bases this claim on several aspects of the hearing before the board which he argues were irregular. The first aspect appellant complains of is the board's failure to require the witnesses to take an oath before testifying. Because such an oath was not required, appellant argues that any testimony is not competent evidence and therefore there is not sufficient competent evidence in the record to sustain his termination.

Primarily, appellant relies on Neb. Rev. Stat. § 14-1012 (Reissue 1977) in support of this argument. That section provides: "The board of directors of the water district or any committee of the members of the board shall have power to compel the attendance of witnesses for investigation of any matters that may come before the board, and the presiding officer of the board, or the chairman of the committee for the time being, may administer the requisite oaths, and the board or committee thereof shall

have the same authority to compel the giving of testimony as is conferred on courts of justice."

We do not read this statute to require the board to swear all witnesses before taking testimony from them. This statute states the presiding officer may administer oaths. The word "may" in this statute makes the administration of oaths a discretionary matter for the board. *State ex rel. Hubbard v. Northwall*, 150 Neb. 894, 36 N.W.2d 282 (1949).

Such an interpretation is in keeping with the long-established proposition that administrative agencies are not to be held to the same standards as courts of law: "The nature of evidence deemed competent in the context of administrative hearings has also been established. It is that which is relevant, admissible, and tends to establish the facts in issue; however, the investigation conducted by an administrative body is not intended to be carried out in observance of the technical rules adopted by courts of law. *Shepherd v City of Omaha*, *supra*; *Munk v. Frink*, 81 Neb. 631, 116 N.W. 525 (1908)." *Beasley v. City of Omaha*, 212 Neb. 153, 155, 322 N.W.2d 377, 379 (1982). We find that the swearing of witnesses before the board was not necessary and that their testimony is competent evidence.

Appellant also complains that the record before the board does show the admission into evidence of certain documentary evidence. Appellant claims this evidence may not be considered by the court. Without reaching this question, we hold that there was sufficient competent evidence adduced before the board to uphold the board's decision, without the consideration of any documentary evidence. *Caniglia v. City of Omaha*, 210 Neb. 404, 315 N.W.2d 241 (1982).

Gary Malmberg, an M.U.D. employee, testified that he saw Flood leaving the scene of the acts of vandalism soon after they occurred. Malmberg also testified that Flood admitted committing the acts of vandalism in question. Whether any documentary

evidence was improperly considered is harmless error at best and does not justify a reversal of the lower court's ruling.

The remainder of appellant's arguments deal with the court's refusal to allow the introduction of any evidence in the District Court that was not before the board. Appellant sought to depose witnesses and adduce testimony in the District Court. This matter comes before us as a proceeding in error.

"The procedure which is applicable to a proceeding in error is well established. It is discussed in detail in Anania v. City of Omaha, 170 Neb. 160, 102 N.W.2d 49. The review is solely upon the record made by the tribunal whose action is being reviewed, and *no new facts or evidence can enter into the consideration of the court.* Moser v. Turner, 180 Neb. 635, 144 N.W.2d 192. If the board acted within its jurisdiction and its findings are sustained by some competent evidence, its action must be sustained. Lynch v. City of Omaha, 153 Neb. 147, 43 N.W.2d 589. See, also, Lewis v. City of Omaha, 153 Neb. 11, 43 N.W.2d 419; First Nat. Bank & Trust Co. v. Ley, 182 Neb. 164, 153 N.W.2d 743; Ostler v. City of Omaha, 179 Neb. 515, 138 N.W.2d 826." (Emphasis supplied.) *Harnett v. City of Omaha*, 188 Neb. 449, 451, 197 N.W.2d 375, 377 (1972). It was not error for the District Court to deny the admission of any additional evidence in this case.

The M.U.D. board acted within its jurisdiction in this matter, and its decision is supported by competent evidence in the record. The decision of the board is correct and the judgment of the District Court is therefore affirmed.

AFFIRMED.

JOSEPH O. DOUGHERTY AND LAVERNE DOUGHERTY, HUSBAND AND WIFE, APPELLANTS, V. DONALD L. ROBSON AND MAROLYN R. ROBSON, HUSBAND AND WIFE, AND UNIVERSAL DEVELOPMENT, INC., APPELLEES.

336 N.W.2d 316

Filed July 15, 1983. No. 82-270.

1. **Releases: Damages.** If one of several joint wrongdoers makes settlement with the injured party and pays him damages which he agrees to receive and does receive as full compensation for all damages sustained, it will release all of the joint wrongdoers.
2. **Breach of Contract: Waiver.** Where a party to a contract, with full knowledge of the facts and with knowledge of a breach by the other party, receives money in the performance of the contract, the breach will be deemed to have been waived.
3. **Contracts: Compromise and Settlement.** After an agreement to compromise and settle a controversy has been entered into by the interested parties, the original matter in dispute is not a proper subject of suit or defense, where fraud, mistake, or duress in procuring the contract is not pleaded.

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

Herbert J. Friedman and James E. Dunlevey of Friedman Law Offices, for appellants.

Ginsburg, Rosenberg, Ginsburg, Cathcart, Curry & Gordon, for appellees.

BOSLAUGH, WHITE, and CAPORALE, JJ., and BURKHARD and FINN, D. JJ.

BURKHARD, D.J.

The plaintiffs-appellants, Joseph Dougherty and LaVerne Dougherty, husband and wife, hereinafter referred to as Joseph and LaVerne, alleged in their amended petition against the defendants a breach of a fiduciary duty by defendant-appellee Donald L. Robson, hereinafter called Donald, in that he allegedly conspired to convert the title to plaintiffs' farm to his own purposes and was unjustly enriched thereby. Plaintiffs further allege that Marolyn R. Robson, wife of Donald, hereinafter called Marolyn, and Universal Development, Inc., a Nebraska corpora-

tion owned by Donald and Marolyn, hereinafter called Universal, also conspired to convert the title to the farm to their own purposes and also became unjustly enriched.

Plaintiffs prayed that a constructive trust be imposed on specific stock and on all other real or personal property acquired by the defendants with funds borrowed from the federal land bank and secured by a loan on plaintiffs' farm; for an accounting of all profits made by the defendants through the investments of said funds; and for judgment for said profits, less proceeds of the loan already returned.

The District Court found that LaVerne had executed a release of her claims and that Joseph had not proved his case of fraud to raise the constructive trust by clear, satisfactory, and convincing evidence. The trial court dismissed plaintiffs' petition as amended, and this appeal followed. We affirm the judgment of the District Court.

Plaintiffs assign as error the following: (1) The court erred in finding that Joseph failed to prove his case by clear, satisfactory, and convincing evidence; (2) The court erred in failing to find that Donald was an escrow agent and, as such, owed a fiduciary duty to plaintiffs, which duty said defendant breached; (3) The court erred in failing to find that the defendants conspired to convert the title to a certain farm for their own purposes; (4) The court erred in failing to find that the defendants have been unjustly enriched by their fraud and conspiracy; (5) The court erred in failing to impose a constructive trust on the proceeds of the money obtained by Donald through his improper conduct, and to order an accounting thereof; and (6) The court erred in finding that there was an accord and satisfaction, and in dismissing the causes of action of LaVerne.

This case revolves around a farm in York County, Nebraska, on which Joseph was raised and which had been owned by members of his family for many years. Joseph was in the construction business and

also owned apartments in Lincoln, Nebraska.

Donald was engaged in the insurance and real estate business in York, Nebraska, since 1948, and had sold bonds and insurance to Joseph prior to the events involved in this case.

In 1966 Joseph, as trustee, entered into a contract for purchase of the York County farm from Helen M. and Louis Kaspari and William B. and Carol Haupt, relatives of Joseph. The purchase price was $30,000. The contract named Donald as escrow agent, and the deeds were delivered to him.

In 1969, and for some time before then, Joseph had a considerable drinking problem. He was also experiencing business problems and had placed title to his Lincoln apartments in a friend, Arch Walker, who subsequently died. Joseph then discussed his problems with Donald, who suggested forming a corporation to own the apartments. Universal was formed, and ownership of the apartments was placed in the corporation, but they were managed by LaVerne.

On August 6, 1969, Joseph, as trustee, executed a land contract for the sale of his farm to the Robsons for $30,000, and also executed a warranty deed to accompany the contract. The contract named Donald as escrow agent to hold the deed until the terms of the contract were fully completed. Also dated August 6, 1969, was a warranty deed for the farm from Donald and Marolyn to Universal.

At this point, Donald, as escrow agent, was holding the deeds from the Kasparis and the Haupts to Joseph, and Joseph's deed to the Robsons. As the president of Universal, he held the deed from the Robsons to the corporation. Joseph continued to operate the farm and completed the payments for its purchase in December 1971.

On October 14, 1970, Donald filed with the register of deeds of York County the three deeds to the farm. On behalf of Universal, Donald obtained a loan from the federal land bank, secured by a mortgage on the

farm, in the amount of $38,500. The loan proceeds were $36,575. Payments on the loan were $577.50 annually, with a final payment of $18,865 due in 2005. In applying for the loan, Donald signed a financial statement showing Universal owed Joseph $10,000. However, Donald's only payment to Joseph on the land contract was a $500 downpayment, and the balance due was $29,500.

Donald deposited the proceeds of the federal land bank loan in a personally owned business account. None of the proceeds were paid to Joseph or used to pay off Joseph's contract for the purchase of the farm. The deposit was made on October 14, 1970, the same date the loan proceeds were disbursed by the federal land bank. Donald used most of the loan proceeds for personal and investment purposes.

There is a factual dispute as to whether LaVerne knew that Donald intended to mortgage the farm before he did so in October 1970. Donald testified that he discussed the matter with LaVerne beforehand. LaVerne testified that he did not. Donald did not discuss the mortgage with Joseph until some time after he had given the mortgage and received the loan proceeds.

There is no argument about the fact that a controversy arose between the Doughertys, on one side, and Donald, on the other side, concerning the mortgaging of the farm. As a result of that controversy, an agreement dated April 7, 1975, was drawn up by John Brogan, an attorney in York, Nebraska, hired by the Doughertys. The agreement of April 7, 1975, was entered into between Donald and the Doughertys. The agreement provided that Donald pay to the federal land bank sufficient moneys to reduce the mortgage loan balance on the farm to the sum of $5,925; that Donald pay the sum of $820.74 on interest to the federal land bank; and that Donald execute two corporate warranty deeds as president of Universal, conveying the real estate in York and Lancaster Counties to LaVerne, subject to the aforesaid

debt of $5,925 on the York County real estate and a loan to Provident Savings & Loan Association of Lincoln on the Lancaster County real estate. The figure of $5,925 was arrived at by allowing Donald a credit of $4,000 for payment for services rendered to the Doughertys, and $1,925 was the value of stock which had to be purchased in the federal land bank in order to secure the original mortgage. Donald was also to assign all interest in Universal to LaVerne and deliver all corporate records to her, but this was changed by addendum on April 7, 1975, to provide that Donald shall retain ownership of Universal. The parties agreed that the performance of the agreement shall constitute a full and complete settlement of all claims of Donald against the Doughertys and of all claims of the Doughertys against Donald, subject to full performance of the agreement on or before May 1, 1975. The deeds to the York and Lancaster County properties were executed and delivered prior to May 1, 1975, but the mortgage balance on the York farm was not reduced to $5,925 by May 1, 1975. The Doughertys then retained attorney E. D. Warnsholz.

Donald talked to Warnsholz on different occasions regarding settlement of the matter with the Doughertys. The Doughertys claim that the April 7, 1975, agreement was breached because the mortgage balance was not reduced to $5,925 by May 1, 1975. However, the mortgage was subsequently paid down to said amount on February 11, 1976, after the Doughertys had retained Mr. Warnsholz. There was therefore full compliance with the April 7, 1975, agreement, as of February 11, 1976. Mr. Warnsholz also said that Donald had to pay something further, beyond the April 7, 1975, agreement, in order to settle with the Doughertys, and that was the balance of $5,925 on the mortgage on the York farmland. Mr. Warnsholz said that if this was not paid, he would file suit against Donald. Mr. Warnsholz had already prepared a petition in LaVerne's name as plaintiff

and had mailed a copy to Donald on March 19, 1976. Donald paid off the $5,925 loan balance on May 13, 1976. Prior to May 13, 1976, Mr. Warnsholz also made demand on Donald for $1,500 for attorney fees for LaVerne. Donald paid the $1,500 to Mr. Warnsholz on or about June 11, 1976, by delivering a check to Mr. Warnsholz at his house, with a notation on the check that it was for "Atty fee for LaVerne Dougherty Settlement." Donald had expected a release signed by both Joseph and LaVerne in exchange for payment of the $1,500, but the release, dated June 8, 1976, was signed by LaVerne only. According to Donald, Mr. Warnsholz said that Donald did not need a release from Joseph "because the original contract was giving LaVerne Dougherty as the party and that's all I needed." This reference is apparently to the April 7, 1975, agreement, which provided that the York and Lancaster County properties were to be transferred to LaVerne only. The release was entitled "Mutual Release of Claims," and it provided that for good and satisfactory consideration LaVerne and Donald released any and all claims which they may have against each other. The Doughertys subsequently filed suit on October 7, 1976.

Joseph and LaVerne admit that they both received the benefits of the April 7, 1975, agreement as well as the benefits of the additional payments by Donald of $5,925 and $1,500.

The April 7, 1975, agreement was intended to be a settlement of all claims between Donald and the Doughertys. Although Marolyn and Universal are not signators to the agreement, they too would be released if Donald were released. " 'If one of several joint wrongdoers makes settlement with the injured party and pays him damages which he agrees to receive and does receive as full compensation for all damages sustained, it will release all of the joint wrongdoers.' " *Crnkovich v. Scaletta*, 203 Neb. 22, 25, 277 N.W.2d 416, 418 (1979), citing *Fitzgerald v.*

Union Stock Yards Co., 89 Neb. 393, 131 N.W. 612 (1911).

Donald eventually fully performed, and more, under the April 7, 1975, agreement. Plaintiffs have waived any breach, and are bound by the agreement and have no further claim against the defendants. " 'Where a party to a contract, with full knowledge of the facts and with knowledge of a breach by the other party, receives money in the performance of the contract the breach will be deemed to have been waived.' " *Wegner v. West*, 169 Neb. 546, 552, 100 N.W.2d 542, 547 (1960). After an agreement to compromise and settle a controversy has been entered into by the interested parties, the original matter in dispute is not a proper subject of suit or defense, where fraud, mistake, or duress in procuring the contract is not pleaded. *Springfield Fire & Marine Ins. Co. v. Peterson*, 93 Neb. 446, 140 N.W. 760 (1913). Plaintiffs do not plead fraud, mistake, or duress in connection with the April 7, 1975, agreement. The trial court was correct in dismissing plaintiffs' amended petition.

In addition, the release executed by LaVerne on June 8, 1976, released all of her claims against Donald, which release in effect released Marolyn and Universal, the other alleged wrongdoers.

The judgment of the District Court is affirmed.

AFFIRMED.

CAPORALE, J., concurs in the result.

SHERRY D. ANSTINE, APPELLANT, V. JACK R. ANSTINE, APPELLEE.

336 N.W.2d 552

Filed July 15, 1983. No. 82-285.

1. **Deeds: Parol Evidence.** For parol evidence to be sufficient to support a finding that a duly executed deed was, in fact, a gift to one of the grantees, such evidence must be clear, unequivocal, and

convincing to overcome the presumption arising from the express terms of the deed.

2. **Divorce: Property Division.** Upon dissolving a marriage the trial court must assign the property acquired during the marriage, by the joint efforts of the parties, title to which is held jointly by them, as the equities require.

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

Kenneth R. Lang of Angle, Murphy, Lang & Valentino, P.C., for appellant.

Blevens, Blevens & Jacobs, for appellee.

BOSLAUGH, WHITE, and CAPORALE, JJ., and BRODKEY, J., Retired, and GRANT, D.J.

GRANT, D.J.

This is an action for dissolution of marriage brought by Sherry D. Anstine, wife and appellant, against Jack R. Anstine, husband and appellee. The District Court dissolved the marriage, awarded custody of three children to the wife, provided for the payment of child support, awarded each party "an undivided one-half interest in and to all personal property owned by the parties as a tenant in common," awarded the wife an undivided one-fourth interest in the real estate owned by the parties, as a tenant in common, and awarded the husband an undivided three-fourths interest in the parties' real estate, as a tenant in common.

The court further found that, because of the character of the real estate and the indebtedness thereon, the real estate could not be equitably divided in kind and should be divided by the above-stated share interests.

The wife appeals, alleging as error only that the trial court erred in finding that a certain conveyance of the parties' real property from the husband's mother was in reality a gift to the husband and should not be included in the marital estate; that the trial court erred in awarding the wife an insufficient

interest in the parties' jointly owned real estate; and that the trial court erred in failing to award costs and an attorney fee to the wife.

No request was made for alimony by the wife in her pleadings, in her testimony, in her motion for new trial, in her brief to this court, or in the arguments made to this court, and, therefore, the issue of alimony, although ordinarily present in a 25-year marriage with five children born to the marriage and where the wife has contributed substantial labors to the marriage, is not before us.

The parties were married on April 14, 1956. Five children were born to the marriage, three of whom were still minors at the time of trial. Each party worked throughout the marriage, both in the family farming operation and intermittently at outside employment. The wife did fieldwork, raised hogs, worked as a waitress, worked as a laborer in erecting farm buildings, and, as indicated in a letter from the manager of the parties' bank in 1976, furnished "leadership" to the couple. That letter stated in part, "Mrs. Anstine is highly regarded here, and in the area as to her character and her ability to work, and general concern of their business affairs."

The husband also worked in the farming operation and in outside employment, including employment at the time of the dissolution of the marriage as a truckdriver at a wage of approximately $13,900 per year. At the same time, the wife was earning approximately $400 per month as a waitress.

The evidence showed, with respect to the issue of the nature of the conveyance of the real estate in question, that on March 3, 1977, appellee's mother, Anna Anstine, by survivorship quitclaim deed prepared by a lawyer in his office, deeded the real property in question to Jack R. Anstine and Sherry Anstine, husband and wife, as joint tenants with the right of survivorship, and not as tenants in common. The Nebraska documentary stamp tax on the deed

was in the amount of $33, indicating a consideration of $30,000. By undisputed testimony the wife and husband additionally agreed to pay $30,000 to the children of the deceased sister of the appellee. Also by undisputed testimony, both wife and husband agreed that Anna Anstine would have the right to live on the farm and the parties would pay her utilities and taxes so long as that life use continued. Additionally, the wife and husband paid off an existing small mortgage on the property. At the time of trial an appraiser determined the real estate to have a value of approximately $320,000. Anna Anstine testified she had been told the land had a value of about $112,500.

Shortly after the signing of the deed, the wife and husband jointly took out a loan in the amount of $212,000 which was used to pay off the small existing loan and to provide for funds to erect certain improvements on the farm.

The evidence is further undisputed that no gift tax return was ever filed in connection with this transaction; that no gift had been claimed or set forth on the transfer statement; and that no documentary evidence existed in support of any alleged gift to the appellee.

The evidence in support of appellee's claim that this transaction constituted a partial gift to him consisted only of answers of Anna Anstine to leading questions indicating that she thought the transaction constituted a partial gift to appellee; that she did not see the names of both the wife and husband on the deed; and that she did not read all of the deed. This testimony was supported by testimony of the appellee, to the effect that there was a partial gift to him from his mother. Typical of the appellee's testimony is the following: "Q. Have you made any claim that a portion of that property, that real estate was a gift to you? A. No. MR. JACOBS: Excuse me. I think we do in our pleadings. We claim that it was partial gift. MR. ANSTINE: Okay. 50 per-

cent of it was actually supposed to have been mine."

From the above testimony and exhibit evidence, appellee contended that his mother intended to make a partial gift to him, either of all of the farmland which was the subject of the deed, except the $30,000 reflected in the documentary stamp tax statement, or a gift of 50 percent of the real estate—whatever that interest might turn out to be.

The trial court concluded and found that the parties acquired the real estate "by purchase and by a substantial gift from respondent's mother for which he should be credited in division of said real estate." This court determines that that finding is not supported by substantial evidence and is in error. The finding would be in direct conflict with the recorded legal title which conveyed the real estate to both parties jointly, and the parol evidence adduced was not of the type which is "clear, unequivocal, and convincing," to the extent that it would overcome the recitals in the deed. *Paul v. McGahan*, 156 Neb. 656, 57 N.W.2d 283 (1953). The evidence in this case is very similar to the situation presented in *Grummert v. Grummert*, 195 Neb. 148, 237 N.W.2d 126 (1975), where the court held that, in the situation there presented, it would not look behind the recorded legal title. In the instant case the trial court should have given full effect to the recorded title and should have considered the real property as an asset of both parties to the marriage.

Once the real property is placed into the parties' marital estate, it is apparent from the facts in the case that this marriage is of the long-standing, and equally contributing, type that should result in an equal division of the parties' assets. Therefore, with regard to the parties' assets, the decision of the trial court is affirmed as herein modified to give appellant an equal one-half share in the real estate of the parties, subject to the existing indebtedness thereon.

With regard to the awarding of an attorney fee, there does not appear to be any reason why appel-

lant should not be awarded an attorney fee, both in the trial court and in this court. Aside from the parties' assets, appellee is earning approximately three times as much as appellant, and in that situation, particularly where no alimony has been awarded, appellee should be required to pay appellant's attorney a $500 fee for services rendered in the trial court and $500 for services rendered in this court. Costs in the trial court and in this court are taxed to appellee.

The cause is remanded to the trial court for the entry of a decree as modified herein. The decree of the trial court, as so modified, is affirmed.

AFFIRMED AS MODIFIED.

KEYSTONE BUS LINES, INC., A NEBRASKA CORPORATION, APPELLANT, V. ARA SERVICES, INC., DOING BUSINESS AS EDUCATIONAL & RECREATIONAL SERVICES, A CALIFORNIA CORPORATION, APPELLEE.

336 N.W.2d 555

Filed July 15, 1983. No. 82-352.

Contracts. If the promisor prevents or hinders the occurrence of a condition precedent and if the condition would have occurred except for such prevention or hindrance, the condition is excused.

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

Harris, Feldman, Stumpf & Pavel, for appellant.

Norman Denenberg, for appellee.

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

SHANAHAN, J.

Plaintiff, Keystone Bus Lines, Inc. (Keystone), appeals dismissal of its action against defendant, ARA Services, Inc. (ARA), to enforce a provision contained in a contract for purchase of certain assets of

Keystone. The provision required ARA to pay Keystone $100,000 if ARA obtained specified revenues from busing operations. Keystone alleged that ARA intentionally prevented occurrence of a condition precedent, i.e., attainment of the prescribed revenues, so the court should disregard the condition and order ARA to pay $100,000. The trial court directed a verdict for ARA, finding no evidence that ARA intentionally prevented revenues from reaching the specified levels of sales. Keystone assigns as error the directed verdict and dismissal of Keystone's petition. We affirm.

In March 1976 the Omaha Public Schools (OPS) awarded a busing contract to ARA. This contract, a result of court-ordered busing and integration, involved OPS' busing second, third, and ninth graders.

After obtaining the OPS contract, ARA began searching for bus facilities and in the spring discussed with Keystone possible purchase of its Omaha bus facilities. On July 30, 1976, Keystone signed a contract to sell certain assets to ARA, including its buses and busing contracts. The contract stated that, in addition to the $555,000 purchase price, ARA would pay $50,000 if sales for 1976-77 reached $1 million, and $50,000 if sales for 1977-78 reached $1.2 million. *Sales*, as defined in the agreement, was gross income from bus service conducted by ARA in Omaha, including charter service for school districts other than OPS and "parent-pay" routes where parents paid for busing their children to school. Specifically excluded from *sales* was revenue derived from bus service for OPS.

After signing its contract with Keystone, ARA sought drivers for the routes previously served by Keystone and utilized television, newspaper ads, flyers, and the Nebraska Job Service in the search. Outside factors thwarted the recruiting efforts by ARA. Women, fearing violence in the integrated school system, were reluctant to apply as drivers, and many of the drivers recruited by ARA failed the

Department of Motor Vehicles' licensing test. Also, ARA faced the problem that recruiting too early could result in losing the drivers before the school year started.

When school began in 1976, ARA was responsible for transportation of OPS pupils and Keystone's obligations, including a Millard school contract and parent-pay routes. ARA did not have enough drivers for all bus routes and made a business decision to allocate its drivers to the OPS and Millard routes. There was some decline in the parent-pay routes, because busing necessitated in the integrated school system supplied free transportation for pupils. Due to the driver shortage ARA was not able to provide full service for the parent-pay routes until the end of October.

For the year 1976-77, revenues from the operations acquired by ARA from Keystone were $760,902, and in the year 1977-78 the revenues were $373,310. According to the levels of revenue specified in the agreement, sales did not obligate ARA to pay an additional $50,000 in either of those years.

Keystone contends that ARA demonstrated bad faith by initially neglecting the parent-pay routes, which resulted in a permanent loss of revenue and prevented ARA's attaining the specified levels of revenue.

Robert Wakin, president of Keystone who had negotiated the sales contract, testified that sales in 1975-76, i.e., the year before the sale to ARA, exceeded $1 million and that he had conservatively projected that sales in 1976-77 would be in excess of $1.1 million. Wakin stated that ARA should have recruited drivers earlier than August and that the initial absence of service on parent-pay routes caused parents to stop using services of ARA. Wakin also testified that beginning in August 1976 ARA made a good faith effort to acquire drivers. On account of ARA's initial erratic service, both Ralston High School and Marian High School transferred trans-

portation to another bus company. ARA presented evidence that it made efforts to acquire sufficient drivers for the parent-pay routes before school began in 1976.

In considering a directed verdict the Supreme Court must assume the truth of the material and relevant evidence Keystone presents, find every controverted fact in its favor, and give it the benefit of every reasonable inference deducible from the evidence. *Syas v. Nebraska Methodist Hospital Foundation*, 209 Neb. 201, 307 N.W.2d 112 (1981).

If the promisor prevents or hinders the occurrence of a condition precedent and if the condition would have occurred except for such prevention or hindrance, the condition is excused. *Schinstock v. Butterfield*, 141 Neb. 877, 5 N.W.2d 86 (1942); *Householder v. Nispel*, 111 Neb. 156, 195 N.W. 932 (1923); *Omaha Public Power Dist. v. Employers' Fire Insurance Co.*, 327 F.2d 912 (8th Cir. 1964); Restatement (Second) of Contracts § 295 (1981). This rule is based on the maxim one cannot profit from or escape liability for his own wrongdoing, but application of such maxim requires demonstration that the promisor took deliberate steps to impede occurrence of the condition precedent. *Omaha Public Power Dist. v. Employers' Fire Insurance Co.*, *supra*.

In viewing the evidence in the light most favorable to Keystone, we find no evidence that ARA in bad faith caused the revenues to fall below the specified levels. Even if ARA's initial, erratic service regarding the parent-pay routes did cause a decline in revenues, Keystone failed to show that ARA deliberately discouraged or impeded use of the parent-pay routes. To the contrary, the undisputed evidence shows that ARA made good faith efforts to obtain sufficient drivers to staff the parent-pay routes before school commenced in 1976. When to recruit drivers and where to allocate drivers were business decisions left to the discretion and judgment of ARA. In selling the bus business to ARA, Keystone relin-

quished control over such business decisions and accepted the risk that good faith decisions and business judgments by ARA could cause revenues to fall below the specified levels which obligated ARA to pay the additional amounts to Keystone. Good faith governed the business decisions which ARA made after the parties entered into their agreement.

AFFIRMED.

TROY LAMBERT, A MINOR, BY AND THROUGH BARBARA JONES, GUARDIAN, ET AL., APPELLEES, V. NEBRASKA CRIME VICTIM'S REPARATIONS BOARD, APPELLANT.

336 N.W.2d 320

Filed July 15, 1983. No. 82-354.

1. **Administrative Law: Crime Victims: Appeal and Error.** Orders and findings of the Nebraska Crime Victim's Reparations Board, Neb. Rev. Stat. §§ 81-1801 et seq. (Reissue 1981), are reviewed as provided for in the rules of administrative agencies, Neb. Rev. Stat. §§ 84-901 et seq. (Reissue 1981).
2. **Administrative Law: Crime Victims: Damages.** Compensation for pecuniary loss to which dependents of victims of crimes may be entitled under Neb. Rev. Stat. §§ 81-1801 et seq. (Reissue 1981) refers to loss of financial support, not loss of love and affection.
3. **Crime Victims: Damages.** The pecuniary loss to a dependent of a deceased is always more or less a matter of estimate and is a question for the trier of fact.
4. **Administrative Law: Crime Victims: Legislature.** Although the availability of funds appropriated for the purposes of the Nebraska Crime Victim's Reparations Act is a factor which the Legislature has directed shall be considered in making awards under the act, it is necessary that the record contain some evidence of such appropriations.

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

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

David L. Herzog, P.C., and Alan G. Stoler, for appellees.

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

HASTINGS, J.

This action originated with an application to the Nebraska Crime Victim's Reparations Board (board) for reparations under the Nebraska Crime Victim's Reparations Act (Act), Neb. Rev. Stat. §§ 81-1801 et seq. (Reissue 1981), due to the loss by Troy and Nyree Lambert of their mother, Ruby Smith Lambert Hardin, and for the loss by Ruby O. Smith of her daughter. The board denied Troy and Nyree any recovery under the Act, and awarded Ruby O. Smith $750 for funeral expenses incurred in the burial of her daughter, Ruby Smith Lambert Hardin, and an attorney fee of $37.50.

Plaintiffs appealed the decision of the board to the District Court for Douglas County, which court modified the decision of the board and awarded Troy and Nyree $10,000 each, awarded Ruby O. Smith $3,867.83, and awarded plaintiffs' attorney $1,193.39, with costs charged to defendant. From the decision of the District Court the board has appealed.

In this appeal the board argues that the District Court erred in its consideration of the Act, including the availability of appropriated funds and the need of plaintiffs for financial aid, and in its finding that the decision of the board was arbitrary and capricious.

Ruby Smith Lambert Hardin was married to and divorced from George Lambert. During the course of this marriage, two children were born, Troy and Nyree Lambert. When the marriage was dissolved, the custody of these two children was awarded to their mother. The decree specified that the father provide support of $75 per month for each of the two children. There was some evidence to suggest that these payments were being made. Subsequently, Ruby Smith Lambert was married to Alan V. Hardin. The Hardins were later separated, and a

petition for dissolution of their marriage was filed on October 10, 1980. On November 1, 1980, Alan V. Hardin entered the home of Ruby Hardin, located at 3910 Burdette Street, Omaha, by driving his automobile through one of its exterior walls, and shot Ruby Hardin to death in the presence of her two children, Troy and Nyree. Alan V. Hardin was thereafter convicted of second degree murder and sentenced to a life term in the Nebraska Penal and Correctional Complex. At the present time these children are in the temporary custody of their aunt and appointed guardian, Barbara Jones, pursuant to order of the District Court in which the dissolution proceedings were pending.

The third plaintiff in this case, Ruby O. Smith, as the mother of the deceased, incurred expenses for the burial of her daughter. The cost of the funeral and burial of the deceased was $3,514.20.

The plaintiffs applied to the board, seeking payment as victims of a crime under the Act. The matter was reviewed by Daniel Ryberg, a hearing officer appointed by the board. Following a hearing, Ryberg found that these two children are eligible for compensation under § 81-1815(3) of this Act, which states: "In a case in which a person is injured or killed as a result of conduct specified in sections 81-1801 to 81-1841, or by any act of any other person which is within the description of offenses listed in sections 81-1801 to 81-1841, the board or a hearing officer may order the payment of compensation:

. . . .

"(3) In the case of death of the victim, to or for the benefit of any one or more of the dependents of the victim."

Section 81-1819 provides for the type of losses that may be recovered: "The board or hearing officer may order the payment of compensation for:

"(1) Expenses actually and reasonably incurred as a result of the personal injury or death of the victim;

"(2) Loss of earning power as a result of total or partial incapacity of the victim and reasonable expenses of job retraining or similar employment-oriented rehabilitative services for the victim;

"(3) *Pecuniary loss to the dependents of the deceased victim*; and

"(4) Any other loss resulting from the personal injury or death of the victim which the board determines to be reasonable." (Emphasis supplied.)

"In determining whether to make an order [for the benefit of a dependent] . . . the board or hearing officer shall consider all circumstances determined to be relevant, including, but not limited to . . . the need for financial aid." § 81-1816(1). "The board or a hearing officer may award compensation . . . for which the applicant is not compensated . . . by the United States, by a state or any of its subdivisions or agencies, or by a private source of emergency awards . . . . Life insurance proceeds and social security payments shall not be treated as forms of such collateral compensation." § 81-1817(1).

Although Hearing Officer Ryberg made several rather heroic efforts to learn from the litigants the "need for financial aid," he was given little if any help. There was testimony that the deceased was employed full time, working a typical 8-hour day, 5 days a week, for which she was paid approximately $6 per hour, and that this job provided the money to support her children by making possible the obtaining of food, clothing, shelter, and transportation. The hearing officer inquired of Barbara Jones: "Mrs. Jones, strictly from a financial standpoint, since November, have the children received any — through your care or Mrs. Smith's care or anyone else, contributions from a financial standpoint? Have they been deprived of anything that they had prior to November?" Mrs. Jones replied: "No, I don't believe so because I get Social Security for them from Ruby."

Ryberg found these children failed to show any

pecuniary loss or financial need arising from the murder of their mother. Because they failed to make such a showing, Ryberg recommended to the board that they be awarded no compensation. Regarding Ruby Smith's application for compensation, Ryberg found that she incurred an expense of $3,514.20 in the burial of her daughter. Ryberg found such an expense is recoverable under § 81-1819(1), set forth above.

Section 81-1832 provides: "All determinations, decisions, and awards made by the board or any hearing officer may be appealed pursuant to the provisions of Chapter 84, article 9."

Neb. Rev. Stat. § 84-917(5) (Reissue 1981) provides for review by the District Court in matters such as this: "The review shall be conducted by the court without a jury on the record of the agency." Subsection (6) under that statute provides the scope of the District Court's review, that being a determination if the board or agency's decision is supported by competent evidence, correct under the relevant law, and if it is arbitrary or capricious.

When reviewing such appeals before this court, we have stated we need only determine if the proper rules of law have been applied and if the decision reached by the board or agency is supported by competent evidence in the record. See *Adams Central School Dist. v. Deist*, *ante* p. 307, 334 N.W.2d 775 (1983). We review the decisions of the board and the court below in light of the foregoing.

The record indicates that the deceased was employed by the Lozier Corporation, and earned roughly $10,000 per year. After her divorce from George Lambert the deceased had custody of her two children and supported them, providing food, clothing, and a home in which to live. Since the death of their mother, the two children have been under the care of their aunt, Mrs. Barbara Jones. Mrs. Jones and her husband have supported these children by way of child support payments made by their father,

George Lambert, social security benefits received due to their mother's death, and support supplied by Mr. and Mrs. Jones directly. The record also reflects that the deceased and her children had a close and loving relationship.

In his recommendation to the board, Ryberg stated that the children should not recover for the loss of their mother's love and affection, as might be allowed in the case of a wrongful death action. With this position we agree. Ryberg also found no proof of actual financial need in the record, evidently because the children are being cared for by their aunt. The board agreed with these findings.

It seems that in the opinion of the board a child must show that it has an immediate need of support to recover under this Act. Under that interpretation the support of an aunt who has no legal obligation to support such a child precludes any award under this Act.

The board also seems to take the position that the loss of future support by the mother of these children is not a pecuniary loss to the children. Evidently, again, because the relatives of these children have voluntarily taken on the burden of supporting the children, they are precluded from recovering under this Act.

This position works to effectively preclude any recovery for individuals in the position of Troy and Nyree Lambert. It seems if a child, whose parent has been murdered, is thereafter supported by anyone, whether under a legal obligation or not, that child cannot recover under this Act.

Troy and Nyree Lambert were 8 and 6 years old, respectively, at the time of their mother's murder. The record indicates that their mother supported them. Clearly, these children are entitled to recover under this Act, as they are dependents of a victim of a crime. § 81-1815(3). As such, they are entitled to recovery of pecuniary losses incurred due to this crime. § 81-1819(3).

Although Chapter 4, § 001.03, of the Nebraska Crime Victim's Reparations Board rules and regulations, which was not adopted and filed until February 14, 1983, provides that " 'Pecuniary loss' shall mean loss of support to a surviving dependent . . ." the rule in effect at the time of this action, Rule No. 11, simply parroted the words of the statute, i.e., "Compensation may be ordered for . . . pecuniary loss to the dependents of the deceased victim . . . ." In *Dow v. Legg*, 120 Neb. 271, 231 N.W. 747 (1930), this court construed the meaning of "pecuniary loss," at least as it applied to Nebraska's wrongful death act, then Comp. Stat. § 1383 (1922). We said: " 'The loss under the statute is still a pecuniary loss. . . .'

"A pecuniary loss has been defined as 'a loss of money, or of something by which money or something of money value may be acquired.' . . .

. . . .

" '. . . The damages recoverable are limited to such loss as results to them because they have been deprived of a reasonable expectation of pecuniary benefits by the wrongful death of the injured employee. . . .' " *Id.* at 274, 231 N.W. at 749. These children have lost the financial support of their mother, for at least the remainder of their minority, due to this crime. Such support would surely total more than $10,000, the limit of any single award under the Act. § 81-1823. This loss is one of money and therefore fits within the definition of "pecuniary loss" we have employed in the past.

The pecuniary damage to a dependent of a deceased is always more or less a matter of estimate. As early as *Post v. Olmsted*, 47 Neb. 893, 66 N.W. 828 (1896), a case involving suit by a father for loss of support by reason of the death of a 17-year-old son, we said: "The boy was seventeen years of age. . . . [H]is earning capacity was about $4 per night on an average. . . . His next of kin was his father, forty-six years old, with an expectancy of twenty-four, a

poor man, with four children younger than the deceased. While it is not shown that he had yet contributed any considerable amount to his father's support, we think that the legal relations and other facts in evidence were sufficient to sustain a verdict for the amount rendered [$2,400]. The pecuniary damage to the next of kin is always more or less a matter of estimate if not of conjecture; and under acts similar to ours, similar verdicts have been often sustained under slighter proof of expectancy." *Id.* at 896-97, 66 N.W. at 829-30. We hold that the loss of this future financial support is a pecuniary loss which is compensable under this Act. Denying this recovery by the board was contrary to the letter of and intent behind this Act, and was arbitrary and capricious. As such, we affirm that portion of the judgment of the District Court.

The evidence before the board with respect to Ruby O. Smith's claim regarding the funeral expenses incurred in the burial of her daughter is clear. Receipts and bills in the record clearly show that Mrs. Smith incurred an expense of $3,514.20. Mr. Ryberg, the hearing officer, found this to be the proper amount to be awarded to Mrs. Smith under § 81-1819(1), and recommended the board make such an award. The board agreed that Mrs. Smith should be awarded compensation for these expenses but, without giving any reason, reduced this award to $750. This would be in accordance with Chapter 4, § 002.06, of the board's rules and regulations, but, as earlier noted, this particular chapter of the rules did not become effective until after the present appeal was lodged in this court. Rule No. 11, in effect at the time of these proceedings, provided that "Compensation may be ordered for . . . expenses actually and reasonably incurred as a result of the . . . death of the victim . . . ." The action of the board in reducing this claim was arbitrary and capricious, and the District Court was correct in ordering the full expenses paid. However, we modify that award

by reducing the amount to $3,514.20, which we find the evidence supports.

The board argues that in eliminating the award to the two children it was exercising the discretion granted by § 81-1814 regarding the availability of funds appropriated for these purposes. The only problem with that contention is that the record is utterly devoid of any such information.

Because of the modification of the allowance for funeral expenses, the attorney fee must be limited to $1,175.71.

The judgment of the District Court is affirmed as modified.

AFFIRMED AS MODIFIED.

McCOWN, J., concurs in the result.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. LARRY R. FRANK, RESPONDENT.

336 N.W.2d 557

Filed July 15, 1983. No. 82-368.

1. **Disciplinary Proceedings.** 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.
2. _____. Cumulative acts of misconduct are distinguishable from isolated incidents of neglect and therefore justify more serious sanctions.

Original action. Judgment of suspension.

Dennis G. Carlson, Counsel for Discipline, for relator.

David L. Herzog, P.C., for respondent.

KRIVOSHA, C.J., BOSLAUGH, McCOWN, HASTINGS, CAPORALE, and SHANAHAN, JJ.

PER CURIAM.

This is an original proceeding in which the Ne-

braska State Bar Association, relator, filed formal charges against Larry R. Frank, respondent, on May 21, 1982. Respondent was admitted to the practice of law in this state on June 25, 1974. The charges alleged a violation of Neb. Rev. Stat. § 7-104 (Reissue 1977), and a violation of DR 1-102, DR 6-101, and DR 7-101 of the Code of Professional Responsibility.

The respondent, who is 35 years old, has been a sole practitioner in Valley, Nebraska, since his admission to practice in 1974. On February 11, 1978, Terry Lewis retained the respondent to probate the estate of Bertha M. Lewis. On March 3, 1978, Terry Lewis was appointed personal representative of the estate. An inventory filed on July 13, 1978, indicated a total estate value of $278,946.

In May 1980, after several inquiries about the delay in completing the probate, Lewis went to the respondent's office at the request of the respondent and signed a document which he was told was a federal estate tax return, form 706. Respondent assured Lewis that the return would be filed promptly and also told him that an extension had been granted by the Internal Revenue Service for filing after the due date. The actual due date for the return was November 10, 1978, 9 months after the date of death.

In July 1980 Lewis received a purported copy of a letter from the respondent to the Internal Revenue Service dated July 7, 1980. The letter inquired as to the approximate date of completion of processing of the estate tax return in the Lewis estate. The evidence shows that no such letter was sent by the respondent.

By early May 1981 Lewis was insisting that respondent close the estate. Respondent sent a letter to Lewis dated May 4, 1981, informing Lewis that the estate was scheduled for closing on June 17, 1981, and that the estate tax payment to the Internal Revenue Service was set for determination and payment on June 10, 1981.

On May 9, 1981, after some investigation, Lewis employed another attorney, John H. Kellogg, Jr., to investigate the delay in closing the estate. Kellogg contacted the respondent and was advised that the estate tax return, form 706, had been filed, and that proper extensions for late filing had been obtained from the Internal Revenue Service.

On May 19, 1981, Lewis went to respondent's office to obtain copies of the return and extensions and was again assured that the return had been filed, but was told that respondent could not find the forms or the letters.

On May 22, 1981, an estate tax return for the Bertha M. Lewis estate was received by the Internal Revenue Service. The return was signed by the respondent as attorney for the estate but was not signed by Lewis as personal representative, and the Internal Revenue Service sent the return back as incomplete.

In late May 1981 Lewis met with respondent and was given a copy of the estate tax return signed by respondent, who advised Lewis that the original had been filed with the Internal Revenue Service. Subsequent investigation established that the Internal Revenue Service had never received any request from the respondent for extensions of the time for filing the estate tax return, form 706. Lewis discharged respondent as attorney for the estate on June 3, 1981, and a federal estate tax return for the estate was finally filed by Kellogg on July 9, 1981.

The estate of Bertha M. Lewis was ordered to pay to the Internal Revenue Service $9,082.58 for failure to file a timely federal estate tax return, and $17,216 in other penalties and interest, for a total sum of $26,298.58.

In December 1981 charges were filed with the Committee on Inquiry of the Second Judicial District. Following hearing before the committee in March 1982 the committee filed formal charges in

this court on May 21, 1982, and hearing was had before the referee appointed by the court.

In all the proceedings the respondent has essentially admitted the charges and conceded that he was not honest with Lewis, the Internal Revenue Service, or Kellogg. The representations made to them were clearly false and intentionally misleading.

Meanwhile, the estate of Bertha M. Lewis filed suit against the respondent for professional malpractice based on the facts detailed here. In 1982 respondent and the estate executed a settlement agreement and conditional release of all claims against the respondent for the sum of $17,500. Respondent apparently paid $7,500 and the remaining amount is payable at the rate of approximately $400 per month until paid.

On November 19, 1982, the referee filed his report in this court recommending that the respondent should be publicly reprimanded and placed on probationary status for an indefinite period, with the conditions of probation to be satisfactory completion of the settlement agreement and a showing that respondent has been rehabilitated from the use of alcohol.

By order of the court the parties were directed to brief and argue the case, and the case was submitted to the court following argument.

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*, 213 Neb. 123, 327 N.W.2d 622 (1982).

DR 1-102(A) provides in part: "A lawyer shall not:

. . . .

"(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

"(5) Engage in conduct that is prejudicial to the administration of justice.

"(6) Engage in any other conduct that adversely reflects on his fitness to practice law."

DR 6-101(A) provides: "A lawyer shall not:

"(1) Handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it.

"(2) Handle a legal matter without preparation adequate in the circumstances.

"(3) Neglect a legal matter entrusted to him."

DR 7-101(A) provides in part: "A lawyer shall not intentionally:

. . . .

"(2) Fail to carry out a contract of employment entered into with a client for professional services

. . . .

"(3) Prejudice or damage his client during the course of the professional relationship, except as required under DR 7-102(B)."

The violation of respondent's oath of office and of the disciplinary rules is conceded as charged. The issue is the proper disciplinary sanction to be imposed.

The respondent failed to file a timely federal estate tax return. That error in itself may not have been sufficient to justify disciplinary sanctions. However, when the respondent first realized his mistake in missing the filing date, the return was only 2 months out of time. Instead of informing his client of the error, respondent intentionally embarked upon a program of deception and misrepresentation for a period of approximately 2 years.

On a number of occasions respondent made statements to his client and a fellow attorney, which statements were intentionally false, misleading, and fraudulent. There can be no doubt that respondent's conduct resulted in serious damage to his client, and adversely reflects upon respondent's fitness to practice law. Cumulative acts of misconduct are distinguishable from isolated incidents of neglect and

therefore justify more serious sanctions. *State ex rel. Nebraska State Bar Association v. Walsh*, 206 Neb. 737, 294 N.W.2d 873 (1980).

Deception of a client strikes at the very heart of the oath taken by each person who assumes the position of attorney. We conclude that the respondent should be suspended from the practice of law for a period of 1 year. All costs are taxed to the respondent.

JUDGMENT OF SUSPENSION.

