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GENERAL ELECTRIC CREDIT CORPORATION, APPELLEE, V. BEST REFRIGERATED EXPRESS, INC., APPELLANT.

385 N.W.2d 81

Filed April 11, 1986. No. 84-894.

1. **Usury.** Usury laws are enacted for the protection of needy borrowers and not to punish extortion in moneylenders.
2. _____. The defense of usury is for the benefit of the borrower and is personal to the borrower.
3. **Contracts: Usury: Standing.** Mere assignees who are strangers to contracts are not in privity with assignors for the purpose of asserting the assignors' usury defense or claims under the Nebraska Installment Loan Act, Neb. Rev. Stat. §§ 45-114 et seq. (Reissue 1984).

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

Robert J. Murray and David D. Begley of Kennedy, Holland, DeLacy & Svoboda, for appellant.

Terrence L. Michael of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, for appellee.

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

WHITE, J.

This appeal originated as a replevin action brought by appellee, General Electric Credit Corporation (GECC), against appellant, Best Refrigerated Express, Inc. (Best). GECC sought, in the alternative, the return of three Kenworth tractors or a money judgment equal to the value of the tractors. Best counterclaimed, contending that GECC's loan terms violated the Nebraska Installment Loan Act (Act) (Neb. Rev. Stat. §§ 45-114 et seq. (Reissue 1984)), were usurious, and, therefore, were void. Best also sought to recover all interest paid to GECC in violation of the Act.

The Douglas County District Court made a general finding of fact in favor of GECC. Rejecting Best's counterclaim, the court ordered an alternative judgment of $43,798.16 in favor of GECC or the return of the three tractors. Best appeals.

On February 1, 1978, John H. Schueman, doing business as Schueman Leasing, purchased two 1978 Kenworth K-100

tractors with $41,875 per truck loaned to him by GECC. Schueman's debt was evidenced in two promissory notes, each providing for payments of $910.45 per month for 60 consecutive months. The initial interest rate on the notes was 11 percent per annum. The notes also provided that during the life of the loan, the interest would float, based upon

> the sum of (a) three per cent (3.0 %) per annum (the "Fixed Rate") Plus (b) an interest rate per annum defined as the greater of (i) the highest rate of interest charged by Morgan Guaranty Trust Company of New York, The Chase Manhattan Bank (National Association) - New York, First National City Bank - New York, Chemical Bank - New York for commercial loans of short term maturities to its largest and most creditworthy borrowers (the "Prime Rate") in effect as of the first business day of the month in which an instalment of principal and interest or interest only is due hereunder or (ii) the latest monthly average rate for prime commercial paper of 4 to 6 months maturities, as indicated in the Money Market Rates table of the Federal Reserve Bulletin (the "Prime Commercial Paper Rate") as last published as of the first business day of the month in which an instalment of principal and interest or interest only is due.

The debt was secured by chattel mortgages on the tractors.

Approximately 4 weeks later, Schueman bought another Kenworth K-100 tractor with an additional $41,875 borrowed from GECC. This debt was also secured by a chattel mortgage on the equipment.

Schueman made monthly payments to GECC up to and including those due in January 1981. On February 3, 1981, Schueman assigned all right, title, and interest in the tractors to Best, with Best assuming, in full, Schueman's obligations to GECC. During the time that Best was acquiring Schueman's interest in the tractors, the interest rate on the notes peaked at 24.5 percent. As of April 1983, the interest rate had dropped to 13.5 percent. After April 1983, Best refused to make further payments to GECC, and GECC subsequently filed its replevin action.

Best bases its defense of usury and its counterclaim for

interest on an allegedly usurious and, therefore, illegal loan agreement between GECC and Schueman. Best urges us to hold the agreement similarly void as between Best and GECC.

Best relies on § 45-138 (Reissue 1974) of the Act as it existed in 1978 to support its counterclaim for $71,508.86 in overpaid interest. Best claims that Neb. Rev. Stat. § 49-301 (Reissue 1984), the so-called saving statute, applies, making the 1978 version of the Act control the outcome of the case.

GECC argues that the Act does not control loans of this nature, and even if it did and the loans were illegal, Best has no standing as an assignee to assert any remedies which may have existed under the 1978 version of the Act.

We believe that *Rader v. Burnett*, 175 Neb. 663, 122 N.W.2d 747 (1963), controls this case and is determinative of Best's rights as an assignee of the original debtor. In *Rader* the plaintiff Rader contended that a conditional sales contract on a mobile home of which she was the assignee was void as usurious under the Act. Like Best, Rader was the assignee of all interest in the mobile home, and she assumed all liability of her assignor.

Assuming for purposes of discussion that the loan was void under the Act, the *Rader* court held that Rader nevertheless lacked standing to raise any action under the Act because she lacked the necessary privity with the original debtor.

The court defined the issue: "Our problem then is whether or not a cause of action for usury is assignable to a stranger to the transaction who is not a surety or in privity with the borrower." *Id.* at 672, 122 N.W.2d at 752-53. The court had determined that no privity existed between Rader and her assignor, in part because of the nature and purpose of usury statutes. Stating that " ' "usury laws are enacted for the protection of needy borrowers, and not to punish extortion in money lenders," ' " and " 'the defense of usury is for the benefit of the borrower and is personal to him,' " *id.* at 669, 122 N.W.2d at 751, the court concluded that mere assignees who are strangers to contracts are not in privity with assignors for the purpose of asserting the assignors' usury defense or claims under the Act. Those parties in privity with debtors were limited in *Rader* to the debtor's "sureties, guarantors, heirs, devisees, and personal

representatives." *Id.*

Rader also argued that her rights as an assignee were defined in the contract with her assignor, the terms of which circumscribed any requirement of privity. The court rejected this argument, again on the basis of the purpose of usury statutes:

> If, as suggested by our cases, the purpose of the usury acts is to protect the necessitous borrower or his privies in blood or estate and not to punish the lender, how may we justify the assignability of a cause of action for usury to a stranger or one merely seeking a windfall? The answer is apparent in this case. Here, the plaintiff, for an investment of $355, lived in a trailer house for more than 5 months, and then secured a judgment for $5,112.36. This will in no way benefit the original borrower, or in any way protect those intended to be protected by the law. We see no reason to depart from the law established by the import of our previous decisions, and hold that a cause of action on a usurious contract is not assignable to a stranger to the transaction.

Id. at 672-73, 122 N.W.2d at 753. See, also, *Industrial Credit Company v. Berg*, 388 F.2d 835 (8th Cir. 1968); *Commonwealth Trailer Sales, Inc. v. Bradt*, 166 Neb. 1, 87 N.W.2d 705 (1958).

The rule set forth in *Rader* applies in this case. In both, a stranger to the contract seeks to enforce provisions of the Act. Neither party is the heir, legal representative, devisee, surety, or guarantor of the debtor's obligation. No privity exists between the debtors and their assignees, who seek refuge from contractual obligations in their assignor's personal rights. Like Rader, Best has no standing to assert such rights.

Accordingly, we do not reach the appellant's remaining issues. The district court's decision is correct and is affirmed.

AFFIRMED.

CAPORALE, J., not participating.

KRIVOSHA, C.J., concurring.

I concur in the result reached by the majority in this case. Because, however, I have some question as to whether our decision in *Rader v. Burnett*, 175 Neb. 663, 122 N.W.2d 747 (1963), relied upon totally by the majority, correctly states the

law with regard to suits brought by a lender under Neb. Rev. Stat. § 45-138 (Reissue 1984), I cannot join with the majority in its opinion. While it may be true that, generally, usury is a personal defense and therefore cannot be assigned, the issue in this case is complicated by the language of the statute. Section 45-138 provides that if a contract is made in violation of § 45-138, the lender *shall* have no right to collect or receive any interest or charges on such loan. That raises totally different questions not addressed by this case, including the question of who has the burden under § 45-138 to establish the lender's right to collect on the contract where the loan on its face is in violation of law. I do not believe that we need to address those issues and can properly leave them for another time. I do so because I believe that our decision in *Farmland Enterprises, Inc. v. Schueman*, 212 Neb. 342, 322 N.W.2d 665 (1982), makes it clear that not only was the counterclaim sought to be raised by Best not available to Best but, in fact, would not have been available even to the assignor, Schueman, and General Electric Credit Corporation (GECC) was entitled under the law to sue on the contract and collect the full amount due.

Best concedes that it can recover only if the court holds that the provisions of § 45-138 (Reissue 1974), as it existed in 1978, are applied. If, in fact, the provisions of § 45-138 as it existed when GECC brought suit apply, then there was no violation of the statute. Our holding in *Farmland Enterprises, Inc., supra,* makes it clear that the law as it existed at the time GECC filed its cause of action and not when the contract was executed is the applicable statute, and therefore a defense contained in a statute previously repealed is not available to Best.

In *Farmland Enterprises, Inc., supra* at 348, 322 N.W.2d at 668, we stated:

> " 'Upon the theory that the privilege of pleading usury as a defense pertains only to the remedy and is not an element in the rights inhering in the contract, many courts have held that the legislature by the amendment or repeal of the usury statutes abridge or take away the right to assert usury as a defense as to contracts previously entered into. It is generally considered that parties to usurious contracts hold any right they may have to penalties given by law,

> subject to a modification or repeal by the legislature, and that the repeal of a statutory prohibition against usury releases any penalties imposed, and thus validates the contract.'
>
> ". . . 'A mere penalty never vests, but remains executory; the repeal of a statute before a penalty is enforced is not a deprivation of vested rights. The unqualified repeal of a statute imposing a penalty operates the same way as the repeal of a strictly criminal statute. It abrogates all rights of action which have not been reduced to judgments. . . .' "

We then concluded in *Farmland Enterprises, Inc., supra* at 348-49, 322 N.W.2d at 669, by saying: "We believe that the enactment of § 45-101.04 some 4 years prior to the bringing of a suit in this case exempted this transaction from the provisions of § 45-105 and the limitations imposed by § 45-101.03."

The same theory applies to the provisions of § 45-138 and its amendments. In April of 1983, when GECC filed suit, neither Schueman nor Best had any defense based upon the previous provisions of § 45-138.

EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, APPELLEE, V. HAROLD JOINER AND VIOLET JOINER, APPELLANTS.

384 N.W.2d 636

Filed April 11, 1986. No. 84-907.

1. **Equity: Contracts: Rescission: Appeal and Error.** An action for rescission of a contract is equitable in nature and, as such, is reviewable by this court de novo on the record. However, when the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and adopted one version of the facts rather than the opposite.
2. **Contracts: Insurance: Fraud.** When an applicant makes an untrue statement with respect to a material fact peculiarly within his knowledge, the finder of fact may, from the mere occurrence of the false statement, conclude it was made knowingly with intent to deceive.
3. _____: _____: _____. In the absence of fraud, one who signs an instrument

without reading it, when he can read and has an opportunity, cannot avoid the effect of his signature merely because he was not informed of the contents of the instrument.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Affirmed.

Ronald F. Krause of Cassem, Tierney, Adams, Gotch & Douglas, for appellants.

Raymond M. Crossman, Jr., and Franklyn K. Norris of Crossman, Norris & Hosford, for appellee.

KRIVOSHA, C.J., CAPORALE, and SHANAHAN, JJ., and GARDEN, D.J., and COLWELL, D.J., Retired.

GARDEN, D.J.