WHITE, J., not participating.

IN RE ESTATE OF MARY M. OLTMER, A PROTECTED PERSON.
VELMA BRANDL AND GERALDINE VOLSICKA, APPELLEES, V. MARY M. OLTMER, APPELLANT.
336 N.W.2d 560

Filed July 15, 1983. No. 82-390.

1. **Guardians and Conservators.** A conservator may be appointed for a person who because of advanced age is unable to manage his property effectively and whose property will be wasted or dissipated unless proper management is provided.
2. **Guardians and Conservators: Appeal and Error.** An order appointing a conservator is reviewed on appeal for error appearing on the record.

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

Lynn D. Hutton, Jr., P.C., for appellant.

Jewell, Otte, Gatz & Collins, for appellees.

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

BOSLAUGH, J.

The appellant, Mary M. Oltmer, appeals from a judgment of the District Court affirming a protective order of the county court appointing a conservator for her.

The appellant is a widow, now 80 years of age. Her husband, John H. Oltmer, died on January 21, 1970. She has three children: Velma Brandl, Geraldine Volsicka, and Kenneth J. Oltmer.

The petition for the appointment of a conservator was filed by her daughters, the appellees, on September 8, 1981. The petition alleged that the appointment of a conservator was necessary because the appellant "is unable to manage her property and affairs effectively because she is not trained through experience or education to manage her property and her property will be wasted or dissipated unless proper management is provided." The petition further alleged: "That the petitioners have knowledge of the person for whom protection is sought is attempting to sell or trade some of the real estate aforesaid for less than fair market value and that this property will be wasted or dissipated unless a conservator is provided."

Neb. Rev. Stat. § 30-2630(2) (Reissue 1979) provided in part as follows: "Appointment of a conservator . . . may be made in relation to the estate and affairs of a person if the court determines that (i) the person is unable to manage his property and affairs effectively for reasons such as . . . advanced age . . . ; and (ii) the person has property which will be wasted or dissipated unless proper management is provided . . . ."

The county court found that the appointment of a conservator was necessary because the appellant was unable to manage her property and affairs effectively or apply her estate to necessary ends by reason of advanced age, the undue influence of Kenneth J. Oltmer, her son, which influence is contrary to the best interest of the appellant, and that the property would be wasted or dissipated unless proper management was provided. The District Court made similar findings.

The appellant has made numerous assignments of error which, in substance, amount to a claim that

the evidence was insufficient to support the finding that the appointment of a conservator was necessary. The review of such an order is now for "error appearing on the record" made in the county court. Neb. Rev. Stat. § 24-541.06 (Cum. Supp. 1982).

The evidence shows that upon the death of her husband in 1970 the appellant became the owner of 640 acres of farmland and approximately $10,000 in bank accounts. Upon distribution of the estate she received another $10,000 in cash.

At the time of the trial in county court on December 2, 1981, she owned 160 acres, known as the Severa place, a small home in Madison, Nebraska, which was in poor condition, and a checking account with a balance of $19.18. She also had a savings account with a balance of less than $1,000, and some unsold grain. There was a balance of $32,000 due her on the Severa place transaction and some cash rent owed by a Mr. Loseke.

She had given 80 acres of land to Mrs. Volsicka, one of the appellees, and an additional 80 acres to her subject to an annual charge of $500 during the life of the appellant.

The balance of her property had been transferred or disposed of through various transactions so that her son, Kenneth J. Oltmer, and his son John, owned 400 acres of land. In 1970 Kenneth had owned no land.

The facts concerning the transaction involving the Severa place are of importance. In 1981 the appellant entered into a contract to trade the "home place," a quarter section described in the record as one of the best farms in Stanton County, having a value of $296,000, for $64,000 and the Severa place, worth $80,000 and described as one of the poorest farms in the county. Testimony by a real estate appraiser established that the appellant lost $152,000 on that transaction.

The appellant had received $32,000 of the cash consideration from the transaction involving the Severa

place. She had applied $20,000 of that amount to debts of Kenneth J. Oltmer and, on October 3, 1981, had deposited $11,950 in her bank account. By the time of the trial, approximately 60 days later, only $19.18 remained in the account.

It is unnecessary to summarize other evidence in the record which supports the finding of the county court. It is apparent that unless a conservator were appointed to manage and conserve the property of the appellant, it is very probable that she would become impoverished and unable to support herself. The record supports the finding that the appellant is unable by reason of advanced age to manage her property and it will be wasted or dissipated unless proper management is provided.

The appellant argues that § 30-2630, prior to the 1982 amendment, did not apply to the appellant because the statute used only the pronoun for the male gender. The argument is frivolous. Under Neb. Rev. Stat. § 49-802 (Reissue 1978) the statute applied to both men and women.

The judgment of the District Court is affirmed.

AFFIRMED.

KRIVOSHA, C.J., dissenting.

I regret that I must respectfully dissent in this case. While there is no doubt that what we seek to do here is commendable, I believe that the precedent we establish by our actions in this case is unwarranted, and I anticipate that we will be required at some future time to narrow the effect of the decision rendered today.

What the record discloses is we have a woman, 80 years of age, who has made some poor business transactions and who apparently lives in a lifestyle with which many of us would take issue. That is not, in my view, what is meant by the provisions of Neb. Rev. Stat. § 30-2630(2) (Reissue 1979). While it is true the record does disclose that an individual of advanced age has improvidently dealt with her property, that is not the same as showing that she is un-

able to manage her property and affairs efficiently because of advanced age. The fact that one has made bad investments or is inclined to give one's property away is not sufficient to justify the appointment of a conservator over the objections of the one for whom the conservator is being sought. Were it otherwise, a number of us would have conservators appointed for us. Often all that persons of advanced age have left is their dignity and the ability to dispose of their property as they may choose. We should not take that right away so quickly, absent evidence of mental incapacity. I would have reversed the action of the court in appointing a conservator in this case.

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

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

STATE OF NEBRASKA, APPELLEE, V. ANNA MASTERSON SPRADLIN AND THOMAS ANTHONY SPRADLIN, SR., APPELLANTS.

336 N.W.2d 563

Filed July 15, 1983. No. 82-400.

1. **Juvenile Courts: Appeal and Error.** An appeal of a juvenile proceeding to this court is heard de novo upon the record, but the findings of fact by the juvenile court will be accorded great weight because it both heard and observed the parties and witnesses.
2. **Parental Rights.** An order of the juvenile court terminating parental rights must be based on clear and convincing evidence.
3. **Juvenile Courts: Jurisdiction: Parental Rights.** Once the jurisdiction of the juvenile court to terminate parental rights has been properly invoked, it continues until such time as the matter is finally determined.
4. **Juvenile Courts.** The primary and paramount consideration in a juvenile court case is the best interests of the infant.
5. **Parental Rights.** It is generally in the best interests of a child to make a final determination with respect to termination of parental rights as soon as possible.

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

Dennis R. Keefe, Lancaster County Public Defender, and Michael D. Gooch, for appellant Anna Masterson Spradlin.

Richard Douglas McClain, for appellant Thomas Spradlin.

Michael G. Heavican, Lancaster County Attorney, Richard J. Hautzinger, and Steven Guenzel, guardian ad litem, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, CAPORALE, AND SHANAHAN, JJ.

PER CURIAM.

This appeal challenges the order of the juvenile court terminating the parental rights of the appellants, Anna Masterson Spradlin and Thomas Anthony Spradlin, Sr., as to their son, Thomas Anthony Spradlin, Jr., born November 27, 1980. We affirm.

Neb. Rev. Stat. § 43-209(5) (Reissue 1978) provides that the juvenile court may terminate all parental rights between parents and a child when the court finds such action to be in the best interests of the child and it appears by the evidence that the parents are unable to discharge their parental responsibilities because of mental illness or mental deficiency, and there are reasonable grounds to believe that such condition will continue for a prolonged, indeterminate period.

In reviewing this matter we are mindful of the fact that an appeal of a juvenile proceeding to this court is heard de novo upon the record, but that the findings of fact by the juvenile court will be accorded great weight because it both heard and observed the parties and witnesses. *In re Interest of Fant*, *ante* p. 692, 335 N.W.2d 314 (1983); *In re Interest of Biesecker*, *ante* p. 425, 333 N.W.2d 923 (1983); *In re Interest of Levey*, 211 Neb. 66, 317 N.W.2d 760 (1982).

We recognize, too, that an order of the juvenile court terminating parental rights must be based on clear and convincing evidence. *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); *In re Interest of McKinzie*, 212 Neb. 399, 323 N.W.2d 78 (1982).

Many of the relevant facts are contained in *In re Interest of Spradlin*, 210 Neb. 734, 317 N.W.2d 59 (1982), affirming the April 20, 1981, order of the juvenile court, which found the minor to be a dependent child, as defined in Neb. Rev. Stat. § 43-202(1) (Reissue 1978), through no fault of the appellant parents, and placed the child in foster care with legal custody in the Lancaster County Department of Public Welfare. We do not reiterate those facts herein. The April 20, 1981, order placing the child in foster care also found grounds existed for termination of parental rights under § 43-209(5). However, instead of terminating appellants' parental rights at that time, the juvenile court reserved ruling on that issue in order to give the parents an opportunity to pursue the arrangement of a plan for a third person live-in caretaker. On October 8, 1981, the juvenile court approved a live-in caretaker plan, with custody of the child remaining in the Lancaster County Department of Public Welfare, and scheduled a further hearing. The evidence adduced at hearings held after the implementation of that plan established that the plan had not succeeded. The appellant Thomas Anthony Spradlin, Sr., argued with and assaulted the caretaker, and the caretaker moved out. There was expert testimony that the continuing of foster care was not logical and that it was important to the child to have a stable living arrangement. The juvenile court, on March 24, 1982, terminated appellants' parental rights in the child, specifically noting that the plan was no more than a temporary foster care arrangement which was subject to abrupt change, that such changes would be psychologically damaging to

the child, and that a caretaker could not correct the mental deficiency of the parents.

In this appeal, counsel for the appellant parents contends as error by the juvenile court the (1) failure to hold § 43-209(5) to be void for unconstitutional vagueness; (2) failure to hold § 43-209(5) to be unconstitutional as being overbroad; (3) admission into evidence of the testimony of Professor John DeFrain; (4) overruling of appellants' motion for continuance; (5) admission of testimony on the issue of termination of parental rights, when such was allegedly not raised by the pleadings; and (6) termination of parental rights when there was allegedly insufficient evidence to sustain the same.

The first assignment concerning vagueness is totally without merit. Indeed, this court has previously decided this issue adversely to the position taken by counsel. In *State v. Metteer*, 203 Neb. 515, 279 N.W.2d 374 (1979), we said, concerning § 43-209(5) in particular, that the statutory language prescribing the conditions under which parental rights may be terminated is sufficiently definite that it does not run afoul of vagueness standards. The Constitution only requires that statutory language be reasonably certain, and that requirement may be satisfied by the use of ordinary terms which find adequate interpretation in common usage and understanding. This case is factually indistinguishable from *Metteer*, as regards the application of the statute to it. Indeed, the diagnosed mental illness found in both cases is identical. Also identical is the lack of care given to the child as a result of the parents' mental illnesses. *Metteer* is therefore controlling and is dispositive of this assignment. In his brief counsel attempts to argue that this court has never addressed the termination of parental rights based solely upon this particular statutory subsection. This contention is simply not true. *Metteer* specifically rested upon this section, inasmuch as the termination therein could not have occurred in its absence.

Counsel further raises a number of other questions, primarily under the second assignment, attempting to interlace these with the court's language in *Metteer* and to suggest that because *Metteer* and other cases do not "answer" these questions, the statutory section at issue is therefore necessarily unconstitutional. Counsel concerns himself with whether the inability to discharge parental duties is to be measured qualitatively or quantitatively, or in both or neither of those fashions; he further concerns himself with the precise percentage of functional ability required and with the circumstances under which a parent must or need not hold a child. Such questions have no basis in the statutory language, nor in the case law language. These rhetorical questions are in fact nothing more than an attempt to recast the second assignment and to tuck it into the confines of the first assignment. The questions are properly disposed of in the discussion which follows.

Appellants' second assignment also claims that § 43-209(5) is unconstitutionally overbroad. This contention has also been decided previously, and adversely to counsel's position. In *State v. A.H.*, 198 Neb. 444, 253 N.W.2d 283 (1977), this court, again in an action based upon, inter alia, this specific statutory section, noted that these grounds were constitutionally adequate, and that although they might be "somewhat broad" in terminology, they nonetheless provide adequate standards which people of ordinary intelligence can understand and by which they can regulate their conduct so as to avoid termination. Indeed, this court noted in *State v. A.H.* that it would be virtually impossible to draw a statute with greater specificity and to at the same time adequately protect the child affected.

Appellants further seek to divide and conquer the statute by differentiating between behavior and status as regards mental illness. *State v. A.H.* makes it clear that the statutes do not contemplate

such a distinction. Rather, mental illness, likely to continue for a prolonged period, is per se an adequate ground for termination of parental rights when the parent is unable to discharge parental responsibilities. The evidence in the record indicates that the appellants are unable to discharge their parental responsibilities because of their mental illnesses. It does not matter, therefore, whether the illness manifests itself otherwise, so long as they are thereby unable to properly discharge their parental duties. Counsel offers a lengthy dissertation in his brief concerning the meaning of the court's treatment of various factual situations in other cases involving termination of parental rights. However, these are inapposite here, since there is no statutory distinction between status and behavior; rather, the decisive factor is the effect of the mental illness upon the ability to parent. The second assignment is therefore also totally without merit and is in fact, as was the first assignment, frivolous. Indeed, it is just a factual situation such as appears in the instant case which requires the flexibility found in the applicable statutes in order that the State may protect hapless dependent and neglected children.

Counsel's third assignment, to the effect that the admission of the testimony of one Professor John DeFrain, over objection, was improper because counsel was not present at the interviews between Professor DeFrain and appellants, is likewise without merit. Counsel largely equates criminal standards requiring counsel in criminal prosecutions with the present situation, but fails to offer any authority for so doing. He apparently fails to realize that this is not a criminal prosecution; rather, it is a statutorily mandated proceeding brought about to protect the dependent and neglected child. Indeed, counsel even acknowledges in his brief that *Lassiter v. Department of Social Services*, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981), indicates that the right to counsel in termination proceedings is not always

constitutionally required. He then asserts that once counsel has been afforded, the State may not unilaterally act without providing counsel. However, he fails to offer any authority whatsoever for this proposition. Counsel's arguments may be summed up thusly: Since there is a right to counsel in criminal prosecutions, and since the professor's testimony was unfavorable, the admission of it was unconstitutional. Such conclusion requires no comment.

With regard to counsel's fourth assignment, concerning the overruling by the trial court of a motion to continue, it is clear that it is also frivolous and without any basis. The argument presented in the brief is to the effect that the court necessarily implicitly dismissed the proceeding by approving the appellants' plan. This is clearly false; the very order approving the trial plan provided that a further hearing on disposition was to be held. See, also, *State v. Williams*, 200 Neb. 182, 263 N.W.2d 90 (1980), stating that once jurisdiction to terminate parental rights has been properly invoked, it continues until such time as the matter is finally determined. Clearly, it is the law in this jurisdiction that the proceeding had not been finally determined by approval of a trial plan.

The fifth assignment contends that error was committed by the admission of testimony on the issue of termination of parental rights, when such was not properly raised by the pleadings. This is only vaguely addressed in the argument, but it appears to be merely a rephrasing of the argument proposed by the fourth assignment, that the cause had been dismissed, and therefore the analysis of the fourth assignment is dispositive of this assignment. That is, the proceeding for termination of parental rights had not been terminated, but merely continued. This is clear from the record, as well as from the applicable case law. *State v. Williams*, *supra*.

The final assignment is to the effect that the juvenile court erred in terminating the parental rights

without a sufficient amount of evidence to sustain the judgment. This suggestion is simply without basis. The record before the court contains no evidence other than that the appellants are unable to discharge their parental functions and that there is no reason to expect that they will be able to do so within any relevant period of time. We are mindful that the primary and paramount consideration in a case such as this is the best interests of the infant. *In re Interest of Wood and Linden*, 209 Neb. 18, 306 N.W.2d 151 (1981). It is also generally in the best interests of a child to make a final determination with respect to the termination question as soon as possible. *In re Interest of Biesecker*, *ante* p. 425, 333 N.W.2d 923 (1983); *In re Interest of Hastings*, 211 Neb. 209, 318 N.W.2d 80 (1982); *In re Interest of Levey*, 211 Neb. 66, 317 N.W.2d 760 (1982). These requirements notwithstanding, the juvenile court patiently delayed its decision regarding termination for a relatively lengthy period of time in order to allow the appellants to attempt to effectuate their plan. Such plan proved to be an utter failure, and the court accordingly proceeded to enforce its prior determination, which resulted in termination of appellants' parental rights.

The evidence clearly and convincingly establishes that appellants herein are simply incapable of caring for the child, even in the best of settings, wherein they were provided live-in household assistance. It is indeed unfortunate that appellants do not have the ability to function adequately as parents; but, as much as one's sympathies may rest with appellants by virtue of that unfortunate reality, the State cannot stand idly by oblivious to the welfare of an infant or heedless of the fact that its failure to intervene, should the child survive, would likely result in producing yet another individual incapable of coping with life.

The action of the trial court was entirely correct and is affirmed.

AFFIRMED.

IN RE ESTATE OF MARTHA M. HESEMANN, DECEASED. BERNARD H. HESEMANN, APPELLANT, V. GEORGE MERSCH, PERSONAL REPRESENTATIVE, ET AL., APPELLEES.

336 N.W.2d 568

Filed July 15, 1983. No. 82-423.

Fraud. Fraud is based on misrepresentation of a Material fact and cannot be based on predictions or expressions of mere possibilities in reference to future events.

Appeal from the District Court for Harlan County: BERNARD SPRAGUE, Judge. Affirmed in part, and in part reversed and remanded with directions.

Sam Grimminger, for appellant.

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

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

SHANAHAN, J.

In this action the District Court affirmed the county court's rejection of two items filed by Bernard Hesemann, an objection to the personal representative's inventory and accounting of Martha Hesemann's estate and an "Application for Leave to File 'Petition for Elective Share.' " We affirm in part and reverse in part.

On July 27, 1976, Martha M. Hesemann executed a will drawn by her attorney, E. Harold Powell. Under Martha's will, Bernard Hesemann, Martha's husband, received all Martha's personal property; all real estate was devised by Martha to two nieces, Karen L. Joyce and Nancy J. Underwood; and George Mersch, father of the two nieces, was appointed personal representative of the estate.

Martha died February 4, 1977. In the first months after Martha's death Hesemann learned from his sister, a legal secretary, that a spouse had a right to claim an elective share of an estate. In June 1977

Hesemann contacted attorney Powell concerning the elective share of a surviving spouse. Powell looked into the situation, and within a month informed Hesemann that he could file a petition for an elective share of the estate. On August 3 Hesemann petitioned the county court for formal probate of Martha's will. On September 8 Martha's will was admitted to formal probate. George Mersch, on September 8, accepted appointment as personal representative of the estate and received "Letters of Personal Representative." Powell was the attorney for the personal representative for the probate proceedings.

In a letter dated October 25 Hesemann asked Powell about the tax consequences if Hesemann did "elect to claim my full share by Inheritance." Powell responded in a letter of October 27: "You ask about your taking your full statutory share. Since there is no Federal Estate Tax, your claiming your share would not effect [sic] that. It would reduce the State Inheritance Tax, and a complete computation of that would have to be made to determine the amount. I hope this would not estrange you from the girls, because obviously they would get less of the farm than they would under Martha's Will.

"If you desire your elective share from the estate, you must present a petition for that purpose by February 4, 1978. . . .

. . . .

"If you would like to talk further about your selection of your statutory share, please let me know, and we can get together one of these days at your and my convenience." In a letter to Hesemann on November 5, Powell expressed his concern with respect to Martha's nieces "about the possibility of ill will" if Hesemann took his elective share. On November 17 Powell wrote to the personal representative, once more mentioned the deadline for Hesemann's election, and sent Hesemann a copy of that letter to Mersch. Hesemann wrote to Powell on No-

vember 22 but did not state whether he would make his election. On November 23 Powell again wrote to Hesemann regarding the effect of Hesemann's taking an elective share of the estate. Hesemann wrote to the nieces and Mersch on January 17, 1978: "So for personal, and tax-saving reasons, I am very seriously considering filing for my 'elective option', or legal share. . . .

. . . .

"I see no reason for hard feelings or 'estrangement' over my intended actions . . . ." Hesemann did not file for an elective share within the statutory time.

The personal representative filed an inventory on October 18, 1977. On February 28, 1979, Hesemann filed a "Petition for Inventory and Accounting," and alleged that he had not received a complete inventory and accounting. No action was taken on the Hesemann petition, and on February 14, 1980, Hesemann filed a "Motion to Compell [sic] an Inventory and Accounting." The county court, on May 2, 1980, heard Hesemann's petition and motion, and on May 30 ordered the personal representative to file an accounting, with a copy of this item furnished to Hesemann. The court also ordered Hesemann to file a "Formal Pleading incorporating all of the requests of the said Bernard H. Hesemann." The court did not specify the time for filing the accounting, delivering of a copy of the accounting to Hesemann, or filing the "Formal Pleading" by Hesemann. No action was taken until Hesemann filed an "Application for Leave to File 'Petition for Elective Share' " on December 30, 1980, alleging that attorney Powell had made fraudulent representations that Hesemann's election could cause possible tax problems and that "there would possibly be estrangement" of the nieces, Joyce and Underwood. On March 6, 1981, the county court granted leave to Hesemann "to call his Application For Leave To File 'PETITION FOR ELECTIVE SHARE' " for hearing upon

the merits, provided there was a hearing within 6 months from March 6, 1981. At a hearing on September 3, 1981, the county court expressly stated that the petition for Hesemann's elective share "was made after the statutory time for making said election had run and said election is hereby found to be without merit or foundation and is hereby denied and rejected." On September 3 the court also ordered the personal representative to make the accounting previously ordered on May 30, 1980. The personal representative was given 30 days from September 3 to render the accounting, and upon receipt of a copy of the accounting Hesemann was given 15 days to object.

On October 1 the personal representative filed the same inventory which he had originally filed October 18, 1977. On October 15 Hesemann filed an objection to the inventory and listed items of personal property missing from the inventory. The personal representative, by deposition, had earlier admitted that certain items of personal property were omitted from the inventory, including an irrigation pipe, jewelry, and a piano belonging to the decedent, Martha. On December 3 the county court dismissed Hesemann's objection to the accounting as "untimely," ruling that, after the court had ordered a formal pleading incorporating all requests, Hesemann had responded to and complied with that order by filing the "Application for Leave to File 'Petition for Elective Share.' " Any filing after such application was therefore untimely, according to the ruling of the county court. The District Court affirmed the orders of the county court.

On the issue of timeliness of filing for the elective share, Neb. Rev. Stat. § 30-2317(a) (Reissue 1979) is applicable. The statute states: "The surviving spouse may elect to take his elective share in the augmented estate by filing . . . a petition for the elective share within six months after the first publication of notice to creditors . . . or within one year

after the date of death, whichever time limitation first expires. The court may extend the time for election as it sees fit for cause shown by the surviving spouse before the time for election has expired."

Hesemann did not file a petition for his elective share within 1 year after Martha's death. Hesemann alleges that he failed to file the petition for his elective share as a result of Powell's misrepresentations as the attorney for the personal representative. The record reflects not that attorney Powell made any misrepresentations to Hesemann, but, rather, that Powell dealt forthrightly in answering Hesemann's inquiries and informing him about possible consequences of taking an elective share. The elements of fraud have not been established by Hesemann. Fraud is based on misrepresentation of a material fact. See *Ames Bank v. Hahn*, 205 Neb. 353, 287 N.W.2d 687 (1980). Powell's comments were nothing more than predictions or possibilities which might occur if Hesemann took an elective share of Martha's estate. Statements regarding the possibility of future events cannot constitute fraud under the circumstances. 37 Am. Jur. 2d *Fraud and Deceit* § 57 (1968). Consequently, Hesemann has presented neither facts nor law which entitles him to file his petition after expiration of the time prescribed by § 30-2317. The order denying Hesemann's request to file a petition for an elective share is therefore affirmed.

Regarding the issue of Hesemann's timeliness in objecting to the inventory filed by the personal representative, we find that the court abused its discretion in determining that the objection was untimely. See, 61A Am. Jur. 2d *Pleading* § 355 (1981); *Von Seggern v. Kassmeier Implement*, 195 Neb. 791, 240 N.W.2d 842 (1976). The September 1981 order regarding the accounting allowed Hesemann 15 days within which to object after receipt of the accounting. He did object within the allotted 15 days. Therefore, Hesemann's objection was timely. This

matter is remanded for further proceedings in reference to Hesemann's objection to the personal representative's accounting.

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

IN RE 1981-82 COUNTY TAX LEVY BY BOONE COUNTY BOARD OF EQUALIZATION.
ROBERT VAN DEWALLE, APPELLANT, V. COUNTY BOARD OF EQUALIZATION ET AL., APPELLEES.

336 N.W.2d 571

Filed July 15, 1983. No. 82-466.

Schools and School Districts: Taxation. A taxpayer objecting to the setting of a nonresident high school tuition levy pursuant to Neb. Rev. Stat. § 79-436 (Reissue 1981) must give notice of appeal within 10 days after the setting of the levy by the county board of equalization.

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

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

David A. Domina of Domina Law Firm, Philip M. Martin, Jr., Oliverius and McNary, Daniel A. Fullner, and Larry D. Bird, for appellees.

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

KRIVOSHA, C.J.

The present appeal is another in a series of cases seeking to contest the setting of the levy to pay nonresident high school tuition pursuant to Neb. Rev. Stat. § 79-436 (Reissue 1981). While several issues concerning the validity of the bond are raised, the record discloses that the notice of appeal was not filed within 10 days of the action of the board of equalization of Boone County, Nebraska, setting the

tax levy. This case is therefore controlled by our recent decision in *In re 1981-82 County Tax Levy, ante* p. 624, 335 N.W.2d 299 (1983), wherein we held that a taxpayer objecting to the setting of a nonresident high school tuition levy pursuant to § 79-436 must give notice of appeal within 10 days after the setting of the levy by the county board of equalization. The judgment of the trial court is therefore affirmed.

AFFIRMED.

JOSIE J. KLITZING, APPELLANT AND CROSS-APPELLEE, V. MARY DIDIER ET AL., APPELLEES AND CROSS-APPELLANTS.

336 N.W.2d 325

Filed July 15, 1983. No. 82-552.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Affirmed. See Rule 7A.

Wright, Simmons & Selzer, for appellant.

George A. Sommer, for appellees.

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

PER CURIAM.

This is a quiet title action. The District Court quieted title in the defendants. Plaintiff appealed, and defendants cross-appealed for denial of attorney fees.

On review of the entire record de novo this court agrees with the determination of the District Court.

AFFIRMED. SEE RULE 7A.

SHANAHAN, J., not participating.

BOSLAUGH, J., concurs in the result.

Cite as 214 Neb. 849

STATE OF NEBRASKA, APPELLEE, V. MARVIN D. SEARLES, APPELLANT.

336 N.W.2d 571

Filed July 15, 1983. No. 82-672.

1. **Motions to Suppress.** A motion to suppress can only be urged by one whose fourth amendment rights were violated and not one aggrieved solely by the introduction of the incriminating evidence.
2. **Search and Seizure.** A defendent is required to show that he had a reasonable expectation of privacy in the area searched before his fourth amendment rights come into play.
3. _____. An officer may seize evidence and contraband which is in "plain view" without a warrant, if he has the right to be in the position where he has such a view. Such activity does not constitute a search.
4. **Evidence: Appeal and Error.** The determination of the admissibility of physical evidence lies within the discretion of the trial court and will not be overturned absent a clear abuse of discretion.
5. **Speedy Trial: Time.** Periods during which the defendant is found incompetent to stand trial are not included in the 6-month period within which a defendant must be brought to trial. Also not included are periods during which pretrial motions made by the defendant are pending, and delays caused by a grant of continuance to the defendant.
6. **Speedy Trial.** Generally, an accused cannot take advantage of a delay in being brought to trial where he was responsible for the delay either by action or inaction.

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

John R. Doyle and Timothy J. Doyle, for appellant.

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

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, CAPORALE, AND SHANAHAN, JJ.

BOSLAUGH, J.

The defendant was convicted of first degree murder in the stabbing of Peggy Baker and was sentenced to life imprisonment. He has appealed and has made the following assignments of error: (1) The trial court erred in refusing to suppress

certain evidence; (2) The trial court erred in refusing to admit a memorandum written by the defendant's psychiatrist; and (3) The defendant was denied his right to a speedy trial.

On May 19, 1980, the defendant was a resident of a state-licensed residential care facility. Although 90 percent of the residents required medication for psychiatric disorders, none of the residents required nursing care. The facility consisted of three-bedroom apartments, each occupied by six residents. The residents shared the use of the apartment's kitchen, bathroom, and living room. The facility had a recreation room and dining room used by all residents. The residents did not have keys to the apartments. The main doors to the building were not locked until after visiting hours in the evening.

The defendant occupied apartment 12 with five others, including the victim, Peggy Baker. The evidence shows that the defendant and Peggy often argued over the use of the apartment's television. On May 19, 1980, defendant was told by Mary O'Shea, the proprietor of the home, that this situation was upsetting the other residents and the defendant would be moved to a different apartment. The defendant resisted this suggestion and indicated that Peggy, not he, should move.

After lunch on that date the defendant returned to the apartment and lay down for a while. When he got up he took a knife out of the kitchen drawer and went out to the balcony where Peggy was standing. He then stabbed her several times, inflicting fatal wounds. The victim died shortly after arrival at the hospital.

Peggy's screams alerted staff members who went to the scene and called the police. The defendant was found in the living room, poking at his stomach with a knife. One of the staff members took the knife away from the defendant and placed it in the kitchen sink.

Mary O'Shea, who was at the scene, testified that

the defendant said: "I stabbed her good; I hope I killed her." Other witnesses testified that the defendant had made a similar remark at that time.

When the police arrived, a staff member answered Officer Miller's inquiries regarding the location of the knife. Miller looked at the knife in the sink and then placed a trash can over the knife so that it would not be disturbed. Miller arrested the defendant and took him to the police station where he was given the *Miranda* warnings.

Detective VanButsel arrived at the scene shortly after the defendant had been taken away. VanButsel remained at the scene and took several measurements and photographs of the apartment and removed the knife from the sink. His investigation at that time was limited to the kitchen, balcony, and living room areas.

Several hours later, Officer Miller returned to the scene with a search warrant. The defendant's bedroom was then searched.

An information charging the defendant with first degree murder was filed on July 9, 1980. On September 15, 1980, pursuant to a motion filed by the defendant on July 18, 1980, the defendant was found incompetent to stand trial. On September 4, 1981, following an examination ordered upon the court's own motion, the defendant was found competent to stand trial.

The public defender withdrew from the case in October 1981. New counsel were then appointed and granted a continuance in order to properly prepare for trial. On September 25, 1981, prior to the withdrawal of the public defender, the defendant had filed a motion to suppress statements made by him. That motion was heard at various times between November 3 and December 21, 1981, and sustained in part and overruled in part on January 4, 1982. On January 7, 1982, the defendant filed a motion to suppress all of the evidence seized by the police officers as a result of the search of the premises on May 19,

1980. This motion was overruled on February 9, 1982. The trial began on March 1, 1982.

The defendant pleaded not guilty by reason of insanity, and admitted at the trial that he had stabbed Peggy Baker. Several psychiatrists testified as to the defendant's mental state at the time he committed the act. There is no contention that the evidence was not sufficient to support the verdict of guilty.

The defendant contends that the search made by Detective VanButsel without a warrant was unreasonable and that the evidence, photographs, and measurements collected by Detective VanButsel without a warrant should have been suppressed.

A failure to have a search warrant when evidence is collected does not necessarily require that the evidence seized be suppressed. "[A] motion to suppress can only be urged by one whose Fourth Amendment rights were violated and not one aggrieved solely by the introduction of the incriminating evidence." *State v. Martinez*, 198 Neb. 347, 352, 252 N.W.2d 630, 633 (1977). The defendant was required to show that he had a reasonable expectation of privacy in the kitchen, living room, and balcony areas of the apartment before his fourth amendment rights would come into play. See, *id*; *State v. Van Ackeren*, 200 Neb. 812, 265 N.W.2d 675 (1978).

In the present case the defendant had no reasonable expectation of privacy in the apartment's common areas. Those areas were used by all six residents. No lock was kept on the door. The staff had access to these areas so that they could supervise the residents. In *People v. Heflin*, 40 Ill. App. 3d 635, 351 N.E.2d 594 (1976), *aff'd* 71 Ill. 2d 525, 376 N.E.2d 1367 (1978), *cert. denied* 439 U.S. 1074, 99 S. Ct. 848, 59 L. Ed. 2d 41 (1979), incriminating letters were found in jointly used areas of a residence. The court held that these letters were properly seized as there was "no reasonable expectation of privacy" in the jointly used areas. *Id.* at 647, 351 N.E.2d at 604.

The only area of the apartment in which the defendant had a privacy interest was his bedroom. That area was properly searched pursuant to the warrant.

Even if we were to assume that the defendant had an expectation of privacy in the common areas, the evidence collected was not unlawfully seized. An officer may seize evidence and contraband which is in "plain view" without a warrant, if he has the right to be in the position where he has such a view. Such activity does not constitute a search. *State v. Romonto*, 190 Neb. 825, 212 N.W.2d 641 (1973); *State v. McCune*, 189 Neb. 165, 201 N.W.2d 852 (1972), *cert. denied* 412 U.S. 954, 93 S. Ct. 3002, 37 L. Ed. 2d 1007 (1973); *State v. Holloman*, 197 Neb. 139, 248 N.W.2d 15 (1976).

In the present case the police officers had a right to be on the scene. They were present in response to a call as a result of a life-threatening emergency. The incriminating evidence they seized while on the premises was discovered in plain view. No warrant is required in such a situation. See *State v. Resler*, 209 Neb. 249, 306 N.W.2d 918 (1981).

The defendant next objects to the exclusion of a memorandum or "charge slip," written by a psychiatrist called by the State, which showed a diagnosis different from that testified to by the witness at the trial. The witness had treated the defendant since 1979, and had treated him in March 1980 when the defendant had been hospitalized for an overdose of Tylenol. The psychiatrist had testified that his diagnosis of the defendant's mental condition was "schizophrenia, residual type, and the seizure disorder by history."

The "charge slip," written by the doctor when the defendant had been hospitalized for the overdose of Tylenol, indicated that the defendant had "acute and chronic alcohol intake." The charge slip was shown to the witness on cross-examination. He admitted having written the document, and his testimony dis-

closed the contents of the writing. The witness testified that the statement on the charge slip was not his official diagnosis but was only a note to the office on charges.

The determination of the admissibility of physical evidence lies within the discretion of the trial court and will not be overturned absent a clear abuse of discretion. *State v. Weible*, 211 Neb. 174, 317 N.W.2d 920 (1982). The defendant elicited all the information contained in the memorandum on cross-examination of the doctor. No prejudice resulted to the defendant by the exclusion of the memorandum. There was no abuse of discretion.

The defendant's final assignment of error is that his motion to dismiss should have been sustained because he was denied his constitutional and statutory right to a speedy trial.

Neb. Rev. Stat. § 29-1207 (Reissue 1979) requires that the defendant be brought to trial within 6 months after the information is filed. Periods during which the defendant is found incompetent to stand trial are not included in the 6-month period. § 29-1207(4)(a). Also not included are periods during which pretrial motions made by the defendant are pending, and delays caused by a grant of continuance to the defendant.

In the present case the information was filed on July 9, 1980. On July 18, 1980, the defendant filed his first pretrial motion, which resulted in a finding that the defendant was incompetent to stand trial. The defendant was found competent to stand trial on September 4, 1981. The motion to suppress statements which was filed on September 25, 1981, was not ruled on until January 4, 1982. The motion to suppress evidence seized in the search of the premises, filed on January 7, 1982, was overruled on February 9, 1982. Trial began on March 1, 1982. The only periods not excluded were 9 days in July 1980, 21 days in September 1981, and 20 days in 1982. See *State v. Jones*, 208 Neb. 641, 305 N.W.2d 355 (1981).

Generally, an accused cannot take advantage of a delay in being brought to trial where he was responsible for the delay either by action or inaction. *State v. Fatica*, *ante* p. 776, 336 N.W.2d 101 (1983). Defendant was not denied his right to a speedy trial.

There being no error, the judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DANIEL WARREN KING, APPELLANT.

336 N.W.2d 576

Filed July 15, 1983. No. 82-698.

Bail Bond. A court, when releasing a defendant on bond, need only inform the defendant of any special or unusual condition attached thereto, as set out in Neb. Rev. Stat. § 29-901 (Reissue 1979), and the court need not inform that defendant of the possible penalty for his simple failure to appear, as set out in Neb. Rev. Stat. § 29-908 (Reissue 1979).

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

Daniel A. Fullner of Moyer, Moyer, Egley & Fullner, for appellant.

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

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

HASTINGS, J.

This is an appeal from the District Court of Madison County where the defendant, Daniel Warren King, was convicted of failure to appear under Neb. Rev. Stat. § 29-908 (Reissue 1979). Because the defendant had two prior felony convictions and was convicted of felony failure to appear, he was thereafter found to be an habitual criminal under Neb. Rev. Stat. § 29-2221 (Reissue 1979) and was sen-

tenced to a term of 10 years in the Nebraska Penal and Correctional Complex.

On appeal the defendant assigns two errors. Basically, the defendant argues that the trial court erred in failing to instruct the jury that the court has a duty to inform a defendant released on bail of the conditions, penalties, options, and alternatives relating to his release on bail. Also, the defendant argues that one of his prior convictions is not proper for consideration as a felony conviction under the habitual criminal statute.

The basic facts underlying this appeal are as follows. On June 26, 1980, the defendant was charged with theft by unlawful taking under Neb. Rev. Stat. § 28-511(1) (Cum. Supp. 1982), a Class IV felony set forth in Neb. Rev. Stat. § 28-518 (Reissue 1979). On July 3, 1980, the defendant was released on bail after paying into court 10 percent, or $1,000, of a $10,000 bond set by Judge Warren. On August 22, 1980, the defendant pleaded guilty to the theft charge and his bond was continued conditioned only upon his returning to the Madison County District Court for sentencing on September 26, 1980. The defendant failed to appear for sentencing on that date and a bench warrant was issued for his arrest. The defendant was thereafter arrested in Tennessee, and on June 7, 1982, he was returned to the custody of the Madison County Sheriff's Department. The defendant was tried by a jury for failure to appear, and on August 30, 1982, was convicted of that offense.

On September 3, 1982, further proceedings were held to determine if the defendant was an habitual criminal. The evidence adduced at that time showed that the defendant had two prior felony convictions. That evidence disclosed that on June 29, 1976, the defendant had been arrested in Box Butte County for destruction of property, under Neb. Rev. Stat. § 28-572 (Reissue 1975), and breaking and entering an automobile, under Neb. Rev. Stat. § 28-531.02 (Reissue 1975). At trial the defendant pleaded

guilty to the charge of felonious injury or destruction of personal property, causing a loss of over $100. For this offense defendant was sentenced to not less than 1 year nor more than 3 years in the Nebraska Penal and Correctional Complex.

Further, the record reveals that on December 13, 1976, the defendant unlawfully operated a motor vehicle in Dawes County. After a high-speed chase, the defendant fled on foot, eluding arrest. After his arrest for this offense the defendant was released on bail and thereafter failed to appear at his arraignment. The defendant was later arrested and pleaded guilty to a felony charge of failure to appear. On April 27, 1977, he was sentenced to 1 year in the Nebraska Penal and Correctional Complex, to run consecutively with the sentence imposed in Box Butte County.

These two prior convictions and the conviction for failure to appear, which is part of this appeal, constitute the required three convictions carrying a sentence of 1 year or more to declare an individual an habitual criminal under § 29-2221. On the basis of these prior convictions the trial court here found the defendant to be an habitual criminal and sentenced him to 10 years in the Nebraska Penal and Correctional Complex.

The defendant initially attacks his conviction for failure to appear. At trial the defendant offered jury instruction No. 10. This instruction sets forth what he viewed to be the material elements of the offense of failure to appear. In relevant part it stated: "Your verdict in this case must be not guilty unless you are satisfied by the evidence beyond a reasonable doubt of the truth of all of the following material elements, to wit:

. . . .

"6. That when the defendant appeared at any judicial proceeding in which the defendant's bail was considered, the judge at such proceeding informed the defendant of the condition or conditions imposed

on his release, the penalties for violating any of the conditions of such release, and any options or alternatives available to the defendant."

The trial court refused to give this instruction. The court instructed the jury on the elements of the offense of failure to appear, excluding any reference to the duty of the court to inform the defendant of the condition of his bail. The court gave its instruction over defendant's objection.

The defendant bases his argument, that to inform the defendant is a necessary element of the offense of failure to appear, on two Nebraska statutes, as follows:

Neb. Rev. Stat. § 29-901.02 (Reissue 1979) provides: "Any judge who shall authorize the release of a defendant under section 29-901 shall issue a written order containing a statement of the condition or conditions imposed, shall inform the defendant of the penalties for violating any of the conditions of such release, and shall advise the defendant that a warrant for his arrest shall be issued immediately upon such violation."

Neb. Rev. Stat. § 29-901.06 (Reissue 1979) provides: "When a bailable defendant appears at any judicial proceeding in which such defendant's bail is being considered, the judge at such proceeding shall inform the defendant of the condition or conditions imposed on his release, the penalties for violating any of the conditions of such release, and any options or alternatives available to such defendant."

On the basis of these statutes the defendant contends the court must, upon releasing a defendant on bail, inform the defendant of all conditions of his release and the consequences of his failing to meet those conditions. Not only must the court advise the defendant of these initially under § 29-901.02, it is argued, but it must do so at each successive judicial proceeding under § 29-901.06.

Under defendant's theory it seems that if a court releases a defendant on bail but neglects to inform

him that if he fails to return to that court he may be arrested and charged with failure to appear, such defendant may fail to appear in court, as ordered, with impunity. Such a position is without merit. This cannot be the intended result of these statutes. The question remains, What do these statutes mean?

The legislative history of article 9 of chapter 29 of the Nebraska statutes indicates that this legislation was patterned after the federal Bail Reform Act of 1966. See Introducer's Statement of Purpose, Committee on Judiciary, L.B. 828, 83d Leg., 2d Sess. (January 28, 1974).

The portions of the federal act relevant to this case are found at 18 U.S.C. § 3146 and 18 U.S.C. § 3150 (1976). Section 3146 basically parallels Neb. Rev. Stat. §§ 29-901 to 29-901.06 (Reissue 1979). Section 3146(a) is roughly the same as § 29-901. Both sections delineate the court's powers to require certain security as well as to place special conditions, such as restrictions on travel or association, on the defendant in order for his release on bail. Section 3146(c) is almost word for word the same as § 29-901.02. Both require the judge or judicial officer to inform the defendant of the conditions of the defendant's bail.

Section 3150 is strikingly similar to § 29-908. It provides in part: "Whoever, having been released pursuant to this chapter, willfully fails to appear before any court or judicial officer as required, shall . . . . (1) if he was released in connection with a charge of felony, or while awaiting sentence or pending appeal or certiorari after conviction of any offense, be fined not more than $5,000 or imprisoned not more than five years, or both . . . ."

Section 29-908 provides in part: "Whoever is charged with a felony and is released from custody under bail, recognizance, or a conditioned release and willfully fails to appear before the court granting such release when legally required or to surrender himself within three days thereafter, shall be

guilty of a Class IV felony, in addition to any other penalties or forfeitures provided by law."

Several federal court decisions have interpreted what is required of the judge or judicial officer in the way of informing the defendant of his bail conditions. In *United States v. DePugh*, 434 F.2d 548 (8th Cir. 1970), *cert. denied* 401 U.S. 978, 91 S. Ct. 1208, 28 L. Ed. 2d 328 (1971), the effect of the failure to warn a defendant as set out in 3146(c), released on bail, was discussed.

The defendant in that case was prosecuted for failure to appear under § 3150. The court said: "Section 3148 relating to bail after conviction contains provisions materially different from the provisions of § 3146 and hence it is questionable whether § 3146(c) is applicable to release on bail after conviction.

"The § 3146(c) reference to conditions, modified by the words 'if any', would reasonably appear to refer to special conditions authorized by § 3146(a) such as placing restrictions with respect to travel, association, custody and supervision. The statute fixes no penalty for violation of such conditions. A reasonable basis exists for fully advising a defendant as to precise conditions of the character above described which are imposed and the consequences of violations.

"Here no conditions of such type were imposed. Defendant has posted a bond to assure his appearance when required. His obligation is limited to appearance when required and the penalty for his failure to do so is clearly set out in § 3150. Defendant was told by the court that his bond is for the purpose of assuring his appearance when required. Defendant by virtue of his prior criminal experience was certainly aware of the necessity of his appearance in court at all material stages of criminal proceedings against him.

. . . .

"We do not believe that Congress intended in the

factual situation here presented that an order stating conditions and a warning as to the penalties for violation would be a condition precedent or an essential element of the offense set out in § 3150. The statute itself clearly sets out the duty to appear as required and the penalty for failure so to do." *Id.* at 552-53.

This rationale was followed in *United States v. Eskew*, 469 F.2d 278 (9th Cir. 1972): "Eskew asserts that under 18 U.S.C. § 3146(c) the trial judge erred by failing to inform him that his nonappearance would result in forfeiture of his bail. Eskew's reliance on § 3146(c) is misplaced. Section 3146(c), which requires a judicial officer to inform a person of the penalties for violation of the conditions of release, 'refer[s] to special conditions authorized by [18 U.S.C.] § 3146(a) such as placing restrictions with respect to travel, association, custody and supervision." *Id.* at 279.

In *United States v. McGill*, 604 F.2d 1252 (9th Cir. 1979), the court, interpreting these statutes, stated: "We reject McGill's suggestion that the release under the superseding indictment was not under 18 U.S.C. § 3146(a) because the court did not repeatedly tell him he was continued on bond and did not amend the original order of release each time the charge was amended. There is no requirement in the Bail Reform Act that the court repeat the conditions of release each time a defendant is arraigned on a superseding indictment. We can think of no useful purpose to be served by interpolating such a requirement. Subsection 3146(c), requiring a statement of release conditions, applies to special conditions, such as restrictions on travel or association. *United States v. Eskew*, 469 F.2d 278, 279 (9th Cir. 1972); *United States v. DePugh*, 434 F.2d 548 (8th Cir. 1970). There were no special conditions imposed here." *Id.* at 1255.

The rule from these cases seems to be that the court only needs to inform the defendant of any spe-

cial or unusual conditions of his bail, as set out in § 3146(a), or § 29-901 under the Nebraska statute, but there is no duty on the court to inform the defendant of the obvious condition that he return to court as ordered. There is no need to inform the defendant that he must return or be guilty of the offense of failure to appear, as set out in § 3150, or § 29-908 under the Nebraska statutes.

Since the relevant Nebraska statutes have been patterned after the federal act and they parallel this act so closely in their language and form, and since this interpretation of the federal statutes is reasonable and just, we adopt it as the correct interpretation for our laws in Nebraska. As such, we hold that a court, when releasing a defendant on bond, need only inform the defendant of any special or unusual condition attached thereto, as set out in § 29-901, and the court need not inform that defendant of the possible penalty for his simple failure to appear, as set out in § 29-908. This rule applies to the duty to inform the defendant upon his initial release on bail under § 29-901.02, and the duty to inform the defendant in any subsequent judicial proceedings, as required under § 29-901.06.

Having adopted this as the rule in this jurisdiction, we hold that the court did not err in refusing the defendant's proffered instruction No. 10, setting out a duty to inform the defendant of the consequences of his failure to appear, since the record does not reflect that any condition, other than his simple appearance when ordered, was placed upon his bail.

The defendant also argues that his conviction in Dawes County should not be considered for purposes of declaring him an habitual criminal. Therefore, he argues, he has only two felony convictions and three are needed before one may be convicted as an habitual criminal.

As the defendant correctly points out in his brief, he was arrested in Dawes County for operating a motor vehicle to avoid arrest. Neb. Rev. Stat.

§ 60-430.07 (Reissue 1974). The offense for which he was sought was failure to yield, a misdemeanor. The offense of operating a motor vehicle to avoid arrest, as it appeared at the time the defendant committed that offense, was punishable by a possible sentence in the Nebraska Penal and Correctional Complex, and therefore was a felony under Neb. Rev. Stat. § 29-102 (Reissue 1975) as it appeared at that time. Under the law as it existed then, there is no question but that the defendant's conviction for operating a motor vehicle to avoid arrest was a felony conviction.

The defendant goes on to point out that on April 27, 1977, the same day that he was sentenced, a new version of § 60-430.07 was signed by the Governor. Under 1977 Neb. Laws, L.B. 196, the defendant argues, his offense would have been a misdemeanor. This act was passed by the Legislature and became effective 3 months following the June 1 adjournment. It provides that it shall be unlawful for any person operating a motor vehicle (1) to flee in such vehicle to avoid arrest for a felony or (2) to flee to avoid arrest for a misdemeanor, and further provides for a penalty of imprisonment of 1 to 3 years for the subsection (1) violation and up to 6 months for violation of the subsection (2) provision of the statute.

The defendant argues that this prior conviction should be treated as a misdemeanor on the basis of Neb. Rev. Stat. § 29-2204.01 (Reissue 1979), which states: "In any criminal proceeding in which a sentence of confinement has been imposed and the particular law under which such sentence was pronounced is thereafter amended to decrease the maximum period of confinement which may be imposed, then any person sentenced under the former law shall be entitled to his discharge from custody when he has served the maximum period of confinement authorized by the new law, notwithstanding the fact that the court may have ordered a longer period of confinement under the authority of the former law."

Also, the defendant points out this proposition of law: " 'It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply. The amendatory act imposing the lighter punishment can be applied constitutionally to acts committed before its passage *provided the judgment convicting the defendant of the act is not final. . . .*' " (Emphasis supplied.) *State v. Randolph*, 186 Neb. 297, 302, 183 N.W.2d 225, 228 (1971).

While we do not dispute these points of law raised by the defendant, his argument must fail for several reasons. First of all, as we have held, § 29-2204.01 only applies when the maximum sentence allowable under a statute has been reduced. *State v. Rubek*, 189 Neb. 141, 201 N.W.2d 255 (1972). In this case the maximum penalty, or any of the penalties under this statute, has not been changed. The new statute did not reduce the maximum sentence; it simply repealed the old statute and reclassified the offense so that some are misdemeanors and some are felonies. Therefore, § 29-2204.01 does not apply. *State v. Country*, 194 Neb. 570, 234 N.W.2d 593 (1975).

Also, while it is true that the new version was signed by the Governor on the date the defendant was sentenced, it did not become effective as law until September 2, 1977, some 4 months later. See 2A Neb. Rev. Stat., app. at 1331 (Reissue 1979). This statute did not become law until after the judgment convicting the defendant was final. Therefore, the provision from *Randolph* does not apply to this case.

We find the conviction of the defendant for failure to appear and the finding that he was an habitual criminal to be correct. Therefore, we affirm the ruling of the District Court.

AFFIRMED.

Cite as 214 Neb. 865

STATE OF NEBRASKA, APPELLEE, V. WILLIAM G. HILL, APPELLANT.

336 N.W.2d 325

Filed July 15, 1983. No. 82-733.

1. **Post Conviction: Appeal and Error.** One seeking post conviction relief has the burden of establishing a basis for such; the findings of the District Court in denying such relief will not be disturbed on appeal unless they are clearly erroneous.
2. **Effectiveness of Counsel: Proof.** One challenging the adequacy of criminal trial representation has the burden of proving incompetence and of showing that such incompetence prejudiced his defense.
3. **Effectiveness of Counsel.** The standard for determining whether criminal defense counsel has provided adequate representation is whether he performed at least as well as a lawyer with ordinary training and skill in criminal law in his area, and whether he has conscientiously protected the interests of his client.
4. **Effectiveness of Counsel: Witnesses.** A claim of prejudice based upon counsel's alleged failure to call witnesses is not sustained in the absence of evidence as to what the witnesses' expected testimony would be.
5. **Effectiveness of Counsel: Identification Procedures.** A claim of prejudice based upon counsel's alleged failure to investigate pretrial identification procedures is not sustained in the absence of evidence as to the defect in the procedures.
6. **Search and Seizure: Constitutional Law.** The warrantless routine search of a vehicle lawfully in the custody of police, following standard procedures, does not violate the U.S. Constitution's fourth amendment prohibition of unreasonable search and seizure.
7. **Search and Seizure.** Whether a search and seizure is unreasonable within the meaning of the fourth amendment depends upon the facts and circumstances of each case.
8. **Search and Seizure: Motor Vehicles.** Less rigorous requirements govern searches of automobiles not only because of the element of mobility but because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office.

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

Duane W. Schroeder, for appellant.

Paul L. Douglas, Attorney General, and Bernard L. Packett, for appellee.

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

CAPORALE, J.

This appeal arises from the denial of relief to defendant-appellant, William G. Hill, under the Post Conviction Act (Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1979)). He seeks to set aside and vacate his prior conviction and to withdraw his plea in order that he may plead anew. We find the appeal to be utterly without merit and legally frivolous; the order of the trial court is affirmed.

Defendant sets forth five purported assignments of error which condense into the claim that his trial counsel had not prepared for trial and was therefore ineffective, as a consequence of which defendant's nolo contendere plea was allegedly not voluntarily, knowingly, and intelligently made.

Defendant was charged with first degree sexual assault and assault with intent to commit sodomy. He originally pled not guilty to both counts; later, pursuant to a plea bargain, he withdrew his plea to the first count and entered a plea of nolo contendere thereto. The second count was then dismissed. Thereafter, he sought to withdraw his plea on a variety of grounds other than the ineffectiveness of counsel as he now urges. The denial of that motion was affirmed by this court in *State v. Hill*, 204 Neb. 743, 285 N.W.2d 229 (1979).

It has long been the rule in this jurisdiction that one seeking post conviction relief has the burden of establishing a basis for such and that the findings of the District Court in denying such relief will not be disturbed on appeal unless they are clearly erroneous. *State v. Rice*, *ante* p. 518, 335 N.W.2d 269 (1983); *Marteney v. State*, 210 Neb. 172, 313 N.W.2d 449 (1981). It is equally well established that one challenging the adequacy of criminal trial representation has the burden of proving incompetence and of showing that such incompetence prejudiced his

defense. Moreover, the standard for determining whether criminal defense counsel has provided adequate representation is whether he performed at least as well as a lawyer with ordinary training and skill in criminal law in his area, and whether he has conscientiously protected the interests of his client. *State v. Pope*, 213 Neb. 645, 330 N.W.2d 747 (1983); *State v. Hunt*, 212 Neb. 304, 322 N.W.2d 624 (1982). We test defendant's claims in accordance with the foregoing rules.

The record reveals that defendant admits an act of sexual intercourse with the minor female victim, but claims it was consensual. This claim conflicts with his prior statement that the rape was conducted at gunpoint on an isolated county road. Defendant provided his trial attorney with the names of certain witnesses, at least some of which counsel did not interview, who allegedly placed the defendant in a city other than the one named by the victim at a given time. Trial counsel did not investigate the out-of-court photographic identification procedures used, filed no motion to suppress evidence which was seized from the interior of an automobile pursuant to a search warrant which authorized only the search of the exterior of the automobile, and filed motions for a continuance and change of venue but 4 days prior to the scheduled trial date. The record also reveals that the defendant vacillated as to whether he wished to plea bargain or proceed to trial, was out of the state and difficult to reach at various times, and that trial counsel conferred with defendant at least four times prior to trial. Defendant has a significant prior criminal record involving sexual crimes.

Defendant's concern with the failure of trial counsel to interview the location witnesses is readily disposed of by observing that the record fails to tell us what those witnesses would have said. A claim of prejudice based upon counsel's alleged failure to call witnesses is not sustained in the absence of evidence as to what the witnesses' expected testimony

would be. *State v. Otey*, 212 Neb. 103, 321 N.W.2d 453 (1982). On the same theory, it accomplishes nothing to allege that trial counsel failed to investigate the pretrial identification procedures without establishing wherein those procedures were defective; no such showing appears.

The search of the vehicle was conducted at a time when it was already in the possession of the police under circumstances not revealed by the record before us. Noting it is only unreasonable searches which must be pursuant to warrant, the U.S. Supreme Court has held that the warrantless routine search of a vehicle lawfully in the custody of police, following standard procedures, does not violate the U.S. Constitution's fourth amendment prohibition of unreasonable search and seizure. The Court also noted that whether a search and seizure is unreasonable within the meaning of the fourth amendment depends upon the facts and circumstances of each case, and further observed that less rigorous requirements govern searches of automobiles not only because of the element of mobility but because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office. *South Dakota v. Opperman*, 428 U.S. 364, 96 S. Ct. 3092, 49 L. Ed. 2d 1000 (1976), *on remand* 247 N.W.2d 673 (S.D. 1976). We conclude that under the facts revealed by the record before us, a warrantless search of defendant's vehicle would have violated neither the fourth amendment nor the provisions of Neb. Const. art. I, § 7, which provides that the right of the people to be secure against unreasonable searches of their effects shall not be violated. See *State v. Watts*, 209 Neb. 371, 307 N.W.2d 816 (1981), approving the principles enunciated in *South Dakota v. Opperman*, *supra*. Since no warrant was required, it is of no import that the search was broader than was authorized by the warrant.

The fact that the motions for continuance and

change of venue were not filed until 4 days prior to the scheduled trial date is no more suggestive that counsel could not have been and was not in fact prepared for trial, notwithstanding the fact one of the stated grounds for seeking a continuance was the alleged lack of time to prepare, than it is suggestive that defendant had not yet come to grips with whether he wished to go to trial. The extensive examination conducted by trial counsel at the preliminary hearing establishes counsel well knew the facts and legal issues involved. We find no support for defendant's claim that he had to plead nolo contendere because his trial attorney had not done his job. The fact of the matter here is that there was no defense to the crime and defendant was well advised to plead a mere nolo contendere to the one count in exchange for dismissal of the second count.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JERRY W. JOHNSON, APPELLANT.

336 N.W.2d 581

Filed July 15, 1983. No. 82-750.

1. **Right to Counsel.** The right to assistance of counsel at a police lineup attaches only at or after the time that adversary judicial proceedings have been initiated against the defendant by the filing of an indictment or information.
2. **Identification Procedures.** A showup identification procedure is constitutionally invalid only when it is so unnecessarily suggestive and conducive to an irreparably mistaken identification that a defendant is denied due process of law; the admission of evidence of a showup without more does not violate due process.
3. _____. A determination as to whether a likelihood of a misidentification exists has to be made on the basis of the totality of the circumstances of each case.

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

James P. Miller and Owen A. Giles, for appellant.

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

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

CAPORALE, J.

Defendant, Jerry W. Johnson, was charged with burglary and adjudged guilty pursuant to a jury verdict. In this appeal defendant attacks his identification as the party who committed the crime. We affirm.

The burglar was encountered by the identifying witness on and in the premises of a LaVista restaurant located at 72d and Harrison Streets in Sarpy County. The witness was a part-time janitor who, upon arriving at the scene at about 4:20 a.m. on May 29, 1982, noticed that a pane of glass was broken out of the door and that the door was unlocked. Upon entering, the witness turned on an additional light and then called the police; at that point the intruder came out of a hiding place in the restaurant, threatened the janitor with a hammer or hatchet, ordered him to drop the phone, and then ran in excess of 15 to 20 feet to the door and left the restaurant.

Defendant was taken into custody by the police about 15 minutes after the report of the burglary. The janitor witness made an identification at the scene of the arrest, confirmed his identification upon being shown the defendant's driver's license, and again affirmed the identification at the police station through a one-way window. According to the witness, all three identifications occurred within a period of approximately 40 minutes from his initial arrival at the restaurant.

Defendant seeks to attack the propriety of the eyewitness identification by alleging a "taint of primary illegality," together with the nonexclusion of the identification from the trial. The argument as constructed in defendant's brief makes the second point rest upon the first, so the sole question presented for

review is whether there was a taint of primary illegality actually shown as to the identification. If such were the case, then, and only then, would the second question arise.

Defendant's basis for claiming that he has shown a prima facie taint of primary illegality rests upon the fact that there was no attorney acting for defendant present at the precharge "showup" identification. However, it is the law of the United States, and this jurisdiction as well, that there is no constitutional requirement for counsel at that stage of an investigation. *State v. Smith*, 209 Neb. 86, 306 N.W.2d 181 (1981), relying upon *Kirby v. Illinois*, 406 U.S. 682, 92 S. Ct. 1877, 32 L. Ed. 2d 411 (1972), held that the right to assistance of counsel at a police lineup attaches only at or after the time that adversary judicial proceedings have been initiated against the defendant by the filing of an indictment or information. That clearly excludes the situation presented by this case, where the identification occurred shortly after the burglary itself and almost immediately upon the defendant being taken into custody. There had been no adversarial proceedings initiated at that time. The identification may therefore not be suppressed on the ground that counsel was not present at the time of the identifications.

Defendant relies upon *United States v. Wade*, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967), for the general proposition that a defendant is entitled to counsel at "critical stages of proceedings." He then goes on to complete the argument to the effect that since there was no counsel here, there was a taint present. However, he fails to cite or discuss *State v. Smith*, *supra*, and *Kirby v. Illinois*, *supra*, which clearly delineate the preadversarial charge period as not being such a critical stage under *United States v. Wade*, *supra*, that counsel is required. Defendant's failure to cite a binding Nebraska case, of a vintage not all that recent, ef-

fectively misstates the law as it applies to these facts.

In his brief defendant engages in a lengthy attack upon the factual sequence of the identification process. He apparently seeks to demonstrate by this some sort of faultiness in the identification process. The record, although there were some discrepancies between the witness' initial description and defendant's actual appearance, nonetheless establishes an adequate basis for identification by the witness herein. The defendant was certainly in general terms the same individual described by the witness; he was dressed in a similar fashion, he was near the site of the burglary, and he was in possession of an unusual dollar amount of coinage, similar in amount to that which was missing from the premises.

Defendant further makes a general attack seeking to imply that the precharge "showup" was so unnecessarily suggestive as to be conducive to an irreparably mistaken identification. However, such was clearly not the case. *State v. Nance*, 197 Neb. 95, 246 N.W.2d 868 (1976), is instructive in this regard. This court indicated in that case that a showup identification procedure is constitutionally invalid only when it is so unnecessarily suggestive and conducive to an irreparably mistaken identification that a defendant is denied due process of law; the admission of evidence of a showup without more does not violate due process. A determination as to whether such a likelihood of a misidentification exists has to be made on the basis of the totality of the circumstances of each case. *State v. Hunt*, 212 Neb. 214, 322 N.W.2d 621 (1982). The totality of the facts surrounding the identification process of this case, as set forth above, shows no unnecessarily suggestive elements present such as would have been conducive to an irreparably mistaken identification.

AFFIRMED.

CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLEE, V. SANITARY AND IMPROVEMENT DISTRICT NO. 287 OF DOUGLAS COUNTY, NEBRASKA, APPELLANT.
DAIN, KALMAN & QUAIL MUNICIPAL-NEBRASKA, INC., APPELLEE AND CROSS-APPELLANT, V. SANITARY AND IMPROVEMENT DISTRICT NO. 287 OF DOUGLAS COUNTY, NEBRASKA, ET AL., APPELLANTS AND CROSS-APPELLEES.
334 N.W.2d 429

Filed July 22, 1983. Nos. 82-149, 82-150.

SUPPLEMENTAL OPINION

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Motion for rehearing overruled.

Thomas J. Guilfoyle of Thomas J. Guilfoyle, P.C., for appellant S.I.D.

Herbert M. Fitle, City Attorney, and Charles K. Bunger, for appellee City.

Kenneth C. Stephan of Knudsen, Berkheimer, Richardson & Endacott, for appellee Dain, Kalman & Quail.

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

HASTINGS, J.

On the court's own motion the following portion of its opinion found at *ante* p. 371, 377, 334 N.W.2d 429, 433 (1983), will be deleted:

"Not only does DKQ fit within this statute but, also, it may find standing under the general rule of law. DKQ has acted as the fiscal agent of S.I.D. since it was formed. As such, DKQ has underwritten construction warrants which have enabled the district to erect improvements. In order to retire the warrants, bonds must be issued to replace them. To enable the district to do so, revenue must be raised, by way of special assessments, to create a

sinking fund to support this bond issue. In order to retire these warrants underwritten by DKQ, sufficient funds must be raised by way of special assessments by the district. This gives DKQ an interest, and it may suffer an injury different from that of the general public.

"To have standing in a matter, the party involved must only show this, that is, an interest in the matter of the possibility of an injury that is different from that of the general public. *First Fed. Sav. & Loan Assn. v. Department of Banking*, 187 Neb. 562, 192 N.W.2d 736 (1971). DKQ's interest in this case is different from the general public's, in that it is in the position of a guarantor on these warrants which are to be retired by special assessment revenues. As such, it has standing to question the determination of what is generally and specially assessed in this case."

MOTION FOR REHEARING OVERRULED.

STATE OF NEBRASKA, APPELLEE, V. ALAN W. FRIES, JR., APPELLANT.

337 N.W.2d 398

Filed July 22, 1983. No. 82-226.

1. **Evidence.** The determination of the admissibility of evidence rests within the sound discretion of the trial court.
2. **Fraud.** When fraud is alleged, a broad and liberal latitude should be given the party alleging it in establishing every fact and circumstance connected with its alleged perpetration.
3. **Notice.** Generally, a notice is regarded in law as actual when the person sought to be affected by it knows of the existence of the particular fact in question.
4. _____. Proof of mailing a notice is prima facie proof that it was received.
5. **Criminal Law: Collateral Evidence.** Proof of collateral matters which do not render the defendant's criminal activity less criminal are not relevant.
6. **Records: Appeal and Error.** Evidence which does not appear in the record can not be considered by this court on appeal.

7. **Criminal Law: Securities Regulation.** The State is not required to prove lack of an exemption as an element of the offense of unlawful sale of unregistered securities.
8. _____: _____. The defendant bears the burden of proof as to a claim of exemption.
9. _____: _____. Proof of a specific intent, evil motive, or knowledge that the law was being violated is not required to sustain a criminal conviction under the Securities Act of Nebraska.
10. **Securities Regulation.** The registration of an agent is not effective during any period when he is not associated with a registered broker-dealer or issuer-dealer.
11. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal in the absence of an abuse of discretion.

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

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

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

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

BOSLAUGH, J.

The defendant, Alan W. Fries, Jr., was found guilty of 27 counts of violating the laws of Nebraska regulating the registration and sale of securities. He was sentenced to imprisonment for 16 months to 5 years on each count, the sentences on the first three counts to run consecutively. On the remaining counts the sentences run concurrently with the sentence on count III.

The charges were based on nine separate transactions in which the defendant sold capital stock which was not registered. The transactions took place between March 17, 1977, and September 28, 1978. One transaction involved the sale of stock in Solar America, Inc. The other eight transactions involved the sale of stock in Energy Company of America, Inc. Nine counts alleged the defendant sold unregistered securities in violation of Neb. Rev. Stat.

§§ 8-1104 and 8-1117 (Reissue 1977); nine counts alleged the sales were made by the defendant when he was not registered as an agent of the issuer-dealer as required by Neb. Rev. Stat. §§ 8-1103 and 8-1117 (Reissue 1977); and nine counts alleged that the defendant made false representations or failed to disclose material facts in violation of Neb. Rev. Stat. §§ 8-1102(1)(b) and 8-1117 (Reissue 1977).

The record shows that in July 1976 the state Department of Banking and Finance learned that the defendant was selling unregistered securities. The defendant was then contacted by the department, and as a result of meetings with the department, the capital stock of Solar America, Inc., was registered, the corporation was qualified as an issuer-dealer, and the defendant was registered as an agent for the issuer-dealer. The registration order was issued on September 3, 1976.

In the months which followed the registration, the department received inquiries regarding representations made by the defendant about Solar America and its stock. Following an investigation, the department concluded that the defendant was making material, false statements regarding the company to investors. On February 21, 1977, the department issued a stop order prohibiting Solar America from selling its securities, and revoked its registration. The effect of the order was to prohibit the defendant from selling the securities. Barry Lake, legal counsel for the department, testified that the order was sent to the defendant by certified mail and that the stop order was discussed with the defendant on numerous occasions after its issuance. The stop order was never lifted.

Due to the misrepresentations that had been made, the department required the company to make a rescission offer. The defendant complied with this requirement, at least in part, but the department was unable to determine whether all stockholders were notified of the offer.

In late 1978 the department began receiving inquiries about a company named Energy Company of America, Inc. An investigation revealed that the defendant was selling the capital stock of this company. The stock had never been registered, the company was not qualified as an issuer-dealer, and the defendant was not registered as its agent. A cease and desist order was issued on June 21, 1979, ordering the defendant to stop selling securities in Solar America and Energy Company of America.

The nine investors who had purchased unregistered stock from the defendant testified in detail concerning the transactions and the representations made by the defendant. Other witnesses testified concerning the facts which established the representations were false. Solar America, Inc., was dissolved for nonpayment of corporation tax on August 2, 1977; Energy Company of America, Inc., was dissolved for nonpayment of corporation tax on August 2, 1979.

As a part of its investigation, the department subpoenaed bank records relating to the corporations and the defendant and his wife. Cash disbursement schedules were then prepared from the information obtained from the bank records. This evidence showed that over $100,000 of the proceeds from the sale of the stock went into personal accounts of the defendant and his wife.

The defendant assigns as error the admission into evidence of the subpoenas and the bank records obtained as a result of the subpoenas. The defendant also alleges error in the admission of the cash disbursement schedules prepared by the department from these records. The thrust of the defendant's argument is that these exhibits were prejudicial because they did not tend to show the true financial picture of the corporation.

The determination of the admissibility of evidence rests within the sound discretion of the trial court. *State v. Martin*, 198 Neb. 811, 255 N.W.2d 844 (1977).

In *New Omaha Thompson-Houston Electric Co. v. Rombold*, 73 Neb. 259, 270, 102 N.W. 475, 479 (1905), *aff'd* 73 Neb. 272, 106 N.W. 213, we said: "[I]t is a universal rule that when fraud is alleged a broad and liberal latitude should be given the party alleging it in establishing every fact and circumstance connected with its alleged perpetration. The mental and physical condition of the party, all representations and inducements held out to him by the adverse party, should be carefully examined into, and all testimony directly connected with the transaction should be admitted."

The exhibits were admissible because they tended to prove that certain representations about the companies' financial status made by the defendant were made with knowledge that they were false. In *Dosek v. United States*, 405 F.2d 405 (8th Cir. 1968), *cert. denied* 395 U.S. 943, 89 S. Ct. 2014, 23 L. Ed. 2d 461 (1969), a prosecution for the fraudulent sale of securities by mail, the court faced a similar issue. The court said at 409: "Ralph DeWald, the Count IV victim of a fraudulent stock sale, after purchasing Securities Investors stock subsequently loaned defendant $8,000 evidenced by a note, Exhibit 74. The check disbursing the proceeds of the loan is Exhibit 73. Such exhibits and testimony relating thereto were received in evidence over defendant's objection based on relevancy and materiality. After hearing from counsel extensively, the testimony was admitted. The record includes a letter from the defendant and DeWald's testimony that the loan was made for the purpose of aiding Securities Investors to purchase an insurance company, and that the loan proceeds were not used for that purpose. Acquisition of insurance companies was represented by the defendant to be one of the prime objectives of Securities Investors. The evidence relating to the loan has a bearing on the scope and extent of the fraudulent scheme. In Hartzell v. United States, 8 Cir., 72 F.2d 569, 584, a mail fraud case, we held:

" 'In prosecutions of this character, great latitude is allowed in the introduction in evidence of attending circumstances. Smith v. United States (C.C.A. 8) 267 F. 665. "The competency of a collateral fact to be used as the basis of legitimate argument is not to be determined by the conclusiveness of the inferences it may afford in reference to the litigated fact. It is enough if these may tend, even in a slight degree, to elucidate the inquiry, or to assist, though remotely, to a determination probably founded in truth." Williamson v. United States, 207 U.S. 425, 28 S. Ct. 163, 172, 52 L. Ed. 278. False statements outside the scheme charged are competent to show the defendant's fraudulent intent. Busch v. United States (C.C.A. 8) 52 F.2d 79; United States v. Sprinkle (C.C.A. 2) 57 F.2d 968; Vause v. United States (C.C.A. 2) 53 F.2d 346. The evidence admissible to establish the scheme and the intent may be extensive in scope and rests largely within the discretion of the trial judge. These admissions tended to show the nature of the scheme, the falsity of the representations, and the knowledge and intent of the defendant.'

"To like effect, see Llanos v. United States, 9 Cir., 206 F.2d 852, 855; Suetter v. United States, 9 Cir., 140 F.2d 103, 107.

"In any event, the evidence in support of the fraudulent scheme is strong. Defendant's argument on prejudicial error is brief and weak.

"Defendant has not established that any prejudicial error was committed in receiving Exhibits 73 and 74 and the testimony relating thereto."

The defendant next assigns as error the admission into evidence of the stop order issued by the department on February 21, 1977. The defendant argues that he did not receive proper notice of the stop order, and therefore the order should not have been admitted into evidence against him. He concludes there was not sufficient evidence to support a find-

ing that the registration of Solar America had been revoked.

Neb. Rev. Stat. § 8-1109.02 (Reissue 1977) provides: "Upon the entry of an order denying effectiveness to, or suspending or revoking the effectiveness of, a registration statement to register securities under any part of section 8-1109 or 8-1109.01, the director shall promptly notify the issuer of the securities and the applicant or registrant that the order has been entered and of the reason therefor and that within fifteen days after the receipt of a written request the matter will be set down for hearing. If no hearing is requested within fifteen days and none is ordered by the director, the director shall enter his written findings of fact and conclusions of law and the order will remain in effect until it is modified or vacated by the director. If a hearing is requested or ordered, the director, after notice of and opportunity for hearing to the issuer and to the applicant or registrant, shall enter his written findings of fact and conclusions of law and may modify or vacate the order. The director may modify or vacate a stop order if he finds that the conditions which prompted its entry have changed or that it is otherwise in the public interest to do so."

The department was unable to produce a certified mail receipt, and the defendant argues that the lack of a receipt is conclusive proof that defendant was not on notice of the stop order.

The evidence shows that a copy of the stop order was mailed to the defendant and that the defendant discussed the order with the department after its issuance. This evidence supports a conclusion that the defendant had actual notice of the stop order. "Generally a notice is regarded in law as actual when the person sought to be affected by it knows of the existence of the particular fact in question . . . ." 66 C.J.S. *Notice* § 3 at 637 (1950). See, also, *Howell v. Fletcher*, 157 Neb. 196, 59 N.W.2d 359 (1953), in which we stated that proof of mailing a notice is

prima facie proof that it was received. The statute requires that notice be given, but does not require a particular form. The order was properly admitted.

The defendant raises issues regarding the department's compliance with § 8-1109.02; in particular, the provisions affording a right to a hearing and requiring the director to enter written findings of fact and conclusions of law. Whether or not these provisions were complied with is of no relevance in this criminal appeal. These are collateral matters which do not render the defendant's criminal activity less criminal. We said in *Scherer v. State*, 168 Neb. 127, 134-35, 95 N.W.2d 329, 334 (1959): "The gist of this case is that defendants failed to obtain authority of any kind but, flaunting [sic] and violating the statutes, they sold securities in complete disregard of the Blue-Sky Law, and what is more, defendants made false promises and offered financial inducements to the buyers of securities which they never kept and never intended to perform. Defendants were and are in no position to collaterally raise the alleged invalidity of the forms of application heretofore described and such alleged invalidity was not in any sense a defense to the crimes charged.

"In that connection, such conclusions are supported by People v. Calabro, 7 Misc. 2d 732, 170 N.Y.S.2d 876; Kilgore Nat. Bank v. Federal Petroleum Board, 209 F.2d 557; State v. Andre, 101 Mont. 366, 54 P.2d 566; State v. Grimshaw, 49 Wyo. 192, 53 P.2d 13; Hyde v. State, 131 Tenn. 208, 174 S.W. 1127; and People v. Asta, 343 Mich. 507, 72 N.W.2d 282. Authorities cited and relied upon by defendants are entirely distinguishable and not controlling here. To discuss them further would serve no useful purpose except to unduly prolong this opinion.

"This court long ago established the general rule that in criminal cases it is not error to exclude evidence which is not substantive proof of any fact relative to the issue, and evidence which does not tend to establish the guilt or innocence of a defendant of a

crime charged is immaterial and should be excluded. Burlingim v. State, 61 Neb. 276, 85 N.W. 76; Kastner v. State, 58 Neb. 767, 79 N.W. 713."

During the trial the defense learned that the State had transcribed statements of its witnesses but had not disclosed these statements to the defense. The defendant moved for a mistrial because the State had failed to disclose these statements to the defense. The trial court ordered that the transcriptions be turned over to the defense, and granted a continuance so that the defense could examine the documents. The trial court examined the documents and stated that it had found no exculpatory material therein. The motion for a mistrial was overruled.

In *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), the U.S. Supreme Court held that suppression by the prosecution of material evidence favorable to the defendant violates the defendant's right to due process and a fair trial. See, also, *State v. Peery*, 205 Neb. 271, 287 N.W.2d 71 (1980). In the present case the trial court found that no such favorable evidence was withheld.

Any prejudicial effect a failure to disclose the evidence may have had upon the defendant's right to a fair trial was mitigated by the procedure followed by the trial court. The trial court ordered the evidence turned over to the defendant, granted a continuance, and examined the documents itself. See *United States v. Espericueta-Reyes*, 631 F.2d 616 (9th Cir. 1980), in which similar steps were held sufficient to mitigate the prejudice resulting from a failure to disclose inculpatory evidence until the day before trial.

We are unable to consider the statements in question because they were not included in the bill of exceptions in this case. A bill of exceptions is the only vehicle for bringing evidence before the Supreme Court. *State v. Manchester*, 213 Neb. 670, 331 N.W.2d 776 (1983). Evidence which does not appear

in the record can not be considered by this court on appeal. *State v. Spurgeon*, 200 Neb. 719, 265 N.W.2d 224 (1978).

The defendant raises several issues with regard to the instructions given to the jury in this case. The defendant contends that the jury should have been instructed with regard to the exemptions from the requirement for security registration. The State is not required to prove lack of an exemption as an element of the offense; rather, the issue may be raised as a defense to a charge of unlawful sale of unregistered securities. *State v. Buchman*, 361 So. 2d 692 (Fla. 1978). The defendant bears the burden of proof as to a claim of exemption. *Id.*; Neb. Rev. Stat. § 8-1121 (Reissue 1977).

In the present case the record is devoid of any proof that the securities involved fell within any of the exemptions listed in Neb. Rev. Stat. §§ 8-1110 and 8-1111 (Reissue 1977). The court properly refused to instruct regarding the exemptions, as to instruct upon issues not supported by the evidence constitutes error. *Todd v. Boals*, 187 Neb. 51, 187 N.W.2d 284 (1971); *Pulliam v. State*, 167 Neb. 614, 94 N.W.2d 51 (1959).

The defendant also contends that the trial court failed to properly instruct the jury with regard to the intent which the State must prove as an element of the offense. The defendant argues that the court incorrectly instructed with regard to the definition of "willfully." The defendant requested an instruction which defined this term as requiring proof of a "bad purpose either to disobey or disregard the law." The defendant argues that because this was a criminal proceeding, in order to convict, proof of a "specific intent" to violate the law was required.

The jury was instructed as follows: "Willfully . . . means knowingly, as distinguished from accidentally or involuntarily, and bears on the intent required. All that is required is proof beyond a reasonable doubt that the defendant intended to commit the acts

with which he is charged, that is, that he was aware of what he was doing. Proof is not required that the defendant acted with evil motive or with a specific intent that he knew that his conduct violated the law."

The defendant was charged under the following statutes: "(1) It shall be unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly:

"(a) To employ any device, scheme, or artifice to defraud;

"(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or

"(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person." § 8-1102(1).

"(1) It shall be unlawful for any person to transact business in this state as a broker-dealer, issuer-dealer, or agent, except in transactions exempt under section 8-1111, unless he is registered under sections 8-1101 to 8-1124. It shall be unlawful for any broker-dealer to employ an agent unless the agent is registered. It shall be unlawful for an issuer to employ an agent unless the issuer is registered as an issuer-dealer and unless the agent is registered. It shall be unlawful for any person to transact business in this state as an investment adviser unless (a) he is so registered under sections 8-1101 to 8-1124, or (b) he is registered as a broker-dealer under sections 8-1101 to 8-1124, or (c) his only clients in this state are investment companies, as defined in the Investment Company Act of 1940, or insurance companies." § 8-1103(1).

"It shall be unlawful for any person to offer or sell any security in this state, except securities exempt under section 8-1110 or when sold in transactions exempt under section 8-1111, unless such security is

registered by notification under section 8-1105 or by coordination under section 8-1106 or by qualification under section 8-1107." § 8-1104.

The intent required to sustain a criminal conviction is stated in § 8-1117: "(1) Any person who *willfully violates* any provision of sections 8-1101 to 8-1124 except section 8-1113, or who willfully violates any rule or order under the provisions of sections 8-1101 to 8-1124, or who willfully violates the provisions of section 8-1113 knowing the statement made to be false or misleading in any material respect shall be guilty of a Class IV felony. No indictment may be returned or information filed under sections 8-1101 to 8-1124 more than five years after the alleged violation." (Emphasis supplied.)

While it is generally true that a more culpable mental state is required in a criminal proceeding than is required to impose civil liability under the blue sky laws, it does not appear that the courts have adopted the strict definition of "willfully" urged by defendant.

Under the Uniform Securities Act, adopted by more than half the states, including Nebraska, civil liability may be imposed for both intentional and negligent misrepresentations or omissions. 3 A. Bromberg & L. Lowenfels, Securities Fraud & Commodities Fraud § 8.4(210) (1982). However, a more strict requirement is present in criminal cases: "The state statutes typically require some element of *scienter* for criminal conviction under the fraud provisions. This is usually expressed by reference to 'wilful' violations [§ 8-1117] . . . . However, this may mean no more than that the actor was aware of what he was doing." *Id.* at 204.2.

Several courts have expressly held that proof of a specific intent, evil motive, or knowledge that the law was being violated is not required to sustain a criminal conviction under a state's blue sky laws. In *State v. Sheets*, 94 N.M. 356, 366, 610 P.2d 760, 770 (1980), the court said: "To meet the willfulness

requirement, all that is required is proof that the person acted intentionally in the sense that he was aware of what he was doing." See, also, *People v. Blair*, 195 Colo. 462, 579 P.2d 1133 (1978), in which the court stated that "willfully" means "knowingly" or "awareness." The court held: "There is no requirement that the defendant purposely intended to violate the law in order to be held criminally liable." *Id.* at 468-69, 579 P.2d at 1138-39. In *State v. Gunnison*, 127 Ariz. 115, 120, 618 P.2d 609, 614 (1979), *approved in part, disapproved in part* 127 Ariz. 110, 618 P.2d 604 (1980), the court said: "A specific intent, an evil motive or knowledge that the law was being violated is not required in order to find a criminal violation."

Specific intent need not be proven to sustain a conviction under the fraud provisions, see, e.g., *People v. Blair*, *supra*, or under the registration provisions, see, e.g., *State v. Sheets*, *supra*. The instruction given was correct.

The defendant contends that the evidence was insufficient to sustain his conviction for unlawful sale of securities when his registration as an agent of the issuer-dealer had been revoked. Defendant argues that the stop order issued February 21, 1977, did not revoke his registration as an agent.

The stop order revoked the registration of the stock and of Solar America, Inc., the issuer-dealer. See Neb. Rev. Stat. § 8-1101(6) and (7) (Reissue 1977). Section 8-1103(3)(c) provides in part: "The registration of an agent shall not be effective during any period when he is not associated with a registered broker-dealer or issuer-dealer specified in his application or a notice filed with the director." The Draftsmen's Commentary to the corresponding section in the uniform act (§ 201(b)) states in part: "In all the statutes which require agents to register, the agent is not effectively registered unless he is employed by a registered broker-dealer or by an is-

suer." L. Loss, Commentary on the Uniform Securities Act 13 (1976).

Defendant's registration as an agent was revoked when the issuer-dealer's registration was revoked. There is sufficient evidence that the defendant was aware of the revocation order and willfully sold securities after his registration as an agent had been revoked.

The defendant's final assignment of error is that the sentences were excessive in the light of his past record.

In *State v. Hadley & Marker*, 205 Neb. 412, 416-17, 288 N.W.2d 37, 40 (1980), we said: "And finally, it is contended that the sentences were excessive. In the first instance, we have often said that a sentence within statutory limits will not be disturbed on appeal absence [sic] an abuse of discretion on the part of the trial court. See State v. Stephenson, 199 Neb. 362, 258 N.W.2d 824. Moreover, while neither appellant had any previous criminal record, it is apparent from the evidence adduced that both appellants had been warned of the violations well in advance of the time they proceeded to carry out their scheme. Notwithstanding the fact that both their attorney and the Department of Banking had informed them of the violations and had afforded them an opportunity to correct the situation without criminal prosecution, the appellants chose to ignore those warnings and proceed as they wished. Too often what is described as 'white-collar crimes' go unpunished because of the argument that there was 'no violence.' While it may be true that there was no physical violence involved herein, it is likewise true that the taking of an individual's life savings may do more violence to their well-being than the physical abuse. The appellants, without care or concern for their investors who relied upon the appellants' ability to tell a good story, willingly accepted the investors' money in return for illegal securities. Individuals placed their confidence as well as their money in appellants, only

to have the confidence destroyed and the money consumed. So-called 'white-collar' criminals must understand that such behavior will not be tolerated and even first offenders may be required to serve time in prison. Punishment by incarceration in these cases was demanded. The sentences in these cases were not in any manner excessive and may have been said to be light."

A sentence imposed within statutory limits will not be disturbed on appeal in the absence of an abuse of discretion. *State v. Manchester*, 213 Neb. 670, 331 N.W.2d 776 (1983). The sentences imposed were within statutory limits. See, § 8-1117 and Neb. Rev. Stat. § 28-105 (Reissue 1979).

The sentences imposed were equivalent to a sentence of from 4 to 15 years. Under the circumstances of this case, the sentences imposed were not excessive.

The judgment of the District Court is affirmed.

AFFIRMED.

WILLIAM NUSS ET AL., APPELLEES, V. PATHFINDER IRRIGATION DISTRICT, APPELLANT.

336 N.W.2d 584

Filed July 22, 1983. No. 82-331.

1. **Mandamus: Irrigation Districts: Bridges.** Mandamus is a proper remedy to compel those in control of an irrigation canal to erect a bridge or bridges across the canal under the provisions of Neb. Rev. Stat. § 46-255 (Reissue 1978).
2. **Irrigation Districts: Bridges.** The provisions of Neb. Rev. Stat. § 46-255 (Reissue 1978), requiring a bridge or bridges to be built across irrigation canals and ditches under specified factual circumstances, apply whether the lands were owned by the owner at the time the canal was built or were subsequently acquired, where the tracts lying on different sides of the canal together constitute one farm or ranch.
3. **Mandamus: Appeal and Error.** An action in mandamus is a law action in which a jury trial on issues of fact is not demandable as a

matter of right, and the findings of fact by the District Court will not be disturbed by this court on appeal unless clearly wrong.

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

R. L. Gilbert, for appellant.

John F. Wright of Wright, Simmons & Selzer, for appellees.

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

MCCOWN, J.

This is an action in mandamus to compel the defendant, Pathfinder Irrigation District, to erect a bridge across an irrigation canal under the provisions of Neb. Rev. Stat. § 46-255 (Reissue 1978). The District Court granted a peremptory writ of mandamus and the irrigation district has appealed.

The plaintiffs own approximately 2,400 acres of land in Scotts Bluff County. The southerly portion of plaintiffs' land lies in Sections 11 and 12, Township 23 North, Range 54 West of the 6th P.M. The Highline Canal, operated by the defendant irrigation district, winds in a northwesterly direction across the extreme southwest corner of Section 12 and continues across the section line between Sections 11 and 12 in a westerly and then southwesterly direction across the southeast corner of Section 11. Except for the canal right-of-way, plaintiffs own all the land in Section 12, and all the land in Section 11 north of the canal. Sixty-three hundredths acres of plaintiffs' land in the southwest corner of Section 12 lies south of the canal.

The Highline Canal was constructed by the United States as an irrigation canal in the years between 1905 and 1912. In 1926, pursuant to federal law, the care, operation, and maintenance of the canal was transferred to the defendant, Pathfinder Irrigation District. The district has operated the canal since

1926, but title to the canal remains in the United States.

In 1953 the county placed a used bridge across the canal on the boundary line between Sections 11 and 12 a short distance north of the south boundary of the two sections, which connected plaintiffs' land north of the canal with plaintiffs' land to the south of the canal. The county also opened, graded, and has maintained a road running south of the bridge along the section line between Sections 11 and 12 and on south to connect with the county road system to the south.

Plaintiffs' predecessor in title constructed improvements on plaintiffs' land consisting of a house and corrals at a point approximately three-quarters of a mile north of the bridge in Section 11 close to the section line between Sections 11 and 12. In 1955 plaintiffs' predecessor built a road from the bridge north to the improvements. At that time it was the policy of the local school board that the county maintain any road on which a schoolbus traveled. The county maintained the road north of the bridge until 1962 when the last of the children living there had completed school. The county has not maintained the road north of the bridge since that time but has continued to maintain the road south of the bridge. The county highway superintendent testified that the county property stopped at the south right-of-way of the Highline Canal and that the bridge over the canal and the road running north to the improvements were not county property.

Plaintiffs purchased the property in 1971. In 1974 plaintiffs and the owners of the small portion of land in Section 11 to the west conveyed land located on the section line between Sections 11 and 12 to the county so that the county could construct a public road on the section line south of the bridge.

The only practical access to the plaintiffs' property north of the canal is by way of the bridge and the county road south of the bridge. There is no ac-

cess to the north or to the west. There is a road running north and south along the east side of Section 12, but it is separated from the improvements on plaintiffs' land by the Winter Creek Drain. Because of the terrain, soil conditions, flooding, and snow, a trail road to the east is dangerous and virtually impossible to drive over. There is also a Winter Creek Draw to the west of the improvements and both Winter Creek Draw and Winter Creek Drain intersect the Highline Canal to the west and to the east of the bridge. At these points siphons carry the canal water undergound so that drainage and flood water from the drain and draw will not wash out the canal. Although these siphons are possible passage points to plaintiffs' land to the south, they are ordinarily impassable to vehicles and it is necessary to cross over property owned by other persons in order to reach the public road south of the bridge.

Over the years all sorts of vehicular traffic, including livestock trucks, have used the bridge in going to or coming from the improvements on plaintiffs' ranch. Sometime in 1981 a propane truck broke through the bridge, and since that time the bridge has been unsafe for anything but light traffic.

Plaintiffs asked the defendant to replace the bridge but the defendant refused. On October 19, 1981, the plaintiffs filed this proceeding for a writ of mandamus to compel the defendant to install a bridge, alleging that the bridge was necessary for the free and convenient use of plaintiffs' land on both sides of the canal. The defendant denied that it was in control of the canal and denied that the bridge was necessary for the free and convenient use of plaintiffs' lands.

Trial was had to the court and the court inspected the premises and took the matter under advisement. On April 15, 1982, the District Court found that the defendant irrigation district was in control of the canal and that the canal separates lands of the plaintiffs. The court also found that the trail road to the

east is dangerous, virtually impossible to drive over in good weather and impossible in rain or snow; the crossover of defendant's canal to the east of defendant's bridge is not possible at all because of terrain and soil conditions; and the crossover to the west of the bridge is not passable for large vehicles such as trucks, not suitable as a road, and is subject to flooding from Winter Creek Drain. The court also found that plaintiffs have no free and convenient access to their lands separated by the canal except by use of a bridge over the canal. The District Court specifically found that it was necessary for the free and convenient use of plaintiffs' land on both sides of defendant's canal that the defendant erect a substantial and convenient bridge across its canal at the present site of the old bridge, and issued a writ of mandamus accordingly. The defendant has appealed.