This appeal arises out of an action filed by Equitable Life Assurance Society of the United States (Equitable), plaintiff-appellee, in the district court for Douglas County, Nebraska, in which Equitable prayed for rescission of a certain lifetime medical insurance policy issued to Harold Joiner, defendant-appellant, which policy also provided coverage for Violet Joiner, wife of the insured. Equitable had rescinded the policy because the Joiners had allegedly failed to disclose certain material medical history of Violet's on the application. The Joiners' sole assignment of error is that "[t]he District Court erred in determining Plaintiff-Appellee Equitable met its burden of proving by clear and convincing evidence the Appellant Joiners were guilty of any misrepresentation made knowingly with intent to deceive under the circumstances established at trial." For the reasons set forth hereinafter we affirm.

Beginning in December 1981, Joiner attempted to contact Jack Webb, an Equitable agent, for the purposes of converting a group medical plan, under which Joiner and his wife, Violet, were covered, to an individual plan. The Joiners' group plan was issued by Equitable. Joiner testified that under the group plan Equitable provided "blanket coverage." That is to say, insureds were accepted without any physical examination or disclosure of prior medical history. Because Webb had been unavailable for several months, conversion apparently was not

possible and an application for a new policy was required.

On March 23, 1982, Webb traveled to the Joiner home and prepared an application for the Joiners. The application was prepared while the Joiners and Webb sat around the kitchen table, with Webb asking questions from the application, the Joiners responding, and Webb physically filling out the application. The application form itself is six pages in length and contains many questions concerning the applicants' health and medical history.

The pertinent questions contained in the application, of utmost relevance to the issues in this case, are the following:

> B. Has this proposed covered person ever been treated for or had any indications of:
>
> . . . .
>
> 9. Mental or Nervous Disease or Disorder? . . .
>
> . . . .
>
> C. Has this proposed covered person:
>
> . . . .
>
> 13. Within the last five years, consulted a physician, or been examined or treated at a hospital or other medical facility? . . .

In regards to question 9, Webb checked the "No" box on the application. Joiner testified that when Webb approached this question, he (Webb) said to the Joiners, "I think we have all experienced this at one time or another, haven't we?" Joiner testified his answer was "either a nod or a yes." Joiner also testified that Webb had spent a great deal of his presentation telling the Joiners about his domestic difficulties. It is for this reason, Joiner argues, that Webb made this comment. Joiner further testified that "I don't feel that I was given an opportunity [to answer the question]."

Also, the only information written on the application in response to question 13 was a physical exam of Harold Joiner in 1977 and a recent hemoglobin test.

Without going into specific detail the record shows that Violet Joiner had a history of being treated by psychiatrists. She was hospitalized between the years 1961 and 1979 on four separate occasions for various psychiatric problems, for a total period of no less than 43 days. Her latest hospital stay was in

April of 1979. Her treatment throughout the years ranged from electric shock and insulin shock treatments to medication. Violet was diagnosed on separate occasions as suffering from an acute psychotic reaction, depression, and schizophrenia. Additionally, beginning in 1968 she consulted, on a regular basis, psychiatrists for the purpose of therapy. Her sessions extended up to and included one in March 1982, the month when the application was completed.

Joiner denies that he intended to defraud Equitable or knowingly give any false information. On cross-examination, in response to opposing counsel's question as to why Violet's hospitalization in 1979 had not been disclosed, Joiner testified, "It was an oversight on my part, because it was for a physical examination, and I did not recall it."

Harold Joiner's testimony concerning what transpired when the application was taken was uncontroverted. While Webb was listed as a witness in the "Order on Pretrial Conference," he did not testify at trial. Violet Joiner also did not testify, because she has since died of pancreatic cancer.

Beginning in October of 1982, Violet was hospitalized for treatment of a condition which was eventually diagnosed as pancreatic cancer. She ultimately died of the cancer and related complications in July 1983. Harold forwarded to Equitable all bills submitted by the various health care providers in connection with Violet's treatment. These bills amounted to over $38,000. Under the policy's terms, Harold argues, all but $2,000 would be covered and payable by Equitable.

Equitable sent a "Notice of Rescission" dated March 3, 1983, to Harold, stating: "Since the application failed to disclose material facts . . . the Equitable declares the above-numbered policy rescinded and null and void, and denies any liability thereunder." Specifically, Equitable denied the claims because of Violet's "Undisclosed Medical History." A check representing a return of the premiums with interest was also enclosed with the rescission notice, but acceptance of the check was refused.

In its petition filed March 24, 1983, Equitable sought rescission of the policy and alleged misrepresentation on the part of the Joiners in failing to disclose in their application

mental and nervous disorders suffered by Violet prior to the application date; that the false answers were known to be false and that the information concealed lay peculiarly within their knowledge and was offered as an inducement for Equitable to issue the policy; and that the answers were material to the risk, were relied upon by Equitable, and deceived it, to its injury. Equitable later filed an amended petition expanding its allegations of misrepresentation, setting forth in factual detail concealed hospitalizations of Violet.

In their answer to Equitable's petition, the Joiners denied allegations of misrepresentation and intent to defraud and asserted good faith in answering all questions put to them to the best of their knowledge. In their counterclaim and amended counterclaim the Joiners sought enforcement of the policy and reimbursement for medical and hospital expenses incurred by Violet.

Trial was had without a jury in the district court for Douglas County, Nebraska, on October 30, 1984, and on November 1 an order was entered, supported by separate findings, finding generally for Equitable. The Joiners' motion for a new trial was overruled.

This is an action in equity for the rescission of an insurance contract. Actions in equity are reviewed by this court de novo on the record. See Neb. Rev. Stat. § 25-1925 (Reissue 1979). However, when the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and adopted one version of the facts rather than the opposite. *Haumont v. Security State Bank*, 220 Neb. 809, 374 N.W.2d 2 (1985).

Joiners' sole assignment of error is that Equitable cannot rescind the policy on the basis of misrepresentation unless it proves by clear and convincing evidence the alleged misrepresentation by the Joiners was made knowingly with the intent to deceive, citing *White v. Medico Life Ins. Co.*, 212 Neb. 901, 327 N.W.2d 606 (1982). Both the statutory and case law controlling this case are well established. The policy issued to the Joiners was for sickness and accident insurance. In

Zimmerman v. Continental Cas. Co., 181 Neb. 654, 150 N.W.2d 268 (1967), this court held that the provisions of Neb. Rev. Stat. § 44-710.14 (Reissue 1984), applying only to sickness and accident insurance, were to be read in pari materia with the provisions of Neb. Rev. Stat. § 44-358 (Reissue 1984), applying to all insurance policies. Section 44-710.14 provides that a misrepresentation which materially affects either acceptance of the risk or the hazard assumed by the insurer defeats coverage. Section 44-358 provides that a misrepresentation which exists at the time of, and contributes to, the loss and which deceives the insurer to its injury defeats coverage. We later held that in order for the insurer to deny coverage on the basis of fraud, the insurer "must plead and prove, among other things, that the misrepresentations were made knowingly with intent to deceive, that the insurer relied and acted upon such statements, and that the insurer was deceived to its injury." *White v. Medico Life Ins. Co., supra* at 905, 327 N.W.2d at 609-10.

There is no question that the Joiners made a misrepresentation to Equitable. In its order the trial court found that the Joiners, in applying for the insurance policy, represented to Equitable that Violet:

> a. had no history of mental or nervous disease or disorder when in fact she had such a history dating from 1961 and continuing through and beyond the date of March 23, 1982.
>
> b. had not within the preceding five years consulted a physician or been examined or treated at a hospital when in fact she had been an inpatient in a Denver hospital in April 1979 and continued to be under follow-up treatment by Dr. Crown, a psychiatrist, for a period extending beyond March 23, 1982.

Our review of the record shows that the trial court's findings were correct and that the representations made by the Joiners are not in accord with the facts, and thus constitute a misrepresentation.

The trial court, sitting as the finder of fact, found that the Joiners, in applying for the insurance policy, made statements "knowingly and with the intent to deceive plaintiff [Equitable] and related to material facts." In *White v. Medico Life Ins. Co.,*

supra at 906, 327 N.W.2d at 610, this court held that "when an applicant makes an untrue statement with respect to a material fact peculiarly within his knowledge, the finder of fact may, from the mere occurrence of the false statement, conclude it was made knowingly with intent to deceive."

The untrue statement in this case is the representation by the Joiners to Equitable that Violet had no history of mental disease or disorder and that she was not hospitalized within 5 years prior to the application date. This misrepresentation was also a material fact. Ralph Pisani, Equitable's underwriting section manager, testified that at the initial time of underwriting, the application is the only tool they (the underwriters) can use and rely on in evaluating the particular risk or exposure assumed by Equitable. Pisani also testified that no medical examination was required in this case and that no investigation was made by the underwriters prior to issuing the policy. Finally, Pisani also testified that had the application contained Violet's history of her 1961 hospitalization with shock treatments, her 1968 hospitalization for acute psychotic reaction, her 1970 hospitalization due to depression, her 1979 hospitalization in Denver, and the followup visits to a psychiatrist, the policy would not have been issued.

All of this information was peculiarly within the knowledge of the Joiners. Harold testified that neither he nor Violet knew Webb socially. He further testified that Webb would not have any knowledge whatsoever of the Joiners' medical background. Harold also testified that he was covered by an Equitable group policy from January 1980 to January 1981. However, no physical exam or medical application questionnaire was required for coverage.

In view of the rule espoused in *White v. Medico Life Ins. Co.*, 212 Neb. 901, 327 N.W.2d 606 (1982), and given the facts in this case, we hold that the district court did not err in finding that the Joiners intentionally made untrue statements concerning Violet's medical history. We note that while there was evidence adduced at trial that might lead another finder of fact to conclude otherwise on the issue of intent, we cannot say that the trial court's finding is contrary to law or supported by insufficient evidence.

In terms of the injury sustained by Equitable, we note that Equitable relied on the application and issued the policy. Equitable was injured to the extent it accepted an insured that it normally would not.

Joiners also argue that "[s]ince the Equitable's agent prepared this application equity dictates Appellee [Equitable] is estopped from asserting the same as a basis for its claim of rescission." Brief for Appellants at 17. We think this argument is without merit. The record shows that both Harold and Violet signed the application. Harold testified that he never read the application until after he received notice of rescission of the policy in March of 1983. In addition, the following language appeared on the inside cover of the policy:

> A copy of the application has been made a part of this policy. We issued this policy on the basis that all the answers to the questions in the application are correct and complete. Write to us within 10 days if any of the information contained in the application is not right or complete. Any incorrect or omitted information could cause us to deny an otherwise valid claim.

It is a well-established rule of law that in the absence of fraud, one who signs an instrument without reading it, when he can read and has the opportunity, cannot avoid the effect of his signature merely because he was not informed of the contents of the instrument. *Erftmier v. Eickhoff*, 210 Neb. 726, 316 N.W.2d 754 (1982), *overruled on other grounds*, *Tobin v. Flynn & Larsen Implement Co.*, 220 Neb. 259, 369 N.W.2d 96 (1985). The Joiners did not plead fraud on the part of Equitable, and none was shown. The Joiners were not prevented from reading the application either at the time they signed it or when a copy of it was attached to the policy. That being the case, the Joiners are bound by the provisions of the policy.

Joiners have raised several other issues in their brief, all of which have no merit. The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. STANLEY R. HUFFMAN, APPELLANT.