Section 46-255 provides in part: "Any person, constructing a ditch or canal through the lands of another, having no interest in such ditch or canal, shall build such ditch or canal in a substantial manner so as to prevent damage to such land. In all cases where necessary for the free and convenient use of lands on both sides of the ditch or canal by the owner or owners of such lands, the owner or those in control of such ditch shall erect substantial and convenient bridges across such canal or ditch . . . ."

This court has held that mandamus is a proper remedy to compel those in control of a canal to erect a substantial bridge or bridges across the canal, and that the statute applies in all cases, whether the lands were owned by the owner at the time the canal was built or were subsequently acquired by purchase, where the tracts lying on different sides of the canal together constitute one farm or ranch. *State ex rel. Johnson v. Central Neb. Public Power & Irrigation Dist.*, 140 Neb. 471, 300 N.W. 379 (1941); *State ex rel. O'Shea v. Farmers Irrigation District*,

98 Neb. 239, 152 N.W. 372 (1915), *aff'd* 244 U.S. 325, 37 S. Ct. 630, 61 L. Ed. 1168 (1917).

The defendant contends that it is not in control of the canal because the title to the canal remains in the United States. Although it is clear that title to the canal remains in the United States, it is also clear that for present purposes, and under the terms of the statute, the defendant is in control of the canal and subject to the requirements of § 46-255.

The federal statute under which the defendant took over the operation of the canal provides: "Whenever any legally organized water-users' association or irrigation district shall so request, the Secretary of the Interior is authorized, in his discretion, to transfer to such water-users' association or irrigation district the care, operation, and maintenance of all or any part of the project works, subject to such rules and regulations as he may prescribe." 43 U.S.C. § 499 (1976). See, also, 43 U.S.C. § 500 (1976).

The contract between the defendant and the United States under which the canal and its works were transferred to the defendant by the United States in 1926 provides that the defendant take over the "care, operation, and maintenance" of the canal and that the "operation, maintenance, and control of said transferred works [shall] be without expense to the United States."

The project manager for the Bureau of Reclamation testified that the operation, management, and control of the canal had been given to the defendant by the United States and that the United States retained only the authority to review the defendant's maintenance of the canal to make sure that it was adequate. The bureau had no objection to the construction of a bridge so long as it did not interfere with the operation and maintenance of the canal.

The statutory language requires the owner *or those in control of such ditch* to erect bridges. The statutory language contemplates the exact situation existing in the present case. The statutes, the con-

tracts, and the past and present system of operation and maintenance all establish that the defendant has the requisite "control" of the canal and is not excused from compliance with the statute merely because the United States is the technical owner of the canal.

The defendant also contends that a bridge is not necessary for the free and convenient use of plaintiffs' land on both sides of the canal. The defendant maintains that the plaintiffs can use other routes but ignores the evidence that the other routes suggested by the defendant are virtually impassable for most of the year and that the turning radius and the road base at both siphon crossovers are inadequate to allow a loaded livestock truck to pass.

The District Court viewed the premises, including the bridge location and the alternate access points, and specifically found that plaintiffs have no free and convenient access to their lands except by use of the bridge and that it is necessary for the free and convenient use of plaintiffs' land on both sides of defendant's canal that the defendant erect a substantial and convenient bridge across the canal at the present site of the old bridge.

An action in mandamus is a law action in which a jury trial on issues of fact is not demandable as a matter of right, and the findings of fact by the District Court will not be disturbed by this court on appeal unless clearly wrong. *State ex rel. Blome v. Bridgeport Irr. Dist.*, 205 Neb. 97, 286 N.W.2d 426 (1979).

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

AFFIRMED.

LINCOLN EDUCATION ASSOCIATION, AN UNINCORPORATED ASSOCIATION, APPELLEE, V. THE SCHOOL DISTRICT OF THE CITY OF LINCOLN, COUNTY OF LANCASTER, STATE OF NEBRASKA, A POLITICAL SUBDIVISION, ALSO KNOWN AS LINCOLN PUBLIC SCHOOLS, APPELLANT.
MILLARD EDUCATION ASSOCIATION, AN UNINCORPORATED ASSOCIATION, APPELLEE, V. THE SCHOOL DISTRICT OF MILLARD, COUNTY OF DOUGLAS, STATE OF NEBRASKA, A POLITICAL SUBDIVISION, APPELLANT.

336 N.W.2d 587

Filed July 22, 1983. Nos. 82-424, 82-463.

1. **Schools and School Districts: Labor and Labor Relations.** Teachers in Class III, IV, and VI school districts are subject to the provisions of the Teachers' Professional Negotiation Act.
2. _____: _____. The provisions of the Teachers' Professional Negotiation Act must be exhausted by covered teachers before action can be taken before the Commission of Industrial Relations.
3. _____: _____. Absent exhaustion, the Commission of Industrial Relations has no jurisdiction over disputes between school boards and covered teachers.

Appeal from the Nebraska Commission of Industrial Relations. Reversed.

Edwin C. Perry of Perry, Perry, Witthoff, Guthery, Haase & Gessford, P.C., for appellant School District of Lincoln.

Rjean K. Knowles and Frank M. Schepers of Young & White, for appellant School District of Millard.

Theodore L. Kessner of Crosby, Guenzel, Davis, Kessner & Kuester, for appellees.

BOSLAUGH, MCCOWN, WHITE, HASTINGS, CAPORALE, and SHANAHAN, JJ.

WHITE, J.

In these consolidated actions we are again called on to consider the interrelation of the Teachers' Professional Negotiation Act, Neb. Rev. Stat. §§ 79-1287 to 79-12,100 (Reissue 1981), and the Commission of

Industrial Relations, Neb. Rev. Stat. §§ 48-801 et seq. (Reissue 1978).

No dispute exists as to the facts in each case and only a common question of law is presented.

Appellants School District of Millard and School District of Lincoln, respectively, are Class III and Class IV school districts, and they are subject to the terms of the Teachers' Professional Negotiation Act (TPNA). Appellees, Lincoln Education Association and Millard Education Association, are unincorporated voluntary associations representing a majority of the full-time teachers of the respective school systems.

Pursuant to a petition filed by each association, the Commission of Industrial Relations (CIR) ordered certification elections, at which elections the associations were chosen as the bargaining agent for their respective groups. The appellant school districts objected to the jurisdiction of the CIR, contending that no industrial dispute existed and that the provisions of the TPNA had not been exhausted. § 48-810. The CIR overruled the challenge to jurisdiction.

The parties agree that appellee Millard Education Association did not seek approval of the Millard School District as a bargaining representative and that the Lincoln Education Association for 13 years had been recognized as the bargaining agent and, by the terms of a contract for the previous year, it was still recognized as the bargaining agent for the following year provided a filing was made prior to January 1 of each year of a membership list certifying that a majority of the teachers are members of the association.

The issue, as succinctly stated by the appellees, is: " 'Is the TPNA "exhausted" when an education association seeks or attains certification as an exclusive collective bargaining agent under the provisions of the CIR Act?' "

The provisions of the TPNA involved in this mat-

ter provide: "Organizations of certificated public school employees shall have the right to represent their members in matters of employee relations with their public school district employers." § 79-1289.

"Notwithstanding the provisions of sections 79-1287 to 79-1296, no board of education or school board of any public school district in the state shall be required to meet or confer with representatives of an organization of certificated school employees unless a majority of the members of such board determines to recognize such organization. Any such recognition shall be and remain in effect for a period of one year." § 79-1290.

The provisions of the CIR statutory scheme involved here provide: "All industrial disputes involving governmental service, service of a public utility, or other disputes as the Legislature may provide shall be settled by invoking the jurisdiction of the Court of Industrial Relations; *Provided*, such court shall have no jurisdiction over any persons, organizations, or school districts subject to the provisions of the Nebraska Teachers' Professional Negotiations [sic] Act, sections 79-1287 to 79-1295, until all provisions of such act have been exhausted without resolution of the dispute involved." § 48-810.

As can be readily seen, while the TPNA grants teachers the right to organize, it does not require the district to recognize or negotiate with their association. It is that matter that is the crux of this dispute. The associations maintain that under the CIR laws they have an absolute right to petition for an election to determine an exclusive bargaining unit for *all* employees in the unit if the requirements of § 48-838 are complied with.

The parties concede that the district is without power to certify an association as representing nonconsenting employees or to recognize such an association for a term in excess of 1 year. § 79-1290.

It is the perceived lack of bargaining ability re-

sulting from the power of a school district board to refuse to recognize a bargaining agent and to refuse to bargain on all or part of a contract proposal, § 79-1292, that prompted the associations to request a CIR-supervised election, with which the districts would be obliged to recognize and collectively bargain, and if they are unable to agree, to have the matter settled by the CIR.

In *Sidney Education Assn. v. School Dist. of Sidney*, 189 Neb. 540, 203 N.W.2d 762 (1973), we said that the TPNA must be exhausted before action before the CIR can be taken, and that the refusal to recognize the association as a bargaining agent is an exhaustion of rights under the TPNA. Absent a refusal to recognize the association, or an impasse, the TPNA has not been exhausted.

We held in *Sidney*, *supra* at 545, 203 N.W.2d at 766, that the Legislature "chose to let the machinery for permissive negotiation for Class III, IV, and V school districts established by TPNA stand. . . . When the provisions of TPNA were exhausted without settlement, then the Industrial Relations Act became operative to those school districts."

However imaginatively the proposition is stated, whether in terms of relative bargaining power of the parties or in terms of the limitation of the power of the districts as compared by the CIR, the effect of the method proposed by the appellee associations is to render useless the TPNA. No authority is cited as to how or by what rationale we are to ignore the plain words of § 48-810, nor how we may ignore the requirements of the TPNA. The actions of the CIR were clearly without jurisdictional basis and the decisions are reversed.

REVERSED.

KRIVOSHA, C.J., participating on briefs.

Cite as 214 Neb. 899

IN RE ESTATE OF FRANCES MAUDE THOMPSON, ALSO KNOWN AS F. MAUDE THOMPSON AND MAUDE THOMPSON, DECEASED.

JOHN E. FINLEY, APPELLANT, V. VICTOR E. THOMPSON, APPELLEE.

336 N.W.2d 590

Filed July 22, 1983. No. 82-488.

1. **Directed Verdict.** A motion for a directed verdict must be treated as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference which can reasonably be deduced from the evidence.
2. **Wills: Revocation.** Revocation of a will may be by either a subsequent will or an act done to the document. If revocation is by a subsequent will, it must be properly executed.
3. _____: _____. Where it cannot be established that a subsequent will was executed in accordance with the statute, there is insufficient evidence to support a finding that it was fully executed and thus it cannot revoke a prior will.

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

John P. Heitz, for appellant.

Warren L. Reimer of Ptak, Ptak & Reimer, for appellee.

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

CAPORALE, J.

Victor E. Thompson, appellee herein, filed a petition for the probate of the last will and testament dated September 2, 1964, of his deceased wife, Frances Maude Thompson. The appellant, John E. Finley, son of the decedent through a prior marriage, filed a petition seeking a formal adjudication of his deceased mother's intestacy. The county court admitted the 1964 will to probate. On appeal the District Court sustained the proponent husband's motion for a directed verdict at the close of the con-

testant's evidence, dismissed the contestant's petition, and admitted the 1964 will to probate. We affirm.

The District Court's actions must be tested in accordance with the rule that a motion for a directed verdict must be treated as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference which can reasonably be deduced from the evidence. *Frahm v. Carlson*, *ante* p. 532, 334 N.W.2d 795 (1983); *Flakus v. Schug*, 213 Neb. 491, 329 N.W.2d 859 (1983).

The son's claim is that his mother executed a subsequent will which revoked the 1964 document offered for probate by the husband. The only evidence concerning the issue is the testimony of the contestant son and his wife. It is to the effect that in July of 1965 they examined and read a one- or two-page typewritten document which the decedent, a Nebraska resident, showed them while she was visiting at their home in Colorado, and which she said was her will. The document began with the words, "Last Will and Testament of Frances Maude Thompson." It contained two signatures in addition to that of his mother, but they could not recall whose they were. According to the son, there was also "some kind of a mark on it for a notary." It bore a 1965 date, but he could not recall the month. The son believed, but could not "swear," that the document contained a clause revoking former wills. His wife recalled such a clause. The son testified further that "The Will specified that if [sic] the property was first to go to Vic Thompson and then to me without restriction, in other words, he wouldn't be deprived of this property during his life time. . . . It had nothing in there that said, specific words, for life." His wife generally corroborated the son in

this regard. They could recall no other specific portions of the document.

It is the son's contention that although the above-cited testimony is insufficient to establish the distributive provisions of the 1965 will so as to entitle it to probate, the evidence is sufficient to establish that a will was duly made and executed after the 1964 will such as to destroy the earlier will. The effect of that circumstance would be that his mother would have died intestate and her property would therefore be subject to distribution under the laws of descent rather than under the 1964 document. In support of that contention he cites Neb. Rev. Stat. § 30-2332 (Reissue 1979); *Clark v. Turner*, 50 Neb. 290, 69 N.W. 843 (1897); and *Williams v. Miles*, 62 Neb. 566, 87 N.W. 315 (1901), 63 Neb. 851, 89 N.W. 455 (1902), 63 Neb. 859, 89 N.W. 451 (1902), 68 Neb. 463, 94 N.W. 705 (1903), 68 Neb. 479, 96 N.W. 151 (1903), 73 Neb. 193, 102 N.W. 482 (1905), 87 Neb. 455, 127 N.W. 904 (1910). Section 30-2332 provides: "A will or any part thereof is revoked (1) by a subsequent will which, as is evident either from its terms or from competent evidence of its terms, revokes the prior will or part expressly or by inconsistency; or (2) by being burned, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revoking it by the testator or by another person in the presence of and by the direction of the testator." *Clark v. Turner*, *supra*, denied probate to a purported subsequent will which had been either lost or stolen. The effective holding of that case is that the declarations of a testator are competent evidence as to whether a will was made, but are insufficient of themselves to prove its contents. See, also, *Muse v. Stewart*, 173 Neb. 520, 113 N.W.2d 644 (1962). The *Clark* court observed it did not appear that any person ever read the will or was aware of any portion of its contents except through statements made by the testator. That is not the situation herein, as the son and his wife testified they did read the 1965 document and

knew some of its contents. The *Clark* court further noted, however, that while a lost will may be established by secondary evidence, the evidence must be "direct, clear, and convincing." 50 Neb. at 302, 69 N.W. at 846. The long and tortuous progress of *Williams v. Miles* ultimately resulted in the dismissal of the petition brought by those seeking to establish a purported subsequent lost or stolen will. The case finally rested on the factual determination that no subsequent will had ever existed. In reaching that result this court reaffirmed what it called "the well-settled doctrine" of this state that " 'parol evidence to show that a former will was revoked by implication by reason of a subsequent will, which cannot be found, must be clear, unequivocal and convincing.' " 87 Neb. at 479, 127 N.W. at 913.

In the posture of this case the threshold question becomes whether the contestant's evidence meets the "clear, unequivocal, and convincing" standard required to establish that a subsequent will was duly executed. We find that it does not.

One need look no further than the first two sentences of the Comment to § 30-2332 to reach that conclusion. Those sentences read: "Revocation of a will may be by either a subsequent will or an act done to the document. If revocation is by a subsequent will, it must be *properly executed.*" (Emphasis supplied.) The evidence does not tell us where the will was executed, what formalities, if any, the witnesses observed in affixing their signatures to the document, or what role a notary, if any, played in the execution process.

We are not told in what jurisdiction the purported subsequent will was executed, nor was the trial court presented with any foreign law. Under those circumstances we presume the common law or statutes of whatever jurisdiction may be relevant are the same as those of Nebraska. Neb. Rev. Stat. § 25-12,101 (Reissue 1979); *Scott v. Scott*, 153 Neb. 906, 46 N.W.2d 627 (1951).

In 1965, Neb. Rev. Stat. § 30-204 (Reissue 1964) provided that, except for nuncupative wills, and wills properly executed in other jurisdictions, wills must be signed by the testator, or some person in his presence, and by his express direction, and attested and subscribed in the presence of the testator by two or more competent witnesses. No showing exists that these formalities were followed. Faced with the same language as to method of execution presently contained in Neb. Rev. Stat. § 30-2327 (Reissue 1979) that, except for holographic wills, certain written statements, and wills properly executed in other jurisdictions, every will is required "to be signed by at least two individuals each of whom witnessed either the signing or the testator's acknowledgment of the signature or of the will," the court in *Matter of Estate of Weidner*, ____ Mont. ____, 628 P.2d 285 (1981), held that where it could not be established that there was a second individual who had witnessed either the signing or the testator's acknowledgment of her signature, there was insufficient evidence to support a finding that the will was fully executed and thus it could not revoke a prior will. We do not read the language of *Williams v. Miles* found in 68 Neb. at 466-76, 94 N.W. at 706-10, to state otherwise. That portion of the *Williams* history recites that the two attesting witnesses testified the purported testator asked them to witness his signature to his will, that he signed his name to the document, which they did not read, in their presence, and procured their signatures. In discussing that testimony the court, through Pound, C., said that if the instrument were in fact signed, attested, and subscribed, as required by the statute, a formal clause reciting the details of the transaction was not required.

There was no evidence before the trial court herein as to the manner in which the 1965 document was executed. We conclude, therefore, that as a matter of law the evidence does not clearly, unequivocally,

and convincingly establish that the 1965 document was properly executed as the last will and testament of the contestant's mother.

The trial court was correct in sustaining proponent's motion for a directed verdict.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. PETER GUILBEAULT, APPELLANT.

336 N.W.2d 593

Filed July 22, 1983. No. 82-500.

Search Warrants: Affidavits. Where an affidavit used for the purpose of obtaining a search warrant includes both illegally obtained facts as well as facts derived from independent and lawful sources, a valid search warrant may issue if the lawfully obtained facts, considered by themselves, establish probable cause to issue the warrant.

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

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

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

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

KRIVOSHA, C.J.

The appellant, Peter Guilbeault, was convicted in the District Court for Douglas County, Nebraska, of second degree murder in violation of Neb. Rev. Stat. § 28-304(1) (Reissue 1979). Following the trial to the court, a jury having been waived, the trial court ordered a presentence investigation and thereafter sentenced Guilbeault to imprisonment in the Nebraska Penal and Correctional Complex for a term of 30 years. Guilbeault now appeals to this court,

assigning but a single error. He maintains that a search of his apartment in Cohoes, New York, by parole officers at the purported request of the Omaha police resulted in his property being searched in violation of those rights guaranteed to him under the fourth amendment to the U.S. Constitution. He further maintains that by reason of this unlawful search any evidence obtained thereby, even though by means of a proper search warrant, must be considered to be the "fruits of a poisonous tree" and, in accordance with the rules announced by the U.S. Supreme Court in the case of *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963), suppressed. The State, in part, argues that the initial search conducted by the New York parole officer, pursuant to a condition of Guilbeault's parole, is merely an extension of our earlier holding with regard to probation officers and therefore not in violation of the fourth amendment to the U.S. Constitution. See, *State v. Morgan*, 206 Neb. 818, 295 N.W.2d 285 (1980); *State v. Lingle*, 209 Neb. 492, 308 N.W.2d 531 (1981). We need not, however, reach that question in this case. By reason of our decision in *State v. Welsh*, *ante* p. 60, 332 N.W.2d 685 (1983), and in light of the affidavit filed for the purpose of obtaining a search warrant in this case, it is clear that the action taken in the instant case was not in violation of Guilbeault's fourth amendment rights. For that reason the conviction and sentence entered by the trial court must be affirmed.

The record reveals that the nude body of James Manning was found in the front yard of his home in Omaha, Nebraska, on October 1, 1981. Severe bruising was visible on Manning's neck and upper torso. An autopsy established the cause of death as asphyxiation associated with multiple injuries of the upper anterior chest, neck, chin, and left facial area. The pathologist noted that there was a band of contusions of the skin across the upper anterior chest,

neck, and shoulders "with an apparent zig zag pattern to the contused skin."

A police investigation uncovered the fact that between the hours of 11:30 p.m. on September 30, 1981, and 1 a.m. on October 1, 1981, Manning had been seen at two bars with the same man, later identified as Guilbeault. At approximately 1 a.m. on October 1, Manning and Guilbeault left the bar together after Manning purchased two six-packs of Pabst beer. This was the last time Manning was seen alive. Guilbeault was described as wearing a yellow T-shirt, blue jeans, and work boots. Evidence further disclosed that on September 30, 1981, Guilbeault was residing with his wife at the Salvation Army hostel in Omaha, Nebraska. Although Guilbeault's wife slept at the hostel that night, Guilbeault did not return to the hostel until 7:18 a.m. on October 1, 1981. At 1:15 p.m. on October 1, 1981, Guilbeault and his wife departed Omaha via a bus with the destination of Albany, New York.

When the police learned that Guilbeault was on parole from New York State, a Detective Nutsch contacted Douglas Smith, Guilbeault's New York parole officer, in an effort to locate Guilbeault. Detective Nutsch advised Smith that there had been a homicide in Omaha and that the Omaha police were interested in Guilbeault and wanted to know if he had arrived in New York. Nutsch learned from Smith that Smith had been notified on September 20, 1981, that Guilbeault was returning to New York and had been asked to conduct an investigation and employment check. Smith had unsuccessfully attempted to locate Guilbeault at a Cohoes, New York, address on September 27 and again on September 30. Smith left messages for Guilbeault to contact him immediately upon his arrival but Guilbeault had not yet done so. Smith volunteered to return to the Cohoes apartment, since Guilbeault had not checked in yet as instructed.

On October 5, 1981, Smith and another parole offi-

cer went to the apartment in Cohoes, New York, where they believed Guilbeault was living with his brother-in-law, Leon Galvin, and Galvin's wife. They found Guilbeault at home, wearing the combat boots in question. Pursuant to parole condition No. 4, which provided in part that Guilbeault would "permit my Parole Officer to visit me at my residence and/or place of employment and I will permit the search and inspection of my person, residence and property," Smith first made a cursory inspection of the apartment and found two shotguns. Upon closer inspection he found a yellow T-shirt similar to the one described by the Omaha police, but no evidence was seized by Smith at that time. Guilbeault was told to report to Smith the following day. Smith then relayed the information he had obtained to Detective Nutsch.

The next day, on October 6, 1981, Guilbeault met with Smith at the report station in Watervliet dressed in blue jeans and the same combat boots he had been wearing the previous day. In accordance with standard procedure he was photographed and fingerprinted at that time.

The following day, on October 7, 1981, Smith met with two members of the Omaha Police Department and a member of the Douglas County attorney's office. He contacted the chief assistant district attorney for Albany County and the state police unit. On October 8, 1981, a New York state policeman and Sergeant Goodrich of the Omaha Police Department submitted affidavits to the county court for Albany County, New York, seeking a search warrant for the residence and person of Peter Guilbeault. Sergeant Goodrich's affidavit alleged that Manning was in the company of a man positively identified as Guilbeault before his death; that Manning had purchased two six-packs of Pabst beer and left the bar with Guilbeault; that Manning was never seen alive after that time; that Guilbeault and his wife were residing at a Salvation Army hostel during the month of Septem-

ber 1981; that Guilbeault did not return to the hostel until approximately 7:18 a.m. on October 1, 1981, and was still wearing a yellow T-shirt and blue jeans that were soiled and stained and Army-type combat boots; that the pathologist concluded that the pattern injuries found on Manning's body were consistent with the victim having been kicked and stomped by an individual wearing boots of the type described as being worn by Guilbeault; that Manning's clothing, key chain, and wallet had not been recovered; that Douglas Smith, parole officer, had seen Guilbeault on two occasions wearing the combat boots and that they appeared to be of the same type as those used for comparison purposes by the pathologist; that a fingerprint on a Pabst beer can found at the murder scene was positively identified as belonging to Guilbeault; that boots of the type described as being worn by Guilbeault were obtained by officers working with Goodrich; that Goodrich caused the boots obtained and the pattern injuries on Manning to be compared and examined by members of the Omaha police division and Dr. Jerry Jones, a pathologist; and that as a result of that examination it was established that the markings were consistent with each other and that measurements were made, thereby demonstrating the pattern of the boots to be within 1 millimeter in length and separation of the marks on the body of James Manning.

Only one paragraph of Sergeant Goodrich's affidavit made any reference at all to Parole Officer Douglas Smith or any information given to him by Smith. The reference was to the effect that Smith told Goodrich that on October 5, 1981, and again on October 6, 1981, he saw Guilbeault wearing the described Army-type combat boots. No reference was made in the affidavit for the search warrant concerning anything seen or uncovered by Smith during either of his visits with Guilbeault other than his observing Guilbeault wearing boots of the type believed to be worn by the individual who killed Manning.

On the basis of that affidavit a search warrant was issued that morning directing the New York state police to search the residence and person of Peter Guilbeault for a wallet, key chain, and jacket belonging to Manning, a yellow T-shirt, blue jeans, and combat boots belonging to Guilbeault, and bus tickets from Omaha to Albany. That same morning, Smith delivered Guilbeault to the state police headquarters where he was questioned by Officer Miller of the Omaha Police Department. Guilbeault ultimately confessed to stripping and kicking Manning. After the officers questioned Guilbeault the search warrant was executed by the New York state police. Greyhound bus tickets indicating departure from Omaha and a destination of Albany, two pairs of blue jeans, and two brown garbage bags were seized at the apartment. The garbage bags, which were located on a landing outside the apartment, were found to contain personal papers belonging to the victim Manning. Also, a wallet and the combat boots were seized from Guilbeault at police headquarters after the interrogation was completed. Later that afternoon the police were notified that a warrant had been issued in Nebraska charging Guilbeault with second degree murder and a fugitive warrant was then issued for him in New York. Guilbeault waived extradition and was returned to Omaha to stand trial.

As we have earlier noted, we believe that our decision in *State v. Welsh*, *ante* p. 60, 332 N.W.2d 685 (1983), is dispositive of this appeal. In the *Welsh* case, as in this case, the defendant maintained that the police had obtained information in violation of his fourth amendment rights and, therefore, the warrant, which was otherwise proper, was tainted by reason of an illegal intrusion into a place where property belonging to Welsh was located. In affirming the action of the trial court in refusing to suppress the evidence obtained by the search warrant, we noted at 65-66, 332 N.W.2d at 688-89: "An exami-

nation of the search warrant in this case discloses that even if the observations made by the officers are disregarded, there were more than ample independent facts contained in the affidavit which would have justified the court in granting a search warrant."

Likewise, in the instant case, all the facts contained in the affidavit which are totally independent of any investigation made by Parole Officer Smith are more than sufficient to have justified the issuance of the search warrant. We noted in *Welsh* at 64-65, 332 N.W.2d at 688: "While it is true that the U.S. Supreme Court decision in *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963), not only requires the suppression of the illegally obtained evidence but the 'fruit of the poisonous tree' as well, not all evidence obtained is considered to be 'fruit of the poisonous tree,' and such evidence may be admitted if there is sufficient independent basis for the discovery of the evidence. In *Wong Sun* the U.S. Supreme Court specifically made that distinction when it observed that the constitutional question under the fourth amendment must be examined in light of whether the evidence to which objection is made has been come at by exploitation of the illegally obtained evidence or, instead, by means sufficiently distinguishable to be purged of the primary taint. . . . The application of the independent source rule in the context of a search warrant does not offend the underlying purpose and objectives of the exclusionary rule. See *United States v. Giordano*, 416 U.S. 505, 94 S. Ct. 1820, 40 L. Ed. 2d 341 (1974). In a long line of cases both the U.S. Supreme Court and other federal courts called upon to examine this question have held that where an affidavit used for the purpose of obtaining a search warrant includes both illegally obtained facts as well as facts derived from independent and lawful sources, a valid search warrant may issue if the lawfully obtained facts, considered by themselves, establish

probable cause to issue the warrant. [Citations omitted.]"

As we have already noted, an examination of Sergeant Goodrich's affidavit was more than sufficient to justify the issuing of the warrant. With the exception of paragraph 14, all of the allegations contained in his affidavit were based upon the results of the Omaha Police Department's investigation of the homicide. Paragraph 14 did nothing more than set out that Officer Goodrich had been advised by Parole Officer Smith that Smith had, on two occasions, observed Guilbeault wearing boots of the type believed to be involved in the murder. As a matter of fact, the evidence clearly discloses that Guilbeault had no expectation of privacy with regard to the boots in view of the fact that he wore them publicly and they were in plain sight when taken from him by the police officers at the state police headquarters. *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967). The affidavit filed by Goodrich was clearly sufficient and based upon independent sources; Guilbeault's contention that the warrant was the result of an illegal prior investigation of his property is simply without merit. In view of our disposition of this case, we need not reach any other questions presented by this appeal. The judgment of the trial court is affirmed.

AFFIRMED.

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

336 N.W.2d 597

Filed July 22, 1983. No. 82-725.

1. **Effectiveness of Counsel.** The standard for determining whether counsel for criminal defendants provided adequate representation is whether trial counsel performed at least as well as lawyers with ordinary training and skill in criminal law in the area and whether they conscientiously protected the interests of their client.

2. _____. The burden of proof in showing incompetence of criminal trial counsel lies upon the party challenging the adequacy of criminal trial representation. Additionally, the defendant must show that he suffered prejudice in the defense of his case as a result of his attorney's actions or inactions.
3. **Post Conviction: Rules of the Supreme Court: Appeal and Error.** Where court-appointed counsel in a post conviction case, after careful and conscientious review of the matter, determines that the appeal is wholly frivolous and without merit, counsel may file a motion in this court, pursuant to Neb. Ct. R. 3B (Rev. 1982), requesting leave to withdraw, supported by a brief and an affidavit setting out the fact that counsel has made a thorough and conscientious examination of the record and has determined the appeal to be without merit and wholly frivolous.

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

Richard J. Spethman and Renne Edmunds, for appellant.

Paul L. Douglas, Attorney General, and J. Kirk Brown, for appellee.

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

KRIVOSHA, C.J.

The appellant, Steven Roy Harper, appeals from a judgment entered by the District Court for Douglas County, Nebraska, denying to Harper post conviction relief sought pursuant to Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1979).

Harper was found guilty in 1979 on two counts of first degree murder and three counts of poisoning with intent to kill, wound, or maim. After hearings on the constitutionality of the death penalty and the existence of aggravating and mitigating circumstances, a sentence of death was imposed by the trial court on each of the first degree murder counts and consecutive sentences of 10 years each on the poisoning counts. Harper appealed that judgment and sentence to this court, and in the case of *State v. Harper*, 208 Neb. 568, 304 N.W.2d 663 (1981) (*Harper I*), the convictions and sentences were affirmed.

The details of the murders and poisonings are set out in our former opinion and need not be repeated here.

Thereafter, Harper filed a petition seeking post conviction relief, maintaining that he had not received effective assistance of counsel and that, further, he had not received adequate notice of both the aggravating and mitigating circumstances relied upon by the court in imposing the sentences. He further maintained that the death penalty was in violation of his constitutional rights. As noted above, the trial court rejected all of Harper's claims and he appealed to this court. He assigns as error in this court the fact that the District Court denied his petition for post conviction relief based upon prejudicially ineffective counsel. He also assigns as error that the District Court was wrong in denying his petition for post conviction relief based upon failure to give adequate notice of the aggravating circumstances charged by the prosecutor and relied on by the trial court as the basis for imposing the death penalty in violation of the sixth, eighth, and fourteenth amendments to the U.S. Constitution, and, further, that the imposition of the death penalty violates his rights under the fourteenth amendment to the U.S. Constitution.

We can dispose of his last two issues quickly. The last assignment of error, dealing with the death penalty, was not argued to this court in the post conviction appeal because it was fully argued in *Harper I* and decided by us at that time. We have frequently held that the Post Conviction Act cannot be used as a substitute for a direct appeal or to secure a further review of issues already litigated. See, *State v. Losieau*, 182 Neb. 367, 154 N.W.2d 762 (1967); *State v. Sheldon*, 181 Neb. 360, 148 N.W.2d 301 (1967). With regard to the second assignment of error, our examination of the record discloses that it is wholly without merit. That leaves us, then, with

only the issue of whether Harper was denied effective assistance of counsel.

The basis for the claim of ineffective assistance of counsel is twofold. In the first instance, Harper maintains that he received ineffective assistance of counsel because a defense of insanity was not sufficiently and vigorously pursued. The record simply does not support that claim. We have previously addressed this issue in *State v. Holtan*, 205 Neb. 314, 321, 287 N.W.2d 671, 675 (1980), wherein we said: "Defendant further maintains that counsel was inadequate in that he did not adequately pursue a defense of insanity. The record, however, discloses that counsel not only had the defendant examined by a prominent local psychiatrist but further consulted with psychiatrists in the State of Washington who were familiar with the defendant's condition. That investigation disclosed that while there was evidence of defendant's mental condition, it was not of the type to satisfy the M'Naghten rule followed in this jurisdiction. Even the testimony produced by defendant at the post conviction hearing did not establish grounds upon which the M'Naghten rule could be pursued as a defense. The failure of trial counsel to pursue that defense was not inadequate."

Likewise, in the instant case the record discloses that Harper's trial counsel, Lawrence Corrigan, relied upon the opinion of, at a minimum, five mental health professionals, three of whom saw Harper personally and all of whom concluded that Harper could not successfully assert an insanity defense. At the post conviction hearing no evidence was introduced to support a claim that a defense of insanity would have been either reasonable or successful. Dr. Kentsmith testified at the post conviction hearing on behalf of Harper, "I am not able to state with reasonable medical certainty that Mr. Harper was sane at the time of the crime. There is a great deal of doubt in my mind based on the objective evidence both before the crime and after to suggest that Mr.

Harper may have decompensated into a schizophreniaform [sic] psychotic illness and may not have fully understood the consequences of his act." This evidence is not sufficient to establish that there was a basis for a defense of insanity or that the five mental health specialists consulted by Harper's trial counsel were in error. Nor does the evidence disclose that Corrigan failed in any manner to adequately represent Harper insofar as the defense of insanity was concerned, or that Harper was prejudiced by what was or was not done.

The other aspect of the claim of ineffective assistance of counsel has to do with the fact that Corrigan permitted Harper to advise the court as to the carcinogenic agent used to poison the individuals, including the three who had not died but who could not be adequately treated unless information as to the agent was quickly known. The court permitted Harper to disclose this information but ordered that the fact that he did so could not be used as evidence in the trial. Harper now contends that this was ineffective assistance of counsel. There is simply no basis for that claim. The refusal of Harper to disclose that information would have only served as an aggravating circumstance. To now suggest that Corrigan should not have permitted Harper to disclose the information is totally without basis. The lives of three individuals hung in the balance. Effective assistance of counsel does not require such callous behavior as suggested by Harper.

We have frequently held that the standard for determining whether counsel for criminal defendants provided adequate representation is whether trial counsel performed at least as well as lawyers with ordinary training and skill in criminal law in the area and whether they conscientiously protected the interests of their client. See, *State v. Pope*, 213 Neb. 645, 330 N.W.2d 747 (1983); *State v. Jones*, 213 Neb. 1, 328 N.W.2d 166 (1982). The burden of proof in showing incompetence of criminal trial counsel lies upon

the party challenging the adequacy of criminal trial representation. *State v. Hunt*, 212 Neb. 304, 322 N.W.2d 624 (1982). Additionally, the 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*, *supra*; *State v. Hunt*, *supra*. The evidence in this case fails to disclose either that Corrigan did not act at least as well as lawyers with ordinary training and skill in criminal law in the area or that Harper was prejudiced by any of the claims now made by him. Quite to the contrary, an examination of the record discloses that Corrigan most effectively represented Harper. There simply was no defense to these terrible crimes. The claim of ineffective assistance of counsel is wholly frivolous and without merit.

This case, however, does point up what is becoming an increasingly more difficult task, both for court-appointed counsel, such as those in this case, and this court as well. The difficulty is that, having been appointed, counsel believe that they must make some argument before this court. Oftentimes, as displayed by this case, because trial counsel were indeed so effective, there are no errors to be argued to this court and any appeal is wholly frivolous. Nevertheless, because no errors do in fact exist, appointed counsel on appeal are compelled to make unsupported accusations against trial counsel who were most effective. And this court must then listen to oral argument and write an opinion in a case in which neither oral argument nor a written opinion is necessary or desirable.

It was that very problem which prompted the U.S. Supreme Court in the case of *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), to declare that if counsel appointed to represent one seeking leave to appeal in forma pauperis is convinced, after conscientious investigation, that the appeal is frivolous, he may ask to withdraw on that account, and if the court is satisfied that counsel has

diligently investigated the possible ground of appeal and agrees with counsel's evaluation of the case, then it may allow leave to withdraw and deny leave to appeal. See, also, *Ellis v. United States*, 356 U.S. 674, 78 S. Ct. 974, 2 L. Ed. 2d 1060 (1958). If such a procedure can satisfy the requisite state and federal constitutional rights on a direct appeal, then it would appear that it would likewise be satisfactory in a post conviction appeal, where oftentimes the request for review is of matters which have previously been reviewed on direct appeal. It is for that reason we amended the rules of this court to include actions seeking post conviction relief for which a motion to withdraw pursuant to Neb. Ct. R. 3B (Rev. 1982) could be filed. For that reason we urge that where court-appointed counsel in a post conviction case, after careful and conscientious review of the matter, determines that the appeal is wholly frivolous and without merit, counsel may file a motion in this court, pursuant to Rule 3B, requesting leave to withdraw, supported by a brief and an affidavit setting out the fact that counsel has made a thorough and conscientious examination of the record and has determined the appeal to be without merit and wholly frivolous. Then this court may proceed, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If we find it is so wholly frivolous, we may grant counsel's request to withdraw and affirm the judgment. On the other hand, if we find any of the legal points arguable on their merits and therefore not frivolous, we shall, prior to decision, afford the indigent the assistance of counsel to argue the appeal.

In this way we believe that we can provide indigent defendants with full and fair representation, while avoiding the necessity of appointed counsel making unmeritorious and unsupported attacks on the competence of prior trial counsel.

The judgment of the trial court is affirmed.

AFFIRMED.

SHANAHAN, J., concurs in the result.

STATE OF NEBRASKA, APPELLEE, V. DAVID A. BEASLEY, APPELLANT.

336 N.W.2d 601

Filed July 22, 1983. No. 82-773.

1. **Criminal Law: Appeal and Error.** In a criminal prosecution it is not the province of the Supreme Court to resolve conflicts in the evidence, pass upon credibility of witnesses, determine the plausibility of explanations, or weigh the evidence.
2. **Verdicts.** The verdict of a jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
3. **Sexual Assault: Corroboration.** In a prosecution for sexual assault it is not essential that the victim be corroborated as to the particular act constituting the offense in order to sustain a conviction. It is sufficient if she is corroborated as to material facts and circumstances which tend to support her testimony and from which, together with her testimony, an inference of guilt may be drawn.
4. **Jury Instructions: Lesser-Included Offenses.** Generally, it is not prejudicial error to not instruct upon a lesser offense when the evidence entirely fails to show an offense of a lesser degree than that charged in the information.
5. _____: _____. If, under a "different but reasonable" view, the evidence would be sufficient to establish guilt of the lesser offense and leave a reasonable doubt as to some element included in the greater offense but not the lesser, the jury should be instructed on the lesser offense.

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

John P. Murphy, Lincoln County Public Defender, for appellant.

Paul L. Douglas, Attorney General, and Dale D. Brodkey, for appellee.

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

BOSLAUGH, J.

The defendant was convicted of sexual assault in the first degree and burglary and was sentenced to concurrent terms of imprisonment for 1 to 3 years. He has appealed and assigned as error the sufficiency of the evidence to support the convictions and the refusal of the trial court to instruct on the lesser-included offenses of sexual assault in the second and third degrees.

The victim testified that early on the morning of March 10, 1982, she was awakened at her home by the defendant, who was lying on top of her with his hands around her neck. She testified that he said he would kill her if she did not have intercourse with him; that he tore off the bedclothes and her pajamas and underwear; that he forced his fingers into her vagina; and that he forced his penis into her mouth. The victim struggled, managed to get away, and ran to the house next door where she was admitted by the neighbors. The victim estimated that the attack lasted 20 minutes.

The neighbors, Tony and Linda, testified that when the victim knocked on their door at about 6 a.m. on March 10, 1982, she had nothing on but her socks. The victim appeared upset and hysterial and told the neighbors that someone had tried to rape her.

The victim and Tony then went back to the victim's house but found no one there. Linda testified that she looked out the window and saw a man dressed in an Army field jacket and jeans standing outside the victim's home. Tony called the police from his residence. The victim told the police that she had been sexually assaulted and described the attacker as wearing jeans and a black western shirt with flowers on the shoulders. She told the police that her front door was closed but had been left unlocked the night before.

The victim was examined at the hospital emergency room. She had recent scratches and abra-

sions on the right side of her neck, under her chin, and over the right side of the clavicle, and had an abrasion and a laceration on her right arm. The examining physician was unable to determine whether penetration had occurred.

After the victim had been examined, she returned with the police to her home. A billfold containing the defendant's driver's license and a blue cap not belonging to the victim were found in the victim's bedroom. The victim identified the man in the photograph on the license as her attacker and later identified the defendant in a photo lineup and in court.

The defendant was arrested at about 11:30 a.m. on March 10, 1982, and was given the *Miranda* warnings. At the trial the defendant testified that he did not commit the assault. He testified that he had been to several parties that night and had been drinking heavily; that he had arrived home at 5:45 a.m. after a 15-minute drive from a friend's home. He further testified that on that date he had been wearing an Army field jacket, jeans, and a black western shirt with flowers on the shoulders. He testified that he had lost his billfold and had a cap like the one found at the scene.

The evidence of the State which has been summarized was more than sufficient, if believed, to permit the jury to find the defendant guilty of both counts beyond a reasonable doubt.

In a criminal prosecution it is not the province of the Supreme Court to resolve conflicts in the evidence, pass upon credibility of witnesses, determine the plausibility of explanations, or weigh the evidence, as such matters are for the jury. The verdict of a jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. True*, 210 Neb. 701, 316 N.W.2d 623 (1982). A conviction will be sustained if the defendant's guilt is established beyond a reasonable doubt from all the evidence presented and from such

reasonable inferences that seem justified. *State v. Buchanan*, 210 Neb. 20, 312 N.W.2d 684 (1981).

The statutes under which the defendant was charged provide: "(1) Any person who subjects another person to sexual penetration and (a) overcomes the victim by force, threat of force, express or implied, coercion, or deception, (b) knew or should have known that the victim was mentally or physically incapable of resisting or appraising the nature of his or her conduct, or (c) the actor is nineteen years of age or older and the victim is less than sixteen years of age is guilty of sexual assault in the first degree." Neb. Rev. Stat. § 28-319 (Reissue 1979). "(1) A person commits burglary if such person willfully, maliciously, and forcibly breaks and enters any real estate or any improvements erected thereon with intent to commit any felony or with intent to steal property of any value." Neb. Rev. Stat. § 28-507 (Reissue 1979).

In a prosecution for sexual assault it is not essential that the victim be corroborated by testimony of other witnesses as to the particular act constituting the offense in order to sustain a conviction. It is sufficient if she is corroborated as to material facts and circumstances which tend to support her testimony and from which, together with her testimony, an inference of guilt may be drawn. *State v. Watkins*, 207 Neb. 859, 301 N.W.2d 338 (1981); *State v. Tatum*, 206 Neb. 625, 294 N.W.2d 354 (1980).

In the present case the victim testified that the defendant subjected her by threat of force to sexual penetration. She identified the defendant as her attacker on three occasions. The uncontradicted evidence is that, immediately after the attack, the victim ran unclothed to her neighbors' home and told them that she had been assaulted. The victim gave the police a description of the defendant's clothing, which matched the description given by the defendant of what he was wearing on March 10, 1982. The neighbor testified she saw a man in an Army jacket

outside the house just after the assault occurred. The victim had recent scratches and abrasions about her neck and arm and the defendant's billfold and hat were found in the victim's bedroom.

This evidence was sufficient to sustain the conviction for sexual assault. The testimony of the victim was sufficiently corroborated as to material facts and circumstances to establish guilt beyond a reasonable doubt.

The evidence was also sufficient to sustain the conviction for burglary. The jury could find beyond a reasonable doubt that the defendant entered the victim's home through a closed door with intent to commit a felony. See *State v. Campbell*, 190 Neb. 394, 208 N.W.2d 670 (1973).

The defendant assigns as error the failure of the trial court to instruct the jury on the lesser-included offenses of sexual assault in the second and third degrees. These lesser offenses do not require penetration as an element of the offense. Rather, only "sexual contact" is required. Neb. Rev. Stat. § 28-320 (Reissue 1979). The defendant contends that instructions on the lesser-included offenses should have been given because the issue of penetration was sufficiently disputed by his alibi; his denial that he assaulted the victim; the failure of the doctor to detect penetration; and certain inconsistencies on the issue of penetration between the victim's deposition and her trial testimony.

Generally, it is not prejudicial error to not instruct upon a lesser offense when the evidence entirely fails to show an offense of a lesser degree than that charged in the information. *State v. Vicars*, 207 Neb. 325, 299 N.W.2d 421 (1980). In *State v. Tamburano*, 201 Neb. 703, 271 N.W.2d 472 (1978), a prosecution for sexual assault in the first degree, the only testimony regarding penetration was that of the victim. The defendant did not testify and argued that the jury should have been instructed on second degree sexual assault. We held that when the State

offers uncontroverted testimony on an essential element of a crime, mere speculation that the jury may disbelieve the testimony does not entitle the defendant to an instruction on a lesser-included offense. The defendant must offer some evidence directly disputing the element necessary for the greater offense but not for the lesser offense before he is entitled to an instruction on the lesser-included offense.

Here, the evidence did not rise to the level of proof required by *Tamburano*. In that case we held that if, under a "different but reasonable" view, the evidence would be sufficient to establish guilt of the lesser offense and leave a reasonable doubt as to some element included in the greater offense but not the lesser, the jury should be instructed on the lesser offense. The defense here was an alibi, and the evidence relied upon by the defendant did not tend to support a view that sexual contact occurred but a reasonable doubt existed as to penetration. See, *State v. Vicars*, *supra* (defendant testified he could not remember the events of the evening in question sufficiently to directly dispute the victim's testimony); *State v. Packett*, 207 Neb. 202, 297 N.W.2d 762 (1980) (alibi not sufficient to dispute evidence of penetration). The trial court properly refused to instruct on the lesser-included offenses.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CHARLES E. WILLIAMS, APPELLANT.

336 N.W.2d 605

Filed July 22, 1983. No. 82-785.

1. **Warrants: Affidavits.** A criminal defendant may challenge the validity of a warrant based on an affidavit only if the affidavit contains deliberate falsehoods or statements made with a reckless disregard for the truth.

2. **Warrants: Affidavits: Probable Cause.** In order to be entitled to a hearing to examine the contents of the affidavit, the challenger must attack only the veracity of the affiant and not of any other informant; he must also make a "substantial preliminary showing," including allegations of "deliberate falsehood or of reckless disregard for the truth," supported by an offer of proof. Moreover, even if the foregoing two requirements are met, no hearing is required if, when the material which is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause.
3. **Warrants: Probable Cause.** Probable cause to issue a warrant exists where the facts and circumstances within the officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.
4. _____: _____. In determining whether probable cause exists for the issuance of a warrant, the issuing magistrate is to make a practical, commonsense decision whether, given the totality of all the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of the persons supplying hearsay information, there is a fair probability that the defendant was implicated in the crime.
5. **Warrants: Affidavits.** Affidavits for warrants must be tested in a commonsense, realistic fashion.
6. **Warrants: Probable Cause.** In evaluating the showing of probable cause necessary to support a warrant, only the probability, and not a prima facie showing, of criminal activity is required.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Affirmed.

Roger C. Lott of Muffly, Lott & Oglesby, for appellant.

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

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

CAPORALE, J.

The defendant-appellant, Charles E. Williams, was convicted of robbery following a bench trial upon stipulated facts. We affirm.

In this appeal defendant assigns as error the non-

suppression of admissions made by him, on the grounds that the affidavit upon which the arrest warrant was issued (1) contained statements which were either deliberately false or made with reckless disregard for the truth, (2) failed to state the only description of the robber known to the police at the time, and (3) was based upon information supplied by informants who were not properly "qualified" as to credibility. Defendant assigns as his fourth and last assignment of error the overruling of his motion to take the deposition of the supporting affiant.

The defendant was found guilty of robbery in violation of Neb. Rev. Stat. § 28-324(1) (Reissue 1979) for his part in the beating and robbery of an elderly man in his home, from whom cash in excess of $12,000 was taken. An information filed by a deputy Lancaster County attorney charged defendant with the robbery of the victim. The deputy county attorney had requested an arrest warrant for the defendant, which was supported by an affidavit signed by the same deputy county attorney. This affidavit recited information which the deputy county attorney had received from a police officer and a deputy sheriff. These two individuals had received information linking the defendant with the robbery from a party who had called the "Crime Stoppers" telephone line, and also from a second informant who had been identified by the Crime Stoppers caller. The affidavit stated, among other things, that the second informant had had a conversation with a coperpetrator, in defendant's presence, which implicated the defendant. The Crime Stoppers caller provided many details concerning the subject robbery and about the defendant and the coperpetrator which were verified by the sheriff's subsequent investigation. The second informant verified the information given by the Crime Stoppers caller. The affidavit recited further that the Crime Stoppers caller had given accurate information in the past.

A warrant was issued, and the defendant was

thereafter arrested in Ozark, Missouri, and returned to Nebraska. While in Missouri, after receiving the *Miranda* warnings, defendant confessed to his involvement in the robbery of the victim. He also made a statement, before the *Miranda* warnings were able to be given, to the effect that he wanted it known he was not responsible for hurting the "old man."

Defendant's first three assignments of error are essentially identical, in that they all seek to attack the supporting affidavit upon which the arrest warrant was issued.

Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978), holds that a criminal defendant may challenge the validity of a search warrant based on an affidavit only if the affidavit contains deliberate falsehoods or statements made with a reckless disregard for the truth. In order to be entitled to a hearing to examine the contents of the affidavit, the challenger must attack only the veracity of the affiant and not of any other informant; he must also make a "substantial preliminary showing," including allegations of "deliberate falsehood or of reckless disregard for the truth," supported by an offer of proof. *Id.* at 171. Moreover, even if the foregoing two requirements are met, no hearing is required if, when the material which is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause. See, also, *State v. Robish*, *ante* p. 190, 332 N.W.2d 922 (1983).

Defendant first complains that the affidavit states that defendant was present when a coperpetrator made statements implicating him. It develops that defendant was in fact not present at the time of that conversation. However, even if we assume for the purposes of our analysis that the statement about which complaint is made was deliberately falsely made or made in reckless disregard of the truth, a

matter we do not decide, the material described above which remains in the affidavit is sufficient to establish probable cause. As we have stated previously, probable cause to issue a warrant exists where the facts and circumstances within the officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. *State v. Anderson*, 204 Neb. 186, 281 N.W.2d 743 (1979). See, also, *State v. Robish*, *supra*.

Neither is there any merit to defendant's second complaint that the affidavit does not contain the description provided by the victim. The victim had said that one of the men who had robbed him "was a white male, approximately 35 years old, being approximately 5'8" to 5'9", being well built, stocky, almost heavy in appearance, with light colored hair which was very short, just to the collar, and who had a receding hairline." The victim did not give any description of the other man involved in the robbery. However, a later deposition of the victim clearly shows that the victim had little, if any, idea what his assailants looked like, other than the fact that one had a receding hairline. These facts do not show that the affidavit in any manner contained perjured statements or statements which were made in reckless disregard for the truth. All of the descriptions of the defendant and coperpetrator in the affidavit are attributed to the two informants, and the defendant has made absolutely no showing that these statements attributed to the informants were not what the informants actually said. The omission of the victim's description does not render the affidavit unreliable.

In view of the foregoing determinations it necessarily follows that the trial court was correct in overruling defendant's motion to take the supporting affiant's deposition. This disposes of defendant's fourth assignment of error.

The preceding discussion also disposes of defendant's remaining (third) assignment of error. The affidavit recited that the Crime Stoppers caller had given reliable information in the past, that caller identified a second informant who corroborated the information given by the initial caller, and the information of the two informants was corroborated by subsequent investigation. Such qualifications of credibility are certainly stronger than those of the anonymous tipster found adequate by the U.S. Supreme Court in *Illinois v. Gates*, ____ U.S. ____, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). The affidavit was well within the test set forth in *State v. Arnold*, *ante* p. 769, 336 N.W.2d 97 (1983), dealing with a search warrant, stating that in determining whether probable cause exists for the issuance of a warrant, the issuing magistrate is to make a practical, commonsense decision whether, given the totality of all the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of the persons supplying hearsay information, there is a fair probability that the defendant was implicated in the crime. As we have said previously, affidavits for warrants must be tested in a commonsense, realistic fashion. *State v. Payne*, 201 Neb. 665, 271 N.W.2d 350 (1978).

In evaluating the showing of probable cause necessary to support a warrant, only the probability, and not a prima facie showing, of criminal activity is required. *State v. Arnold*, *supra*; *State v. Robish*, *ante* p. 190, 332 N.W.2d 922 (1983).

The record does not sustain defendant's assignments of error.

AFFIRMED.

HEADNOTES
Contained in this Volume

Accounting
Actions
Administrative Law
Administrative Orders
Adverse Possession
Affidavits
Alimony
Annexation
Appeal and Error
Assessments
Attorney and Client
Attorney Fees
Attorneys at Law

Bail Bond
Blood, Breath, and Urine Tests
Boundaries
Breach of Contract
Breach of Promise
Breach of Warranty
Bridges
Burglary

Causes of Action
Certificate of Title
Child Custody
Child Support
Circumstantial Evidence
Collateral Attack
Collateral Evidence
Compromise and Settlement
Confessions
Constitutional Law
Construction Contracts
Contracts
Convictions
Corporations
Corroboration
Court Rules
Courts
Crime Victims
Criminal Law

Damages
Decedents' Estates
Deeds
Demurrer
Depositions
Directed Verdict
Disciplinary Proceedings
Discrimination
Divorce
Due Process

Easements
Effectiveness of Counsel
Eminent Domain
Employer and Employee
Employment Contracts
Employment Security Law
Equal Opportunity Commission
Equity
Estates
Evidence
Executors and Administrators
Expert Witnesses

Fees
Final Orders
Firefighters
Forcible Entry and Detainer
Fraud

Garnishment
Governmental Subdivisions
Guardians and Conservators

Habitual Criminals
Hearsay
Highways

Identification Procedures
Immunity
Improvements
Independent Contractors

Injunction
Insurance
Intent
Intervention
Invitor-Invitee
Irrigation Districts

Judgments
Judicial Construction
Jurisdiction
Jury Instructions
Justiciable Issues
Juvenile Courts

Labor and Labor Relations
Landlords and Tenants
Legislature
Lesser-Included Offenses
Liability
Liens
Limitations of Actions

Mandamus
Marriage
Mechanics' Liens
Medical Malpractice
Mental Distress
Minors
Miranda Rights
Moot Question
Motions for Continuance
Motions for New Trial
Motions to Suppress
Motor Carriers
Motor Vehicles
Municipal Corporations

Negligence
Notice

Parental Rights
Parol Evidence
Parties
Partition
Partnerships
Paternity
Pensions
Perpetuities
Plea in Abatement
Pleadings
Pleas
Police Officers and Sheriffs
Political Subdivisions
Post Conviction
Prejudgment Interest
Prejudicial Statements
Presumptions
Pretrial Motions
Principal and Agent
Probable Cause
Proof
Property
Property Division
Proximate Cause
Public Meetings
Public Officers and Employees
Public Service Commission
Public Utilities

Questions of Law

Rates
Records
Reformation
Releases
Rescission
Revocation
Right to Counsel
Robbery
Rules of Evidence
Rules of the Road
Rules of the Supreme Court

Sanitary and Improvement Districts
Schools and School Districts
Search and Seizure
Search Warrants
Seasonal Employment
Securities Regulation
Security Interests
Sentences
Service of Process
Sexual Assault
Social Security
Special Education

Special Legislation
Speedy Trial
Standing
State Equalization Board
Statutes
Summary Judgment

Taxation
Teacher Contracts
Termination of Employment
Time
Tort Claims Act
Torts
Trial
Trusts

Uniform Commercial Code

Valuation
Verdicts

Wages
Waiver
Warrants
Warranty
Waters
Wills
Wiretaps
Witnesses
Words and Phrases
Workmen's Compensation

Zoning

INDEX

Accounting.

1. An action for an accounting may, under one set of circumstances, find its remedy in an action at law and, under another, find it within the jurisdiction of equity. Anderson v. Clemens Mobile Homes 283
2. Where the intimate relationships of the parties are involved, an adequate remedy is available only within the equitable jurisdiction of the court. Anderson v. Clemens Mobile Homes 283
3. The relationships between the minority and majority shareholders of a two-shareholder corporation are such that an adequate accounting remedy is available only within the equitable jurisdiction of the court. Anderson v. Clemens Mobile Homes 283
4. Although the burden is ordinarily upon the party seeking an accounting to produce evidence to sustain the accounting, where another is in control of the books and has managed the business, that other is in the position of a trustee and must make a proper accounting. Anderson v. Clemens Mobile Homes 283

Actions.

1. An action under the Nebraska Uniform Commercial Code is one at law. First Nat. Bank & Trust Co. v. Hughes 42
2. Without injury there is no cause of action; injury occurs in a tort action as soon as the act or omission takes place. Interholzinger v. Estate of Dent 264
3. As a general rule, a shareholder suing on behalf of a corporation for wrongs done to it must first seek to persuade the officers and directors to bring the action; however, he is not required to make such an effort if it would have been unavailing. Anderson v. Clemens Mobile Homes 283

Administrative Law.

1. Administrative findings are required in order to inform the accused of the exact nature of the findings against him and to give a reviewing court a clear view of the basis of the administrative agency's action to permit a review of the sufficiency of the evidence. Richardson v. City of Omaha 97
2. Administrative findings may be express or implied. Richardson v. City of Omaha 97

3. Language of a statute or regulation which conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices will not be held to be unconstitutionally vague or overbroad on those grounds. Richardson v. City of Omaha 97
4. The standard of review which must be followed in an appeal from an error proceeding is based solely on the record originally created by the administrative tribunal, and if that record discloses the tribunal acted within its jurisdiction and its findings are supported by some competent evidence, its decision must be sustained. Richardson v. City of Omaha 97
5. Appeals under the Administrative Procedures Act, Neb. Rev. Stat. §§ 84-901 et seq. (Reissue 1981), may be taken from actions of agencies of the State of Nebraska. Fisher v. Housing Auth. of City of Omaha 499
6. The attempt to raise the same issues in an original action for monetary damages as those employed in an unsuccessful direct appeal from the action of the same agency constitutes a collateral attack on the decision of that agency. Fisher v. Housing Auth. of City of Omaha 499
7. A collateral attack upon a judgment will not lie unless the judgment is absolutely void. Where the court or agency has jurisdiction of the parties and the subject matter, its judgment is not subject to collateral attack, because such judgment is only voidable and not void. Fisher v. Housing Auth. of City of Omaha 499
8. The rule against collateral impeachment of judicial decisions applies to the determination of state and county officers or boards of officers, who, although not constituting a court, are called on to act judicially in matters of administration. Fisher v. Housing Auth. of City of Omaha 499
9. Orders and findings of the Nebraska Crime Victim's Reparations Board, Neb. Rev. Stat. §§ 81-1801 et seq. (Reissue 1981), are reviewed as provided for in the rules of administrative agencies, Neb. Rev. Stat. §§ 84-901 et seq. (Reissue 1981). Lambert v. Nebraska Cr. Vict. Rep. Bd. 817
10. Compensation for pecuniary loss to which dependents of victims of crimes may be entitled under Neb. Rev. Stat. §§ 81-1801 et seq. (Reissue 1981) refers to loss of financial support, not loss of love and affection. Lambert v. Nebraska Cr. Vict. Rep. Bd. 817
11. Although the availability of funds appropriated for the purposes of the Nebraska Crime Victim's Reparations Act is a factor which the Legislature has directed shall

be considered in making awards under the act, it is necessary that the record contain some evidence of such appropriations. Lambert v. Nebraska Cr. Vict. Rep. Bd. 817

Administrative Orders.

1. The standard of review to be employed by both the District Court and this court of an order of the Nebraska State Real Estate Commission is whether the order was supported by competent, material, and substantial evidence, and whether the order is arbitrary or capricious. Weiner v. State ex rel. Real Estate Comm. 404
2. Substantial evidence for purposes of administrative review must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury, and this is something less than the weight of evidence; and the possibility of drawing two inconsistent conclusions from evidence does not prevent an administrative agency's finding from being supported by substantial evidence. Weiner v. State ex rel. Real Estate Comm. 404
3. Action of an administrative agency or tribunal must be sustained, if such action is not arbitrary and capricious and is based upon competent evidence. In re Appeal of Levos 507
4. In reviewing the findings and decision of an administrative agency or tribunal, it is not for the Supreme Court to resolve conflicts in the evidence. Credibility of witnesses and the weight to be given to testimony are for the administrative agency or tribunal as the trier of fact. In re Appeal of Levos 507
5. Action of a civil service commission is "in good faith for cause" when the findings and decision of such agency are based on competent evidence, neither "arbitrary and capricious" nor the result of "political or religious reasons," and reasonably necessary for effectual and beneficial public service. In re Appeal of Levos 507

Adverse Possession.

1. The burden is on one who claims title by adverse possession to prove by a preponderance of the evidence that he has been in actual, continuous, exclusive, notorious, and adverse possession under a claim of ownership for the statutory period. Cofer v. Kuhlmann ... 341
Petsch v. Widger 390
2. Adverse possession is recognized as a defense in a pro-

ceeding under Neb. Rev. Stat. § 34-301 (Reissue 1978). Petsch v. Widger 390
3. An adverse claimant must show the extent of his possession, the exact property which was the subject of the claim of ownership, that his entry covered the land up to the line of his claim, and that he occupied adversely a definite area sufficiently described to found a verdict upon the description. Petsch v. Widger 390
4. Where a fence is constructed as the boundary line, although it is not the actual boundary line, and the parties claim ownership of land up to the fence for the uninterrupted statutory period, the parties gain title to such land by adverse possession. Petsch v. Widger ... 390
5. If the adverse claimant is under no misapprehension as to the location of the boundary line and does not occupy the land with the intent to own it, he will not be deemed to be an adverse possessor. Petsch v. Widger 390
6. In Nebraska, intent to assert ownership of the property is a requirement of adverse possession even though, in most cases, it is inferred from the circumstances. Petsch v. Widger 390
7. An important element to be proved before title is gained through adverse possession is that the claimant must show notice to the true owner. More specifically, the acts of dominion over the land must be so open, notorious, and hostile as to put an ordinarily prudent person on notice that his lands are in the adverse possession of another. Petsch v. Widger 390
8. Possession of real estate by permission of the owner can never ripen into title by adverse possession unless the change of such possession has been brought home to the true owner. Petsch v. Widger 390
9. As between parties sustaining parental and filial relationships, the possession of land of one by the other is presumed to be permissive, not adverse. Petsch v. Widger 390
10. Adverse possession requires possession of another's land, while a prescriptive right involves only adverse use of another's land. Plettner v. Sullivan 636

Affidavits.

1. Where an affidavit used for the purpose of obtaining a search warrant includes both illegally obtained facts as well as facts derived from independent and lawful sources, a valid search warrant may issue if the lawfully obtained facts, considered by themselves, estab-

lish probable cause to issue the warrant. State v. Welsh 60
State v. Guilbeault 904
2. Where some of the underlying circumstances are detailed in the affidavit, where reason for crediting the source of the information is given, and when a magistrate has found probable cause, the court should not invalidate the warrant by interpreting the affidavit in a hypertechnical rather than a commonsense manner. State v. Arnold 769
3. An informant selected by the police, who makes a purchase of controlled substances under the personal direction, supervision, and control of a police officer, and informs the officer of what the informant saw and heard at the time of the purchase, is presumptively reliable. State v. Arnold 769
4. A criminal defendant may challenge the validity of a warrant based on an affidavit only if the affidavit contains deliberate falsehoods or statements made with a reckless disregard for the truth. State v. Williams 923
5. In order to be entitled to a hearing to examine the contents of the affidavit, the challenger must attack only the veracity of the affiant and not of any other informant; he must also make a "substantial preliminary showing," including allegations of "deliberate falsehood or of reckless disregard for the truth," supported by an offer of proof. Moreover, even if the foregoing two requirements are met, no hearing is required if, when the material which is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause. State v. Williams 923
6. Affidavits for warrants must be tested in a commonsense, realistic fashion. State v. Williams 923

Alimony.

In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is one of reasonableness. Whitney v. Whitney 565

Annexation.

1. Annexation of territory by a metropolitan city pursuant to Neb. Rev. Stat. § 14-117 (Reissue 1977) is a legislative matter. However, courts have the power to inquire into and determine whether the conditions exist which authorize the annexation thereof. Omaha Country Club v. City of Omaha 3

2. The use of land for agricultural purposes does not necessarily mean it is rural in character. It is the nature of its location as well as its use which determines whether it is rural or urban in character. Omaha Country Club v. City of Omaha 3

Appeal and Error.

1. The exercise by the trial court of its discretion in ruling on the admission or rejection of evidence will generally not be reviewed by an appellate court, unless it is clearly or plainly shown that the trial court abused its discretion. Nusz v. Wells Manufacturing Corp. 1
2. Findings of fact made by the compensation court after rehearing will not be set aside unless clearly wrong. Van Winkle v. Electric Hose & Rubber Co. 8
   Novotny v. Electric Hose & Rubber Co. 216
   Sortino v. Miller 592
   Elrod v. Prairie Valley 697
3. The task of this court in cases where a defendant has been convicted of a crime is to determine whether the evidence is such that it is sufficient to support the finding of guilt beyond a reasonable doubt. State v. Dofner 56
4. The determination as to whether the evidence is sufficient to support a finding of guilt beyond a reasonable doubt cannot be made in the absence of a record which tells us clearly with what crime defendant has been charged so that we may know whether the pleadings support the judgment. State v. Dofner 56
5. In reviewing a criminal case this court will not set aside the verdict of guilty if, taking the view most favorable to the State, there is sufficient evidence to support the verdict. State v. Welsh 60
6. An appeal to this court under the Employment Security Law is heard de novo. Erspamer Advertising Co. v. Dept. of Labor 68
7. In determining whether the findings of the District Court are supported by the evidence, this court must consider the evidence and all permissible inferences therefrom in a light most favorable to the successful party. State ex rel. Schuler v. Dunbar 85
8. The decision of a trial judge on a question of fact in a law action will not be set aside on appeal unless clearly wrong. State ex rel. Schuler v. Dunbar 85
9. Administrative findings are required in order to inform the accused of the exact nature of the findings against him and to give a reviewing court a clear view of the basis of the administrative agency's action to permit a

review of the sufficiency of the evidence. Richardson v. City of Omaha 97
10. The standard of review which must be followed in an appeal from an error proceeding is based solely on the record originally created by the administrative tribunal, and if that record discloses the tribunal acted within its jurisdiction and its findings are supported by some competent evidence, its decision must be sustained. Richardson v. City of Omaha 97
11. The judgment of a trial court in an action at law where a jury has been waived has the effect of a verdict of a jury and should not be set aside unless clearly wrong; in determining the sufficiency of the evidence to sustain a judgment, that evidence must be considered most favorably to the successful party and every controverted fact must be resolved in that party's favor and he is entitled to the benefit of any inferences reasonably deducible from it. Jeffres v. Countryside Homes 104
McKenzie v. Ladd Trucking Co. 209
12. An appellate court may properly decline to express an opinion on a mere abstraction or to determine a moot case. City of Crete v. County of Saline 200
13. A motion to vacate a judgment and sentence under the Post Conviction Act cannot be used as a substitute for a direct appeal nor to secure a further review of issues already litigated. State v. Moore 202
14. 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. State v. Roy 204
15. As provided for in Neb. Rev. Stat. § 24-541.06 (Cum. Supp. 1982), all cases other than small claims which are appealed from the municipal or county courts are reviewed by the District Court for error appearing on the record. McKenzie v. Ladd Trucking Co. 209
16. A judgment which is clearly against the weight of the evidence constitutes error and must be set aside on appeal. McKenzie v. Ladd Trucking Co. 209
17. In a law action it is not within the province of the Supreme Court to weigh or resolve conflicts in the evidence. The credibility of witnesses and the weight to be given their testimony are for the trier of fact. Novotny v. Electric Hose & Rubber Co. 216
18. The rule is well established that on an appeal to the Supreme Court from an order of the Nebraska Public Service Commission, administrative or legislative in character, the only questions to be determined are whether the commission acted within the scope of its

authority and whether the order complained of is reasonable and not arbitrarily made. However, a different rule is applied in the event that there has been the application of incorrect rules of law to the facts of the case or evidence showing that the commission has exceeded its authority, in which case the action of the commission would be illegal, arbitrary, and unreasonable. In re Application of Hunt Transportation 236

19. On appeal of a review by the District Court of an order of the Equal Opportunity Commission, the Supreme Court does not try the facts and will not disturb the District Court's findings if they are supported by substantial evidence; however, the District Court in the first instance and the Supreme Court on appeal must reach independent conclusions with respect to questions of law. Ranger Division v. Bayne 251

20. An order dismissing one theory of recovery while a second theory of recovery arising out of the same cause of action, that is, the same set of operative facts, remains pending for trial is not a final appealable order. Interholzinger v. Estate of Dent 264

21. A summary judgment dismissing one cause of action is a final appealable order notwithstanding the fact another cause of action still pends for trial. Interholzinger v. Estate of Dent 264

22. In an equitable proceeding we review the record de novo and reach an independent conclusion without being influenced by the findings of the trial court, except, however, that where credible evidence is in conflict, we must give weight to the fact that the trial court saw the witnesses and observed their demeanor while testifying. Anderson v. Clemens Mobile Homes 283
Cofer v. Kuhlmann 341
State ex rel. Douglas v. Bigelow 464
Hardt v. Short-Line Irr. Dist. 612

23. The reception of evidence is within the broad discretion of the trial court, and in order to authorize reversal of a judgment on account of the rejection of such evidence, there must have been a clear abuse of discretion. Childers v. LCW Apartments 291

24. An adjudication order of a juvenile court that determines that a juvenile is a juvenile as described in Neb. Rev. Stat. § 43-202(3) (Reissue 1978) is appealable. In re Interest of Aufenkamp 297

25. The standard of review of a juvenile proceeding in this court is de novo upon the record. In re Interest of Aufenkamp 297
In re Interest of Biesecker 425

26. The findings of fact made by the juvenile court will be accorded great weight because it heard and observed the witnesses. Those findings will be affirmed unless they are against the weight of the evidence or there is clear abuse of discretion. In re Interest of Aufenkamp 297
In re Interest of Biesecker 425
27. The admission of immaterial or irrelevant evidence in a trial to the court is not reversible error. In re Interest of Aufenkamp 297
State v. Davis 474
28. Evidence which should not have been admitted by the trial court will be disregarded by this court in a de novo review. In re Interest of Aufenkamp 297
29. The courts, in reviewing special education appeal proceedings under Neb. Rev. Stat. §§ 43-661 et seq. (Reissue 1978), are not to make independent findings of their own but must follow the criteria set forth in Neb. Rev. Stat. § 84-917 (Reissue 1981) and determine if the action was supported by substantial and competent evidence and was neither arbitrary nor capricious. Adams Central School Dist. v. Deist 307
30. In the absence of prejudicial error as a matter of law, a jury verdict supported by competent evidence must be affirmed. Kluender v. Mattea 327
31. A party cannot be heard to complain of error which such party was instrumental in bringing about. Kluender v. Mattea 327
32. The trial court has a wide discretion in determining whether evidence relating to illustrative experiments should be received. A judgment will not be reversed unless there has been a clear abuse of discretion. Kluender v. Mattea 327
33. An action to establish boundaries under Neb. Rev. Stat. § 34-301 (Reissue 1978) is an equity action triable de novo on the record on appeal to this court. Cofer v. Kuhlmann 341
34. On appeal of assessments made by a board of a sanitary and improvement district, there is no presumption of regularity attached to such action. On appeal the District Court, and this court, shall hear and determine such appeals in a summary manner as in a case in equity and shall increase or reduce the assessments as the same may be required to provide that assessments shall be to the full extent of special benefits, and to make the apportionment of benefits equitable. City of Omaha v. S.I.D. No. 287 371
35. When a court is given the power to review a case "in a summary manner as in equity," that court is given

power to review such matter de novo as in other equity actions. City of Omaha v. S.I.D. No. 287 371
36. By statute each fiscal agent for a sanitary and improvement district is entitled to notice of the amount and schedule of assessments proposed for improvements and, as such, may become a "person . . . feeling aggrieved" so as to have standing to appeal such action to the District Court. City of Omaha v. S.I.D. No. 287 371
37. The standard of review to be employed by both the District Court and this court of an order of the Nebraska State Real Estate Commission is whether the order was supported by competent, material, and substantial evidence, and whether the order is arbitrary or capricious. Weiner v. State ex rel. Real Estate Comm. 404
38. In filiation proceedings tried to the court without a jury, the findings of the trial court have the same effect as a verdict of a jury, and such findings will not be disturbed unless clearly wrong. Gregory v. Davis 408
39. In determining the sufficiency of the evidence to sustain a conviction in a criminal prosecution, this court does not resolve conflicts in the evidence, pass upon the credibility of the witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of the facts, and its verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. State v. Huffman 429
State v. Rowe 685
State v. Beasley 918
40. On appeal this court will not interfere with a guilty verdict based upon evidence in a criminal case unless that evidence is so lacking in probative force that it can be said that, as a matter of law, the evidence is insufficient to support a verdict of guilty beyond a reasonable doubt. State v. Huffman 429
State v. Evans 432
State v. Hochstetler 482
41. A sentence imposed within the statutory limits will not be disturbed on appeal absent an abuse of discretion. State v. Evans 432
State v. Ellefson 747
State v. Fries 874
42. Information as to alleged discriminatory sentencing not appearing in the record may not be considered by this court on appeal. State v. Evans 432
43. Ordinarily, the failure to object to instructions after they have been submitted to counsel for review will preclude raising an objection on appeal, unless there is

plain error in the record indicative of a probable miscarriage of justice. Keating v. Klemish 458
Sanders v. May Broadcasting Co. 755
44. Errors assigned but not discussed will generally not be considered. State ex rel. Douglas v. Bigelow 464
State v. Hochstetler 482
Holt County Co-op Assn. v. Corkle's, Inc. 762
45. An appeal from a county board of equalization involving the valuation of real estate for tax purposes is tried de novo as an equitable proceeding. Richman Gordman v. Board of Equalization 470
46. The review in this court is de novo upon the record. Richman Gordman v. Board of Equalization 470
47. If the effect of an increase in valuation ordered by the State Board of Equalization and Assessment is to raise the assessed value of a particular property above the actual value, the remedy of the taxpayer is before the county board of equalization. Richman Gordman v. Board of Equalization 470
48. A presumption arises that the trial court, in trying a case without a jury, will consider only such evidence as is competent and relevant, and this court will not reverse a case so tried because evidence was erroneously admitted where there is other material, competent, and relevant evidence sufficient to sustain the trial court's judgment. State v. Davis 474
49. In the absence of a present and existing controversy, there is no relief this court may grant; it is not our function to render advisory opinions. State v. Hochstetler 482
50. Appeals under the Administrative Procedures Act, Neb. Rev. Stat. §§ 84-901 et seq. (Reissue 1981), may be taken from actions of agencies of the State of Nebraska. Fisher v. Housing Auth. of City of Omaha 499
51. Where no statutory right to review has been provided, proceedings in error afford the only remedy. Fisher v. Housing Auth. of City of Omaha 499
52. The failure of a petitioner to timely file in the District Court an authenticated transcript with the petition in error deprives that court of jurisdiction in the matter. Fisher v. Housing Auth. of City of Omaha 499
53. Action of an administrative agency or tribunal must be sustained, if such action is not arbitrary and capricious and is based upon competent evidence. In re Appeal of Levos 507
54. In reviewing the findings and decision of an administrative agency or tribunal, it is not for the Supreme Court to resolve conflicts in the evidence. Credibility

of witnesses and the weight to be given to testimony are for the administrative agency or tribunal as the trier of fact. In re Appeal of Levos 507
55. Procedural due process does not require a trial de novo or an additional and independent evaluation of evidence. In re Appeal of Levos 507
56. A litigant on appeal cannot complain about the admission of evidence which favored or benefited the litigant's case. In re Appeal of Levos 507
57. The defendant has the burden of establishing a basis for relief in a post conviction proceeding under Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1979), and the findings of the District Court in denying such relief will not be disturbed on appeal unless they are clearly erroneous. State v. Rice 518
State v. Hill 865
58. Neb. Rev. Stat. § 23-168.04 (Reissue 1977) relates only to appeals from the boards of adjustment and is not applicable to action taken by the county board of supervisors. Van Heek v. County of Knox 538
59. Parties to litigation cannot confer subject matter jurisdiction on a judicial tribunal by either acquiescence or consent. Whitehouse Energy Savers v. Hanlon 572
60. Judicial review of the allowance or disallowance of claims under the Employment Security Law, Neb. Rev. Stat. §§ 48-601 et seq. (Reissue 1978), shall be taken to the District Court of the county in which the claimant was last employed or in which the claimant resides, or to any District Court of the state upon which the parties may agree, but the rate of contribution or the liability for contribution of an employer under the act shall be judicially reviewed by the District Court of Lancaster County only. Whitehouse Energy Savers v. Hanlon ... 572
61. The right of appeal is statutory and the requirements of the statute are mandatory and must be complied with before the appellate court acquires jurisdiction of the subject matter of the action. Whitehouse Energy Savers v. Hanlon 572
62. It is fundamental that want of jurisdiction of the subject matter of the action is a defect which requires the court to proceed by dismissal of the case or other suitable action. Whitehouse Energy Savers v. Hanlon 572
63. An objection to the adduced evidence must appear in the record for preservation of a question to be reviewed on appeal. State v. Tomrdle 580
64. Rejection of a plea in abatement will not be reversed after a verdict of guilty which is based on sufficient evi-

dence that a crime has been committed. State v. Tomrdle 580
65. In determining the sufficiency of evidence necessary to sustain an award of the Nebraska Workmen's Compensation Court after rehearing, such evidence must be considered most favorably to the successful party, every controverted fact must be resolved in his or her favor, and he or she must receive the benefit of every inference reasonably deducible from it. Sortino v. Miller 592
66. In reviewing findings of the trial court when it has made an inspection of the premises and has given consideration to the competent and relevant facts revealed thereby, this court must give weight thereto. Hardt v. Short-Line Irr. Dist. 612
67. An action for partition is triable de novo on the record in the Supreme Court. Noell v. Noell 632
68. The petition filed in error proceedings must specifically set out each of the alleged errors relied upon. Bickford v. Board of Ed. of Sch. Dist. #82 642
69. Although the review in the Supreme Court of an order of a juvenile court is de novo on the record, the findings of the trial court are accorded great weight. In re Interest of Fant 692
70. Where a notice of appeal is not filed within 1 month from the entry of the final order appealed from as required by Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 1982), this court obtains no jurisdiction to hear the appeal, and the appeal must be dismissed. State v. Harrington 696
71. Error cannot be predicated on the admission of testimony when testimony of the same nature was previously admitted without objection. In re Estate of Hill . 702
72. A mechanic's lien foreclosure is to be considered by the Supreme Court on appeal de novo on the record, giving credit to the fact that the trial court observed the witnesses and their manner of testifying. Senften v. Church of the Nazarene 708
73. The standard of review of an order granting a new trial is whether the trial court abused its discretion. This court will not disturb an order granting a new trial unless it clearly appears that no tenable grounds existed therefor. Hegarty v. Campbell Soup Co. 716
74. A party has the right to cross-examine a witness with regard to an interest which affects credibility. Failure to permit such inquiry constitutes reversible error if prejudice results to the complaining party. Hegarty v. Campbell Soup Co. 716

75. The fact that this court arrives at the same conclusion as the District Court, but for a different reason, is no cause to reverse the judgment. Lilyhorn v. Dier 728
76. On an appeal to this court of an action under the State Tort Claims Act, the findings of the trial court will not be disturbed unless clearly wrong. Shepard v. State of Nebraska 744
77. A judgment of the District Court brought to this court for review is supported by a presumption of correctness, and the burden is upon the party complaining of the action of that court to show by the record that it is erroneous. Flood v. Keller 797
78. A review by petition in error is conducted solely on the record made by the tribunal whose action is being reviewed, and no new facts or evidence can enter into the consideration of the court. Flood v. Keller 797
79. Orders and findings of the Nebraska Crime Victim's Reparations Board, Neb. Rev. Stat. §§ 81-1801 et seq. (Reissue 1981), are reviewed as provided for in the rules of administrative agencies, Neb. Rev. Stat. §§ 84-901 et seq. (Reissue 1981). Lambert v. Nebraska Cr. Vict. Rep. Bd. 817
80. An order appointing a conservator is reviewed on appeal for error appearing on the record. In re Estate of Oltmer 830
81. An appeal of a juvenile proceeding to this court is heard de novo upon the record, but the findings of fact by the juvenile court will be accorded great weight because it both heard and observed the parties and witnesses. In re Interest of Spradlin 834
82. The determination of the admissibility of physical evidence lies within the discretion of the trial court and will not be overturned absent a clear abuse of discretion. State v. Searles 849
83. Evidence which does not appear in the record can not be considered by this court on appeal. State v. Fries .. 874
84. An action in mandamus is a law action in which a jury trial on issues of fact is not demandable as a matter of right, and the findings of fact by the District Court will not be disturbed by this court on appeal unless clearly wrong. Nuss v. Pathfinder Irr. Dist. 888
85. Where court-appointed counsel in a post conviction case, after careful and conscientious review of the matter, determines that the appeal is wholly frivolous and without merit, counsel may file a motion in this court, pursuant to Neb. Ct. R. 3B (Rev. 1982), requesting leave to withdraw, supported by a brief and an affidavit setting out the fact that counsel has made a thor-

ough and conscientious examination of the record and has determined the appeal to be without merit and wholly frivolous. State v. Harper 911

Assessments.

On appeal of assessments made by a board of a sanitary and improvement district, there is no presumption of regularity attached to such action. On appeal the District Court, and this court, shall hear and determine such appeals in a summary manner as in a case in equity and shall increase or reduce the assessments as the same may be required to provide that assessments shall be to the full extent of special benefits, and to make the apportionment of benefits equitable. City of Omaha v. S.I.D. No. 287 371

Attorney and Client.

As a general rule the duty to exercise reasonable care and skill which a lawyer owes his client ordinarily does not extend to third parties. Lilyhorn v. Dier 728

Attorney Fees.

1. Special rules apply to contingent fee contracts between a lawyer and his client. In order for the plaintiff to recover on the basis of an express contract, the evidence must show an agreement which was in compliance with these rules. Kirby v. Liska 356
2. Evidence to prove an oral agreement for a contingent fee must be clear, convincing, and satisfactory. Kirby v. Liska 356
3. The nature of the attorney-client relationship demands that the attorney be held to such a standard of proof. Kirby v. Liska 356
4. As soon as feasible after a lawyer has been employed, it is desirable that he reach a clear agreement with his client as to the basis of the fee charges to be made. Kirby v. Liska 356
5. No lawyer retained on a contingent fee basis should be too busy to prepare a written instrument precisely detailing all terms of the employment contract. Kirby v. Liska 356
6. When a lawyer informs a prospective client, at the time he is retained, that his fee will be on a contingent basis, he should clearly indicate the percentage of recovery to be received. In the absence of knowledge and approval by the client, it can not be said that there was a meeting of the minds sufficient to give rise to a contract for a contingent fee. Kirby v. Liska 356

7. A contingent fee which is not fair and reasonable can not be recovered in an action for attorney fees. Kirby v. Liska 356
8. Courts have authority to monitor and determine the reasonableness of contingent fee contracts under their inherent power to regulate the bar. Kirby v. Liska 356
9. A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee. Kirby v. Liska 356
10. A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Kirby v. Liska 356
11. There is no rule that requires the trial court to necessarily award attorney fees in accordance with the value of services in a divorce case. The award of attorney fees is discretionary with the trial court and depends upon a variety of factors, including all the circumstances, such as the amount of the division of property and alimony awarded, the earning capacity of the parties, and the general equities of the situation. Whitney v. Whitney 565
12. It is the general practice in this state to allow the recovery of attorney fees and expenses only in those cases as are provided for by statute, or where the uniform course of procedure has been to allow such recovery. Holt County Co-op Assn. v. Corkle's, Inc. 762
13. Attorney fees may be shifted to the opponent when there exists and the court specifically finds conduct during the course of litigation which is so vexatious, unfounded, and dilatory as to constitute or be tantamount to bad faith. Holt County Co-op Assn. v. Corkle's, Inc. 762
14. Such an attorney fee may be limited in amount so as to relate only to that part of the action necessitated by the misconduct. Holt County Co-op Assn. v. Corkle's, Inc. 762

Attorneys at Law.

1. Practicing attorneys of other states may be admitted to practice in this state for the purpose of conducting professional business upon the showing that they have associated and appearing with them in the action an attorney who is a resident of Nebraska duly and regularly admitted to practice in the courts of record of this state upon whom service may be had in all matters connected with said action with the same effect as if personally made on such foreign attorneys within this state. Neb. Rev. Stat. § 7-103 (Reissue 1977). Emry v. American Honda Motor Co. 435

2. The purpose of resident counsel joining with nonresident counsel is to insure that the nonresident counsel will be associated with a counsel involved in the litigation who is knowledgeable and familiar with the laws and practices of this state. A resident lawyer should not permit his or her name to be affixed to pleadings or briefs unless he or she intends to be involved in the litigation and familiar with the actions taken by nonresident counsel. Emry v. American Honda Motor Co. 435
3. The courts of Nebraska look primarily to members of its bar for the conduct of litigation in which they appear. State ex rel. Douglas v. Bigelow 464

Bail Bond.

A court, when releasing a defendant on bond, need only inform the defendant of any special or unusual condition attached thereto, as set out in Neb. Rev. Stat. § 29-901 (Reissue 1979), and the court need not inform that defendant of the possible penalty for his simple failure to appear, as set out in Neb. Rev. Stat. § 29-908 (Reissue 1979). State v. King 855

Blood, Breath, and Urine Tests.

1. Before the State may offer in evidence the results of a breath test for the purpose of establishing that a defendant was at a particular time operating a motor vehicle while having ten-hundredths of one percent or more by weight of alcohol in his body fluid, the State must prove the following: (1) That the testing device or equipment was in proper working order at the time of conducting the test; (2) That the person giving and interpreting the test was properly qualified and held a valid permit issued by the Nebraska Department of Health at the time of conducting the test; (3) That the test was properly conducted in accordance with a method currently approved by the Nebraska Department of Health; and (4) That there was compliance with all statutory requirements. State v. Dush 51
2. Evidence that the result of a breath test showed a concentration of alcohol in the blood greater than ten-hundredths of one percent does not create a presumption of guilt, but may be sufficient to make a prima facie case on the issue of blood alcohol concentration. State v. Dush 51

Boundaries.

1. A tree, standing directly upon the line between adjoining owners so that the line passes through it, is the

common property of both parties, whether marked or not; and trespass will lie if one cuts and destroys it without the consent of the other. Patterson v. Oye 167
2. An injunction will be granted to prevent one adjoining owner from injuring or destroying trees that are growing on the boundary line. Patterson v. Oye 167
3. An action to establish boundaries under Neb. Rev. Stat. § 34-301 (Reissue 1978) is an equity action triable de novo on the record on appeal to this court. Cofer v. Kuhlmann 341
4. Where a fence is constructed as the boundary line, although it is not the actual boundary line, and the parties claim ownership of land up to the fence for the uninterrupted statutory period, the parties gain title to such land by adverse possession. Petsch v. Widger ... 390
5. If the adverse claimant is under no misapprehension as to the location of the boundary line and does not occupy the land with the intent to own it, he will not be deemed to be an adverse possessor. Petsch v. Widger 390

Breach of Contract.

1. The measure of damages for a breach of contract to lend money is usually the difference between the contract interest rate and the increased interest rate the borrower is obligated to pay in procuring a new loan. Rubin v. Pioneer Fed. S & L. Assn. 364
2. The general rule is that the burden rests on the plaintiff to show the fulfillment of a condition precedent to his right of recovery. Rubin v. Pioneer Fed. S. & L. Assn. 364
3. Where a party to a contract, with full knowledge of the facts and with knowledge of a breach by the other party, receives money in the performance of the contract, the breach will be deemed to have been waived. Dougherty v. Robson 802

Breach of Promise.

Any cause of action which may otherwise exist by reason of the breach of a promise to marry is extinguished once the parties begin to cohabit prior to fulfillment of the promise. Menhusen v. Dake 450

Breach of Warranty.

A purchaser must plead and prove that he gave timely notice of a breach of warranty. Moore v. Puget Sound Plywood 14

Bridges.

1. Mandamus is a proper remedy to compel those in con-

trol of an irrigation canal to erect a bridge or bridges across the canal under the provisions of Neb. Rev. Stat. § 46-255 (Reissue 1978). Nuss v. Pathfinder Irr. Dist. 888
2. The provisions of Neb. Rev. Stat. § 46-255 (Reissue 1978), requiring a bridge or bridges to be built across irrigation canals and ditches under specified factual circumstances, apply whether the lands were owned by the owner at the time the canal was built or were subsequently acquired, where the tracts lying on different sides of the canal together constitute one farm or ranch. Nuss v. Pathfinder Irr. Dist. 888

Burglary.
1. A conviction of burglary can be based on circumstantial evidence. State v. Tomrdle 580
2. Nocturnal entry into a building known to contain property is a circumstance from which an intent to steal may be inferred. State v. Tomrdle 580

Causes of Action.
1. A "cause of action" is the operative facts which give rise to a "right of action" or the remedial right affording redress. Thus, there may be several rights of action arising out of a cause of action. Mindt v. Shavers 786
2. A single cause of action may give rise to more than one theory upon which recovery may be had. Mindt v. Shavers 786

Certificate of Title.
1. In accordance with the provisions of Neb. Rev. Stat. § 60-105(1) (Reissue 1978), no person acquiring a motor vehicle from the owner thereof shall acquire any right, title, claim, or interest in or to such motor vehicle until he shall have had delivered to him physical possession of such motor vehicle and a certificate of title duly executed. State Farm Mut. Auto. Ins. Co. v. Fitzgerald .. 226
2. While it may be true that a certificate of title is not conclusive evidence of ownership, it is likewise true that absent a duly executed certificate of title, ownership may not be established. State Farm Mut. Auto. Ins. Co. v. Fitzgerald 226
3. A purchaser who receives possession of an automobile without obtaining the certificate of title thereto, as required by our statute, acquires no title or ownership therein. State Farm Mut. Auto. Ins. Co. v. Fitzgerald 226
4. Where a purchaser contracts to buy an automobile and takes possession thereof without objection and uses the automobile, such use is a use with the permission of the

owner until such time as a certificate of title thereto is issued to the purchaser. State Farm Mut. Auto. Ins. Co. v. Fitzgerald 226

Child Custody.

1. In a dissolution proceeding no preference as to custody of children may be given to either parent based upon the sex of the parent. Hicks v. Hicks 588
2. The moral fitness and conduct of the parties, along with other matters, are of great significance in determining questions of custody. Hicks v. Hicks 588

Child Support.

In determining the amount of child support to be awarded, the status, character, and situation of the parties and attendant circumstances must be considered; the financial position of the husband as well as estimated costs to support the children must be taken into account. Whitney v. Whitney 565

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. State v. Rowe 685

Collateral Attack.

1. The attempt to raise the same issues in an original action for monetary damages as those employed in an unsuccessful direct appeal from the action of the same agency constitutes a collateral attack on the decision of that agency. Fisher v. Housing Auth. of City of Omaha 499
2. A collateral attack upon a judgment will not lie unless the judgment is absolutely void. Where the court or agency has jurisdiction of the parties and the subject matter, its judgment is not subject to collateral attack, because such judgment is only voidable and not void. Fisher v. Housing Auth. of City of Omaha 499
3. The rule against collateral impeachment of judicial decisions applies to the determination of state and county officers or boards of officers, who, although not constituting a court, are called on to act judicially in matters of administration. Fisher v. Housing Auth. of City of Omaha 499

Collateral Evidence.