385 N.W.2d 85

Filed April 11, 1986. No. 85-334.

1. **Appeal and Error.** The function of assignments of error is that they set out the issues presented on appeal. They serve to advise the appellee of the question submitted for determination in order that the appellee may know what contentions must be met. They also advise this court of the issues which are submitted for decision.
2. **Jury Instructions: Testimony: Appeal and Error.** It is not reversible error for a trial court to fail to give a specific instruction on credibility of the testimony of an accomplice where such an instruction is not requested.
3. **Convictions: Testimony: Proof.** A conviction may rest on the uncorroborated testimony of an accomplice.
4. **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.
5. **Prior Convictions: Habitual Criminals: Right to Counsel: Waiver.** The records of prior convictions of a defendant relied on to establish a finding that defendant is a habitual criminal must show that at the time of the prior convictions defendant was represented by counsel or knowingly, intelligently, and voluntarily waived counsel.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Sentence vacated and the cause remanded for resentencing.

Gary L. Hogg, Buffalo County Public Defender, and Michael W. Baldwin, for appellant.

Robert M. Spire, Attorney General, and Calvin D. Hansen, for appellee.

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

GRANT, J.

Defendant, Stanley R. Huffman, appeals his conviction, after a jury trial, on two charges of burglary and one charge of aiding in the consummation of a felony. Defendant was found to be a habitual criminal at a hearing held after his conviction. The sentences imposed, as enhanced by the habitual criminal statute, Neb. Rev. Stat. § 29-2221 (Reissue 1979), were 10 to 25

years for each burglary and 10 to 25 years for the felony of aiding in the consummation of a felony. All three sentences were to be served concurrently. Defendant's motion for judgment notwithstanding the verdict or, in the alternative, for a new trial was overruled. Defendant timely appealed to this court.

In defendant's appeal he assigns three errors: (1) The district court "erred in failing to sustain Defendant's motion for a mistrial"; (2) The district court erred "in failing to dismiss all four counts in the information on Defendant's motion to dismiss at the close of the State's evidence and renewed at the close of all evidence by reason of insufficient evidence to support the charges in the information"; and (3) The district court erred "in failing to grant the Defendant's motion for judgment notwithstanding the verdict or in the alternative for a new trial." In connection with these assignments of error, we again state that "generalized and vague assertions do not advise this court of the issues submitted for decision." *Coyle v. Janssen*, 212 Neb. 785, 786, 326 N.W.2d 44, 45 (1982). As stated in *Cook v. Lowe*, 180 Neb. 39, 40, 141 N.W.2d 430, 431 (1966):

> The function of assignments of error is that they set out the issues presented on appeal. They serve to advise the appellee of the question submitted for determination in order that the appellee may know what contentions must be met. They also advise this court of the issues which are submitted for decision.

See, also, *McClellen v. Dobberstein*, 189 Neb. 669, 204 N.W.2d 559 (1973). Nevertheless, because specific points are raised by defendant in his brief in this criminal case and responded to in the State's brief, we dispose of defendant's specific contentions as we see such contentions presented in the briefs. In so doing we are not approving of the method of assigning errors used in this case. For the following reasons we affirm defendant's convictions but remand the cause for resentencing.

On January 15, 1985, an amended information was filed in district court charging defendant with four counts of burglary, one count of aiding in the consummation of a felony, and one count of being a habitual criminal. On March 18, 1985, one of the counts of burglary was dismissed upon the State's motion.

Jury trial was held on March 19 and 20, 1985, on the remaining counts. The jury returned a verdict of not guilty on one of the three remaining counts of burglary, and defendant was convicted of two counts of burglary and one count of aiding in the consummation of a felony.

Defendant was convicted for the September 26, 1984, burglary at Geno's Tavern, Kearney, Nebraska. The record shows the following facts as to that burglary. The proprietor of the tavern, Eugene Schlotman, left the establishment sometime between 10:30 and 11 the night before the burglary. When he left, everything was normal. A security guard checked the tavern doors at 2 a.m. on September 26 and testified that the doors were locked and the building secure. When Schlotman returned at 7 the next morning, he found the front door of the tavern pried open and the back door unlocked. The cash drawer, the loose change kept in the drawer, and some rolled change were missing. The cash drawer was later found by a police detective in a Kearney storm sewer and was identified by Schlotman at the police station. A two-wheel cart was also taken from the tavern, but Schlotman did not know when. The cart was later recovered by the police and identified by Schlotman.

Walter Smith was a self-admitted accomplice of defendant in the crimes charged in the information. In connection with the Geno's Tavern burglary, Smith testified that the two-wheel cart had been taken from the alley behind Geno's Tavern by himself and defendant at an earlier time when they had attempted unsuccessfully to break into the tavern. Smith also testified that defendant pried open the front door to the tavern, entered the tavern, and left through the back door into the alley, where Smith had driven. Defendant was carrying the cash drawer, which contained loose change. Smith entered the tavern to check for cash and rolled change but found only rolled change. Some keys were also taken from the tavern. In his testimony defendant denied any participation in this burglary.

Defendant was also convicted of a burglary at McCue's Grocery on October 18 or 19 of 1984. Myron McCue, the proprietor of the grocery, testified that the store's office was separate from the grocery itself. McCue secured the office

when he left on the evening of the 18th at about 6:30. On the morning of the 19th, McCue arrived at the office at approximately 6:30 and found that the key would not open the door, that the office was in disarray, and that a window was broken out. A safe was missing from the office. The safe and its contents were later identified by McCue at the police station.

In connection with the McCue's Grocery burglary, Smith testified that he and defendant had previously discussed burglarizing McCue's but failed at an earlier attempt to enter the office. At the time of the burglary of which he was convicted, defendant used a pry bar on the window but was unable to open it. Defendant then broke the glass, cranked the window open, and entered through the window. Defendant opened the front door, brought in the two-wheel cart that he and Smith had stolen from Geno's Tavern, and removed the safe to the car trunk. Smith and defendant then took the safe out to Buffalohead sandpit near Kearney and pounded it open. No money was found in the safe. The papers in the safe were scattered about the scene near the sandpit, and the two-wheel cart was thrown in the lake.

Jeffrey Hupp, a detective with the Kearney Police Department, testified and corroborated Smith's testimony as to the physical appearance of the office after the break-in. The safe was missing, and Hupp noticed evidence showing that the safe had been wheeled out. On October 22 Hupp was summoned to the Buffalohead sandpit, where the McCue safe had been found. In connection with this burglary defendant testified he had not participated in any such burglary and that he had spent the evening of October 18 at home sleeping.

Defendant was also convicted of aiding in the consummation of a felony on or about October 20, 1984. The facts show that Walter Smith, the admitted accomplice of defendant in the burglaries, opened a checking account at Platte Valley State Bank and deposited $25 in a new account on a Friday afternoon. Smith then wrote checks at several establishments after the bank had closed. Smith purchased merchandise at one local store, on the date that the account was opened, for approximately $320. Smith testified that both he and defendant knew that the check was insufficiently funded. The next day,

defendant returned some of the merchandise to the store and used the cash receipt to obtain a cash refund. Smith and defendant shared that cash equally between them. That Saturday afternoon, Smith and defendant left the State of Nebraska in defendant's car. Smith and defendant were later arrested in Kingman, Arizona, on Buffalo County warrants, and returned to Kearney. In his testimony in connection with this crime, defendant admitted returning the merchandise for Smith and dividing the money but denied he knew that the check written by Smith was insufficiently funded when given to the store.

Defendant's first assignment of error alleges that the trial court erred in failing to sustain defendant's motion for mistrial made during the direct testimony of Hupp. Hupp testified that he had a conversation with defendant at the time defendant had been returned to Kearney and was in the Buffalo County jail. The following questions were addressed to Hupp on his direct examination by the county attorney:

> Q Did he [defendant] tell you whether or not he'd been involved with the McCue's burglary?
>
> A He stated he didn't want to talk to me about it.
>
> Q Did you ask him about Geno's Tavern?
>
> A Prior to talking to him, I had made mention that I was investigating several burglaries, and I did mention McCues, Geno's, Plaza Wash and Dry, and Goodrich Dairy; those four.
>
> Q And several other matters?
>
> A I think mainly I — well, I did take some other theft reports along with me, yes, sir.
>
> Q Did Mr. Huffman want to talk with you about any of those matters?
>
> A Not unless a deal could be made.

Defendant's counsel then approached the bench, and the jury was excused. Without making any specific objection to the question, counsel then orally moved the court to declare a mistrial as follows: "I would move the Court to declare a mistrial for the reason that the answer by the witness is a highly statement — it is highly prejudicial and improper and constitutes prejudicial error as far as this defendant is

concerned." The court then denied the motion and, at defendant's counsel's request, orally instructed the jury to disregard the answer.

Defendant premises his assignment of error as to the failure of the trial court to grant his motion for a mistrial on this portion of the trial testimony. It is clear that no specific objections were made to any of the questions directed to the witness Hupp, and the only reason given to the trial court or this court for granting a mistrial was that the statement was "prejudicial and improper." The question is whether the statement was admissible. The statement might well have been prejudicial to defendant's position in the trial. It is obvious that evidence of a full confession by defendant would have been even more prejudicial to his position. Whether a defendant's statement to a police officer is prejudicial is not controlling as to the admissibility of the statement. The officer's answer might well have been nonresponsive to the series of leading questions addressed to him, but no such objections were made. The question of the voluntariness of defendant's statements made to Officer Hupp is not presented to this court. The bill of exceptions does not contain any *Miranda* hearing procedures except a passing reference where a written letter from defendant to Officer Hupp was excluded. No objection was made in the trial court that defendant's statements were not voluntary or were given before appropriate warnings, nor are any such contentions made in this court. In that state of the record, we can only conclude that defendant's statements to the police officer were voluntary and made after proper warnings. In the absence of any objection attacking the voluntariness of the statement or a showing that the statement was obtained in violation of defendant's constitutional rights, the trial court protected those rights more than adequately by instructing the jury to disregard the statement. Defendant's contention that the trial court erred in refusing to grant his motion for mistrial is without merit.

In his second assignment of error, defendant contends that there was insufficient evidence to support his conviction. Under that assignment of error defendant presents contentions as to alleged errors not specifically assigned. He first asserts that the

jury was not properly instructed regarding the close scrutiny that is to be given to the uncorroborated testimony of an accomplice. Defendant raises this point with his attack on the sufficiency of the evidence by alleging that if the jury had been so instructed, it would not have found sufficient evidence to sustain defendant's conviction. Defendant's position rests on his contentions as to the credibility of his alleged accomplice witness. He asserts that testimony should be discounted, thereby making the evidence insufficient for a conviction.

With regard to defendant's contentions concerning the court's instructions, the record does not show that the jury instruction that defendant asserts should have been given was requested. Defendant cannot now complain about incomplete instructions. *State v. Randolph*, 183 Neb. 506, 162 N.W.2d 123 (1968); *Rains v. State*, 173 Neb. 586, 114 N.W.2d 399 (1962). The trial court gave a general instruction on credibility. It may be reversible error for a court to fail or refuse to give an instruction on weight and credibility when requested. *Jungclaus v. State,* 170 Neb. 704, 104 N.W.2d 327 (1960). It is not reversible error for a trial court to fail to give a specific instruction on credibility of the testimony of an accomplice where such an instruction is not requested. Insofar as defendant challenges the sufficiency of the evidence, his main contention is that the testimony of his alleged accomplice is uncorroborated and, therefore, insufficient. This contention is without merit.

First of all, we note that Smith's testimony was corroborated. The testimony of the police officers and the owners of the various premises showed that the physical results in connection with the burglaries showed damages completely consistent with activities described by Smith. Officer Hupp testified that a tennis shoe print found on the safe removed from McCue's Grocery matched a tennis shoe owned by Walter Smith. When defendant was arrested in Arizona, he was wearing a pair of Smith's tennis shoes. Various missing items were found where Smith directed the police. In connection with defendant's obtaining the alleged refund for merchandise purchased by Smith, defendant himself admitted all the pertinent facts except his guilty knowledge.

Secondly, the law in Nebraska does not require

corroboration of an accomplice's testimony. A conviction may rest on the uncorroborated testimony of an accomplice. *State v. Huffman*, 214 Neb. 429, 334 N.W.2d 3 (1983); *State v. Oglesby*, 188 Neb. 211, 195 N.W.2d 754 (1972).

With regard to the specific assignment as to the sufficiency of the evidence, we note that while the record discloses conflicts in the evidence and questions of credibility, it presents sufficient evidence, if believed, to sustain defendant's conviction. We have said many times:

> [I]t is not for this court to accept one version of the case over another . . . . 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. Warnke, 221 Neb. 625, 627, 380 N.W.2d 241, 242 (1986), and cases cited therein.

Our examination of the record shows that appellant's claim of insufficiency of the evidence is without merit. We cannot say that defendant's conviction was based upon evidence so lacking in probative force that it was insufficient as a matter of law. *Warnke, supra.*

In defendant's third assignment of error, he asserts that the trial court erred in denying his motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. The specific point argued by defendant is that the State's failure to produce psychological and psychiatric reports of Smith, as ordered by the court, requires a new trial to be granted.

The record on this point is somewhat in confusion. On February 27, 1985, defendant filed a "Motion for Discovery" requesting that the trial court require the State to produce for defendant's inspection and copying "the psychological and psychiatric records concerning State's witness Walter Smith" and to permit defendant's counsel "to review any psychological or psychiatric examinations performed at the request or by the

order of the District Court of Buffalo County, Nebraska, concerning prior criminal cases in the District Court in which Walter Smith was a defendant." On March 5, 1985, the trial court entered an order in which it "sustains Defendant's Motion . . . to inspect records of the prior convictions and evaluations of witness Walter Smith." The record does not disclose what, if anything, was done after this court order.

On April 18, 1985, defendant filed an "Amended Motion . . . for a New Trial." In this motion defendant alleged: "6. The Court erred in refusing to order production of psychiatric records of Walter Smith." The obvious answer to defendant's contention is that the trial court did not refuse to order production, but sustained defendant's motion to inspect some records of Smith's.

The record, however, shows no other action by the court or any counsel after the court's order. In his brief at 17 defendant states: "Defense Counsel believes the reports are crucial to further undermining the credibility of the testimony of Smith. It is believed such psychiatric or psychological records reflect a mental state causing Smith's testimony to be neither credible nor reliable."

With the record before us it is impossible to tell what records were or were not made available to defendant's counsel. We do not in any way rule as to whether Walter Smith's personal medical records need be made available to a third party. We do note that defendant made no motion for a continuance and did not move for any sanctions allowable under Neb. Rev. Stat. § 29-1919 (Reissue 1979) concerning a party's failure to comply with discovery orders. See, *State v. Surber*, 221 Neb. 714, 380 N.W.2d 293 (1986); *State v. Vicars*, 207 Neb. 325, 299 N.W.2d 421 (1980). Defendant's third assignment of error is without merit.

None of defendant's assigned errors have merit, and his conviction on all three counts is affirmed.

While defendant has not assigned error in finding him a habitual criminal and sentencing him as such, we note plain error on the record. *State v. Rodriquez*, 220 Neb. 808, 374 N.W.2d 1 (1985). Neither the transcript nor the bill of exceptions of the enhancement proceeding establishes that the

prior convictions upon which the habitual criminal finding is based were cases in which defendant was represented by counsel. Counsel for the State, in accordance with the requirements of ethical conduct, called this omission to this court's attention. The records of prior convictions of a defendant relied on to establish a finding that defendant is a habitual criminal must show that at the time of the prior convictions defendant was represented by counsel or knowingly, intelligently, and voluntarily waived counsel. *Baldasar v. Illinois*, 446 U.S. 222, 100 S. Ct. 1585, 64 L. Ed. 2d 169 (1980), *reh'g denied* 447 U.S. 930, 100 S. Ct. 3030, 65 L. Ed. 2d 1125; *State v. Smith*, 213 Neb. 446, 329 N.W.2d 564 (1983). While the convictions are affirmed, the cause must be remanded for resentencing.

SENTENCE VACATED AND THE CAUSE REMANDED FOR RESENTENCING.

RAYMOND L. POLLARD, APPELLANT, V. HOLLY JENSEN, DIRECTOR OF THE DEPARTMENT OF MOTOR VEHICLES, STATE OF NEBRASKA, APPELLEE.

384 N.W.2d 640

Filed April 11, 1986. No. 85-414.

1. **Implied Consent: Blood, Breath, and Urine Tests.** A refusal to submit to a chemical test occurs within the meaning of the implied consent law when the licensee, after being asked to submit to a test, so conducts himself as to justify a reasonable person in the requesting officer's position in believing that the licensee understood that he was being asked to submit to a test and manifested an unwillingness to take it.
2. _____: _____. The only understanding required by the licensee is that he has been asked to take a test. It is not a defense that he does not understand the consequences of refusal or is not able to make a reasoned judgment as to what course of action to take.
3. _____: _____. If the suspect knew that he was being asked a question and manifested a refusal, for the purpose of the statute he refused to take the test.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Affirmed.

Ronald A. Ruff, for appellant.

Robert M. Spire, Attorney General, and Jill Gradwohl, for appellee.

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

PER CURIAM.

The plaintiff, Raymond L. Pollard, appeals from the judgment of the district court affirming the order of the director of the Department of Motor Vehicles revoking the plaintiff's operator's license and operating privileges under the implied consent law (Neb. Rev. Stat. § 39-669.08 (Reissue 1984)).

The plaintiff was arrested after he was found slumped over the steering wheel of his automobile which had stopped in the middle of an intersection in North Platte, Nebraska. The police officer who found the plaintiff in this condition testified that the plaintiff had "passed out." The officer awakened the plaintiff and asked for his identification. The plaintiff was confused as to where he was; his breath had a strong odor of alcoholic beverage; and he could hardly stand up. When the officer advised the plaintiff that he would have to go with the officer, the plaintiff inquired as to what would happen if he resisted.

The plaintiff was taken to the police department, where the implied consent advisement was read to him and he was asked to submit to a breath test. When asked to submit to a breath test, the plaintiff replied, "No." The plaintiff was then taken to the sheriff's office and incarcerated.

The plaintiff contends that his refusal to submit to the breath test was invalid because he did not understand that he had been asked to submit to a breath test because of his state of intoxication.

A refusal to submit to a chemical test occurs within the meaning of the implied consent law when the licensee, after being asked to submit to a test, so conducts himself as to justify a reasonable person in the requesting officer's position in believing that the licensee understood that he was being asked to

submit to a test and manifested an unwillingness to take it. *Hoyle v. Peterson*, 216 Neb. 253, 343 N.W.2d 730 (1984).

The only understanding required by the licensee is that he has been asked to take a test. It is not a defense that he does not understand the consequences of refusal or is not able to make a reasoned judgment as to what course of action to take. *Winter v. Peterson*, 208 Neb. 785, 305 N.W.2d 803 (1981).

If the suspect knew that he was being asked a question and manifested a refusal, for the purpose of the statute he refused to take the test. *Wohlgemuth v. Pearson*, 204 Neb. 687, 285 N.W.2d 102 (1979).

The only testimony in this case was that of one of the arresting officers. The officer testified:

> The first time I came in contact with him, as I said, he was passed out, he was very drowsy and didn't appear to know for sure what was going on, he was confused. By the time we got him to the station and was reading him the rights, he was fully conscious.

Although it is clear that the plaintiff was severely intoxicated at the time of his arrest, the evidence supports a finding that when the plaintiff was asked to take a breath test, he understood he was being asked to submit to a breath test and refused to do so. The evidence does not establish that the plaintiff's condition rendered him incapable of refusing the test. The judgment is, therefore, affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DANIEL J. SCHENCK, APPELLANT.

384 N.W.2d 642

Filed April 11, 1986. No. 85-603.

1. **Constitutional Law: Sexual Assault: Evidence.** Nebraska's rape shield law, Neb. Rev. Stat. § 28-321 (Cum. Supp. 1984), which generally excludes evidence in the form of details of the victim's prior sexual conduct, does not prevent defendants from presenting *relevant* evidence in their own defense. It merely denies a

defendant the opportunity to harass and humiliate the complainant at trial and divert the attention of the jury to issues not relevant to the controversy. A defendant has no constitutional right to inquire into irrelevant matters.

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. The verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
3. **Criminal Law: Prior Statements.** Although prior contradictory statements made by the prosecutrix may cause the jury to doubt the account of facts testified to by her at trial, generally such prior statements do not negate, erase, or eradicate the evidence that a certain fact exists.
4. **Criminal Law: Verdicts: Appeal and Error.** After a jury has considered all of the evidence and returned a verdict of guilty, that verdict may not, as a matter of law, be set aside on appeal for insufficiency of evidence if the evidence sustained some rational theory of guilt.
5. **Trial: Evidence: Expert Witnesses.** If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.
6. **Trial: Expert Witnesses.** It is for the trial court to make the initial decision on whether the testimony of an expert will assist the trier of fact. The soundness of its determination depends upon the qualification of the witness, the nature of the issue on which the opinion is sought, the foundation laid, and the particular facts of the case.
7. **Evidence: Words and Phrases.** 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.
8. **Evidence.** The determination of the admissibility of evidence generally rests within the sound discretion of the trial court.
9. **Sentences: Appeal and Error.** When the punishment of an offense created by statute is left to the discretion of the trial court, to be exercised within certain prescribed limits, a sentence imposed within those limits will not be disturbed on appeal unless the record reveals an abuse of discretion.

Appeal from the District Court for Sheridan County: PAUL D. EMPSON, Judge. Affirmed.

James R. Wefso, for appellant.

Robert M. Spire, Attorney General, and Lynne R. Fritz, for appellee.

KRIVOSHA, C.J., BOSLAUGH, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and BLUE, D.J.

HASTINGS, J.

Daniel J. Schenck appeals his conviction by jury for first degree sexual assault. Schenck was sentenced to 5 to 15 years' imprisonment. We affirm the trial court proceedings.

The prosecutor offered evidence of the following events. The victim, L.H., met Schenck in a Hay Springs bar on Friday, March 1, 1985. In the course of the evening they discovered that they shared the same birthday (March 3), so L.H. invited Schenck to celebrate with her and her friends at another Hay Springs bar on Saturday night. Schenck did not join them.

On her birthday, Sunday, March 3, 1985, L.H. spent the evening in her home in Hay Springs, reading a book. At about 1 a.m., March 4, L.H. got up from the living room couch, preparing to go to bed, unlocked the front door to let her dog out, and went into the bathroom to brush her teeth. When the dog started to bark, L.H. came out of the bathroom and saw Schenck coming through her front door. Schenck said he had heard there was a party at her house, and L.H. responded that there was not and that she did not appreciate visitors at that hour of the night. It had been snowing heavily that evening, so L.H. consented when Schenck asked if he could stay a few minutes to warm up.