Proof of collateral matters which do not render the de-

fendant's criminal activity less criminal are not relevant. State v. Fries 874

Compromise and Settlement.

After an agreement to compromise and settle a controversy has been entered into by the interested parties, the original matter in dispute is not a proper subject of suit or defense, where fraud, mistake, or duress in procuring the contract is not pleaded. Dougherty v. Robson 802

Confessions.

1. In determining whether a statement was made voluntarily, the totality of the circumstances must be examined. State v. Erks 302
2. Factors to be considered in making the determination as to whether a statement was made voluntarily are age, intelligence, education, background, the atmosphere in which the interrogation took place, the demeanor of the interrogation, physical treatment, prior history with the police, and the presence or absence of warnings. State v. Erks 302
3. A physical condition of the defendant which makes him incapable of understanding the meaning of his statements renders a statement involuntary. State v. Erks 302
4. Deception by police is not sufficient to make an otherwise valid confession inadmissible, unless it is such as to produce a false or unworthy confession. State v. Erks 302
5. A confession must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. State v. Erks 302
6. To be admissible, a statement or confession must be free and voluntary. It must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. State v. Ellefson 747
7. The applicable standard to determine the admissibility of statements made by an accused during a custodial interrogation is whether the accused intelligently, knowingly, and voluntarily waived his right to remain silent and his right to have counsel present at that time. State v. Ellefson 747
8. In determining whether the State has shown the admissibility of custodial statements by the requisite degree of proof, this court will accept the factual determination and credibility choices made by the trial judge un-

less they are clearly erroneous, and in so doing we will look to the totality of the circumstances. State v. Ellefson 747

Constitutional Law.

1. Language of a statute or regulation which conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices will not be held to be unconstitutionally vague or overbroad on those grounds. Richardson v. City of Omaha 97
2. In the area of economics and social welfare, a state does not violate the equal protection clause merely because the classifications made by its laws are imperfect. If the classification has some reasonable basis, it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality. County of Antelope v. Stenberg 150
3. Where hearsay statements admitted into evidence have sufficient indicia of reliability to afford the trier of fact a satisfactory basis for evaluating their truth, they do not violate the right of confrontation. State v. Roy 204
4. The federal government has not undertaken to preempt the right of the several states to legislate in the area of discriminatory employment practices. Ranger Division v. Bayne 251
5. The federal government's power to regulate commerce among the states does not exclude all state regulation of the subject. Ranger Division v. Bayne 251
6. The property of no person shall be taken or damaged for public use without just compensation therefor. Kohl v. State of Nebraska 348
7. The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution. State v. Rice 518
8. The duty of the prosecution to respond to a general request for obviously exculpatory evidence does not arise simply because there is a mere possibility that an item of undisclosed information might have helped the defense or might have affected the outcome of the trial. The materiality of that evidence in a constitutional sense is not established. State v. Rice 518
9. If the evidence which the prosecution fails to disclose would have created a reasonable doubt as to the defendant's guilt, constitutional error has been commit-

ted. However, if there is no reasonable doubt about guilt, whether or not the additional evidence is considered, there is no justification for a new trial. State v. Rice 518

10. The warrantless routine search of a vehicle lawfully in the custody of police, following standard procedures, does not violate the U.S. Constitution's fourth amendment prohibition of unreasonable search and seizure. State v. Hill 865

Construction Contracts.

1. While it is true that a contract, oral or written, between a subcontractor and a contractor is not binding upon the owner of the property, it is also true that, absent evidence to the contrary, the existence of such a contract does establish the fair and reasonable value of the services. Senften v. Church of the Nazarene 708
2. In the absence of a contract to pay a definite sum, the builder is entitled to recover only the reasonable market value for material and labor. Senften v. Church of the Nazarene 708

Contracts.

1. In the absence of fraud one who signs an instrument without reading it, when he can read and has an opportunity to do so, cannot avoid the effect of his signature merely because he was not informed of the contents of the instrument. Interholzinger v. Estate of Dent 264
2. Rescission by its nature implies the extinction of the contract which leaves the parties without a right of recovery on the contract itself. Rubin v. Pioneer Fed. S. & L. Assn. 364
3. An agreement partly written and partly oral may, in legal effect, be regarded in its entirety as a parol contract. Beekman v. Cornhusker Farms 418
4. A cause of action is not on an "agreement, contract or promise in writing" within the meaning of Neb. Rev. Stat. § 25-205 (Reissue 1979), providing that an action on any "agreement, contract or promise in writing" can only be brought within 5 years, merely because it is in some way remotely or indirectly connected with the instrument or because the instrument may be a link in the chain of evidence establishing a cause of action. Beekman v. Cornhusker Farms 418
5. In order for an action to be on an "agreement, contract or promise in writing" within the meaning of Neb. Rev. Stat. § 25-205 (Reissue 1979), providing that an action on any "agreement, contract or promise in writing"

can only be brought within 5 years, it must in itself contain a contract or promise to do the thing for nonperformance of which the action is brought. Beekman v. Cornhusker Farms 418

6. A contract is not an "agreement, contract or promise in writing" within the meaning of Neb. Rev. Stat. § 25-205 (Reissue 1979), providing that an action on any "agreement, contract or promise in writing" can only be brought within 5 years, unless it can be wholly proved by a writing or writings; and if there is anything that must be supplied by parol evidence to make it a binding obligation, it is not an "agreement, contract or promise in writing." Beekman v. Cornhusker Farms 418
7. An action is not upon an "agreement, contract or promise in writing" within the meaning of Neb. Rev. Stat. § 25-205 (Reissue 1979), if the writing relied upon as the basis of the action contains no promise to do the thing for nonperformance of which the action is brought or states no fact from which the law applies an obligation to do that thing. Beekman v. Cornhusker Farms 418
8. In the absence of anything to indicate a contrary intention, instruments executed at the same time by the same parties for the same purpose and in the course of the same transaction are, in the eyes of the law, one instrument and will be read and construed together as if they were as much one in form as they are in substance. Lauritzen v. Davis 547
9. Beneficiaries of a contract may recover thereon, though not named as parties, when it appears by express stipulation or by reasonable intendment that rights and interests of such beneficiaries were contemplated and being provided for thereon. Lauritzen v. Davis 547
10. The interpretation given to a contract by the parties themselves while engaged in the performance of it is one of the best indications of true intent and should be given great, if not controlling, influence. Lauritzen v. Davis 547
11. After an agreement to compromise and settle a controversy has been entered into by the interested parties, the original matter in dispute is not a proper subject of suit or defense, where fraud, mistake, or duress in procuring the contract is not pleaded. Dougherty v. Robson 802
12. If the promisor prevents or hinders the occurrence of a condition precedent and if the condition would have occurred except for such prevention or hindrance, the

condition is excused. Keystone Bus Lines v. ARA Services 813

Convictions.

1. The task of this court in cases where a defendant has been convicted of a crime is to determine whether the evidence is such that it is sufficient to support the finding of guilt beyond a reasonable doubt. State v. Dofner 56
2. The determination as to whether the evidence is sufficient to support a finding of guilt beyond a reasonable doubt cannot be made in the absence of a record which tells us clearly with what crime defendant has been charged so that we may know whether the pleadings support the judgment. State v. Dofner 56
3. A conviction may rest on the uncorroborated testimony of an accomplice. State v. Huffman 429
4. A conviction may rest solely on circumstantial evidence. State v. Evans 432
5. In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. State v. Rowe 685

Corporations.

1. As a general rule, a shareholder suing on behalf of a corporation for wrongs done to it must first seek to persuade the officers and directors to bring the action; however, he is not required to make such an effort if it would have been unavailing. Anderson v. Clemens Mobile Homes 283
2. Although an officer or a director of a corporation is not necessarily precluded from entering into a separate business because it is in competition with the corporation, his fiduciary relationship to the corporation and its stockholders is such that if he does so he must prove by a preponderance of the evidence that he did so in good faith and did not act in such a manner as to cause or contribute to the injury or damage of the corporation, or deprive it of business; if he fails in this burden of proof, there has been a breach of that fiduciary trust or relationship. Anderson v. Clemens Mobile Homes .. 283
3. A director or other corporate officer cannot acquire an interest adverse to that of the corporation while acting

for the corporation or when dealing individually with third persons. Anderson v. Clemens Mobile Homes ... 283
4. Although the burden is ordinarily upon the party seeking an accounting to produce evidence to sustain the accounting, where another is in control of the books and has managed the business, that other is in the position of a trustee and must make a proper accounting. Anderson v. Clemens Mobile Homes 283
5. Generally, no corporate opportunity exists if the corporation is by itself financially unable to undertake such. Anderson v. Clemens Mobile Homes 283
6. A corporate officer has no specific duty to use or pledge his personal funds to enable the corporation to take advantage of a business opportunity. Anderson v. Clemens Mobile Homes 283
7. In order to be a corporate opportunity, the business must generally be one of practical advantage to the corporation and must fit into and further an established corporate policy. Anderson v. Clemens Mobile Homes 283
8. Corporate ratification of unauthorized acts may be inferred from inaction. Anderson v. Clemens Mobile Homes 283

Corroboration.

In a prosecution for sexual assault it is not essential that the victim be corroborated as to the particular act constituting the offense in order to sustain a conviction. It is sufficient if she is corroborated as to material facts and circumstances which tend to support her testimony and from which, together with her testimony, an inference of guilt may be drawn. State v. Beasley 918

Court Rules.

Under Douglas County District Court rule 12C the service of notice of an order to show cause and knowledge on the part of local counsel of such order is sufficient compliance with such court rule. Emry v. American Honda Motor Co. 435

Courts.

1. As provided for in Neb. Rev. Stat. § 24-541.06 (Cum. Supp. 1982), all cases other than small claims which are appealed from the municipal or county courts are reviewed by the District Court for error appearing on the record. McKenzie v. Ladd Trucking Co. 209
2. Courts of general jurisdiction possess inherent power to vacate and modify their own judgments at any time during the term at which they were pronounced. This

power exists entirely independent of any statute. It is derived from the common law. At common law, judgments were subject to vacation or modification only during the term in which rendered. Emry v. American Honda Motor Co. 435

3. Courts of general jurisdiction have inherent power to do all things necessary for the proper administration of justice and equity within the scope of their jurisdiction. Holt County Co-op Assn. v. Corkle's, Inc. 762

Crime Victims.

1. Orders and findings of the Nebraska Crime Victim's Reparations Board, Neb. Rev. Stat. §§ 81-1801 et seq. (Reissue 1981), are reviewed as provided for in the rules of administrative agencies, Neb. Rev. Stat. §§ 84-901 et seq. (Reissue 1981). Lambert v. Nebraska Cr. Vict. Rep. Bd. 817
2. Compensation for pecuniary loss to which dependents of victims of crimes may be entitled under Neb. Rev. Stat. §§ 81-1801 et seq. (Reissue 1981) refers to loss of financial support, not loss of love and affection. Lambert v. Nebraska Cr. Vict. Rep. Bd. 817
3. The pecuniary loss to a dependent of a deceased is always more or less a matter of estimate and is a question for the trier of fact. Lambert v. Nebraska Cr. Vict. Rep. Bd. 817
4. Although the availability of funds appropriated for the purposes of the Nebraska Crime Victim's Reparations Act is a factor which the Legislature has directed shall be considered in making awards under the act, it is necessary that the record contain some evidence of such appropriations. Lambert v. Nebraska Cr. Vict. Rep. Bd. 817

Criminal Law.

1. The punishment for a criminal act should, in all circumstances, be commensurate with the offense. State v. Kowalski 48
2. In reviewing a criminal case this court will not set aside the verdict of guilty if, taking the view most favorable to the State, there is sufficient evidence to support the verdict. State v. Welsh 60
3. In order to warrant the enhancement of the penalty under the Nebraska habitual criminal statute, Neb. Rev. Stat. § 29-2221 (Reissue 1979), the prior convictions, except the first conviction, must be for offenses committed after each preceding conviction, and all such prior

convictions must precede the commission of the principal offense. State v. Ellis 172
4. While Neb. Rev. Stat. § 29-2260 (Reissue 1979) lists grounds to be considered by the sentencing court, it does not control its discretion. State v. Hunt 214
5. In determining the sufficiency of the evidence to sustain a conviction in a criminal prosecution, this court does not resolve conflicts in the evidence, pass upon the credibility of the witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of the facts, and its verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. State v. Huffman 429
State v. Beasley 918
6. The existence of an agreement to testify by a witness under threats or promises of leniency made by the prosecutor is relevant to the credibility of such witness, and failure to bring that to the attention of the jury denies the defendant due process of law. State v. Rice .. 518
7. An expectation of leniency on the part of a witness, absent evidence of any expressed or implied agreement, need not be revealed to the jury. State v. Rice 518
8. The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution. State v. Rice 518
9. The duty of the prosecution to respond to a general request for obviously exculpatory evidence does not arise simply because there is a mere possibility that an item of undisclosed information might have helped the defense or might have affected the outcome of the trial. The materiality of that evidence in a constitutional sense is not established. State v. Rice 518
10. If the evidence which the prosecution fails to disclose would have created a reasonable doubt as to the defendant's guilt, constitutional error has been committed. However, if there is no reasonable doubt about guilt, whether or not the additional evidence is considered, there is no justification for a new trial. State v. Rice 518
11. The principle that a state may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, does not cease to apply merely because the false testimony goes only to the credibility of the witness, but for that rule to apply, the evidence withheld must have been false. State v. Rice 518

12. When trial counsel makes a choice of defenses as a matter of trial strategy, even if that choice proves to be ineffective, it does not without more sustain a finding of ineffective assistance of counsel. State v. Poe 540
13. Discovery in criminal cases, as authorized by Neb. Rev. Stat. §§ 29-1912 et seq. (Reissue 1979), is patterned on the Federal Rules of Criminal Procedure. State v. Brown 665
14. Upon a defendant's proper request through discovery procedure, the State must disclose information which is material to the preparation of a defense to the charge against the defendant. State v. Brown 665
15. Information obtainable by discovery procedure in criminal cases is material if the requested information may affect the outcome of the trial. State v. Brown 665
16. In order that the defendant receive a fair trial, requested and material information must be disclosed to the defendant. State v. Brown 665
17. Proof of collateral matters which do not render the defendant's criminal activity less criminal are not relevant. State v. Fries 874
18. The State is not required to prove lack of an exemption as an element of the offense of unlawful sale of unregistered securities. State v. Fries 874
19. The defendant bears the burden of proof as to a claim of exemption. State v. Fries 874
20. Proof of a specific intent, evil motive, or knowledge that the law was being violated is not required to sustain a criminal conviction under the Securities Act of Nebraska. State v. Fries 874

Damages.

1. The measure of damages for a breach of contract to lend money is usually the difference between the contract interest rate and the increased interest rate the borrower is obligated to pay in procuring a new loan. Rubin v. Pioneer Fed. S. & L. Assn. 364
2. In a cause of action for damage to land due to seepage, the burden is on the plaintiffs to prove that it was the acts of the defendants in their maintenance and operation of a drain or diversion structure that caused the plaintiff's injury. Hardt v. Short-Line Irr. Dist. 612
3. In a condemnation proceeding, in the absence of evidence to the contrary, it will be presumed that the amount of an award of damages by appraisers and the amount of the verdict of the jury for damages on which final judgment was entered were each duly and prop-

erly determined according to law. Schneekloth v. County of Sarpy 618
4. When the issue of liability has been determined and there has been error in the determination of damages such that the verdict must be set aside, a new trial may be limited to the issue of damages. Hegarty v. Campbell Soup Co. 716
5. If one of several joint wrongdoers makes settlement with the injured party and pays him damages which he agrees to receive and does receive as full compensation for all damages sustained, it will release all of the joint wrongdoers. Dougherty v. Robson 802
6. Compensation for pecuniary loss to which dependents of victims of crimes may be entitled under Neb. Rev. Stat. §§ 81-1801 et seq. (Reissue 1981) refers to loss of financial support, not loss of love and affection. Lambert v. Nebraska Cr. Vict. Rep. Bd. 817
7. The pecuniary loss to a dependent of a deceased is always more or less a matter of estimate and is a question for the trier of fact. Lambert v. Nebraska Cr. Vict. Rep. Bd. 817

Decedents' Estates.

1. The right to dispose of one's property by will at death is a valuable right which is favored by the law, and it will be sustained whenever possible. In re Estate of Schmitz 28
2. A liability contract, although an asset of an estate, creates a contractual right which vests only when a liability claim against insured ripens into judgment. Tank v. Peterson 34
3. Tort claims filed against an estate under the liability insurance exception do not affect the interests of the beneficiaries under the estate and thus present no obstacle to an orderly and exact administration of the estate. Tank v. Peterson 34
4. To the extent of liability coverage, nothing in Neb. Rev. Stat. §§ 30-2401 et seq. (Reissue 1979) affects any proceeding to establish liability of a decedent or personal representative for which he is protected by liability insurance. Tank v. Peterson 34
5. Under South Dakota law no sale of any property of an estate of a decedent is valid unless made under an order of the probate court, except as otherwise provided. All sales must be reported under oath and confirmed by the court before title to the property passes. Coe v. Covert 140
6. Ordinarily the acts of an executor or administrator in

his individual capacity cannot operate as an estoppel against him in his representative capacity. Coe v. Covert 140
7. Where an ancestor dies intestate his lands descend instantly to his heirs. It does not require settlement of his estate or a probate order declaring heirship to vest his title. Noell v. Noell 632
8. Under Neb. Rev. Stat. § 30-2316 (Reissue 1979) "fair disclosure" contemplates that each spouse should be given information of a general and approximate nature concerning the net worth of the other. "Fair disclosure" is not synonymous with detailed disclosure such as a financial statement of net worth and income. In re Estate of Hill 702

Deeds.

1. An otherwise effective conveyance of property transfers the entire interest which the conveyor has and has the power to convey, unless an intent to transfer a less interest is effectively manifested. Miller v. McMillen 244
2. Neb. Rev. Stat. § 76-238 (Reissue 1981) is designed to protect a subsequent purchaser even though there was a prior conveyance or transaction concerning the property, provided the subsequent purchaser recorded his title first, and provided further that the subsequent purchaser was a bona fide purchaser without notice of any other claims to the property. Miller v. McMillen 244
3. In order to warrant the reformation of a written instrument in any material respect, the evidence must be clear, convincing, and satisfactory; and until overcome by such proof, the terms of the instrument must stand as evidencing the intention of the parties. Noell v. Noell 632
4. For parol evidence to be sufficient to support a finding that a duly executed deed was, in fact, a gift to one of the grantees, such evidence must be clear, unequivocal, and convincing to overcome the presumption arising from the express terms of the deed. Anstine v. Anstine 808

Demurrer.

1. In reviewing the sustaining of a demurrer this court must treat the facts alleged in the petition as undisputed. Dieter v. Hand 257
2. In ruling on a demurrer the court must assume that the facts are as alleged, and cannot assume the existence of any facts not alleged, nor find facts in aid of the pleading, nor consider what evidence may be intro-

duced at the trial. Fisher v. Housing Auth. of City of Omaha 499

Depositions.

The reasonable time used to obtain a deposition requested by a defendant in preparation for trial is excluded in computing the last day permissible for commencement of trial under Neb. Rev. Stat. § 29-1207(1) (Reissue 1979). State v. Fatica 776

Directed Verdict.

1. Upon an appeal from an order sustaining a motion for dismissal at the close of plaintiff's evidence, we must treat as admitted the truth of all material and relevant evidence favorable to plaintiff, and plaintiff is entitled to the benefit of all proper inferences which can reasonably be deduced therefrom. First Nat. Bank & Trust Co. v. Hughes 42
2. The introduction of evidence by the defendant following the overruling of a motion for directed verdict at the close of the State's case waives any error in the ruling on the motion; however, the defendant is not prevented from questioning the sufficiency of the evidence in the entire record to sustain a conviction. State v. Hochstetler 482
3. A motion for directed verdict must be treated as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence. Frahm v. Carlson 532
In re Estate of Thompson 899
4. In every case, before the evidence is submitted to the jury there is a preliminary question for the court to decide when properly raised, not whether there is literally no evidence but whether there is any evidence upon which a jury can properly proceed to find a verdict for the party producing it upon whom the burden of proof is imposed. Frahm v. Carlson 532
5. A directed verdict is granted when there is no evidence to justify a finding that the accused is guilty of the charge contained in the complaint or information filed in the proceedings. State v. Tomrdle 580
6. Where a verdict should have been directed on the issue of liability, no prejudice can result from any error in instructions on the issue of liability. Hegarty v. Campbell Soup Co. 716

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. Frank 825
2. Cumulative acts of misconduct are distinguishable from isolated incidents of neglect and therefore justify more serious sanctions. State ex rel. NSBA v. Frank . 825

Discrimination.

1. The federal government has not undertaken to preempt the right of the several states to legislate in the area of discriminatory employment practices. Ranger Division v. Bayne 251
2. 49 C.F.R. § 391.41 (1978) constitutes a per se bona fide occupational qualification defense for a charge of discrimination brought under Neb. Rev. Stat. § 48-1104 (Reissue 1978) against an interstate carrier. Ranger Division v. Bayne 251

Divorce.

1. The right of third parties to intervene in proceedings for dissolution of marriage is very limited. Arnold v. Arnold 39
2. Intervention may be permitted where it is necessary to procure justice for third persons whose property interest may be adversely affected in the dissolution action. Arnold v. Arnold 39
3. There is no rule that requires the trial court to necessarily award attorney fees in accordance with the value of services in a divorce case. The award of attorney fees is discretionary with the trial court and depends upon a variety of factors, including all the circumstances, such as the amount of the division of property and alimony awarded, the earning capacity of the parties, and the general equities of the situation. Whitney v. Whitney 565
4. Upon dissolving a marriage the trial court must assign the property acquired during the marriage, by the joint efforts of the parties, title to which is held jointly by them, as the equities require. Anstine v. Anstine 808

Due Process.

1. For procedural due process a notice must reasonably inform a person of the accusation levied and the forum where evidence upon such accusation can be presented. In re Appeal of Levos 507
2. Procedural due process does not require a trial de novo

or an additional and independent evaluation of evidence. In re Appeal of Levos 507

Easements.

Adverse possession requires possession of another's land, while a prescriptive right involves only adverse use of another's land. Plettner v. Sullivan 636

Effectiveness of Counsel.

1. When trial counsel makes a choice of defenses as a matter of trial strategy, even if that choice proves to be ineffective, it does not without more sustain a finding of ineffective assistance of counsel. State v. Poe 540
2. One challenging the adequacy of criminal trial representation has the burden of proving incompetence and of showing that such incompetence prejudiced his defense. State v. Hill 865
State v. Harper 911
3. The standard for determining whether criminal defense counsel has provided adequate representation is whether he performed at least as well as a lawyer with ordinary training and skill in criminal law in his area, and whether he has conscientiously protected the interests of his client. State v. Hill 865
State v. Harper 911
4. A claim of prejudice based upon counsel's alleged failure to call witnesses is not sustained in the absence of evidence as to what the witnesses' expected testimony would be. State v. Hill 865
5. A claim of prejudice based upon counsel's alleged failure to investigate pretrial identification procedures is not sustained in the absence of evidence as to the defect in the procedures. State v. Hill 865

Eminent Domain.

1. A municipality having the power of eminent domain is not subject to its own zoning ordinances with respect to governmental projects for the construction of which it has the power to condemn. County of Knox v. City of Creighton 196
2. Normally, a taking by eminent domain does not include the personal property lying on the premises taken, but not affixed thereto. Kohl v. State of Nebraska 348
3. The property of no person shall be taken or damaged for public use without just compensation therefor. Kohl v. State of Nebraska 348
4. In order to provide just compensation for the taking of personal property by a state or its agency, the rules

governing the measure of compensation for real property in a condemnation action apply to that of personal property. Kohl v. State of Nebraska 348
5. Whenever the property is of such character and nature that it has no fair market value in the ordinary sense, its value for the uses and purposes to which it is being devoted and to which it is peculiarly adaptable may be shown. Kohl v. State of Nebraska 348
6. In a condemnation action tried before a jury, the presiding judge rules on the admissibility of evidence and other questions of law, while the jury determines questions of fact, such as the value of the property taken. Kohl v. State of Nebraska 348
7. The general rule is that an expert witness, when properly qualified, may testify as to the valuation of the property, and the weight and credibility of what the witness considers in coming to his conclusion is for the jury to determine. Kohl v. State of Nebraska 348
8. In a condemnation proceeding, if an appeal is taken from the award of the appraisers by the condemnee and the amount of the final judgment in the District Court is less than 15 percent more than the amount of the award of the appraisers, the condemnee is not entitled to an award for attorney and expert witness fees. Neb. Rev. Stat. § 76-720 (Reissue 1981). Schneekloth v. County of Sarpy 618
9. In a condemnation proceeding, in the absence of evidence to the contrary, it will be presumed that the amount of an award of damages by appraisers and the amount of the verdict of the jury for damages on which final judgment was entered were each duly and properly determined according to law. Schneekloth v. County of Sarpy 618

Employer and Employee.

1. Under the Nebraska Wage Payment and Collection Act an employee is "any individual permitted to work by an employer"; an employer is anyone "employing any person as an employee"; and wages are "compensation for labor or services rendered by an employee." Rudolf v. Tombstone Pizza Corp. 276
2. The criteria for determining whether one is an independent contractor or an employee include the right of control, the independence the workman enjoys, the degree of supervision of the work, whether tools are provided by the workman or the other party, the method of payment, and the contractual understanding between the parties. Rudolf v. Tombstone Pizza Corp. 276

3. Under the Nebraska Wage Payment and Collection Act an employer may deduct, withhold, or divert a portion of an employee's wages only when required to do so by state or federal law, or order of a court, or when authorized by a written agreement with the employee. Rudolf v. Tombstone Pizza Corp. 276
4. In a workmen's compensation claim, the burden of proof is on the claimant in each case to prove the nature of his employment. Sortino v. Miller 592
5. The primary test, when determining for workmen's compensation purposes whether one is an employee or independent contractor, is one of control. Sortino v. Miller 592

Employment Contracts.

1. When an employee contracts to fill a particular position, any material change in duties or significant reduction in rank will constitute a constructive discharge which, if unjustified, is a breach of contract. Sanders v. May Broadcasting Co. 755
2. The doctrine of constructive discharge is applied when an employer deliberately renders an employee's working conditions intolerable, thus forcing him to quit his job. Sanders v. May Broadcasting Co. 755

Employment Security Law.

1. An appeal to this court under the Employment Security Law is heard de novo. Erspamer Advertising Co. v. Dept. of Labor 68
2. The standards prescribed in Neb. Rev. Stat. § 48-604(5) (Reissue 1978) are not exclusive in determining whether an individual is an employee or an independent contractor. Erspamer Advertising Co. v. Dept. of Labor 68
3. Control or the right of control is the chief criterion in the determination of whether one acts as an independent contractor. Erspamer Advertising Co. v. Dept. of Labor 68
4. Judicial review of the allowance or disallowance of claims under the Employment Security Law, Neb. Rev. Stat. §§ 48-601 et seq. (Reissue 1978), shall be taken to the District Court of the county in which the claimant was last employed or in which the claimant resides, or to any District Court of the state upon which the parties may agree, but the rate of contribution or the liability for contribution of an employer under the act shall be judicially reviewed by the District Court of Lancaster County only. Whitehouse Energy Savers v. Hanlon ... 572
5. One is disqualified for benefits under Neb. Rev. Stat.

§ 48-628(a) (Cum. Supp. 1980) if, by leaving work voluntarily without good cause, one thereby makes himself or herself "unemployed." Gilbert v. Hanlon 676

6. Where more than one job is held concurrently by an employee, a disqualifying termination of one job does not thereby automatically disqualify the employee from benefits based upon other jobs against which no disqualification applies. With regard to disqualification for benefits under Neb. Rev. Stat. § 48-628(a) (Cum. Supp. 1980), each job should be considered separately and benefits disqualified separately according to the facts relating to the termination of each employment. Gilbert v. Hanlon 676

Equal Opportunity Commission.

On appeal of a review by the District Court of an order of the Equal Opportunity Commission, the Supreme Court does not try the facts and will not disturb the District Court's findings if they are supported by substantial evidence; however, the District Court in the first instance and the Supreme Court on appeal must reach independent conclusions with respect to questions of law. Ranger Division v. Bayne 251

Equity.

1. An action for an accounting may, under one set of circumstances, find its remedy in an action at law and, under another, find it within the jurisdiction of equity. Anderson v. Clemens Mobile Homes 283
2. Where the intimate relationships of the parties are involved, an adequate remedy is available only within the equitable jurisdiction of the court. Anderson v. Clemens Mobile Homes 283
3. The relationships between the minority and majority shareholders of a two-shareholder corporation are such that an adequate accounting remedy is available only within the equitable jurisdiction of the court. Anderson v. Clemens Mobile Homes 283
4. In an equitable proceeding we review the record de novo and reach an independent conclusion without being influenced by the findings of the trial court, except, however, that where credible evidence is in conflict, we must give weight to the fact that the trial court saw the witnesses and observed their demeanor while testifying. Anderson v. Clemens Mobile Homes 283
Cofer v. Kuhlmann 341
State ex rel. Douglas v. Bigelow 464
Hardt v. Short-Line Irr. Dist. 612

5. Where a situation exists which is contrary to the principles of equity and which can be redressed within the scope of judicial action, a court of equity will devise a remedy to meet the situation. Anderson v. Clemens Mobile Homes 283
6. An action to establish boundaries under Neb. Rev. Stat. § 34-301 (Reissue 1978) is an equity action triable de novo on the record on appeal to this court. Cofer v. Kuhlmann 341
7. Neb. Rev. Stat. § 25-2001 (Reissue 1979) is not the exclusive remedy for vacating a judgment after the term has expired, but is concurrent with an independent equity jurisdiction. However, to proceed in equity the litigant must show that he is without a remedy at law. Equity will not afford relief if the complainant has a remedy by statutory proceeding in the original action, and to be entitled to equitable relief a party must not have neglected to avail himself of the statutory remedy. Emry v. American Honda Motor Co. 435
8. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain a beneficial interest, equity converts him into a trustee. Lauritzen v. Davis 547
9. In reviewing findings of the trial court when it has made an inspection of the premises and has given consideration to the competent and relevant facts revealed thereby, this court must give weight thereto. Hardt v. Short-Line Irr. Dist. 612

Estates.

1. A life tenant cannot compel partition of real estate over the objection of remaindermen. Williams v. Nebraska Wesleyan Univ. 92
2. Where a life tenant seeks to compel partition against remaindermen who are minors, it is the duty of the court to determine whether partition is in the best interests of the minors. If partition is not in the best interests of the minor remaindermen, it should be denied. Williams v. Nebraska Wesleyan Univ. 92

Evidence.

1. The exercise by the trial court of its discretion in ruling on the admission or rejection of evidence will generally not be reviewed by an appellate court, unless it is clear-

ly or plainly shown that the trial court abused its discretion. Nusz v. Wells Manufacturing Corp. 1
Childers v. LCW Apartments 291
State v. Davis 474
State v. Searles 849
State v. Fries 874

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. State v. Roy 204
3. In a law action it is not within the province of the Supreme Court to weigh or resolve conflicts in the evidence. The credibility of witnesses and the weight to be given their testimony are for the trier of fact. Novotny v. Electric Hose & Rubber Co. 216
4. In testing the sufficiency of evidence to support findings of fact made by the Nebraska Workmen's Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. Novotny v. Electric Hose & Rubber Co. 216
5. Though prior incidents occurring on the premises might ordinarily be admissible to establish notice on the part of defendant, the evidence offered of such incidents must also show a substantial similarity to the incident which is the subject of the trial. Childers v. LCW Apartments 291
6. The admission of immaterial or irrelevant evidence in a trial to the court is not reversible error. In re Interest of Aufenkamp 297
State v. Davis 474
7. Evidence which should not have been admitted by the trial court will be disregarded by this court in a de novo review. In re Interest of Aufenkamp 297
8. The trial court has a wide discretion in determining whether evidence relating to illustrative experiments should be received. A judgment will not be reversed unless there has been a clear abuse of discretion. Kluender v. Mattea 327
9. An illustrative experiment is admissible if a competent person conducted the experiment, an apparatus of suitable kind and condition was utilized, and the experiment was conducted fairly and honestly. Kluender v. Mattea 327
10. Where a person, without reasonable explanation, changes his testimony concerning the material facts on a vital issue, such change clearly being made to meet the exigencies of pending litigation, the testimony is discredited as a matter of law and should be disregarded. Kluender v. Mattea 327

11. The rule of discreditation of testimony does not apply where the witness offers a rational or sufficient explanation for the change in testimony. Kluender v. Mattea 327
12. Substantial evidence for purposes of administrative review must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury, and this is something less than the weight of evidence; and the possibility of drawing two inconsistent conclusions from evidence does not prevent an administrative agency's finding from being supported by substantial evidence. Weiner v. State ex rel. Real Estate Comm. . 404
13. A presumption arises that the trial court, in trying a case without a jury, will consider only such evidence as is competent and relevant, and this court will not reverse a case so tried because evidence was erroneously admitted where there is other material, competent, and relevant evidence sufficient to sustain the trial court's judgment. State v. Davis 474
14. A litigant on appeal cannot complain about the admission of evidence which favored or benefited the litigant's case. In re Appeal of Levos 507
15. The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution. State v. Rice 518
16. The duty of the prosecution to respond to a general request for obviously exculpatory evidence does not arise simply because there is a mere possibility that an item of undisclosed information might have helped the defense or might have affected the outcome of the trial. The materiality of that evidence in a constitutional sense is not established. State v. Rice 518
17. If the evidence which the prosecution fails to disclose would have created a reasonable doubt as to the defendant's guilt, constitutional error has been committed. However, if there is no reasonable doubt about guilt, whether or not the additional evidence is considered, there is no justification for a new trial. State v. Rice 518
18. The principle that a state may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, does not cease to apply merely because the false testimony goes only to the credibility of the witness, but for that rule to apply, the evidence withheld must have been false. State v. Rice 518

19. An objection to the adduced evidence must appear in the record for preservation of a question to be reviewed on appeal. State v. Tomrdle 580
20. A party may, by his acts or omissions, waive, or be estopped to make, objections to the admission or exclusion of evidence. Such waiver or estoppel may raise from failure to object, from acts done or omitted before the evidence is offered, as by failure to object to previous similar evidence, or from some affirmative act done after the ruling on the evidence. In re Estate of Hill 702
21. Error cannot be predicated on the admission of testimony when testimony of the same nature was previously admitted without objection. In re Estate of Hill . 702
22. Evidence relating to a "Mary Carter" agreement should be admitted where the agreement bears upon the bias and credibility of witnesses employed by a party to the agreement. Hegarty v. Campbell Soup Co. 716

Executors and Administrators.

Ordinarily the acts of an executor or administrator in his individual capacity cannot operate as an estoppel against him in his representative capacity. Coe v. Covert 140

Expert Witnesses.

1. Triers of fact are not required to take the opinions of experts as binding on them. Novotny v. Electric Hose & Rubber Co. 216
2. The general rule is that an expert witness, when properly qualified, may testify as to the valuation of the property, and the weight and credibility of what the witness considers in coming to his conclusion is for the jury to determine. Kohl v. State of Nebraska 348
3. Expert testimony is permitted even in areas where laymen have competence to determine the facts testified to by the expert where a trial court may feel the opinion would assist them. Hegarty v. Campbell Soup Co. 716

Fees.

In a condemnation proceeding, if an appeal is taken from the award of the appraisers by the condemnee and the amount of the final judgment in the District Court is less than 15 percent more than the amount of the award of the appraisers, the condemnee is not entitled to an award for attorney and expert witness fees. Neb. Rev. Stat. § 76-720 (Reissue 1981). Schneekloth v. County of Sarpy 618

Final Orders.

1. An order dismissing one theory of recovery while a second theory of recovery arising out of the same cause of action, that is, the same set of operative facts, remains pending for trial is not a final appealable order. Interholzinger v. Estate of Dent 264
2. A summary judgment dismissing one cause of action is a final appealable order notwithstanding the fact another cause of action still pends for trial. Interholzinger v. Estate of Dent 264
3. Where a notice of appeal is not filed within 1 month from the entry of the final order appealed from as required by Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 1982), this court obtains no jurisdiction to hear the appeal, and the appeal must be dismissed. State v. Harrington 696

Firefighters.

Pursuant to the provisions of Neb. Rev. Stat. §§ 35-211 and 35-206 (Reissue 1978), as presently enacted, a firefighter, employed by a city of the first class, who becomes permanently disabled in the line of duty and by reason thereof is retired is entitled to receive a pension equal to at least 50 percent of the salary such retiring firefighter is receiving at the time he or she goes upon such pension list. Adkisson v. City of Columbus 129

Forcible Entry and Detainer.

1. An action under the Uniform Residential Landlord and Tenant Act for restitution of the premises is merely possessory, and the question of title to real estate cannot be either tried or determined in the case. Brennan v. Brennan 125
2. An equitable title to real estate and possession thereof may be shown as a defense in an action for restitution of the premises under the Uniform Residential Landlord and Tenant Act. Brennan v. Brennan 125
3. A claim of title is an affirmative defense to an action for restitution of the premises under the Uniform Residential Landlord and Tenant Act. Brennan v. Brennan 125

Fraud.

1. In the absence of fraud one who signs an instrument without reading it, when he can read and has an opportunity to do so, cannot avoid the effect of his signature merely because he was not informed of the contents of the instrument. Interholzinger v. Estate of Dent 264
2. Fraud is based on misrepresentation of a material fact

and cannot be based on predictions or expressions of mere possibilities in reference to future events. In re Estate of Hesemann 842
3. When fraud is alleged, a broad and liberal latitude should be given the party alleging it in establishing every fact and circumstance connected with its alleged perpetration. State v. Fries 874

Garnishment.

Under the provisions of 42 U.S.C. § 407 (1976), social security payments to a recipient on deposit with a bank are exempt from garnishment under state law. Havelock Bank v. Hog Confinement Systems 783

Governmental Subdivisions.

1. As a general rule, governmental entities established by municipalities or counties to perform in a wholly local capacity and to deal with local problems on a local basis, and which are independent from any statewide system, are not state agencies within the meaning of the Administrative Procedures Act of Nebraska. Fisher v. Housing Auth. of City of Omaha 499
2. Housing authorities created under the authority of the Nebraska Housing Authorities Law, Neb. Rev. Stat. §§ 71-1503, 71-1509, and 71-1518 to 71-1554 (Reissue 1981), are not "agencies" within the meaning of Neb. Rev. Stat. § 84-901(1) (Reissue 1981). Fisher v. Housing Auth. of City of Omaha 499

Guardians and Conservators.

1. Neb. Rev. Stat. § 30-2630 (Reissue 1979) grants the county court power to appoint a conservator if a minor owns property which requires management or protection. In re Estate of Carlson 453
2. A conservator may be appointed for a person who because of advanced age is unable to manage his property effectively and whose property will be wasted or dissipated unless proper management is provided. In re Estate of Oltmer 830
3. An order appointing a conservator is reviewed on appeal for error appearing on the record. In re Estate of Oltmer 830

Habitual Criminals.

In order to warrant the enhancement of the penalty under the Nebraska habitual criminal statute, Neb. Rev. Stat. § 29-2221 (Reissue 1979), the prior convictions, except the first conviction, must be for offenses committed af-

ter each preceding conviction, and all such prior convictions must precede the commission of the principal offense. State v. Ellis 172

Hearsay.

1. A statement relating to a startling event made while the declarant was under the stress of the excitement caused by the event constitutes an exception to the general rule that hearsay is not admissible into evidence. State v. Roy 204
2. Statements made under the immediate force of the circumstances and not as afterthoughts are admissible into evidence as an "excited utterance" exception to the hearsay rule. State v. Roy 204
3. Where hearsay statements admitted into evidence have sufficient indicia of reliability to afford the trier of fact a satisfactory basis for evaluating their truth, they do not violate the right of confrontation. State v. Roy 204

Highways.

It is the duty of the state to use reasonable and ordinary care in the construction, maintenance, and repair of its highways and bridges so that they will be reasonably safe for the traveler using them while in the exercise of reasonable and ordinary care and prudence. Shepard v. State of Nebraska 744

Identification Procedures.

1. A claim of prejudice based upon counsel's alleged failure to investigate pretrial identification procedures is not sustained in the absence of evidence as to the defect in the procedures. State v. Hill 865
2. A showup identification procedure is constitutionally invalid only when it is so unnecessarily suggestive and conducive to an irreparably mistaken identification that a defendant is denied due process of law; the admission of evidence of a showup without more does not violate due process. State v. Johnson 869
3. A determination as to whether a likelihood of a misidentification exists has to be made on the basis of the totality of the circumstances of each case. State v. Johnson 869

Immunity.

1. When public employees are compelled to testify by threat that otherwise they will be removed from office, the testimony that they give cannot be used against them in a subsequent prosecution. State v. Gallagher 487

2. Public employees may be required to answer even potentially incriminating questions if they have not been required to surrender their constitutional immunity. State v. Gallagher 487
3. A public employee's refusal to answer questions where there has been no requested surrender of protected rights is a ground for his dismissal. State v. Gallagher 487
4. Public employees are not entitled to an affirmative tender of immunity before they may be required to answer questions specifically, directly, and narrowly related to the performance of the employee's public duties. State v. Gallagher 487

Improvements.

In general, in the absence of a statute any permanent improvement placed upon the land of another, by one having no interest or title therein, without the owner's consent, prima facie becomes a part of the realty and belongs to the owner of the fee, although it was placed thereon by mistake or with a view of enforcing an adverse right in land, unless there is an express agreement which takes the case out of the rule, or unless the owner is estopped to claim such ownership. In re Estate of Carlson 453

Independent Contractors.

1. The standards prescribed in Neb. Rev. Stat. § 48-604(5) (Reissue 1978) are not exclusive in determining whether an individual is an employee or an independent contractor. Erspamer Advertising Co. v. Dept. of Labor 68
2. Control or the right of control is the chief criterion in the determination of whether one acts as an independent contractor. Erspamer Advertising Co. v. Dept. of Labor 68
3. The primary test, when determining for workmen's compensation purposes whether one is an employee or independent contractor, is one of control. Sortino v. Miller 592
4. An independent contractor is one who, in the course of an independent occupation or employment, undertakes work subject to the will or control of the person for whom the work is done only as to the result of the work and not as to the methods or means used. Sortino v. Miller 592
5. One indispensable element to one's character as an independent contractor is that there must have been a contract to do a specific piece of work for a specific price. Sortino v. Miller 592

Injunction.

1. An injunction will be granted to prevent one adjoining owner from injuring or destroying trees that are growing on the boundary line. Patterson v. Oye 167
2. When there is clear proof of its necessity and practicability, a mandatory injunction may be granted. County of Knox v. City of Creighton 196

Insurance.

1. A liability contract, although an asset of an estate, creates a contractual right which vests only when a liability claim against insured ripens into judgment. Tank v. Peterson 34
2. Tort claims filed against an estate under the liability insurance exception do not affect the interests of the beneficiaries under the estate and thus present no obstacle to an orderly and exact administration of the estate. Tank v. Peterson 34
3. To the extent of liability coverage, nothing in Neb. Rev. Stat. §§ 30-2401 et seq. (Reissue 1979) affects any proceeding to establish liability of a decedent or personal representative for which he is protected by liability insurance. Tank v. Peterson 34
4. When uncertainty or ambiguity results from the wording of an insurance policy, a construction favorable to the insured will be adopted. Denis v. Woodmen Acc. & Life Co. 495
5. Fair doubt in the meaning of the wording of an insurance policy will be resolved against the insurer as the drafter of the contract. Denis v. Woodmen Acc. & Life Co. 495
6. An ambiguous exclusionary clause in a policy of insurance will be construed in favor of the existence of coverage. Denis v. Woodmen Acc. & Life Co. 495
7. Where one who has sustained personal injuries, and with his attention directed to the known injuries, which are trivial in their nature, contracts for the settlement of his damages with reference thereto, in ignorance of other and more serious injuries, both parties at the time believing that the known injuries are all the injuries sustained, then there is a mutual mistake, and the release, although couched in general terms, should be held not to be a bar to an action for the more serious and unknown injuries. Frahm v. Carlson 532
8. An insurance policy should be construed as any other contract and should be given effect according to the ordinary sense of the terms used; and if those terms are clear, they are to be applied according to their

plain and ordinary meaning. Swanson v. First Fidelity Life Ins. Co. 654
9. Generally, whether a new, distinct, and independent contract results when a policy is issued under the provisions of a conversion option contained in a former policy depends upon the extent to which the terms of the substituted policy differ from the terms of the policy containing the option. Swanson v. First Fidelity Life Ins. Co. 654

Intent.

Nocturnal entry into a building known to contain property is a circumstance from which an intent to steal may be inferred. State v. Tomrdle 580

Intervention.

1. The right of third parties to intervene in proceedings for dissolution of marriage is very limited. Arnold v. Arnold 39
2. Intervention may be permitted where it is necessary to procure justice for third persons whose property interest may be adversely affected in the dissolution action. Arnold v. Arnold 39
3. An intervenor who is not an indispensable party cannot change the nature and form of the action or the issues presented therein. Arnold v. Arnold 39

Invitor-Invitee.

1. A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness. Corbin v. Mann's Int'l Meat Specialties 222
2. An invitee must ordinarily take notice of changes in floor levels, steps, or other obstacles which are plainly visible to one who takes the trouble to look. Murphy v. Justus 272

Irrigation Districts.

1. Mandamus is a proper remedy to compel those in control of an irrigation canal to erect a bridge or bridges across the canal under the provisions of Neb. Rev. Stat. § 46-255 (Reissue 1978). Nuss v. Pathfinder Irr. Dist. 888
2. The provisions of Neb. Rev. Stat. § 46-255 (Reissue 1978), requiring a bridge or bridges to be built across irrigation canals and ditches under specified factual circumstances, apply whether the lands were owned by

the owner at the time the canal was built or were subsequently acquired, where the tracts lying on different sides of the canal together constitute one farm or ranch. Nuss v. Pathfinder Irr. Dist. 888

Judgments.