Schenck initiated a rambling and repetitive conversation, during which L.H. repeatedly asked Schenck to leave. L.H. finally got angry, handed Schenck his coat, and ordered him to leave.

As L.H. opened the front door, her dog ran out, and Schenck slammed the door behind it. He grabbed L.H. by the waist, pulling her away from the door. The two struggled for quite some time, with L.H. escaping Schenck's grasp, only to be caught and dragged by the wrists and upper arms into the bedroom time and again. Schenck ripped open L.H.'s blouse and pulled her bra up around her neck. Her threats to identify him to the police were of no avail.

L.H. was becoming exhausted, and she realized that the more she struggled the more violent Schenck became. Pinned on the bed, L.H. told Schenck that she would stop struggling if he would stop hurting her. Schenck agreed, as long as she promised to do everything he ordered.

Hoping to delay or escape her attacker, L.H. asked to go to the bathroom for some lotion to prevent her injury. Schenck allowed her to enter the bathroom but held onto her arm constantly. When they returned to the bedroom, Schenck penetrated L.H. Failing to ejaculate, Schenck stopped, asked L.H. to "participate," and talked at length about his deep feelings for her and his bewilderment as to how to approach her.

L.H. tried to convince Schenck to leave, and at one point sat up to go to the bathroom, only to be pushed back down. Finally, she admitted to Schenck that she was afraid if he did not leave, she would not be alive in the morning. At that point Schenck penetrated L.H. again, but again failed to ejaculate. When Schenck rolled to one side of the bed, L.H. asked to go to the bathroom and Schenck murmured "huh-uh."

As L.H. left the bedroom, she grabbed a nightgown that was among the clean laundry that had been thrown off the bed during the struggle. She ran out the front door naked, and put the nightgown on en route to her best friend's house. L.H. ran the 2½ blocks barefoot in the snow, arriving at her friend's house at 3:30 a.m. L.H. told her friend that Schenck had raped her, and the friend called the police. L.H. was still sobbing and crying when the deputy sheriffs arrived at 4 a.m. Because she was so upset, it was difficult for L.H. to respond to the deputies' questions.

Between 6 and 6:30, the deputies took L.H. to the Rushville Hospital. At the hospital Dr. Pearl Narvaez, who did not testify at trial, examined L.H. Although there is no evidence that the doctor observed bruises on L.H.'s arms, there is also no evidence that she did not. The attending nurse was busy marking specimens during the examination, but did testify that she noticed an abrasion on L.H.'s left wrist.

After the examination Deputy Puchner took L.H. to the sheriff's office to take her statement. At that time L.H. showed the deputy the bruises on her upper arms.

On March 18 L.H. was examined by Dr. Margaret Stockwell, who testified at trial. She testified that bruises are usually caused by blunt trauma and often take time to develop. They may not be observable until a half day or a day after the trauma occurred. Bruises last variable lengths of time and change color

over time; green and yellow being latter stages. Dr. Stockwell testified that it was possible for blunt trauma suffered on March 4 to cause bruises which would still be visible on March 18, and would probably be yellow or green in color. She also testified that on March 18 L.H. had yellow and green bruises of various sizes on her arms and one on her leg, along with scratch marks of the same age. These bruises were consistent with L.H.'s complaint of Schenck's squeezing and pulling her arms.

After the March 18 examination photographs of L.H.'s bruised upper arms were taken at the sheriff's office. These were offered as exhibits 8 and 9 at trial and were identified by L.H. Also exhibited at trial were photographs of L.H.'s disheveled bedroom, a stained nightgown, and L.H.'s blouse with all but one button torn off.

Schenck testified that he and L.H. engaged in consensual sexual intercourse on March 4, 1985. However, when he testified that he had not seen L.H. in a police cruiser after the alleged sexual assault, Schenck was very effectively impeached for credibility. He admitted that in one of his first interrogations he told an officer that he thought he saw a "cop car" in Hay Springs with L.H. inside and that "kind of paranoid me out," so he went to a friend's house in Alliance.

In his assignments of error Schenck argues that the district court erred in (1) denying his motion to declare the rape shield law, Neb. Rev. Stat. § 28-321 (Cum. Supp. 1984), unconstitutional; (2) finding sufficient evidence to convict; (3) admitting Dr. Stockwell's expert testimony on bruises; (4) admitting the photographs of bruises without proper foundation; (5) admitting L.H.'s testimony stating her weight at the time of the incident and at the time of trial; (6) denying Schenck's motion to dismiss at the conclusion of the State's evidence; (7) denying Schenck's motion for new trial; and (8) imposing an excessive sentence.

In support of his first assignment of error, challenging the constitutionality of Nebraska's rape shield law, Schenck argues that the statute deprives him of due process by preventing him from presenting evidence in his own defense. He is willing to concede that in many sexual assault cases evidence of past sexual conduct by the victim is not relevant. Schenck objects,

however, to the almost blanket prohibition of such evidence by § 28-321, suggesting that the statute gives the presiding judge insufficient discretion to determine the relevancy of such evidence.

The pertinent subsection of the rape shield law provides:

> (2) Upon motion to the court by either party in a prosecution in a case of sexual assault, an in camera hearing shall be conducted in the presence of the judge, under guidelines established by the judge, to determine the relevance of evidence of the victim's or the defendant's past sexual behavior. Evidence of a victim's past sexual behavior shall not be admissible unless such evidence is: (a) Evidence of past sexual behavior with persons other than the defendant, offered by the defendant upon the issue whether the defendant was or was not, with respect to the victim, the source of any physical evidence, including but not limited to, semen, injury, blood, saliva, and hair; or (b) evidence of past sexual behavior with the defendant when such evidence is offered by the defendant on the issue of whether the victim consented to the sexual behavior upon which the sexual assault is alleged if it is first established to the court that such activity shows such a relation to the conduct involved in the case and tends to establish a pattern of conduct or behavior on the part of the victim as to be relevant to the issue of consent.

§ 28-321. The legislative purpose and history of this statute is amply discussed in *State v. Hopkins*, 221 Neb. 367, 377 N.W.2d 110 (1985). Stated briefly, the statutory purpose was to protect rape victims from grueling cross-examination concerning their previous sexual behavior, which often elicited evidence of questionable relevance to the case being tried. The quoted statute is patterned after Fed. R. Evid. 412, in that it presumes that evidence of specific instances of a victim's past sexual activities is irrelevant and inadmissible unless it involves the victim's (1) relations with third persons when offered by the accused on the issue of the source of semen or injury or (2) relations with the accused when offered by the accused on the issue of consent.

As we noted in *Hopkins*, the vast majority of states have

adopted rape shield laws based substantially on Rule 412. 1A J. Wigmore, Evidence in Trials at Common Law § 62 n.11 (Tillers rev. 1983). Despite the prevalence of rape shield laws patterned after Rule 412, the appellant is unable to cite any such statute that has been found facially unconstitutional. In fact, statutes similar to § 28-321 have consistently withstood constitutional challenges such as that brought by Schenck in the current case. See, e.g., *People v Williams*, 416 Mich. 25, 330 N.W.2d 823 (1982); *People v. Requena*, 105 Ill. App. 3d 831, 435 N.E.2d 125 (1982), *cert. denied* 459 U.S. 1204, 103 S. Ct. 1191, 75 L. Ed. 2d 436 (1983); *People v. Cornes*, 80 Ill. App. 3d 166, 399 N.E.2d 1346 (1980); *State v. Gardner*, 59 Ohio St. 2d 14, 391 N.E.2d 337 (1979); *State v. Ryan*, 157 N.J. Super. 121, 384 A.2d 570 (1978).

The Nebraska Legislature operated well within its prerogative in enacting § 28-321, excluding irrelevant details of the victims' sexual histories from evidence in sexual assault trials. The exclusion of this evidence does not prevent defendants from presenting relevant evidence in their own defense. "It merely denies defendant the opportunity to harass and humiliate the complainant at trial and divert the attention of the jury to issues not relevant to the controversy." *People v. Cornes, supra* at 175, 399 N.E.2d at 1353. A defendant has no constitutional right to inquire into irrelevant matters. *Pratt v. Parratt*, 615 F.2d 486 (8th Cir. 1980).

Interestingly enough, the evidence Schenck sought to introduce in contravention of § 28-321 was precisely the type of evidence these statutes were originally designed to exclude: that of the victim's previous consensual sexual relations with third parties. As was suggested by the trial judge, evidence of prior voluntary sexual conduct by the complaining witness with third parties is no more relevant in a prosecution of the defendant for forcible sexual assault than would previous instances of money gifts by the prosecutrix to third parties have any relevancy to a charge against the defendant of robbery of the victim. Section 28-321 is not unconstitutional on its face or as applied.

We also reject the appellant's second assignment of error. There was sufficient evidence to support his conviction of first degree sexual assault. 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. The verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Hunt*, 220 Neb. 707, 371 N.W.2d 708 (1985).

In his defense Schenck offered the testimony of two of L.H.'s friends to whom she had related the details of the sexual assault. Their testimony brought out some slight factual discrepancies in L.H.'s accounts of the incident. For example, one of her friends testified that L.H. had told her she had been in bed before Schenck arrived, rather than on the living room couch. Another friend testified that he had been told that Schenck fell asleep before L.H. ran from the house naked. In his argument that he was convicted on insufficient evidence, it is this testimony that Schenck asserts. The appellant misunderstands the concept of challenging a conviction on insufficient evidence.

The testimony of L.H.'s confidants addresses the credibility of the prosecutrix. Though it might have caused the jury to doubt L.H.'s account of the alleged sexual assault, that testimony did not negate, erase, or eradicate the evidence that the sexual assault took place. The jury apparently chose to believe L.H.'s explanation of the incident at trial. This court cannot now reweigh the credibility of the witnesses. After a jury has considered all of the evidence and returned a verdict of guilty, that verdict may not, as a matter of law, be set aside on appeal for insufficiency of evidence if the evidence sustained some rational theory of guilt. *State v. Wilkening, ante* p. 107, 382 N.W.2d 340 (1986).

In his third assignment of error Schenck contends that the trial court erred in overruling defense objections to the expert testimony of Margaret Stockwell, M.D., regarding bruises sustained by L.H. The appellant suggests that due to the 2-week delay between the alleged assault and Dr. Stockwell's examination of the victim, there was a lack of foundation established to allow Dr. Stockwell to express her opinions. We disagree. The 2-week interim before Dr. Stockwell's

examination was the very factor that made Dr. Stockwell's expert testimony on the nature and healing of bruises useful to the jury.

The Nebraska Evidence Rules provide:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Neb. Rev. Stat. § 27-702 (Reissue 1979).

Since Dr. Stockwell did not observe L.H.'s bruises until 2 weeks after the alleged sexual assault, the jury needed specialized knowledge to determine whether those bruises could have been sustained 2 weeks earlier. It is for the trial court to make the initial decision on whether the testimony of an expert will assist the trier of fact. The soundness of its determination depends upon the qualification of the witness, the nature of the issue on which the opinion is sought, the foundation laid, and the particular facts of the case. *National Bank of Commerce Trust & Sav. Assn. v. Katleman*, 201 Neb. 165, 266 N.W.2d 736 (1978). See, also, *Hegarty v. Campbell Soup Co.*, 214 Neb. 716, 335 N.W.2d 758 (1983); *State v. Ammons*, 208 Neb. 812, 305 N.W.2d 812 (1981). The trial court did not abuse its discretion in admitting the expert testimony of Dr. Stockwell.

Also assigned as error was the admission into evidence of photographs of bruises on L.H.'s upper arms. Schenck argues that because the photographs were taken 14 days after the alleged sexual assault, the State was unable to establish proper foundation for their admission. The appellant asserts that since the medical staff members that examined L.H. on March 4 at the Rushville Hospital did not testify that they observed the victim's bruises, the photographs are not competent proof that L.H. sustained bruises on March 4.

The failure of the State, however, to offer the ideal, direct evidence of a fact in controversy does not render incompetent other circumstantial evidence of the same fact. "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." Neb. Rev. Stat. § 27-401 (Reissue 1979).

Furthermore, the record indicates that Deputy Puchner saw L.H.'s bruises on March 4. His testimony, and that of L.H. testifying to the appearance of the bruises on that date and identifying the photographs, and Dr. Stockwell's expert testimony on the nature of bruises and their healing process were sufficient foundation for the admission of the photographs admitted as exhibits 8 and 9.

As his final assignment of error on an evidentiary matter, Schenck argues that the trial court erred in overruling his objection to L.H.'s testimony regarding her weight at the time of the alleged assault and at the time of trial. At trial the appellant objected to the testimony on the ground that it was beyond the scope of cross-examination. He has apparently abandoned this theory of inadmissibility on appeal, since, in his brief, his sole argument concerning the evidence on L.H.'s weight is that the testimony was intended to arouse sympathy. We do not agree that the probative value of the evidence was outweighed by the danger of unfair prejudice.

L.H. testified that her weight had changed from 118 to 104 pounds. Her weight at the time of the sexual assault was clearly relevant to the jury's assessment of evidence of the physical struggle between L.H. and Schenck, and of injuries sustained by L.H. Since the jury had an opportunity to observe L.H. at trial, the weight differential might have proved useful in that same assessment. The determination of the admissibility of evidence rests within the sound discretion of the trial court. *State v. Fries*, 214 Neb. 874, 337 N.W.2d 398 (1983). Evidence of the 14-pound weight loss by L.H. was not so prejudicial as to establish an abuse of discretion by the trial court.

We also overrule the appellant's sixth assignment of error. In a prosecution in which the State has introduced competent evidence which, if believed by the jury, was sufficient to establish all elements of the crime charged against the defendant, denial of the defendant's motion to dismiss is without error. *State v. Hurlburt*, 218 Neb. 121, 352 N.W.2d 602 (1984).

Our recital of the facts and our previously stated conclusion that the State presented sufficient evidence to convict leave little

doubt that the State offered sufficient evidence to establish all elements of first degree sexual assault. Neb. Rev. Stat. § 28-319 (Reissue 1979). The trial court properly overruled the appellant's motion to dismiss.

Appellant argues that the trial court erred in denying his motion for new trial, contending that there was insufficient evidence as a matter of law to convict on first degree sexual assault and that his evidentiary objections were improperly overruled. As we have already decided that there was sufficient evidence to support Schenck's conviction and that the trial court was not in error in its evidentiary rulings, we find this assignment is also without merit. Under Neb. Rev. Stat. § 29-2101 (Reissue 1979), the trial court was correct in denying the motion for new trial.

Finally, the appellant assigns as error the imposition of an excessive sentence. First degree sexual assault is a Class II felony, punishable by imprisonment for not less than 1 year nor more than 50 years. Neb. Rev. Stat. §§ 28-319, 28-105 (Reissue 1979). The appellant was sentenced to the Nebraska Penal and Correctional Complex for not less than 5 years nor more than 15 years, with credit for 114 days spent in custody.

When the punishment of an offense created by statute is left to the discretion of the trial court, to be exercised within certain prescribed limits, a sentence imposed within those limits will not be disturbed on appeal unless the record reveals an abuse of discretion. *State v. Smith*, 221 Neb. 406, 377 N.W.2d 527 (1985); *State v. Davis*, 200 Neb. 557, 264 N.W.2d 198 (1978).

The trial court was in agreement with the jury that the appellant committed the offense with which he was charged. It also concluded that Schenck had perjured himself at trial and that he showed no remorse for his acts. The court did not abuse its discretion in imposing the sentence it did. The judgment is affirmed.

AFFIRMED.

DAVID J. SNYDER, APPELLANT, V. IBP, INC., APPELLEE.

385 N.W.2d 424

Filed April 18, 1986. No. 85-135.

1. **Workmen's Compensation: Appeal and Error.** Findings of fact made by the Workmen's Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case and will not be reversed or set aside unless clearly wrong.
2. **Workmen's Compensation: Expert Witnesses: Appeal and Error.** The weight and credibility of expert witnesses in workmen's compensation cases is for the trier of fact.
3. **Expert Witnesses: Words and Phrases.** The meaning of words used by medical experts may be ascertained by the sense in which they are used.
4. **Workmen's Compensation: Words and Phrases.** Impairments of the body as a whole are compensated in terms of loss of earning power or capacity rather than in terms of loss of physical function.
5. _____: _____. Loss of earning power or capacity is measured by an evaluation of a worker's general eligibility to procure and hold employment, his or her capacity to perform the tasks required by the work, and his or her ability to earn wages in employment in which he or she is engaged or is fitted.
6. _____: _____. Loss of earning power or capacity is the means by which a physical impairment to the body as a whole is measured for the purpose of determining the benefits due under the act; there can be no loss of earning power or capacity in the absence of a physical impairment to the body as a whole.
7. _____: _____. Vocational rehabilitation cannot be ordered in the absence of total or partial disability which is or is likely to be permanent.
8. **Workmen's Compensation: Attorney Fees.** An employee is not entitled to an attorney fee or to interest where the employer applies for rehearing and succeeds in reducing the award an employee obtained upon original hearing.

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

Paul W. Deck of Deck & Deck, for appellant.

Wayne E. Boyd of Smith & Boyd, for appellee.

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

CAPORALE, J.

Plaintiff, David J. Snyder, sustained injury in an accident arising out of and in the course of his employment with defendant, IBP, Inc. The Nebraska Workmen's Compensation Court on rehearing awarded him temporary total disability benefits and further ordered IBP to pay certain medical,

hospital, and drug expenses and litigation costs. The issues raised on this appeal by Snyder's assignments of error are whether (1) the majority of the compensation court erred in finding that he suffered no disability after June 10, 1984, and suffered no loss of earning power, (2) the majority of the compensation court erred in ruling that he was not entitled to vocational rehabilitation services, and (3) the compensation court erred in ruling that he was not entitled to the award of an attorney fee or interest. We affirm.

Snyder is 24 years old, right handed, holds a general equivalency diploma, and trained as a warehouseman while in the U.S. Marine Corps. Following discharge from that service in 1978 up to his employment by IBP in 1982, he worked at a variety of jobs, including as a dishwasher, truckdriver, warehouseman, and construction worker. He also had some on-the-job training as an automobile tuneup technician. He has worked at a variety of tasks at IBP, and on the day of the accident in question, December 27, 1983, was working as a boner and injured his right shoulder when a hook with which he was pulling meat from a bone slipped and jerked his right arm.

Following that accident, Snyder, on June 11, 1984, began to work as a flagman for a construction company at $4.25 an hour. After 2 or 3 weeks he changed his work for the same contractor and began spreading concrete after it was dumped from a truck. On that job he earned approximately $7 per hour and put in 50 to 65 hours per week. He did that until August 3, 1984. While the contractor described the concrete spreading job as "medium duty" work and Snyder as a good worker who made no physical complaints, Snyder testified that he was taking pain medication so he could get through the day. After leaving the concrete contractor, Snyder worked as a uniloader operator at $6.50 per hour. That lasted until August 31, 1984. He was to begin working for another contractor on September 11, 1984, the day after the rehearing, operating a concrete cutting saw, an easier type of work, at an unknown rate of pay. Snyder has also enrolled in a 2-year automobile mechanics course at Western Iowa Technical Community College at Sioux City. Snyder testified that at the time of the subject accident he was earning $8.35 per hour.

Snyder has seen a number of physicians, complaining of right shoulder pain as a consequence of the December 1983 accident. One of these physicians expressed the opinion that Snyder had too much pain to "really go back at least to IBP and be a happy, productive worker" but that the condition would improve. Another physician, when asked whether he had an opinion as to whether Snyder was suffering from a permanent disability of the right shoulder, testified that taking into account the work Snyder had done during the summer of 1984, "he can't be having too much trouble with the shoulder." A third physician expressed the opinion that Snyder had no permanent disability when last seen on January 17, 1984.

Resolution of the first issue, the extent of Snyder's disability, if any, and resultant loss of earning power, if any, involves an evaluation of the evidence. In that task we are bound by the rule that the findings of fact made by the Workmen's Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case and will not be reversed or set aside unless clearly wrong. Neb. Rev. Stat. § 48-185 (Reissue 1984); *Evans v. American Community Stores, post* p. 538, 385 N.W.2d 91 (1986); *Vredeveld v. Gelco Express, ante* p. 363, 383 N.W.2d 780 (1986); *Pollock v. Monfort of Colorado,* 221 Neb. 859, 381 N.W.2d 154 (1986). To state the foregoing rule and the rule that the weight and credibility of expert witnesses is for the trier of fact, *Vredeveld v. Gelco Express, supra*, and *Person v. Red Lion Inn*, 217 Neb. 745, 350 N.W.2d 570 (1984), is to resolve adversely to Snyder his claim that the compensation court erred in finding that he suffered no disability after June 10, 1984.

The statement that Snyder could not be having too much trouble with his shoulder means, in the context of the question asked, that in that physician's opinion there was no permanent disability. See *Unruh v. Industrial Comm.*, 8 Wis. 2d 394, 99 N.W.2d 182 (1959), which recognizes that the task of ascertaining the meaning of words used by medical experts at times presents a problem of interpretation which may be resolved by the sense in which they are used. Moreover, there is the opinion of the third physician that as of January 17, 1984, there was no permanent disability. While it is true that the

compensation court found there was temporary disability beyond that date, the finding of no permanent disability cannot, in face of the medical evidence, be said to be clearly wrong.

Snyder further contends, in effect, that irrespective of what his physical condition may be, the evidence nonetheless establishes that he has suffered a loss of earning power.

In that connection Snyder correctly argues that impairments of the body as a whole are compensated in terms of loss of earning power or capacity rather than in terms of loss of physical function. *Nordby v. Gould, Inc.*, 213 Neb. 372, 329 N.W.2d 118 (1983); Neb. Rev. Stat. § 48-121 (Supp. 1985). He also correctly argues that loss of earning power or capacity is measured by an evaluation of a worker's general eligibility to procure and hold employment, his or her capacity to perform the tasks required by the work, and his or her ability to earn wages in employment in which he or she is engaged or is fitted. *Minshall v. Plains Mfg. Co.*, 215 Neb. 881, 341 N.W.2d 906 (1983); *Akins v. Happy Hour, Inc.*, 209 Neb. 236, 306 N.W.2d 914 (1981), *supp. op.* 209 Neb. 748, 311 N.W.2d 518 (1981). However, Snyder overlooks that once it is determined that no permanent disability, that is to say, no permanent physical impairment of the body as a whole, resulted from the subject accident, then it necessarily follows that no loss of earning power can result from that accident. Loss of earning power or capacity is the means by which a physical impairment to the body as a whole is measured for the purpose of determining the benefits due under the act. In order to apply that measure, there must first be a physical impairment to the body as a whole. See, *Nordby v. Gould, Inc., supra*; *Wolfe v. American Community Stores*, 205 Neb. 763, 290 N.W.2d 195 (1980).