1. The decision of a trial judge on a question of fact in a law action will not be set aside on appeal unless clearly wrong. State ex rel. Schuler v. Dunbar 85
2. The judgment of a trial court in an action at law where a jury has been waived has the effect of a verdict of a jury and should not be set aside unless clearly wrong; in determining the sufficiency of the evidence to sustain a judgment, that evidence must be considered most favorably to the successful party and every controverted fact must be resolved in that party's favor and he is entitled to the benefit of any inferences reasonably deducible from it. Jeffres v. Countryside Homes 104
3. Findings of fact made by the trial court have the effect of a jury verdict and will not be set aside on appeal unless clearly wrong. McKenzie v. Ladd Trucking Co. .. 209
4. A judgment which is clearly against the weight of the evidence constitutes error and must be set aside on appeal. McKenzie v. Ladd Trucking Co. 209
5. Courts are without authority to interfere with findings and orders of the Public Service Commission, except where it exceeds its jurisdiction or acts arbitrarily. In re Application of Hunt Transportation 236
6. The office of an order nunc pro tunc is to correct a record which has been made so that it will truly record the action had, which through inadvertence or mistake was not truly recorded. Continental Oil Co. v. Harris 422
7. It is not the function of an order nunc pro tunc to change or revise a judgment or order, or to set aside a judgment actually rendered, or to render an order different from the one actually rendered, even though such order was not the order intended. Continental Oil Co. v. Harris 422
8. An order nunc pro tunc cannot be used to enlarge the judgment as originally rendered or to change the rights fixed by it. Continental Oil Co. v. Harris 422
9. An order nunc pro tunc cannot be employed where the fault in the original judgment is that it is wrong as a matter of law, nor can it be employed to allow the court to review and reverse its action with respect to what it formerly did or refused to do. Continental Oil Co. v. Harris 422

10. An order nunc pro tunc may be supported by the judge's notes, court files, or other entries of record. It may also be based upon other evidence, oral or written, which is sufficient to establish that the order is required to make the record reflect the truth. Continental Oil Co. v. Harris 422
11. Courts of general jurisdiction possess inherent power to vacate and modify their own judgments at any time during the term at which they were pronounced. This power exists entirely independent of any statute. It is derived from the common law. At common law, judgments were subject to vacation or modification only during the term in which rendered. Emry v. American Honda Motor Co. 435
12. After the final adjournment of the term of court at which a judgment has been rendered, the court has no authority or power to vacate or modify the judgment except for the reasons stated and within the time limited in Neb. Rev. Stat. § 25-2001 (Reissue 1979). Emry v. American Honda Motor Co. 435
13. In an action to vacate judgment after the adjournment of the term, the applicant must allege and prove that he exercised due diligence and that his failure to secure a proper decision was not due to his fault or negligence. Emry v. American Honda Motor Co. 435
14. Unavoidable casualty alone does not provide a basis for vacating a judgment after term. That casualty must also be one preventing the party from prosecuting or defending. Emry v. American Honda Motor Co. 435
15. Lack of diligence or negligence of counsel is not an unavoidable casualty or misfortune. Emry v. American Honda Motor Co. 435
16. Neb. Rev. Stat. § 25-2001 (Reissue 1979) is not the exclusive remedy for vacating a judgment after the term has expired, but is concurrent with an independent equity jurisdiction. However, to proceed in equity the litigant must show that he is without a remedy at law. Equity will not afford relief if the complainant has a remedy by statutory proceeding in the original action, and to be entitled to equitable relief a party must not have neglected to avail himself of the statutory remedy. Emry v. American Honda Motor Co. 435
17. The attempt to raise the same issues in an original action for monetary damages as those employed in an unsuccessful direct appeal from the action of the same agency constitutes a collateral attack on the decision of that agency. Fisher v. Housing Auth. of City of Omaha 499
18. A collateral attack upon a judgment will not lie unless

the judgment is absolutely void. Where the court or agency has jurisdiction of the parties and the subject matter, its judgment is not subject to collateral attack, because such judgment is only voidable and not void. Fisher v. Housing Auth. of City of Omaha 499

19. The rule against collateral impeachment of judicial decisions applies to the determination of state and county officers or boards of officers, who, although not constituting a court, are called on to act judicially in matters of administration. Fisher v. Housing Auth. of City of Omaha 499
20. The fact that this court arrives at the same conclusion as the District Court, but for a different reason, is no cause to reverse the judgment. Lilyhorn v. Dier 728
21. A judgment of the District Court brought to this court for review is supported by a presumption of correctness, and the burden is upon the party complaining of the action of that court to show by the record that it is erroneous. Flood v. Keller 797

Judicial Construction.

Generally, where a statute has been judicially construed and that construction has not evoked an amendment, it will be presumed that the Legislature has acquiesced in the court's determination of its intent. Erspamer Advertising Co. v. Dept. of Labor 68

Jurisdiction.

1. The failure of a petitioner to timely file in the District Court an authenticated transcript with the petition in error deprives that court of jurisdiction in the matter. Fisher v. Housing Auth. of City of Omaha 499
2. Parties to litigation cannot confer subject matter jurisdiction on a judicial tribunal by either acquiescence or consent. Whitehouse Energy Savers v. Hanlon 572
3. Judicial review of the allowance or disallowance of claims under the Employment Security Law, Neb. Rev. Stat. §§ 48-601 et seq. (Reissue 1978), shall be taken to the District Court of the county in which the claimant was last employed or in which the claimant resides, or to any District Court of the state upon which the parties may agree, but the rate of contribution or the liability for contribution of an employer under the act shall be judicially reviewed by the District Court of Lancaster County only. Whitehouse Energy Savers v. Hanlon ... 572
4. The right of appeal is statutory and the requirements of the statute are mandatory and must be complied with before the appellant court acquires jurisdiction of the

subject matter of the action. Whitehouse Energy Savers v. Hanlon 572
5. It is fundamental that want of jurisdiction of the subject matter of the action is a defect which requires the court to proceed by dismissal of the case or other suitable action. Whitehouse Energy Savers v. Hanlon 572
6. Under the State Tort Claims Act the District Court, sitting without a jury, has exclusive jurisdiction to hear, determine, and render judgment on any suit or tort claim under the act. Neb. Rev. Stat. § 81-8,214 (Reissue 1981). Shepard v. State of Nebraska 744
7. Courts of general jurisdiction have inherent power to do all things necessary for the proper administration of justice and equity within the scope of their jurisdiction. Holt County Co-op Assn. v. Corkle's, Inc. 762
8. If service of the summons in a case is, in fact, made on the defendant, that gives the court jurisdiction to render a valid judgment, so far as the service of process is concerned, although the evidence of record, constituting the proof of service, may fail in essential particulars to establish that such service was in fact made. In cases where service was in fact had, the court has jurisdiction and may, after judgment, permit an amendment of the record to supply omissions necessary to show that the service was in fact made. Mindt v. Shavers 786
9. Once the jurisdiction of the juvenile court to terminate parental rights has been properly invoked, it continues until such time as the matter is finally determined. In re Interest of Spradlin 834

Jury Instructions.

1. It is error to refuse requested instructions containing correct propositions of law which are applicable to the issues in the case and which are not covered in the instructions given to the jury. State v. Dush 51
2. A trial court is not required to give a proffered instruction upon a subordinate issue or which unduly emphasizes a part of the evidence in a case. Kluender v. Mattea 327
3. The trial court must eliminate all matters not in dispute and submit to the jury only the controverted questions of fact upon which the verdict must depend. Kluender v. Mattea 327
4. As a general rule, NJI 3.01, "A person may assume that every other person will use reasonable care and perform in accordance with the law until the contrary reasonably appears," is an instruction given only where

there is an issue as to contributory negligence. Kluender v. Mattea 327
5. In an action involving alleged concurrent negligence, if there is neither pleading nor proof of negligence proximately causing the plaintiff's injuries on the part of one not a party to the action, the trial court need not give that portion of NJI 3.42 reading, "It is no defense that all those who might have been held responsible are not made parties to this action." Kluender v. Mattea 327
6. Generally, the trial court is not required to instruct negatively. Kluender v. Mattea 327
7. Ordinarily, the failure to object to instructions after they have been submitted to counsel for review will preclude raising an objection on appeal, unless there is plain error in the record indicative of a probable miscarriage of justice. Keating v. Klemish 458
Sanders v. May Broadcasting Co. 755
8. Generally, it is not prejudicial error to not instruct upon a lesser offense when the evidence entirely fails to show an offense of a lesser degree than that charged in the information. State v. Beasley 918
9. If, under a "different but reasonable" view, the evidence would be sufficient to establish guilt of the lesser offense and leave a reasonable doubt as to some element included in the greater offense but not the lesser, the jury should be instructed on the lesser offense. State v. Beasley 918

Justiciable Issues.

In the absence of a present and existing controversy, there is no relief this court may grant; it is not our function to render advisory opinions. State v. Hochstetler 482

Juvenile Courts.

1. An adjudication order of a juvenile court that determines that a juvenile is a juvenile as described in Neb. Rev. Stat. § 43-202(3) (Reissue 1978) is appealable. In re Interest of Aufenkamp 297
2. The standard of review of a juvenile proceeding in this court is de novo upon the record. In re Interest of Aufenkamp 297
3. The findings of fact made by the juvenile court will be accorded great weight because it heard and observed the witnesses. Those findings will be affirmed unless they are against the weight of the evidence or there is clear abuse of discretion. In re Interest of Aufenkamp 297
4. The juvenile court has broad discretion as to the dispo-

sition of a child found to be delinquent. In re Interest of Aufenkamp 297
5. It is within the jurisdiction and discretion of the juvenile court to order a juvenile who is eligible for commitment to the Youth Development Center to be placed in the Youth Development Center temporarily for the purpose of evaluation preliminary to a dispositional hearing. In re Interest of Aufenkamp 297
6. An appeal of a juvenile proceeding to this court is heard de novo upon the record; and the findings of fact by the trial court will be accorded great weight because the trial court heard and observed the parties and witnesses. The trial court's findings will not be set aside on appeal unless they are against the weight of the evidence or there is a clear abuse of discretion. In re Interest of Biesecker 425
In re Interest of Fant 692
In re Interest of Spradlin 834
7. Once the jurisdiction of the juvenile court to terminate parental rights has been properly invoked, it continues until such time as the matter is finally determined. In re Interest of Spradlin 834
8. The primary and paramount consideration in a juvenile court case is the best interests of the infant. In re Interest of Spradlin 834

Labor and Labor Relations.

1. Teachers in Class III, IV, and VI school districts are subject to the provisions of the Teachers' Professional Negotiation Act. Lincoln Ed. Assn. v. School Dist. of Lincoln 895
2. The provisions of the Teachers' Professional Negotiation Act must be exhausted by covered teachers before action can be taken before the Commission of Industrial Relations. Lincoln Ed. Assn. v. School Dist. of Lincoln 895
3. Absent exhaustion, the Commission of Industrial Relations has no jurisdiction over disputes between school boards and covered teachers. Lincoln Ed. Assn. v. School Dist. of Lincoln 895

Landlords and Tenants.

1. An action under the Uniform Residential Landlord and Tenant Act for restitution of the premises is merely possessory, and the question of title to real estate cannot be either tried or determined in the case. Brennan v. Brennan 125
2. An equitable title to real estate and possession thereof

may be shown as a defense in an action for restitution of the premises under the Uniform Residential Landlord and Tenant Act. Brennan v. Brennan 125
3. A claim of title is an affirmative defense to an action for restitution of the premises under the Uniform Residential Landlord and Tenant Act. Brennan v. Brennan 125

Legislature.

Although the availability of funds appropriated for the purposes of the Nebraska Crime Victim's Reparations Act is a factor which the Legislature has directed shall be considered in making awards under the act, it is necessary that the record contain some evidence of such appropriations. Lambert v. Nebraska Cr. Vict. Rep. Bd. 817

Lesser-Included Offenses.

1. Generally, it is not prejudicial error to not instruct upon a lesser offense when the evidence entirely fails to show an offense of a lesser degree than that charged in the information. State v. Beasley 918
2. If, under a "different but reasonable" view, the evidence would be sufficient to establish guilt of the lesser offense and leave a reasonable doubt as to some element included in the greater offense but not the lesser, the jury should be instructed on the lesser offense. State v. Beasley 918

Liability.

1. An employee of a corporation, whose negligence causes injury, is jointly and severally liable, with the corporation, in an action for damages caused by such injuries. Dieter v. Hand 257
2. Before an employee becomes liable for an act or omission alleged to have constituted negligence, with resultant injury to a third person, it must appear that the employee has agreed to perform such act for his employer and has assumed the performance of it. Dieter v. Hand 257
3. Individual employee liability does not extend to render an employee liable to a third person for a loss sustained by the latter as the result of the employee's failure to perform a duty owing only to his employer, unaccompanied by any act or omission constituting a breach of his duty owing to a third person. Dieter v. Hand 257
4. The determination of whether a particular employee owed a duty of due care to a third person in the position of the plaintiff is a question of law and depends upon

the circumstances of the particular case. Dieter v. Hand 257
5. Where a verdict should have been directed on the issue of liability, no prejudice can result from any error in instructions on the issue of liability. Hegarty v. Campbell Soup Co. 716
6. When the issue of liability has been determined and there has been error in the determination of damages such that the verdict must be set aside, a new trial may be limited to the issue of damages. Hegarty v. Campbell Soup Co. 716

Liens.

When a person in the ordinary course of his business furnishes services or materials with respect to goods subject to a security interest, a lien upon goods in the possession of such person given by statute or rule of law for such materials or services takes priority over a perfected security interest unless the lien is statutory and the statute expressly provides otherwise. United States Nat. Bank v. Atlas Auto Body 597

Limitations of Actions.

1. The period of limitations contained in Neb. U.C.C. § 2-725(2) (Reissue 1980) does not apply to express warranties. Moore v. Puget Sound Plywood 14
2. The point at which a statute of limitations commences to run must be determined from the facts of each case; a cause of action accrues, and the statute of limitations begins to run, when the aggrieved party has the right to institute and maintain suit, even though such plaintiff may be ignorant of the existence of the cause of action. Interholzinger v. Estate of Dent 264
3. A cause of action is not on an "agreement, contract or promise in writing" within the meaning of Neb. Rev. Stat. § 25-205 (Reissue 1979), providing that an action on any "agreement, contract or promise in writing" can only be brought within 5 years, merely because it is in some way remotely or indirectly connected with the instrument or because the instrument may be a link in the chain of evidence establishing a cause of action. Beekman v. Cornhusker Farms 418
4. In order for an action to be on an "agreement, contract or promise in writing" within the meaning of Neb. Rev. Stat. § 25-205 (Reissue 1979), providing that an action on any "agreement, contract or promise in writing" can only be brought within 5 years, it must in itself contain a contract or promise to do the thing for nonper-

formance of which the action is brought. Beekman v. Cornhusker Farms 418
5. A contract is not an "agreement, contract or promise in writing" within the meaning of Neb. Rev. Stat. § 25-205 (Reissue 1979), providing that an action on any "agreement, contract or promise in writing" can only be brought within 5 years, unless it can be wholly proved by a writing or writings; and if there is anything that must be supplied by parol evidence to make it a binding obligation, it is not an "agreement, contract or promise in writing." Beekman v. Cornhusker Farms 418
6. An action is not upon an "agreement, contract or promise in writing" within the meaning of Neb. Rev. Stat. § 25-205 (Reissue 1979), if the writing relied upon as the basis of the action contains no promise to do the thing for nonperformance of which the action is brought or states no fact from which the law applies an obligation to do that thing. Beekman v. Cornhusker Farms 418
7. The 10-year statute of repose provided for in Neb. Rev. Stat. § 25-222 (Reissue 1979) begins to run when the physician's treatment, which the patient claims to have constituted malpractice, ceases, as opposed to simply the termination of the physician-patient relationship. Smith v. Dewey 605

Mandamus.

1. Before a court is warranted in granting a peremptory writ, it must appear that the relator has a clear legal right to the performance of the duty by the respondent. To warrant the issue of mandamus against an officer to compel him to act, it must be established that (1) the duty must be imposed upon him by law, (2) the duty must still exist at the time the writ is applied for, and (3) the duty to act must be clear. State ex rel. Council #32 v. City of Hastings 20
State ex rel. Doe v. Mid-Neb. Retard. Serv. 381
2. A writ of mandamus may be issued to any inferior tribunal, corporation, board, or person to compel the performance of an act which the law specifically enjoins as a duty resulting from an office, trust, or station. State ex rel. Doe v. Mid-Neb. Retard. Serv. 381
3. Mandamus is a proper remedy to compel those in control of an irrigation canal to erect a bridge or bridges across the canal under the provisions of Neb. Rev. Stat. § 46-255 (Reissue 1978). Nuss v. Pathfinder Irr. Dist. 888
4. An action in mandamus is a law action in which a jury trial on issues of fact is not demandable as a matter of

right, and the findings of fact by the District Court will not be disturbed by this court on appeal unless clearly wrong. Nuss v. Pathfinder Irr. Dist. 888

Marriage.

Any cause of action which may otherwise exist by reason of the breach of a promise to marry is extinguished once the parties begin to cohabit prior to fulfillment of the promise. Menhusen v. Dake 450

Mechanics' Liens.

1. A mechanic's lien foreclosure is to be considered by the Supreme Court on appeal de novo on the record, giving credit to the fact that the trial court observed the witnesses and their manner of testifying. Senften v. Church of the Nazarene 708
2. Mechanic's lien statutes are cumulative and remedial in nature and require a liberal construction so as to effectuate their objects and purposes and protect all claimants within their scope as well as to promote substantial justice. Senften v. Church of the Nazarene ... 708

Medical Malpractice.

The 10-year statute of repose provided for in Neb. Rev. Stat. § 25-222 (Reissue 1979) begins to run when the physician's treatment, which the patient claims to have constituted malpractice, ceases, as opposed to simply the termination of the physician-patient relationship. Smith v. Dewey 605

Mental Distress.

1. To recover damages for intentional infliction of emotional distress by outrageous conduct, the plaintiff must show that her emotional distress was severe. Hassing v. Wortman 154
2. The distress must have been so severe that no reasonable person could have been expected to endure it. Hassing v. Wortman 154

Minors.

1. Neb. Rev. Stat. § 30-2630 (Reissue 1979) grants the county court power to appoint a conservator if a minor owns property which requires management or protection. In re Estate of Carlson 453
2. Neb. Rev. Stat. § 30-2637(2) (Reissue 1979) does not permit the adjudication of "best interests" on the basis of an undefined subjective, metaphysical, or intuitive ap-

proach to what is fair and equitable without reference to existing rules of law. In re Estate of Carlson 453

Miranda Rights.

The applicable standard to determine the admissibility of statements made by an accused during a custodial interrogation is whether the accused intelligently, knowingly, and voluntarily waived his right to remain silent and his right to have counsel present at that time. State v. Ellefson 747

Moot Question.

An appellate court may properly decline to express an opinion on a mere abstraction or to determine a moot case. City of Crete v. County of Saline 200

Motions for Continuance.

A motion for continuance is addressed to the sound discretion of the trial court, and in the absence of a showing of an abuse of discretion, a ruling on such a motion will not be disturbed on appeal. State ex rel. Douglas v. Bigelow 464

Motions for New Trial.

1. The standard of review of an order granting a new trial is whether the trial court abused its discretion. This court will not disturb an order granting a new trial unless it clearly appears that no tenable grounds existed therefor. Hegarty v. Campbell Soup Co. 716
2. A motion for new trial should be granted only where there is error prejudicial to the rights of the unsuccessful party. Unless such error appears, a party who has sustained the burden and expense of trial, and who has succeeded in securing a verdict on the facts in issue, has a right to keep the benefit of that verdict. Hegarty v. Campbell Soup Co. 716
3. When the issue of liability has been determined and there has been error in the determination of damages such that the verdict must be set aside, a new trial may be limited to the issue of damages. Hegarty v. Campbell Soup Co. 716

Motions to Suppress.

1. No evidence may be suppressed because of technical irregularities not affecting the substantial rights of the accused. State v. Brennen 734
2. One who seeks to suppress evidence seized pursuant to

a warrant regular on its face has the burden of establishing that the warrant was invalid. State v. Brennen 734
3. A motion to suppress can only be urged by one whose fourth amendment rights were violated and not one aggrieved solely by the introduction of the incriminating evidence. State v. Searles 849

Motor Carriers.
1. The provisions of Neb. Rev. Stat. §§ 75-301 to 75-322.01 (Reissue 1981) do not apply to the transportation of passengers or property by motor carriers for hire engaged in intrastate commerce of supplies or merchandise being transported by motor vehicle from or to any ranch, dairy, feedlot, or farm for use thereon when originating at or destined to a neighboring trading point or points. In re Application of Hunt Transportation 236
2. A shipment intended to be delivered to a farm under Neb. Rev. Stat. § 75-303(6) (Reissue 1981) but where actual delivery is frustrated by an act of God, is exempted as provided therein, and it is not necessary that the bill of lading show the farm as consignee. In re Application of Hunt Transportation 236
3. The entitlement to an exemption under Neb. Rev. Stat. § 75-303 (Reissue 1981) will deny the Public Service Commission its jurisdiction over a qualified exempt carrier. In re Application of Hunt Transportation 236
4. The federal government's power to regulate commerce among the states does not exclude all state regulation of the subject. Ranger Division v. Bayne 251
5. The federal government has the power to establish qualifications with respect to drivers employed by an interstate carrier. Ranger Division v. Bayne 251
6. Where there exists a direct conflict between state and federal action affecting interstate commerce, state power must yield to federal power. Ranger Division v. Bayne 251
7. 49 C.F.R. § 391.41 (1978) constitutes a per se bona fide occupational qualification defense for a charge of discrimination brought under Neb. Rev. Stat. § 48-1104 (Reissue 1978) against an interstate carrier. Ranger Division v. Bayne 251

Motor Vehicles.
1. The duty to maintain a proper lookout implies the duty to see what is in plain sight. McKenzie v. Ladd Trucking Co. 209
2. Conditions blocking visibility impose upon a driver the duty to exercise a degree of care commensurate with

the existing conditions, including waiting to proceed until it can be done in safety. McKenzie v. Ladd Trucking Co. 209
3. When a motorist, being in a place of safety, sees, or by the exercise of reasonable care could have seen, the approach of a moving vehicle and moves from the place of safety into the path of such vehicle and is struck, such motorist's own conduct constitutes negligence more than slight, as a matter of law, and precludes recovery. McKenzie v. Ladd Trucking Co. 209
4. In accordance with the provisions of Neb. Rev. Stat. § 60-105(1) (Reissue 1978), no person acquiring a motor vehicle from the owner thereof shall acquire any right, title, claim, or interest in or to such motor vehicle until he shall have had delivered to him physical possession of such motor vehicle and a certificate of title duly executed. State Farm Mut. Auto. Ins. Co. v. Fitzgerald .. 226
5. While it may be true that a certificate of title is not conclusive evidence of ownership, it is likewise true that absent a duly executed certificate of title, ownership may not be established. State Farm Mut. Auto. Ins. Co. v. Fitzgerald 226
6. A purchaser who receives possession of an automobile without obtaining the certificate of title thereto, as required by our statute, acquires no title or ownership therein. State Farm Mut. Auto. Ins. Co. v. Fitzgerald 226
7. Where a purchaser contracts to buy an automobile and takes possession thereof without objection and uses the automobile, such use is a use with the permission of the owner until such time as a certificate of title thereto is issued to the purchaser. State Farm Mut. Auto. Ins. Co. v. Fitzgerald 226
8. Less rigorous requirements govern searches of automobiles not only because of the element of mobility but because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office. State v. Hill 865

Municipal Corporations.

1. Annexation of territory by a metropolitan city pursuant to Neb. Rev. Stat. § 14-117 (Reissue 1977) is a legislative matter. However, courts have the power to inquire into and determine whether the conditions exist which authorize the annexation thereof. Omaha Country Club v. City of Omaha 3
2. A municipality having the power of eminent domain is not subject to its own zoning ordinances with respect to governmental projects for the construction of which it

has the power to condemn. County of Knox v. City of Creighton 196

Negligence.

1. When a motorist, being in a place of safety, sees, or by the exercise of reasonable care could have seen, the approach of a moving vehicle and moves from the place of safety into the path of such vehicle and is struck, such motorist's own conduct constitutes negligence more than slight, as a matter of law, and precludes recovery. McKenzie v. Ladd Trucking Co. 209
2. An employee of a corporation, whose negligence causes injury, is jointly and severally liable, with the corporation, in an action for damages caused by such injuries. Dieter v. Hand 257
3. Before an employee becomes liable for an act or omission alleged to have constituted negligence, with resultant injury to a third person, it must appear that the employee has agreed to perform such act for his employer and has assumed the performance of it. Dieter v. Hand 257
4. Individual employee liability does not extend to render an employee liable to a third person for a loss sustained by the latter as the result of the employee's failure to perform a duty owing only to his employer, unaccompanied by any act or omission constituting a breach of his duty owing to a third person. Dieter v. Hand 257
5. The determination of whether a particular employee owed a duty of due care to a third person in the position of the plaintiff is a question of law and depends upon the circumstances of the particular case. Dieter v. Hand 257
6. The duty to maintain a proper lookout is a part of the duty to use due care imposed upon a person using steps leading from the front porch of an apartment house. Murphy v. Justus 272
7. An invitee must ordinarily take notice of changes in floor levels, steps, or other obstacles which are plainly visible to one who takes the trouble to look. Murphy v. Justus 272
8. Though prior incidents occurring on the premises might ordinarily be admissible to establish notice on the part of defendant, the evidence offered of such incidents must also show a substantial similarity to the incident which is the subject of the trial. Childers v. LCW Apartments 291
9. Two acts of independent source are not concurrent in

causing an injury if one of them merely furnishes a condition by which such injury is made possible and, later, such injury occurs through the independent operation of the other. Childers v. LCW Apartments 291

10. In an action involving alleged concurrent negligence, if there is neither pleading nor proof of negligence proximately causing the plaintiff's injuries on the part of one not a party to the action, the trial court need not give that portion of NJI 3.42 reading, "It is no defense that all those who might have been held responsible are not made parties to this action." Kluender v. Mattea 327
11. Where it is apparent that no one act of the defendant can be separated from the whole of these acts and held to be the independent cause of the accident, under these circumstances each act is not to be segregated and weighed separately to determine whether or not it constituted gross negligence. The several acts are to be considered as a whole. Keating v. Klemish 458
12. While each of several acts, standing alone, may not exceed the bounds of ordinary negligence, yet, taken together, they may establish gross negligence. In such cases it is for the jury to determine whether a defendant is guilty of gross or ordinary negligence. Keating v. Klemish 458

Notice.

1. A purchaser must plead and prove that he gave timely notice of a breach of warranty. Moore v. Puget Sound Plywood 14
2. Apparent authority of an agent may exist beyond termination of the principal-agency relationship when notice of the termination has not been given. Moore v. Puget Sound Plywood 14
3. Ambiguous language in a notice sent pursuant to Neb. U.C.C. 9-504(3) (Reissue 1980) is to be construed against the drafter of the language. First Nat. Bank & Trust Co. v. Hughes 42
4. Compliance with the notice provisions of the Uniform Commercial Code is a condition precedent to the right of a creditor to recover a deficiency judgment. First Nat. Bank & Trust Co. v. Hughes 42
5. By statute each fiscal agent for a sanitary and improvement district is entitled to notice of the amount and schedule of assessments proposed for improvements and, as such, may become a "person . . . feeling aggrieved" so as to have standing to appeal such action to the District Court. City of Omaha v. S.I.D. No. 287 . 371
6. Under Douglas County District Court rule 12C the serv-

ice of notice of an order to show cause and knowledge on the part of local counsel of such order is sufficient compliance with such court rule. Emry v. American Honda Motor Co. 435
7. For procedural due process a notice must reasonably inform a person of the accusation levied and the forum where evidence upon such accusation can be presented. In re Appeal of Levos 507
8. Generally, a notice is regarded in law as actual when the person sought to be affected by it knows of the existence of the particular fact in question. State v. Fries 874
9. Proof of mailing a notice is prima facie proof that it was received. State v. Fries 874

Parental Rights.
1. An order terminating parental rights under Neb. Rev. Stat. § 43-209 (Reissue 1978) must be supported by clear and convincing evidence. In re Interest of J.C.G. and T.R.G. 295
In re Interest of Spradlin 834
2. When natural parents cannot rehabilitate themselves within a reasonable time after the adjudication hearing, the best interests of the children require that a final disposition be made without delay. In re Interest of Biesecker 425
3. Where a parent is unable to discharge parental responsibilities because of mental deficiency, and there are reasonable grounds to believe that such condition will continue for a prolonged and indeterminate period, parental rights may be terminated if such action is in the best interests of the child. In re Interest of Fant .. 692
4. Once the jurisdiction of the juvenile court to terminate parental rights has been properly invoked, it continues until such time as the matter is finally determined. In re Interest of Spradlin 834
5. It is generally in the best interests of a child to make a final determination with respect to termination of parental rights as soon as possible. In re Interest of Spradlin 834

Parol Evidence.
For parol evidence to be sufficient to support a finding that a duly executed deed was, in fact, a gift to one of the grantees, such evidence must be clear, unequivocal, and convincing to overcome the presumption arising from the express terms of the deed. Anstine v. Anstine 808

Parties.

A defect in parties raised by answer rather than by demurrer generally is deemed to have been waived. City of Omaha v. S.I.D. No. 287 371

Partition.

1. A life tenant cannot compel partition of real estate over the objection of remaindermen. Williams v. Nebraska Wesleyan Univ. 92
2. Where a life tenant seeks to compel partition against remaindermen who are minors, it is the duty of the court to determine whether partition is in the best interests of the minors. If partition is not in the best interests of the minor remaindermen, it should be denied. Williams v. Nebraska Wesleyan Univ. 92
3. An action for partition is triable de novo on the record in the Supreme Court. Noell v. Noell 632

Partnerships.

It is a general rule that capital furnished by any partner, in the absence of agreement to the contrary, is a debt owing by the firm to the contributing partner, and necessarily is to be repaid him, if the firm assets are sufficient after paying the firm's liabilities to outsiders. Upon dissolution, where one has contributed capital and another services, the one contributing the capital is entitled to withdraw its value. Badran v. Bertrand ... 413

Paternity.

1. In filiation proceedings tried to the court without a jury, the findings of the trial court have the same effect as a verdict of a jury, and such findings will not be disturbed unless clearly wrong. Gregory v. Davis 408
2. The corroboration of testimony required in filiation proceedings may consist of circumstantial evidence. Gregory v. Davis 408

Pensions.

Pursuant to the provisions of Neb. Rev. Stat. §§ 35-211 and 35-206 (Reissue 1978), as presently enacted, a firefighter, employed by a city of the first class, who becomes permanently disabled in the line of duty and by reason thereof is retired is entitled to receive a pension equal to at least 50 percent of the salary such retiring firefighter is receiving at the time he or she goes upon such pension list. Adkisson v. City of Columbus 129

Perpetuities.

1. The rule against perpetuities prohibits only the creation of future interests or estates which, by possibility, may not become vested within a life or lives in being and 21 years, together with the period of gestation when necessary to cover cases of posthumous birth. In re Estate of Schmitz 28
2. While the rule against perpetuities prevails over intention, a document should be interpreted, if feasible, to avoid the conclusion that it violates the rule. In re Estate of Schmitz 28
3. Where the language of a will leaves the court in doubt whether the rule has been transgressed, the doubt may within reasonable limits be resolved in favor of the construction that the future estate constitutes a vested rather than a contingent remainder. In re Estate of Schmitz 28

Plea in Abatement.

Rejection of a plea in abatement will not be reversed after a verdict of guilty which is based on sufficient evidence that a crime has been committed. State v. Tomrdle 580

Pleadings.

1. Pleadings frame the issues upon which a cause is to be tried and advise the adversary as to what he must meet. Moore v. Puget Sound Plywood 14
2. It is the facts well pleaded, not the theory of recovery nor legal conclusions, which state a cause of action. Moore v. Puget Sound Plywood 14
3. 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. County of Knox v. City of Creighton 196
4. The court may, before or after judgment, in furtherance of justice, amend any pleading, when the amendment does not change substantially the claim or defense, by conforming the claim or proceeding to the facts proved. Neb. Rev. Stat. § 25-852 (Reissue 1979). Cofer v. Kuhlmann 341
5. No variance between the allegation in a pleading and the proof is to be deemed material unless it have actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Neb. Rev. Stat. § 25-846 (Reissue 1979). Cofer v. Kuhlmann 341

6. A defect in parties raised by answer rather than by demurrer generally is deemed to have been waived. City of Omaha v. S.I.D. No. 287 371
7. In ruling on a demurrer the court must assume that the facts are as alleged, and cannot assume the existence of any facts not alleged, nor find facts in aid of the pleading, nor consider what evidence may be introduced at the trial. Fisher v. Housing Auth. of City of Omaha 499
8. The failure of a petitioner to timely file in the District Court an authenticated transcript with the petition in error deprives that court of jurisdiction in the matter. Fisher v. Housing Auth. of City of Omaha 499
9. A motion in limine is a step preliminary to the introduction of evidence. State v. Tomrdle 580
10. The petition filed in error proceedings must specifically set out each of the alleged errors relied upon. Bickford v. Board of Ed. of Sch. Dist. #82 642

Pleas.

1. A plea of guilty embodies a waiver of every defense to a charge, whether procedural, statutory, or constitutional. State v. Jones 145
2. A defendant will be allowed to withdraw his plea of guilty or nolo contendere upon timely motion if he proves that withdrawal is necessary to correct a manifest injustice. In the absence of proof by the defendant of such manifest injustice, the defendant should not be permitted to withdraw his plea. State v. Jipp 577

Police Officers and Sheriffs.

1. A judicial officer, whether of a court of limited or general jurisdiction, is not liable in a civil action for acts performed in his judicial capacity, if he has acquired and does not exceed the jurisdiction conferred by law. He is not liable in damages for mere error of judgment while acting within his jurisdiction, but he is not protected if he assumes to act beyond the scope of his authority. Jeffres v. Countryside Homes 104
2. Sheriffs and constables are not relieved from liability for acts of negligence, but are bound by the same rule of negligence that a civilian is bound by under like circumstances. A peace officer may be held liable for negligent or wrongful acts causing damage to property. If an officer, in executing a writ of restitution or possession, wantonly or carelessly and roughly handling chattel property injures it, he is liable for the damage caused. Jeffres v. Countryside Homes 104

3. The fact that an officer acts in good faith will not itself protect him from liability for negligence. Jeffres v. Countryside Homes 104
4. Ordinarily, a judgment or order of a court having apparent jurisdiction, if valid on its face, protects a sheriff or constable from liability for any proper or necessary act done in its execution. Jeffres v. Countryside Homes 104
5. The immunity enjoyed by an official in executing a writ or order of the court generally extends to those rightfully aiding the officer, but such persons are liable for their negligent acts which result in damage to persons or property. Jeffres v. Countryside Homes 104

Political Subdivisions.

1. If no intervening rights of third persons have arisen, a board of county commissioners has power to correct the record of the proceedings had at a previous meeting so as to make it speak the truth, particularly where the correction supplies some omitted fact or action and is done not to contradict or change the original record but to have the record show that a certain action was taken or thing done, which the original record fails to show. State ex rel. Schuler v. Dunbar 85
2. Neb. Rev. Stat. § 23-168.04 (Reissue 1977) relates only to appeals from the boards of adjustment and is not applicable to action taken by the county board of supervisors. Van Heek v. County of Knox 538

Post Conviction.

1. A motion to vacate a judgment and sentence under the Post Conviction Act cannot be used as a substitute for a direct appeal nor to secure a further review of issues already litigated. State v. Moore 202
2. The defendant has the burden of establishing a basis for relief in a post conviction proceeding under Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1979), and the findings of the District Court in denying such relief will not be disturbed on appeal unless they are clearly erroneous. State v. Rice 518
State v. Hill 865
3. The defendant has the burden of proving the existence of such promises or threats as he does for all bases for relief in a post conviction hearing. State v. Rice 518
4. An evidentiary hearing may be denied if the trial court on examination finds that the proceeding is without foundation or merit. Neb. Rev. Stat. § 29-3001 (Reissue 1979). State v. Poe 540

5. Where court-appointed counsel in a post conviction case, after careful and conscientious review of the matter, determines that the appeal is wholly frivolous and without merit, counsel may file a motion in this court, pursuant to Neb. Ct. R. 3B (Rev. 1982), requesting leave to withdraw, supported by a brief and an affidavit setting out the fact that counsel has made a thorough and conscientious examination of the record and has determined the appeal to be without merit and wholly frivolous. State v. Harper 911

Prejudgment Interest.

1. Prejudgment interest may be recovered on claims that are liquidated. Classen v. Becton, Dickinson & Co. 543
2. A claim is liquidated if the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance upon opinion or discretion. Classen v. Becton, Dickinson & Co. 543
3. Where a reasonable controversy exists as to the plaintiff's right to recover or as to the amount of such recovery, the claim is generally considered to be unliquidated and prejudgment interest is not allowed. Classen v. Becton, Dickinson & Co. 543
4. Where a reasonable controversy exists as to a plaintiff's right to recover or as to the amount of such recovery, the claim is unliquidated and prejudgment interest is not recoverable. Holt County Co-op Assn. v. Corkle's, Inc. 762
5. Prejudgment interest is recoverable where the parties have contracted for such; however, where the amount due and the date from which it is due cannot be computed without opinion or discretion, the claim is unliquidated and prejudgment interest is not recoverable. Holt County Co-op Assn. v. Corkle's, Inc. 762

Prejudicial Statements.

A statement by counsel in the trial of a civil action relating to race may be, but is not necessarily, improper or prejudicial. The primary considerations are whether the statement in question has any relevancy to or legitimate bearing on the issues in the case and, if not, whether it is calculated or has a tendency to arouse racial prejudice. Mindt v. Shavers 786

Presumptions.

Any presumption that the value fixed by the board of equalization was correct disappears when there is competent evidence to the contrary. Once the presumption

is destroyed, the burden is upon the taxpayer to show that the value of his property was arbitrarily or unlawfully fixed in an amount greater than actual value. The reasonableness of the valuation then becomes a question of fact to be determined from the evidence. Richman Gordman v. Board of Equalization 470

Pretrial Motions.

1. Discovery in criminal cases, as authorized by Neb. Rev. Stat. §§ 29-1912 et seq. (Reissue 1979), is patterned on the Federal Rules of Criminal Procedure. State v. Brown 665
2. Upon a defendant's proper request through discovery procedure, the State must disclose information which is material to the preparation of a defense to the charge against the defendant. State v. Brown 665
3. Information obtainable by discovery procedure in criminal cases is material if the requested information may affect the outcome of the trial. State v. Brown 665
4. In order that the defendant receive a fair trial, requested and material information must be disclosed to the defendant. State v. Brown 665

Principal and Agent.

1. Apparent authority of an agent may exist beyond termination of the principal-agency relationship when notice of the termination has not been given. Moore v. Puget Sound Plywood 14
2. An employee of a corporation, whose negligence causes injury, is jointly and severally liable, with the corporation, in an action for damages caused by such injuries. Dieter v. Hand 257
3. Before an employee becomes liable for an act or omission alleged to have constituted negligence, with resultant injury to a third person, it must appear that the employee has agreed to perform such act for his employer and has assumed the performance of it. Dieter v. Hand 257
4. Individual employee liability does not extend to render an employee liable to a third person for a loss sustained by the latter as the result of the employee's failure to perform a duty owing only to his employer, unaccompanied by any act or omission constituting a breach of his duty owing to a third person. Dieter v. Hand 257
5. The determination of whether a particular employee owed a duty of due care to a third person in the position of the plaintiff is a question of law and depends upon

the circumstances of the particular case. Dieter v. Hand 257

6. An agent who contracts on behalf of a disclosed principal, in the absence of some other agreement to the contrary or other circumstances showing that the agent has expressly or impliedly incurred or intended to incur personal responsibility, is not liable to the other contracting party. Cargill Leasing Corp. v. Mueller .. 569

Probable Cause.

1. In evaluating the showing of probable cause necessary to support a search warrant, only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause. State v. Robish 190
   State v. Arnold 769
   State v. Williams 923
2. Probable cause exists where the facts and circumstances within the officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. State v. Robish 190
   State v. Williams 923
3. In determining probable cause for issuance of a search warrant, the issuing magistrate is to make a practical, commonsense decision whether, given the totality of all the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. State v. Arnold 769
   State v. Williams 923
4. In order to be entitled to a hearing to examine the contents of the affidavit, the challenger must attack only the veracity of the affiant and not of any other informant; he must also make a "substantial preliminary showing," including allegations of "deliberate falsehood or of reckless disregard for the truth," supported by an offer of proof. Moreover, even if the foregoing two requirements are met, no hearing is required if, when the material which is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause. State v. Williams 923

Proof.

1. No variance between the allegation in a pleading and the proof is to be deemed material unless it have ac-

tually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Neb. Rev. Stat. § 25-846 (Reissue 1979). Cofer v. Kuhlmann 341

2. The burden is upon the one claiming the existence of a resulting trust to establish the facts upon which it is based by clear and satisfactory evidence. Superior Hybrids Co. v. Carmichael 384
3. The corroboration of testimony required in filiation proceedings may consist of circumstantial evidence. Gregory v. Davis 408
4. A conviction may rest on the uncorroborated testimony of an accomplice. State v. Huffman 429
5. A conviction may rest solely on circumstantial evidence. State v. Evans 432
6. The victim of a sexual assault must be corroborated as to material facts and circumstances which tend to support his testimony and from which, together with the victim's testimony as to the principal fact, an inference of guilt may be drawn. State v. Davis 474
7. Corroboration of the principal act constituting the offense is not required. State v. Davis 474
8. The uncorroborated testimony of the victim of a robbery is sufficient to sustain a conviction. State v. Davis 474
9. A conviction of burglary can be based on circumstantial evidence. State v. Tomrdle 580
10. In a cause of action for damage to land due to seepage, the burden is on the plaintiffs to prove that it was the acts of the defendants in their maintenance and operation of a drain or diversion structure that caused the plaintiff's injury. Hardt v. Short-Line Irr. Dist. 612
11. While it is true that a contract, oral or written, between a subcontractor and a contractor is not binding upon the owner of the property, it is also true that, absent evidence to the contrary, the existence of such a contract does establish the fair and reasonable value of the services. Senften v. Church of the Nazarene 708
12. One challenging the adequacy of criminal trial representation has the burden of proving incompetence and of showing that such incompetence prejudiced his defense. State v. Hill 865

Property.

1. In general, in the absence of a statute any permanent improvement placed upon the land of another, by one having no interest or title therein, without the owner's consent, prima facie becomes a part of the realty and

belongs to the owner of the fee, although it was placed thereon by mistake or with a view of enforcing an adverse right in land, unless there is an express agreement which takes the case out of the rule, or unless the owner is estopped to claim such ownership. In re Estate of Carlson 453
2. Neb. Rev. Stat. § 30-2637(2) (Reissue 1979) does not permit the adjudication of "best interests" on the basis of an undefined subjective, metaphysical, or intuitive approach to what is fair and equitable without reference to existing rules of law. In re Estate of Carlson 453

Property Division.
1. The rules for determining division of property in an action for dissolution of marriage provide no mathematical formula by which such awards can be precisely determined; they are to be determined by the facts in each case. Whitney v. Whitney 565
2. Generally speaking, awards in cases of this kind vary from one-third to one-half the value of the property involved, depending upon the facts and circumstances of the particular case, and particularly so when the marriage is of long duration and the parties are the parents of the children involved. Whitney v. Whitney 565
3. Upon dissolving a marriage the trial court must assign the property acquired during the marriage, by the joint efforts of the parties, title to which is held jointly by them, as the equities require. Anstine v. Anstine 808

Proximate Cause.
1. The proximate cause of an injury is that cause which, in natural and continuous sequence, unaccompanied by any efficient, intervening cause, produces the injury, and without which the result would not have occurred. Hegarty v. Campbell Soup Co. 716
2. Although the question of proximate cause is ordinarily for the determination of the jury, where, upon the evidence produced, only one inference can be drawn, it is for the court to decide whether a given act or series of acts is the proximate cause of the injury. Hegarty v. Campbell Soup Co. 716

Public Meetings.
1. The purpose of a nunc pro tunc correction is to make the record speak the truth. Its purpose is not to correct oversights or failures in the performance of mandatory acts. State ex rel. Schuler v. Dunbar 85
2. If no intervening rights of third persons have arisen, a

board of county commissioners has power to correct the record of the proceedings had at a previous meeting so as to make it speak the truth, particularly where the correction supplies some omitted fact or action and is done not to contradict or change the original record but to have the record show that a certain action was taken or thing done, which the original record fails to show. State ex rel. Schuler v. Dunbar 85

Public Officers and Employees.

1. A judicial officer, whether of a court of limited or general jurisdiction, is not liable in a civil action for acts performed in his judicial capacity, if he has acquired and does not exceed the jurisdiction conferred by law. He is not liable in damages for mere error of judgment while acting within his jurisdiction, but he is not protected if he assumes to act beyond the scope of his authority. Jeffres v. Countryside Homes 104
2. Sheriffs and constables are not relieved from liability for acts of negligence, but are bound by the same rule of negligence that a civilian is bound by under like circumstances. A peace officer may be held liable for negligent or wrongful acts causing damage to property. If an officer, in executing a writ of restitution or possession, wantonly or carelessly and roughly handling chattel property injures it, he is liable for the damage caused. Jeffres v. Countryside Homes 104
3. The fact that an officer acts in good faith will not itself protect him from liability for negligence. Jeffres v. Countryside Homes 104
4. Ordinarily, a judgment or order of a court having apparent jurisdiction, if valid on its face, protects a sheriff or constable from liability for any proper or necessary act done in its execution. Jeffres v. Countryside Homes 104
5. The immunity enjoyed by an official in executing a writ or order of the court generally extends to those rightfully aiding the officer, but such persons are liable for their negligent acts which result in damage to persons or property. Jeffres v. Countryside Homes 104
6. When public employees are compelled to testify by threat that otherwise they will be removed from office, the testimony that they give cannot be used against them in a subsequent prosecution. State v. Gallagher 487
7. Public employees may be required to answer even potentially incriminating questions if they have not been required to surrender their constitutional immunity. State v. Gallagher 487

8. A public employee's refusal to answer questions where there has been no requested surrender of protected rights is a ground for his dismissal. State v. Gallagher 487
9. Public employees are not entitled to an affirmative tender of immunity before they may be required to answer questions specifically, directly, and narrowly related to the performance of the employee's public duties. State v. Gallagher 487

Public Service Commission.