With respect to the second issue, vocational rehabilitation can be ordered only where, among other things, the employee "is entitled to compensation for total or partial disability which is or is likely to be permanent . . . ." Neb. Rev. Stat. § 48-162.01(6) (Reissue 1984). Since the record supports the compensation court's finding that there was no disability after June 10, 1984, there can be no disability which is or is likely to be permanent. There is, therefore, no basis upon which the

compensation court might have ordered vocational rehabilitation.

As to the third issue, following the original hearing before a single judge of the compensation court, Snyder was found to be temporarily totally disabled, and IBP was therefore, among other things, ordered to pay Snyder total disability benefits for an indefinite future period. On rehearing, upon IBP's application, Snyder's total disability benefits were terminated and IBP's total liability thereby reduced. Therefore, Snyder is not entitled to an attorney fee or interest. Neb. Rev. Stat. § 48-125 (Reissue 1984); *Mulder v. Minnesota Mining & Mfg. Co.*, 219 Neb. 241, 361 N.W.2d 572 (1985); *Smith v. Fremont Contract Carriers*, 218 Neb. 652, 358 N.W.2d 211 (1984); *Person v. Red Lion Inn*, 217 Neb. 745, 350 N.W.2d 570 (1984).

Each of Snyder's assignments of error failing, we affirm the judgment of the Workmen's Compensation Court.

AFFIRMED.

ROY EVANS, APPELLANT, V. AMERICAN COMMUNITY STORES, APPELLEE.

385 N.W.2d 91

Filed April 18, 1986. No. 85-505.

1. **Workmen's Compensation: Appeal and Error.** Findings of fact by the Workmen's Compensation Court on rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong.
2. **Workmen's Compensation.** An employee suffering a schedule injury is entitled only to the compensation provided for in Neb. Rev. Stat. § 48-121(3) (Reissue 1984), unless some unusual or extraordinary condition as to the other members or parts of the body develops as a result of the injury.
3. _____. The right of an injured workman to vocational rehabilitation depends upon his inability to perform work for which he has previous training and experience.
4. _____. Whether an injured workman is entitled to vocational rehabilitation is ordinarily a question of fact to be determined by the compensation court.

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

Raymond J. Hasiak, for appellant.

Melvin C. Hansen and Jack A. Dike of Hansen, Engles & Locher, P.C., for appellee.

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

PER CURIAM.

This is an appeal in a proceeding under the Workmen's Compensation Act, Neb. Rev. Stat. §§ 48-101 et seq. (Reissue 1984). The plaintiff, Roy Evans, was injured on April 21, 1977, while employed as a truckdriver by the defendant. The accident occurred when the plaintiff caught his left foot on a pallet and fell, injuring his left knee. The plaintiff commenced this action on July 23, 1984.

After a hearing before one judge of the Workmen's Compensation Court, the plaintiff recovered an award of compensation for temporary total disability and 30 percent permanent partial disability to the left leg; drugs, medical, and hospital expenses; and vocational rehabilitation services.

Upon rehearing, the award for permanent partial disability was reduced to 25 percent to the left leg, and the plaintiff was denied vocational rehabilitation. The compensation court found that after the plaintiff's temporary disability had ended, he returned to driving a truck until the defendant cut back on the number of drivers. The plaintiff then worked in the defendant's warehouse until there was a further layoff of employees due to economic conditions. The compensation court specifically found that "the inability of the plaintiff to secure employment is primarily due to economic conditions and not because the plaintiff is totally disabled, either temporarily or permanently . . . ."

Upon appeal to this court the plaintiff contends that the compensation court erred in finding that the plaintiff's inability to secure employment was due to economic conditions, and in denying vocational rehabilitation.

Findings of fact by the Workmen's Compensation Court on rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong. *Snyder*

v. IBP, Inc., ante p. 534, 385 N.W.2d 424 (1986); *Pollock v. Monfort of Colorado,* 221 Neb. 859, 381 N.W.2d 154 (1986).

The plaintiff's injury to his left knee in the accident on April 21, 1977, was a schedule injury which is compensated under subsection (3) of § 48-121. An employee suffering a schedule injury is entitled only to the compensation provided for in § 48-121(3), unless some unusual or extraordinary condition as to the other members or parts of the body develops as a result of the injury. *Scamperino v. Federal Envelope Co.*, 205 Neb. 508, 288 N.W.2d 477 (1980); *Broderson v. Federal Chemical Co.*, 199 Neb. 278, 258 N.W.2d 137 (1977). There is no evidence in this case that the plaintiff's disability resulting from the injury to his left knee is other than that normally resulting from such an injury.

Although the evidence shows that the plaintiff may be unable to perform all of the tasks which he was able to do in the past while working as a truckdriver, the evidence does not show that he is unable to perform *any* of the work for which he has the training and experience to perform. We cannot say that the compensation court was clearly wrong in finding that his inability to secure employment was due to economic conditions and not because he was totally disabled.

The right of an injured workman to vocational rehabilitation depends upon his inability to perform work for which he has previous training and experience. § 48-162.01; *Behrens v. Ken Corp.*, 191 Neb. 625, 216 N.W.2d 733 (1974). This is ordinarily a question of fact to be determined by the compensation court. *Pollock v. Monfort of Colorado, supra.*

In his report dated March 21, 1984, Dr. W. Michael Walsh stated that the plaintiff had been "tolerating quite well" his return to truck driving. Michael L. Newman, the vocational evaluator who testified by deposition for the defendant, stated that in his opinion there were jobs within the trucking industry in the Omaha area that the plaintiff was physically able to perform. The record is such that we cannot say that the finding of the compensation court on the issue of vocational rehabilitation was clearly wrong.

The judgment is, therefore, affirmed.

AFFIRMED.

WHITE, J., dissenting.

I dissent from that part of the decision affirming the panel's order denying rehabilitative services. The record contains evidence that the plaintiff is unable to perform as a truckdriver due to physical disability. The evidence establishes that plaintiff is severely limited in his ability to lift, stoop, climb, shift and engage the clutch in semis, or sit for prolonged periods.

SHANAHAN, J., joins in this dissent.

CITY OF KEARNEY, NEBRASKA, A MUNICIPAL CORPORATION, APPELLANT, V. ANNA L. JOHNSON ET AL., APPELLEES.

385 N.W.2d 427

Filed April 25, 1986. No. 84-727.

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

Michael E. Kelley, Kearney City Attorney, for appellant.

Kenneth C. Fritzler of Ross, Schroeder & Fritzler, for appellee Anna L. Johnson.

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

GRANT, J.

The City of Kearney commenced this action in the district court for Buffalo County, Nebraska, to foreclose a lien for delinquent special assessments which had been levied by the city against property owned by the appellee Anna L. Johnson. Johnson filed a demurrer claiming that the same land and the same paving district, No. 395, were the subject of a previous suit (case No. 7203) and that the city had filed a "dismissal with prejudice" as to that cause of action in the previous suit, and, thus, the present case (case No. 7829) is barred by the doctrine

of res judicata. The demurrer was overruled, but, subsequently, the district court sustained a motion for summary judgment, on the same basis, filed by Johnson. The court found that the cause of action in case No. 7203 covering the same land had been "dismissed with prejudice by the Plaintiff upon payment of an agreed sum" and that "[d]ismissal with prejudice indicates an adjudication on the merits . . . [and] operates as res judicata concluding the rights of the parties." The court held, therefore, that Johnson was entitled to judgment as a matter of law. We believe that the district court was in error; for that reason we reverse and remand.

On March 18, 1982, the city filed a petition in the district court for Buffalo County, Nebraska, seeking to foreclose the delinquent special assessments for paving districts Nos. 395 and 448, water district No. 269, and sewer district No. 233 levied against property in the City of Kearney then owned by Schnabel Construction, Inc. That action was docketed as case No. 7203. While all of the districts were described in the petition, paving district No. 395 was not then eligible to be foreclosed. Neb. Rev. Stat. §§ 16-622 and 16-669 (Reissue 1983) require that three payments be delinquent before the city may foreclose, and the city is required to pass and publish an acceleration resolution declaring the entire amount due and owing. Although paving district No. 395 was included in the petition filed in case No. 7203, it had not been included in the acceleration resolution previously adopted by the city council because three payments had not become delinquent. The petition prayed for recovery of $4,998.19, the amount due at the time the petition was filed for all four special assessment districts, including paving district No. 395.

After the suit was filed, Johnson, by then the owner of the property, and the city attorney conducted negotiations. On July 23, 1982, the city received a letter from Johnson's attorney requesting the exact dollar figure required to pay off the special assessments. The city responded by letter on July 23, 1982, and demanded payment in the amount of $2,993.30. The July 23 letter referred only to paving district No. 448 and made no reference to paving district No. 395. Subsequent to this letter and prior to August 8, 1982, in response to a call to the city

attorney's office by Johnson's attorney, the city attorney informed Johnson's attorney that only those assessments relating to paving district No. 448, water district No. 269, and sewer district No. 233 were legally collectible as they were the only assessments which had been included in the acceleration resolution. While this discussion was going on, it is not clear whether anyone realized that paving district No. 395 was also a part of the action then pending.

On September 8, 1982, a call was made to the office of Johnson's attorney, informing his secretary that the payoff figure for paving district No. 448, water district No. 269, and sewer district No. 233 was $3,036.54 plus $78.60 for court costs, a total of $3,115.14, and that the payoff figure for paving district No. 395, not included in the acceleration resolution, was $1,489.93. This information was delivered to Johnson's attorney by memo from his secretary on September 8, 1982. The note specifically pointed out that paving district No. 395 was not part of the foreclosure but that the figure had been provided at the attorney's request.

On September 14, 1982, the city received a letter from the attorney for Johnson, which included a copy of a check made payable to the clerk of the district court for Buffalo County for the exact amount necessary to pay the assessments in the three delinquent districts as of Monday, September 13, but not enough to pay the assessments for paving district No. 395. On September 20, 1982, the City of Kearney filed a document in the district court, entitled "DISMISSAL OF CAUSE OF ACTION NUMBER 2." In this document the city only stated that it "hereby dismisses with prejudice Cause of Action Number 2" in case No. 7203. Cause of action No. 2 concerned the land in question. No court order was entered concerning this document or dismissing the cause of action.

On March 29, 1983, the city filed this action, No. 7829, in the district court, seeking to foreclose the delinquent payments due for special assessments levied for paving district No. 395. The district court ultimately dismissed case No. 7829, and the appeal of the city is taken from that dismissal.

The single issue presented to us is whether the "DISMISSAL OF CAUSE OF ACTION NUMBER 2" filed by the city

attorney on September 20, 1982, in case No. 7203, bars the city from seeking to collect the delinquencies due on paving district No. 395 in case No. 7829 under the doctrine of res judicata. As we have indicated, we believe that, under the facts in this case, the city is not so barred.