1. The provisions of Neb. Rev. Stat. §§ 75-301 to 75-322.01 (Reissue 1981) do not apply to the transportation of passengers or property by motor carriers for hire engaged in intrastate commerce of supplies or merchandise being transported by motor vehicle from or to any ranch, dairy, feedlot, or farm for use thereon when originating at or destined to a neighboring trading point or points. In re Application of Hunt Transportation ... 236
2. A shipment intended to be delivered to a farm under Neb. Rev. Stat. § 75-303(6) (Reissue 1981), but where actual delivery is frustrated by an act of God, is exempted as provided therein, and it is not necessary that the bill of lading show the farm as consignee. In re Application of Hunt Transportation 236
3. The rule is well established that on an appeal to the Supreme Court from an order of the Nebraska Public Service Commission, administrative or legislative in character, the only questions to be determined are whether the commission acted within the scope of its authority and whether the order complained of is reasonable and not arbitrarily made. However, a different rule is applied in the event that there has been the application of incorrect rules of law to the facts of the case or evidence showing that the commission has exceeded its authority, in which case the action of the commission would be illegal, arbitrary, and unreasonable. In re Application of Hunt Transportation 236
4. The entitlement to an exemption under Neb. Rev. Stat. § 75-303 (Reissue 1981) will deny the Public Service Commission its jurisdiction over a qualified exempt carrier. In re Application of Hunt Transportation 236
5. Courts are without authority to interfere with findings and orders of the Public Service Commission, except where it exceeds its jurisdiction or acts arbitrarily. In re Application of Hunt Transportation 236

Public Utilities.

1. The reasonableness or unreasonableness of rates

charged or action taken by the board of directors of a public power district is a proper matter for judicial examination and review. McGinley v. Wheat Belt P.P. Dist. 178
2. Persons receiving similar service under similar circumstances cannot be charged for such service in an arbitrary, designed, dissimilar manner. McGinley v. Wheat Belt P.P. Dist. 178
3. A dissimilar rate may not be imposed for similar service solely on the basis that the additional source of the power or energy is more costly than previous sources. All of the sources must properly be blended into a rate which results in all customers obtaining the same service under the same conditions being charged the same rate. McGinley v. Wheat Belt P.P. Dist. 178
4. A discrimination may arise from a mere inequality in rates, but an overcharge arises only where the rate charged is unreasonable in and of itself, irrespective of the rate exacted of others, or when it is in excess of the rate established for the particular customer or business. In a suit for overcharges the rate paid by others is immaterial. It is only in suits for damages for discrimination that rates charged others are important. McGinley v. Wheat Belt P.P. Dist. 178

Questions of Law.

This court is obligated to make its own determinations as to questions of law. Elrod v. Prairie Valley 697

Rates.

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Records.

Evidence which does not appear in the record can not be considered by this court on appeal. State v. Fries 874

Reformation.

In order to warrant the reformation of a written instrument in any material respect, the evidence must be clear, convincing, and satisfactory; and until overcome by such proof, the terms of the instrument must stand as evidencing the intention of the parties. Noell v. Noell 632

Releases.

1. Where one who has sustained personal injuries, and with his attention directed to the known injuries, which are trivial in their nature, contracts for the settlement of his damages with reference thereto, in ignorance of other and more serious injuries, both parties at the time believing that the known injuries are all the injuries sustained, then there is a mutual mistake, and the release, although couched in general terms, should be held not to be a bar to an action for the more serious and unknown injuries. Frahm v. Carlson 532
2. If one of several joint wrongdoers makes settlement with the injured party and pays him damages which he agrees to receive and does receive as full compensation for all damages sustained, it will release all of the joint wrongdoers. Dougherty v. Robson 802

Rescission.

Rescission by its nature implies the extinction of the contract which leaves the parties without a right of recovery on the contract itself. Rubin v. Pioneer Fed. S. & L. Assn. 364

Revocation.

1. Revocation of a will may be by either a subsequent will or an act done to the document. If revocation is by a subsequent will, it must be properly executed. In re Estate of Thompson 899

2. Where it cannot be established that a subsequent will was executed in accordance with the statute, there is insufficient evidence to support a finding that it was fully executed and thus it cannot revoke a prior will. In re Estate of Thompson 899

Right to Counsel.

1. The general rule is that an accused may waive his right to counsel where such waiver is made intelligently and understandingly, with knowledge of the right to counsel. State v. Jones 145
2. In the absence of a knowing and intelligent waiver of counsel, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial. State v. Sondag 659
3. No defendant can be completely denied the assistance of counsel absent a determination of his ability to retain counsel or his desire to have counsel appointed. State v. Sondag 659
4. The right to assistance of counsel at a police lineup attaches only at or after the time that adversary judicial proceedings have been initiated against the defendant by the filing of an indictment or information. State v. Johnson 869

Robbery.

The uncorroborated testimony of the victim of a robbery is sufficient to sustain a conviction. State v. Davis 474

Rules of Evidence.

1. A statement relating to a startling event made while the declarant was under the stress of the excitement caused by the event constitutes an exception to the general rule that hearsay is not admissible into evidence. State v. Roy 204
2. Statements made under the immediate force of the circumstances and not as afterthoughts are admissible into evidence as an "excited utterance" exception to the hearsay rule. State v. Roy 204
3. Where hearsay statements admitted into evidence have sufficient indicia of reliability to afford the trier of fact a satisfactory basis for evaluating their truth, they do not violate the right of confrontation. State v. Roy 204
4. Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more

probable or less probable than it would be without the evidence. State v. Davis 474

Rules of the Road.

1. The duty to maintain a proper lookout implies the duty to see what is in plain sight. McKenzie v. Ladd Trucking Co. 209
2. Conditions blocking visibility impose upon a driver the duty to exercise a degree of care commensurate with the existing conditions, including waiting to proceed until it can be done in safety. McKenzie v. Ladd Trucking Co. 209
3. When a motorist, being in a place of safety, sees, or by the exercise of reasonable care could have seen, the approach of a moving vehicle and moves from the place of safety into the path of such vehicle and is struck, such motorist's own conduct constitutes negligence more than slight, as a matter of law, and precludes recovery. McKenzie v. Ladd Trucking Co. 209

Rules of the Supreme Court.

Where court-appointed counsel in a post conviction case, after careful and conscientious review of the matter, determines that the appeal is wholly frivolous and without merit, counsel may file a motion in this court, pursuant to Neb. Ct. R. 3B (Rev. 1982), requesting leave to withdraw, supported by a brief and an affidavit setting out the fact that counsel has made a thorough and conscientious examination of the record and has determined the appeal to be without merit and wholly frivolous. State v. Harper 911

Sanitary and Improvement Districts.

1. On appeal of assessments made by a board of a sanitary and improvement district, there is no presumption of regularity attached to such action. On appeal the District Court, and this court, shall hear and determine such appeals in a summary manner as in a case in equity and shall increase or reduce the assessments as the same may be required to provide that assessments shall be to the full extent of special benefits, and to make the apportionment of benefits equitable. City of Omaha v. S.I.D. No. 287 371
2. By statute each fiscal agent for a sanitary and improvement district is entitled to notice of the amount and schedule of assessments proposed for improvements and, as such, may become a "person . . . feeling

aggrieved" so as to have standing to appeal such action to the District Court. City of Omaha v. S.I.D. No. 287 371

3. When the purpose and effect of a sanitary and improvement district improvement is to improve each individual lot, the improvement is a local one, although there is incidental benefit to the district as a whole; but if the primary purpose and effect is to benefit the entire district, the improvement is not local, although it may incidentally benefit the individual properties. City of Omaha v. S.I.D. No. 287 371

Schools and School Districts.

1. The courts, in reviewing special education appeal proceedings under Neb. Rev. Stat. §§ 43-661 et seq. (Reissue 1978), are not to make independent findings of their own but must follow the criteria set forth in Neb. Rev. Stat. § 84-917 (Reissue 1981) and determine if the action was supported by substantial and competent evidence and was neither arbitrary nor capricious. Adams Central School Dist. v. Deist 307
2. A state which accepts financial assistance from the federal government under the Education for All Handicapped Children Act of 1975, 20 U.S.C. §§ 1401 et seq. (1976), is obligated to provide all handicapped children with a free appropriate public education. Adams Central School Dist. v. Deist 307
3. A free appropriate public education requires that each handicapped child be given the opportunity to achieve such child's full potential commensurate with the opportunity provided to other children. Adams Central School Dist. v. Deist 307
4. When a handicapped child is sent home from a school setting and is not allowed to return, such child has been expelled from the school. Adams Central School Dist. v. Deist 307
5. The expulsion of a handicapped child from school constitutes a change in placement, and when that occurs the procedural protections of the Education for All Handicapped Children Act of 1975, 20 U.S.C. §§ 1401 to 1415 (1976), are to be followed. Adams Central School Dist. v. Deist 307
6. Local school officials are prohibited, under the Education for All Handicapped Children Act of 1975, 20 U.S.C. §§ 1401 et seq. (1976), from expelling students whose handicaps cause them to be disruptive; and in such a case a school may only transfer the disruptive student to an appropriate, more restrictive environment. Adams Central School Dist. v. Deist 307

7. The burden rests with the local school officials to produce evidence as to whether or not the student involved was expelled for behavior due to such child's handicap. Adams Central School Dist. v. Deist 307
8. A school district, responsible for providing a "free appropriate public education" to a handicapped child, which fails to furnish adequate facilities and programs to afford such education, is liable to reimburse a parent who, in order to protect the physical and emotional health of such child, does obtain such reasonable services. Adams Central School Dist. v. Deist 307
9. The state is not obligated under either the Education for All Handicapped Children Act of 1975, 20 U.S.C. §§ 1401 et seq. (1976), or the state care and education of handicapped children legislation, Neb. Rev. Stat. §§ 43-601 et seq. (Reissue 1978), to provide a free appropriate public education beyond the child's 21st birthday. Adams Central School Dist. v. Deist 307
10. A taxpayer objecting to the setting of a nonresident high school tuition levy pursuant to Neb. Rev. Stat. § 79-436 (Reissue 1981) must give notice of appeal within 10 days after the setting of the levy by the county board of equalization. In re 1981-82 County Tax Levy 624
In re 1981-82 County Tax Levy 847
11. Teachers in Class III, IV, and VI school districts are subject to the provisions of the Teachers' Professional Negotiation Act. Lincoln Ed. Assn. v. School Dist. of Lincoln 895
12. The provisions of the Teachers' Professional Negotiation Act must be exhausted by covered teachers before action can be taken before the Commission of Industrial Relations. Lincoln Ed. Assn. v. School Dist. of Lincoln 895
13. Absent exhaustion, the Commission of Industrial Relations has no jurisdiction over disputes between school boards and covered teachers. Lincoln Ed. Assn. v. School Dist. of Lincoln 895

Search and Seizure.

1. Facts improperly obtained may nevertheless be admissible in evidence if knowledge of the facts is gained from an independent source. State v. Welsh 60
2. One who seeks to suppress evidence seized pursuant to a warrant regular on its face has the burden of establishing that the warrant was invalid. State v. Brennen 734
3. A defendant is required to show that he had a reasonable expectation of privacy in the area searched before

his fourth amendment rights come into play. State v. Searles 849
4. An officer may seize evidence and contraband which is in "plain view" without a warrant, if he has the right to be in the position where he has such a view. Such activity does not constitute a search. State v. Searles ... 849
5. The warrantless routine search of a vehicle lawfully in the custody of police, following standard procedures, does not violate the U.S. Constitution's fourth amendment prohibition of unreasonable search and seizure. State v. Hill 865
6. Whether a search and seizure is unreasonable within the meaning of the fourth amendment depends upon the facts and circumstances of each case. State v. Hill ... 865
7. Less rigorous requirements govern searches of automobiles not only because of the element of mobility but because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office. State v. Hill 865

Search Warrants.
1. Where an affidavit used for the purpose of obtaining a search warrant includes both illegally obtained facts as well as facts derived from independent and lawful sources, a valid search warrant may issue if the lawfully obtained facts, considered by themselves, establish probable cause to issue the warrant. State v. Welsh 60
State v. Guilbeault 904
2. Affidavits for search warrants must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. Technical requirements of elaborate specificity once exacted under common-law pleadings have no proper place in this area. State v. Robish 190
3. In evaluating the showing of probable cause necessary to support a search warrant, only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause. State v. Robish 190
State v. Arnold 769
4. Probable cause exists where the facts and circumstances within the officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. State v. Robish 190
5. Where some of the underlying circumstances are detailed in the affidavit, where reason for crediting the

source of the information is given, and when a magistrate has found probable cause, the court should not invalidate the warrant by interpreting the affidavit in a hypertechnical rather than a commonsense manner. State v. Arnold 769

6. An informant selected by the police, who makes a purchase of controlled substances under the personal direction, supervision, and control of a police officer, and informs the officer of what the informant saw and heard at the time of the purchase, is presumptively reliable. State v. Arnold 769
7. In determining probable cause for issuance of a search warrant, the issuing magistrate is to make a practical, commonsense decision whether, given the totality of all the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. State v. Arnold 769

Seasonal Employment.

Seasonal employment refers to occupations which can be carried on only at certain or fairly definite seasons or portions of the year, and does not include such occupations as may be carried on throughout the entire year. Elrod v. Prairie Valley 697

Securities Regulation.

1. The State is not required to prove lack of an exemption as an element of the offense of unlawful sale of unregistered securities. State v. Fries 874
2. The defendant bears the burden of proof as to a claim of exemption. State v. Fries 874
3. Proof of a specific intent, evil motive, or knowledge that the law was being violated is not required to sustain a criminal conviction under the Securities Act of Nebraska. State v. Fries 874
4. The registration of an agent is not effective during any period when he is not associated with a registered broker-dealer or issuer-dealer. State v. Fries 874

Security Interests.

When a person in the ordinary course of his business furnishes services or materials with respect to goods subject to a security interest, a lien upon goods in the possession of such person given by statute or rule of law for such materials or services takes priority over a perfected security interest unless the lien is statutory and

the statute expressly provides otherwise. United States Nat. Bank v. Atlas Auto Body 597

Sentences.

1. The punishment for a criminal act should, in all circumstances, be commensurate with the offense. State v. Kowalski 48
2. While Neb. Rev. Stat. § 29-2260 (Reissue 1979) lists grounds to be considered by the sentencing court, it does not control its discretion. State v. Hunt 214
3. A sentence imposed within the statutory limits will not be disturbed on appeal absent an abuse of discretion. State v. Evans 432
   State v. Ellefson 747
   State v. Fries 874
4. Information as to alleged discriminatory sentencing not appearing in the record may not be considered by this court on appeal. State v. Evans 432
5. It is well settled that the test of whether consecutive sentences may be imposed under two or more counts charging separate offenses, arising out of the same transaction or the same chain of events, is whether the offense charged in one count involves any different elements than the offense charged in another count. The test is whether some additional evidence is required to prove one of the offenses than is necessary to prove one of the other offenses. State v. Ellefson 747

Service of Process.

If service of the summons in a case is, in fact, made on the defendant, that gives the court jurisdiction to render a valid judgment, so far as the service of process is concerned, although the evidence of record, constituting the proof of service, may fail in essential particulars to establish that such service was in fact made. In cases where service was in fact had, the court has jurisdiction and may, after judgment, permit an amendment of the record to supply omissions necessary to show that the service was in fact made. Mindt v. Shavers 786

Sexual Assault.

1. The victim of a sexual assault must be corroborated as to material facts and circumstances which tend to support his testimony and from which, together with the victim's testimony as to the principal fact, an inference of guilt may be drawn. State v. Davis 474

2. Corroboration of the principal act constituting the offense is not required. State v. Davis 474
3. In a prosecution for sexual assault the victim may testify in chief on direct examination, if within a reasonable time under all the circumstances after the act was committed a complaint was made, to the fact and nature of the complaint, but not as to its details; and others may likewise testify in chief to such fact and nature of the complaint, but not as to its details. State v. Davis 474
4. In determining whether a complaint was made promptly and voluntarily, all circumstances surrounding the event must be examined. State v. Davis 474
5. The effect of a delay in making a complaint may be alleviated by proof of a sufficient reason for the delay such as intimidation or threats. State v. Davis 474
6. Fear of the attacker and shame may be sufficient mitigating factors to alleviate the delay between the attack and the complaint. State v. Davis 474
7. There is no hard and fast rule that a complaint in the form of an answer to a question is involuntary. State v. Davis 474
8. A sexual assault may involve much more than a mere assault and battery. Mindt v. Shavers 786
9. In a prosecution for sexual assault it is not essential that the victim be corroborated as to the particular act constituting the offense in order to sustain a conviction. It is sufficient if she is corroborated as to material facts and circumstances which tend to support her testimony and from which, together with her testimony, an inference of guilt may be drawn. State v. Beasley 918

Social Security.

Under the provisions of 42 U.S.C. § 407 (1976), social security payments to a recipient on deposit with a bank are exempt from garnishment under state law. Havelock Bank v. Hog Confinement Systems 783

Special Education.

1. The courts, in reviewing special education appeal proceedings under Neb. Rev. Stat. §§ 43-661 et seq. (Reissue 1978), are not to make independent findings of their own but must follow the criteria set forth in Neb. Rev. Stat. § 84-917 (Reissue 1981) and determine if the action was supported by substantial and competent evidence and was neither arbitrary nor capricious. Adams Central School Dist. v. Deist 307
2. A state which accepts financial assistance from the fed-

eral government under the Education for All Handicapped Children Act of 1975, 20 U.S.C. §§ 1401 et seq. (1976), is obligated to provide all handicapped children with a free appropriate public education. Adams Central School Dist. v. Deist 307

3. A free appropriate public education requires that each handicapped child be given the opportunity to achieve such child's full potential commensurate with the opportunity provided to other children. Adams Central School Dist. v. Deist 307
4. When a handicapped child is sent home from a school setting and is not allowed to return, such child has been expelled from the school. Adams Central School Dist. v. Deist 307
5. The expulsion of a handicapped child from school constitutes a change in placement, and when that occurs the procedural protections of the Education for All Handicapped Children Act of 1975, 20 U.S.C. §§ 1401 to 1415 (1976), are to be followed. Adams Central School Dist. v. Deist 307
6. Local school officials are prohibited, under the Education for All Handicapped Children Act of 1975, 20 U.S.C. §§ 1401 et seq. (1976), from expelling students whose handicaps cause them to be disruptive; and in such a case a school may only transfer the disruptive student to an appropriate, more restrictive environment. Adams Central School Dist. v. Deist 307
7. The burden rests with the local school officials to produce evidence as to whether or not the student involved was expelled for behavior due to such child's handicap. Adams Central School Dist. v. Deist 307
8. A school district, responsible for providing a "free appropriate public education" to a handicapped child, which fails to furnish adequate facilities and programs to afford such education, is liable to reimburse a parent who, in order to protect the physical and emotional health of such child, does obtain such reasonable services. Adams Central School Dist. v. Deist 307
9. The state is not obligated under either the Education for All Handicapped Children Act of 1975, 20 U.S.C. §§ 1401 et seq. (1976), or the state care and education of handicapped children legislation, Neb. Rev. Stat. §§ 43-601 et seq. (Reissue 1978), to provide a free appropriate public education beyond the child's 21st birthday. Adams Central School Dist. v. Deist 307

Special Legislation.

1. In the area of economics and social welfare, a state

does not violate the equal protection clause merely because the classifications made by its laws are imperfect. If the classification has some reasonable basis, it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality. County of Antelope v. Stenberg 150

2. In reviewing the classification in legislation, the standard used is whether the classification has a rational basis. County of Antelope v. Stenberg 150

Speedy Trial.

1. For computation of the time at which a defendant must be brought to trial in compliance with the "6-month rule" prescribed by Neb. Rev. Stat. § 29-1207 (Reissue 1979), the period pertaining to the final disposition of a pretrial motion for discovery is excluded in computing the date for trial. State v. Brown 665
2. An accused's constitutional right to a speedy trial is weighed in a "balancing test," according to *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). State v. Brown 665
3. The reasonable time used to obtain a deposition requested by a defendant in preparation for trial is excluded in computing the last day permissible for commencement of trial under Neb. Rev. Stat. § 29-1207(1) (Reissue 1979). State v. Fatica 776
4. Periods during which the defendant is found incompetent to stand trial are not included in the 6-month period within which a defendant must be brought to trial. Also not included are periods during which pretrial motions made by the defendant are pending, and delays caused by a grant of continuance to the defendant. State v. Searles 849
5. Generally, an accused cannot take advantage of a delay in being brought to trial where he was responsible for the delay either by action or inaction. State v. Searles 849

Standing.

To have standing in a matter the party involved must only show that it has an interest in the matter, such as the possibility of an injury that is different from that of the general public. City of Omaha v. S.I.D. No. 287 ... 371

State Equalization Board.

If the effect of an increase in valuation ordered by the State Board of Equalization and Assessment is to raise

the assessed value of a particular property above the actual value, the remedy of the taxpayer is before the county board of equalization. Richman Gordman v. Board of Equalization 470

Statutes.

1. Statutes are not open to construction as a matter of course. It is not our province to read meaning into a statute not warranted by the language. State ex rel. Council #32 v. City of Hastings 20
2. Generally, where a statute has been judicially construed and that construction has not evoked an amendment, it will be presumed that the Legislature has acquiesced in the court's determination of its intent. Erspamer Advertising Co. v. Dept. of Labor 68
3. An exemption becomes meaningless if it does not exempt anything from the statutory provisions. Erspamer Advertising Co. v. Dept. of Labor 68
4. Language of a statute or regulation which conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices will not be held to be unconstitutionally vague or overbroad on those grounds. Richardson v. City of Omaha 97
5. A statute should be construed so that an ordinary person reading it would get from it the usual, accepted meaning. Rules of interpretation are resorted to for the purpose of resolving an ambiguity, not of creating it. Adkisson v. City of Columbus 129
6. The obligation of the court in the consideration and application of a statute is to determine and give effect to the purpose and intention of the Legislature as ascertained from the entire language thereof considered in its plain, ordinary, and popular sense. It is the duty of the court to give effect to the whole and each part of the statute if not in conflict with the legislative intent and to reconcile the different provisions of it, if possible, so as to make them logical, harmonious, and sensible. Adkisson v. City of Columbus 129
7. It is a fundamental rule of statutory construction that effect must be given, if possible, to all its several parts. No sentence, clause, or word should be rejected as meaningless or superfluous, if it can be avoided; but the subject of the enactment and the language employed, in its plain, ordinary, and popular sense, should be taken into account in order to determine the legislative will. It is the duty of the court to discover, if pos-

sible, the legislative intent from the statute itself. Adkisson v. City of Columbus 129
8. A sensible construction will be placed upon a statute to effectuate the object of the legislation rather than a literal meaning that would have the effect of defeating the legislative intent. In order to determine this intent the reasons for the enactment of the statute and the purposes and objects of an act as obtained from an examination of the legislative history may be used as guides in an attempt to give effect to the main intent of lawmakers. Adkisson v. City of Columbus 129
9. In construing statutes this court will, if possible, try to avoid a construction which leads to absurd, unjust, or unconscionable results. Adkisson v. City of Columbus 129
10. Where the general intent of the Legislature may be readily discerned, and yet the language in which the law is expressed leaves the application of it in specific instances obscure, doubtful, ambiguous, or uncertain, the courts may have recourse to historical facts or general information in order to aid them in interpreting its provisions. Adkisson v. City of Columbus 129
11. The legislative intention is to be determined from the general consideration of the whole act with reference to the subject matter to which it applies and the particular topic under which the language in question is found, and the intent deduced from the whole will prevail over that of a particular part considered separately. To ascertain such intent, a court will not examine an operative provision without likewise examining the statute as a whole in the light of objects and purposes of the act. Adkisson v. City of Columbus 129
12. A primary rule of construction is that the intention of the Legislature is to be found in the ordinary meaning of the words of a statute in the connection in which they are used and in light of the mischief to be remedied. Adkisson v. City of Columbus 129
13. The reasons for the enactment and the purposes and objects of an act may be guides in an attempt to give effect to the main intent of the lawmakers. The court must look to the object to be accomplished or the purpose to be subserved and place such construction on the statute that will best effect that purpose, rather than one that will defeat it. Adkisson v. City of Columbus 129
14. In construing a statute of doubtful meaning courts may consider all statutes on the same subject. Adkisson v. City of Columbus 129
15. Whether the words of a statute are ambiguous is a

question of law for the court. Weiner v. State ex rel. Real Estate Comm. 404
16. A statute is not open to construction as a matter of course, and, in the absence of anything to indicate the contrary, words must be given their ordinary meaning. It is not within our province to read a meaning into a statute that is not there, nor to read anything direct and plain out of a statute. Weiner v. State ex rel. Real Estate Comm. 404
17. In giving effect to the intent of the Legislature in the adoption of legislation, statutes in pari materia must be construed together. United States Nat. Bank v. Atlas Auto Body 597
18. Generally, the word "may," when used in a statute, suggests discretionary rather than mandatory action. Flood v. Keller 797

Summary Judgment.

1. Where a motion for summary judgment has been duly noticed for hearing, it should be rendered forthwith, if upon the hearing it appears from the pleadings, depositions, and admissions on file, together with the affidavits, if any, that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Monarch Industries v. Caldwell Mfg. Co. 26
2. The moving party is not entitled to summary judgment except where there exists no genuine issue as to any material fact and where, under the facts, he is entitled to judgment as a matter of law. State ex rel. Douglas v. Associated Grocers 79
Interholzinger v. Estate of Dent 264
Swanson v. First Fidelity Life Ins. Co. 654
3. Summary judgment is an extreme remedy and should be awarded only when the issue is clear beyond all doubt. Any reasonable doubt touching the existence of a material issue of fact must be resolved against the moving party. State ex rel. Douglas v. Associated Grocers 79
4. Upon a motion for summary judgment the court examines the evidence not to decide any issue of fact but to discover if any real issue of fact exists. In this respect the court should take that view of the evidence most favorable to the party against whom the motion is directed, giving to that party the benefit of all favorable inferences which may reasonably be drawn from the evidence. State ex rel. Douglas v. Associated Grocers 79

5. A summary judgment dismissing one cause of action is a final appealable order notwithstanding the fact another cause of action still pends for trial. Interholzinger v. Estate of Dent 264
6. A motion for summary judgment requires compliance with all statutory requirements. Curley v. Curley 780

Taxation.

1. An appeal from a county board of equalization involving the valuation of real estate for tax purposes is tried de novo as an equitable proceeding. Richman Gordman v. Board of Equalization 470
2. The review in this court is de novo upon the record. Richman Gordman v. Board of Equalization 470
3. All real property is to be assessed at its actual value. Neb. Rev. Stat. § 77-201 (Reissue 1981). Richman Gordman v. Board of Equalization 470
4. Actual value, market value, and fair market value mean exactly the same thing for purposes of taxation. Richman Gordman v. Board of Equalization 470
5. If the effect of an increase in valuation ordered by the State Board of Equalization and Assessment is to raise the assessed value of a particular property above the actual value, the remedy of the taxpayer is before the county board of equalization. Richman Gordman v. Board of Equalization 470
6. Any presumption that the value fixed by the board of equalization was correct disappears when there is competent evidence to the contrary. Richman Gordman v. Board of Equalization 470
7. A taxpayer objecting to the setting of a nonresident high school tuition levy pursuant to Neb. Rev. Stat. § 79-436 (Reissue 1981) must give notice of appeal within 10 days after the setting of the levy by the county board of equalization. In re 1981-82 County Tax Levy 624
In re 1981-82 County Tax Levy 847
8. 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. Warner v. Board of Equalization 730
9. Real property taxes may not be equalized by merely classifying property and then arbitrarily applying a given value to all properties of that classification. Warner v. Board of Equalization 730

Teacher Contracts.

1. The deliberate disregard by a teacher or guidance counselor of the orders and directions given him by the

principal of the school, who was his supervisor, constitutes "neglect of duty," which is a statutory ground for the discharge of the teacher by the school board, and the cancellation of the teacher's contract with the school board. Bickford v. Board of Ed. of Sch. Dist. #82 642
2. The failure or refusal of a teacher or guidance counselor to comply with or fulfill the duties of his position, as set out in the written guidelines of the school outlining such duties, constitutes "neglect of duty" under the statutory grounds for termination of the teacher. Bickford v. Board of Ed. of Sch. Dist. #82 642
3. Untruthful statements made by a teacher or guidance counselor to his superior constitutes "unprofessional conduct" and may be the basis for the termination of the teacher's contract by the school board. Bickford v. Board of Ed. of Sch. Dist. #82 642

Termination of Employment.

1. When an employee contracts to fill a particular position, any material change in duties or significant reduction in rank will constitute a constructive discharge which, if unjustified, is a breach of contract. Sanders v. May Broadcasting Co. 755
2. The doctrine of constructive discharge is applied when an employer deliberately renders an employee's working conditions intolerable, thus forcing him to quit his job. Sanders v. May Broadcasting Co. 755

Time.

1. The point at which a statute of limitations commences to run must be determined from the facts of each case; a cause of action accrues, and the statute of limitations begins to run, when the aggrieved party has the right to institute and maintain suit, even though such plaintiff may be ignorant of the existence of the cause of action. Interholzinger v. Estate of Dent 264
2. Without injury there is no cause of action; injury occurs in a tort action as soon as the act or omission takes place. Interholzinger v. Estate of Dent 264
3. For computation of the time at which a defendant must be brought to trial in compliance with the "6-month rule" prescribed by Neb. Rev. Stat. § 29-1207 (Reissue 1979), the period pertaining to the final disposition of a pretrial motion for discovery is excluded in computing the date for trial. State v. Brown 665
4. Periods during which the defendant is found incompetent to stand trial are not included in the 6-month period within which a defendant must be brought to

trial. Also not included are periods during which pretrial motions made by the defendant are pending, and delays caused by a grant of continuance to the defendant. State v. Searles 849

Tort Claims Act.

1. Under the State Tort Claims Act the District Court, sitting without a jury, has exclusive jurisdiction to hear, determine, and render judgment on any suit or tort claim under the act. Neb. Rev. Stat. § 81-8,214 (Reissue 1981). Shepard v. State of Nebraska 744
2. On an appeal to this court of an action under the State Tort Claims Act, the findings of the trial court will not be disturbed unless clearly wrong. Shepard v. State of Nebraska 744

Torts.

Without injury there is no cause of action; injury occurs in a tort action as soon as the act or omission takes place. Interholzinger v. Estate of Dent 264

Trial.

1. 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. State v. Roy 204
2. It is within the sound discretion of the trial court whether a party may be permitted to withdraw its rest. In re Interest of Aufenkamp 297
3. The determination of the admissibility of evidence is largely within the discretion of the trial court. State v. Davis 474
4. A party may, by his acts or omissions, waive, or be estopped to make, objections to the admission or exclusion of evidence. Such waiver or estoppel may arise from failure to object, from acts done or omitted before the evidence is offered, as by failure to object to previous similar evidence, or from some affirmative act done after the ruling on the evidence. In re Estate of Hill 702
5. A statement by counsel in the trial of a civil action relating to race may be, but is not necessarily, improper or prejudicial. The primary considerations are whether the statement in question has any relevancy to or legitimate bearing on the issues in the case and, if not, whether it is calculated or has a tendency to arouse racial prejudice. Mindt v. Shavers 786

Trusts.

1. A resulting trust is one raised by implication of law and presumed always to have been contemplated by the parties, the intention as to which is to be found in the nature of their transaction, but not expressed in deed or instrument of conveyance. Superior Hybrids Co. v. Carmichael 384
2. Where a transfer of property is made to one person and the whole or a part of the purchase price is paid by another, a resulting trust arises in favor of the person by whom such payment is made. Superior Hybrids Co. v. Carmichael 384
3. The presumption of a resulting trust in favor of the person who provides the consideration is rebuttable by proof of a contrary intention on the part of such person. Superior Hybrids Co. v. Carmichael 384
4. A resulting trust does not arise where the parties are sufficiently close so as to give rise to a presumption that a gift was intended. Superior Hybrids Co. v. Carmichael 384
5. The burden is upon the one claiming the existence of a resulting trust to establish the facts upon which it is based by clear and satisfactory evidence. Superior Hybrids Co. v. Carmichael 384
6. A constructive trust is a relationship, with respect to property, subjecting the person who holds title to property to an equitable duty to convey it to another on the ground that his acquisition or retention of the property would constitute unjust enrichment. Lauritzen v. Davis 547
7. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain a beneficial interest, equity converts him into a trustee. Lauritzen v. Davis 547

Uniform Commercial Code.

1. The period of limitations contained in Neb. U.C.C. § 2-725(2) (Reissue 1980) does not apply to express warranties. Moore v. Puget Sound Plywood 14
2. An action under the Nebraska Uniform Commercial Code is one at law. First Nat. Bank & Trust Co. v. Hughes 42
3. A guarantor is entitled to notice as a "debtor" under the definition of such in Neb. U.C.C. § 9-105(1)(d) (Reissue 1980) as one "who owes payment or other performance of the obligation secured." First Nat. Bank & Trust Co. v. Hughes 42
4. Ambiguous language in a notice sent pursuant to Neb.

U.C.C. 9-504(3) (Reissue 1980) is to be construed against the drafter of the language. First Nat. Bank & Trust Co. v. Hughes 42
5. Compliance with the notice provisions of the Uniform Commercial Code is a condition precedent to the right of a creditor to recover a deficiency judgment. First Nat. Bank & Trust Co. v. Hughes 42
6. When a person in the ordinary course of his business furnishes services or materials with respect to goods subject to a security interest, a lien upon goods in the possession of such person given by statute or rule of law for such materials or services takes priority over a perfected security interest unless the lien is statutory and the statute expressly provides otherwise. United States Nat. Bank v. Atlas Auto Body 597

Valuation.

1. An appeal from a county board of equalization involving the valuation of real estate for tax purposes is tried de novo as an equitable proceeding. Richman Gordman v. Board of Equalization 470
2. The review in this court is de novo upon the record. Richman Gordman v. Board of Equalization 470
3. All real property is to be assessed at its actual value. Neb. Rev. Stat. § 77-201 (Reissue 1981). Richman Gordman v. Board of Equalization 470
4. Any presumption that the value fixed by the board of equalization was correct disappears when there is competent evidence to the contrary. Richman Gordman v. Board of Equalization 470
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. Warner v. Board of Equalization 730
6. Real property taxes may not be equalized by merely classifying property and then arbitrarily applying a given value to all properties of that classification. Warner v. Board of Equalization 730

Verdicts.

1. In the absence of prejudicial error as a matter of law, a jury verdict supported by competent evidence must be affirmed. Kluender v. Mattea 327
2. On appeal this court will not interfere with a guilty verdict based upon evidence in a criminal case unless that evidence is so lacking in probative force that it can be said that, as a matter of law, the evidence is insuffi-

cient to support a verdict of guilty beyond a reasonable doubt. State v. Huffman 429
State v. Evans 432
State v. Hochstetler 482

3. A motion for new trial should be granted only where there is error prejudicial to the rights of the unsuccessful party. Unless such error appears, a party who has sustained the burden and expense of trial, and who has succeeded in securing a verdict on the facts in issue, has a right to keep the benefit of that verdict. Hegarty v. Campbell Soup Co. 716
4. The verdict of a jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. State v. Beasley 918

Wages.

Under the Nebraska Wage Payment and Collection Act an employer may deduct, withhold, or divert a portion of an employee's wages only when required to do so by state or federal law, or order of a court, or when authorized by a written agreement with the employee. Rudolf v. Tombstone Pizza Corp. 276

Waiver.

1. The general rule is that an accused may waive his right to counsel where such waiver is made intelligently and understandingly, with knowledge of the right to counsel. State v. Jones 145
2. A plea of guilty embodies a waiver of every defense to a charge, whether procedural, statutory, or constitutional. State v. Jones 145
3. A defect in parties raised by answer rather than by demurrer generally is deemed to have been waived. City of Omaha v. S.I.D. No. 287 371
4. The introduction of evidence by the defendant following the overruling of a motion for directed verdict at the close of the State's case waives any error in the ruling on the motion; however, the defendant is not prevented from questioning the sufficiency of the evidence in the entire record to sustain a conviction. State v. Hochstetler 482
5. Where a party to a contract, with full knowledge of the facts and with knowledge of a breach by the other party, receives money in the performance of the contract, the breach will be deemed to have been waived. Dougherty v. Robson 802

Warrants.

1. A criminal defendant may challenge the validity of a warrant based on an affidavit only if the affidavit contains deliberate falsehoods or statements made with a reckless disregard for the truth. State v. Williams 923
2. In order to be entitled to a hearing to examine the contents of the affidavit, the challenger must attack only the veracity of the affiant and not of any other informant; he must also make a "substantial preliminary showing," including allegations of "deliberate falsehood or of reckless disregard for the truth," supported by an offer of proof. Moreover, even if the foregoing two requirements are met, no hearing is required if, when the material which is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause. State v. Williams 923
3. Probable cause to issue a warrant exists where the facts and circumstances within the officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. State v. Williams 923
4. In determining whether probable cause exists for the issuance of a warrant, the issuing magistrate is to make a practical, commonsense decision whether, given the totality of all the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of the persons supplying hearsay information, there is a fair probability that the defendant was implicated in the crime. State v. Williams 923
5. Affidavits for warrants must be tested in a commonsense, realistic fashion. State v. Williams 923
6. In evaluating the showing of probable cause necessary to support a warrant, only the probability, and not a prima facie showing, of criminal activity is required. State v. Williams 923

Warranty.

A description of goods which becomes a basis of the bargain creates an express warranty that the goods conform to the description. Moore v. Puget Sound Plywood 14

Waters.

In a cause of action for damage to land due to seepage, the burden is on the plaintiffs to prove that it was the acts of the defendants in their maintenance and opera-

tion of a drain or diversion structure that caused the plaintiff's injury. Hardt v. Short-Line Irr. Dist. 612

Wills.

1. The cardinal rule in construing a will is to ascertain and effectuate the intention of the testator if such intention is not contrary to the law. In re Estate of Schmitz 28
2. The right to dispose of one's property by will at death is a valuable right which is favored by the law, and it will be sustained whenever possible. In re Estate of Schmitz 28
3. In searching for the intention of the testator the court must examine the entire will, consider each of its provisions, give words their generally accepted literal and grammatical meaning, and indulge the presumption that the testator understood the meaning of the words used. In re Estate of Schmitz 28
4. The rule against perpetuities prohibits only the creation of future interests or estates which, by possibility, may not become vested within a life or lives in being and 21 years, together with the period of gestation when necessary to cover cases of posthumous birth. In re Estate of Schmitz 28
5. While the rule against perpetuities prevails over intention, a document should be interpreted, if feasible, to avoid the conclusion that it violates the rule. In re Estate of Schmitz 28
6. Where the language of a will leaves the court in doubt whether the rule has been transgressed, the doubt may within reasonable limits be resolved in favor of the construction that the future estate constitutes a vested rather than a contingent remainder. In re Estate of Schmitz 28
7. Revocation of a will may be by either a subsequent will or an act done to the document. If revocation is by a subsequent will, it must be properly executed. In re Estate of Thompson 899
8. Where it cannot be established that a subsequent will was executed in accordance with the statute, there is insufficient evidence to support a finding that it was fully executed and thus it cannot revoke a prior will. In re Estate of Thompson 899

Wiretaps.

1. The showing required to permit the interception of wire or oral communications under the provisions of Neb. Rev. Stat. § 86-703 (Reissue 1981) must be such as to provide a judge with a substantial basis to conclude,

under the totality of the circumstances, that probable cause exists to find that one was committing, had committed, or was about to commit one of the crimes enumerated therein. State v. Brennen 734

2. The interception of wire or oral communications may not be the initial step in a criminal investigation. Its employment may not be indiscriminate but, rather, must be with great care; however, the telecommunications statute does not require an exhaustion of all other possible, or even all other reasonable, avenues of investigation prior to the interception of telephonic communications. The affidavit must be such as to satisfy a judge either that other methods have been tried and failed or that other procedures are unlikely to succeed or are too dangerous. State v. Brennen 734
3. The ultimate burden of showing an unlawful interception of telephonic communications rests upon the party against whom the fruits of the electronic surveillance are offered. State v. Brennen 734

Witnesses.

1. An illustrative experiment is admissible if a competent person conducted the experiment, an apparatus of suitable kind and condition was utilized, and the experiment was conducted fairly and honestly. Kluender v. Mattea 327
2. Where a person, without reasonable explanation, changes his testimony concerning the material facts on a vital issue, such change clearly being made to meet the exigencies of pending litigation, the testimony is discredited as a matter of law and should be disregarded. Kluender v. Mattea 327
3. The rule of discreditation of testimony does not apply where the witness offers a rational or sufficient explanation for the change in testimony. Kluender v. Mattea 327
4. In a prosecution for sexual assault the victim may testify in chief on direct examination, if within a reasonable time under all the circumstances after the act was committed a complaint was made, to the fact and nature of the complaint, but not as to its details; and others may likewise testify in chief to such fact and nature of the complaint, but not as to its details. State v. Davis 474
5. The existence of an agreement to testify by a witness under threats or promises of leniency made by the prosecutor is relevant to the credibility of such witness,

and failure to bring that to the attention of the jury denies the defendant due process of law. State v. Rice .. 518
6. The defendant has the burden of proving the existence of such promises or threats as he does for all bases for relief in a post conviction hearing. State v. Rice 518
7. An expectation of leniency on the part of a witness, absent evidence of any expressed or implied agreement, need not be revealed to the jury. State v. Rice 518
8. The principle that a state may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, does not cease to apply merely because the false testimony goes only to the credibility of the witness, but for that rule to apply, the evidence withheld must have been false. State v. Rice 518
9. A party has the right to cross-examine the witnesses produced by his adversary touching every relation tending to show their interest or bias. Hegarty v. Campbell Soup Co. 716
10. A party has the right to cross-examine a witness with regard to an interest which affects credibility. Failure to permit such inquiry constitutes reversible error if prejudice results to the complaining party. Hegarty v. Campbell Soup Co. 716
11. Evidence relating to a "Mary Carter" agreement should be admitted where the agreement bears upon the bias and credibility of witnesses employed by a party to the agreement. Hegarty v. Campbell Soup Co. 716
12. A claim of prejudice based upon counsel's alleged failure to call witnesses is not sustained in the absence of evidence as to what the witnesses' expected testimony would be. State v. Hill 865

Words and Phrases.

1. The use of land for agricultural purposes does not necessarily mean it is rural in character. It is the nature of its location as well as its use which determines whether it is rural or urban in character. Omaha Country Club v. City of Omaha 3
2. A guarantor is entitled to notice as a "debtor" under the definition of such in Neb. U.C.C. § 9-105(1)(d) (Reissue 1980) as one "who owes payment or other performance of the obligation secured." First Nat. Bank & Trust Co. v. Hughes 42
3. Statements made under the immediate force of the circumstances and not as afterthoughts are admissible into evidence as an "excited utterance" exception to the hearsay rule. State v. Roy 204
4. Under the Nebraska Wage Payment and Collection Act

an employee is "any individual permitted to work by an employer"; an employer is anyone "employing any person as an employee"; and wages are "compensation for labor or services rendered by an employee." Rudolf v. Tombstone Pizza Corp. 276

5. When a court is given the power to review a case "in a summary manner as in equity," that court is given power to review such matter de novo as in other equity actions. City of Omaha v. S.I.D. No. 287 371
6. Actual value, market value, and fair market value mean exactly the same thing for purposes of taxation. Richman Gordman v. Board of Equalization 470
7. Under Neb. Rev. Stat. § 30-2316 (Reissue 1979) "fair disclosure" contemplates that each spouse should be given information of a general and approximate nature concerning the net worth of the other. "Fair disclosure" is not synonymous with detailed disclosure such as a financial statement of net worth and income. In re Estate of Hill 702
8. A "cause of action" is the operative facts which give rise to a "right of action" or the remedial right affording redress. Thus, there may be several rights of action arising out of a cause of action. Mindt v. Shavers 786
9. Generally, the word "may," when used in a statute, suggests discretionary rather than mandatory action. Flood v. Keller 797

Workmen's Compensation.

1. Compensation may be recovered for emotional or psychological conditions which are proximately caused by a work-related injury and result in disability. Van Winkle v. Electric Hose & Rubber Co. 8
2. Issues of causation in compensation cases are to be determined by the finder of fact. Van Winkle v. Electric Hose & Rubber Co. 8
3. Findings of fact made by the compensation court after rehearing will not be set aside unless clearly wrong. Van Winkle v. Electric Hose & Rubber Co. 8
   Novotny v. Electric Hose & Rubber Co. 216
   Elrod v. Prairie Valley 697
4. Where there is nothing more than conflicting medical testimony, this court will not substitute its judgment for that of the Workmen's Compensation Court. Van Winkle v. Electric Hose & Rubber Co. 8
5. In testing the sufficiency of evidence to support findings of fact made by the Nebraska Workmen's Compensation Court after rehearing, the evidence must be con-

sidered in the light most favorable to the successful party. Novotny v. Electric Hose & Rubber Co. 216

6. Findings of fact made by the Nebraska Workmen's Compensation Court after rehearing shall have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong. Sortino v. Miller 592

7. In determining the sufficiency of evidence necessary to sustain an award of the Nebraska Workmen's Compensation Court after rehearing, such evidence must be considered most favorably to the successful party, every controverted fact must be resolved in his or her favor, and he or she must receive the benefit of every inference reasonably deducible from it. Sortino v. Miller 592

8. In a workmen's compensation claim, the burden of proof is on the claimant in each case to prove the nature of his employment. Sortino v. Miller 592

9. The primary test, when determining for workmen's compensation purposes whether one is an employee or independent contractor, is one of control. Sortino v. Miller 592

10. Seasonal employment refers to occupations which can be carried on only at certain or fairly definite seasons or portions of the year, and does not include such occupations as may be carried on throughout the entire year. Elrod v. Prairie Valley 697

Zoning.

A municipality having the power of eminent domain is not subject to its own zoning ordinances with respect to governmental projects for the construction of which it has the power to condemn. County of Knox v. City of Creighton 196