The unilateral action of the city attorney in dismissing a part of case No. 7203 is not res judicata. There is no "judicata." Res judicata is defined in Black's Law Dictionary 1174 (5th ed. 1979) as "A matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgment." In *Hickman v. Southwest Dairy Suppliers, Inc.*, 194 Neb. 17, 20, 230 N.W.2d 99, 102 (1975), this court said:

> Under the traditional rule of res judicata . . . any rights, facts, or matter in issue directly adjudicated or necessarily involved in the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies.

There was no judgment entered in case No. 7203 as to paving district No. 395. The city attorney merely dismissed a cause of action. The action of an attorney in filing a motion for dismissal, with prejudice, of a cause of action does not, of itself, operate as res judicata. Whether the city attorney's conduct rises to a form of estoppel or some related legal doctrine is not before us on this appeal from the summary judgment entered herein.

This case differs from *Simpson v. City of North Platte*, 215 Neb. 351, 338 N.W.2d 450 (1983), where there was a court order dismissing the action. It is stated in that case at 353, 338 N.W.2d at 451-52: "On May 1, 1981, pursuant to a dismissal with prejudice filed by the plaintiffs, the U.S. District Court ordered the cause of action dismissed." In the case at bar there is no such court order.

The judgment of the district court must therefore be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

KRIVOSHA, C.J., concurring.

I concur in the result reached by the plurality in this case. I do not agree, however, with the method by which the plurality reaches its result, and for that reason I write separately.

The plurality has concluded that a dismissal with prejudice, absent a court order, is not a bar to the bringing of another suit, although the subsequent action may be subject to the defense of estoppel or some related legal doctrine not now before us.

In my view the action of the city attorney in dismissing case No. 7203 was void. Obviously, if the action was void, we need not engage in any discussion regarding res judicata. Under the facts of this case the city attorney's action cannot give rise to any defense of estoppel or other related legal doctrine, and the city is free to seek the collection of the delinquent assessment. In reaching that conclusion I find myself somewhere between the opinion expressed by the plurality and the concurring opinion filed by White, J., and joined by Shanahan, J.

In my view the single issue presented to us by this case is whether the voluntary dismissal filed by the city attorney on September 20, 1982, in case No. 7203, bars the city from seeking to collect the delinquencies due on paving district No. 395 in case No. 7829.

To begin with we have held that the power to sue and be sued, conferred on a city of the first class by Neb. Rev. Stat. § 16-201 (Reissue 1983), gives the power to compromise and settle the amount of a special assessment *only* to the mayor and city council of cities acting in their legislative capacity. See *Farnham v. City of Lincoln*, 75 Neb. 502, 106 N.W. 666 (1906). In *Communication Workers of America, AFL-CIO v. City of Hastings*, 198 Neb. 668, 672, 254 N.W.2d 695, 697 (1977), we said: "[A] city attorney is essentially the legal advisor to the city council and city officers. The city attorney serves at the pleasure of the mayor and the city council. He or she has no statutory power to make governmental decisions which affect the city."

I do not agree with the concurring opinion by White, J., that the city attorney has unlimited authority to sue or settle unless directly limited by a specific statute. The authority of a city attorney, like any lawyer, is limited to carrying out the goals and objectives of the client. Moreover, the authority of a city attorney is further limited by the responsibilities given by law to

elected city officials.

The critical issue in this case, then, is not whether the dismissal constitutes res judicata and therefore bars any subsequent action but, rather, whether a city attorney without lawful authority who voluntarily dismisses a cause of action for the collection of a special assessment can thereby bar a city from collecting the taxes otherwise due. I do not believe the city attorney can. Nor do I believe under the facts of this case and the law as it presently exists that the presence or absence of a court order makes any significant difference.

Had the city attorney, acting alone, *intended* to compromise the tax claim and waive payment of the assessment for paving district No. 395, he would have been without authority to do so. The city attorney's "contract" with Johnson was beyond his authority, and void, and therefore could not have been the basis for any suit to enforce the agreement.

In 10 E. McQuillin, The Law of Municipal Corporations § 29.17 at 265 (3d ed. rev. 1981), the noted author observes: "If the wrong officer or board makes a contract in behalf of a municipality . . . [the municipality] may successfully set up the defense that the contract was unauthorized, and the contract will be declared void . . . ." The general rule has long been followed in Nebraska. In *Heese v. Wenke*, 161 Neb. 311, 73 N.W.2d 223 (1955), we observed that a contract entered into with a village, contrary to law, was void. See, also, *Nebraska State Bank Liquidation Ass'n v. Village of Burton*, 134 Neb. 623, 279 N.W. 319 (1938); *Campbell Co. v. City of Harvard*, 123 Neb. 539, 243 N.W. 653 (1932). In *Helleberg v. City of Kearney*, 139 Neb. 413, 417, 297 N.W. 672, 674 (1941), we said:

> No member of a city council or the mayor or the city attorney, each acting separately as an individual, can bind the city by a contractual obligation creatable only by official action of the city council, nor can any one of them ratify or reinstate a void city contract or estop the city from denying the validity thereof. *Scott v. City of Lincoln*, 104 Neb. 546, 178 N.W. 203.

Does the fact, then, that the city attorney filed a dismissal with prejudice in the earlier case without a hearing on the merits give validity to an act which was otherwise invalid? The

authorities, both in this state and elsewhere, seem to be to the contrary.

To begin with we have previously held that even if a judgment is entered into by the consent of an officer to a matter in which he has no authority to bind the public, and the judgment was not a decision by a court after a hearing *on the merits*, it affords no basis for a plea of res judicata as against the public interest involved. See *Warren v. County of Stanton*, 145 Neb. 220, 15 N.W.2d 757 (1944). See, also, *Loup County v. Rumbaugh*, 151 Neb. 563, 38 N.W.2d 745 (1949).

In *State ex rel. Goodsell v. Tunnicliff*, 169 Neb. 128, 132-33, 98 N.W.2d 710, 713-14 (1959), we said:

> It is the declared policy of the law in this state that a county attorney may not confess judgment against a county without appropriate authority to do so. This rule is for the protection of the public against results arising by improper or inept handling of litigation by a county attorney. In the instant case the county attorney confessed judgment for the county and the county board of equalization without any authority to prevent the filing of a contempt action against certain county officers. Certainly, the county attorney should not be permitted as a matter of public policy to trade away the rights of the public as a means of protecting individuals against personal action for their conduct. The county attorney operates counter to these provisions of law when he does so. Having no authority to confess judgment, any judgment based thereon is absolutely void and subject to collateral attack. If this were not so, and the judgment became final if no appeal were taken, the policy of the law could be easily thwarted, particularly as to those who were not parties to the action and yet bound by it because of its class nature. We conclude that the judgment in the Cassidy case is void, subject to collateral attack, and ineffective to defeat this issuance of a writ of mandamus.

An appointed city attorney certainly has no greater authority in this regard than an elected county attorney.

In the few cases which have been decided elsewhere, similar conclusions have been reached. In an annotation found in 67

A.L.R. 1503, 1505 (1930), the author notes: "A consent judgment in which the officials representing the municipality assume obligations against the municipality unauthorized by law is void." In *City of St. Paul v. Chicago, St. P. M. & O. Ry. Co.*, 139 Minn. 322, 166 N.W. 335 (1918), the court held that the fact that by consent of the municipal officers an agreement or stipulation made by them had been put in the form of a judgment in an effort to give it the force and effect of a judgment did not cure the lack of power in the officers to make it, and if such power was lacking, the judgment as well as the stipulation was void. See, also, *State ex rel. City of St. Paul v. Great Northern Ry. Co.*, 134 Minn. 249, 158 N.W. 972 (1916); *Kelley v. Milan*, 127 U.S. 139, 8 S. Ct. 1101, 32 L. Ed. 77 (1888). Without attempting to define all of the authority possessed by a city attorney in representing the municipality, it is nevertheless clear that where, as here, the action involved is one which emanates from the legislative branch of government and, by statute, requires formal action to be taken by the legislative branch before any action may be taken by the city, a city attorney who voluntarily dismisses an action which he had no authority in the first instance to bring is without authority to so act, and any action taken by the city attorney, including consenting to a court order, in that regard is without authority and is wholly void.

One may argue that persons should be entitled to rely upon a court record and not be required to look behind it. Perhaps there are situations where such a rule applies. But where, as here, the record clearly shows that the city attorney voluntarily dismissed an action which he was not authorized to bring in the first instance, the rule constituting an exception as to when res judicata applies is proper. If the person signing the stipulation as city attorney was not in fact the city attorney, the city would not be bound. I see little reason to hold otherwise where, as here, the person signing is the city attorney but without authority to take the action he did. I do not believe that the absence of a court order is significant to the decision of this case.

CAPORALE, J., joins in this concurrence.

WHITE, J., concurring.

I concur in the result reached by the majority. I believe, however, that the doctrine of res judicata is inapplicable in the case because the city attorney initially lacked the power to take the actions he did in case No. 7203 regarding paving district No. 395.

The single issue presented is whether the city attorney's dismissal of case No. 7203 bars the city under the doctrine of res judicata from collecting delinquencies due on paving district No. 395 in case No. 7829. Resolution of this issue depends upon the legal effect, if any, of the city attorney's action dismissing with prejudice case No. 7203. This, in turn, depends upon the scope of the city attorney's power to bring and dismiss actions on behalf of the city.

Neb. Rev. Stat. § 16-319 (Reissue 1983) includes in its delineation of a city attorney's power the authority to "commence, prosecute, and defend all suits and actions necessary to be commenced, prosecuted, or defended on behalf of the city, or that may be ordered by the council." This language does not condition the city attorney's general power "to prosecute" a case on behalf of the city. "Prosecute" includes not only commencing the suit but also "following it to an ultimate conclusion," Black's Law Dictionary 1099 (5th ed. 1979), including settlements and compromises.

Section 16-319 cannot, however, be read in a vacuum. When, as here, the effect of another statute is to establish specific prerequisites to a city attorney's authority, then § 16-319 must be interpreted in conjunction with such a statute. Neb. Rev. Stat. §§ 16-622 and 16-669 (Reissue 1979) provide the procedures a city must follow in accelerating future payments when foreclosing on a delinquent special assessment. These statutes require a city to publish a resolution declaring all future installments due on a future fixed date. Such a resolution may not be filed until three payments have become delinquent.

In foreclosing assessments a city is subject to a rigorous burden of proof at every stage. See *Turner v. City of North Platte*, 203 Neb. 706, 279 N.W.2d 868 (1979). A city's record of special assessments must affirmatively show a compliance with all the conditions essential to a valid exercise of the taxing

power, and no omission of essential fact may be supplied by a presumption. *Belza v. Village of Emerson*, 158 Neb. 641, 64 N.W.2d 214 (1954), *vacated* 159 Neb. 651, 68 N.W.2d 272 (1955). Any variation from compliance with statutory requirements renders the assessment void. *Campbell v. City of Ogallala*, 183 Neb. 238, 159 N.W.2d 574 (1968). Assessment authorization and collection statutes are so strictly construed because of the exclusive nature of the statutory assessment scheme. See 14 E. McQuillin, The Law of Municipal Corporations § 38.255 (3d ed. rev. 1970).

Here, the Kearney City Council properly did not include paving district No. 395 in its acceleration resolution because Mrs. Johnson was not yet three payments delinquent as required by statute. In this instance a prerequisite to the city attorney's power to prosecute under § 16-319 was a council resolution seeking to accelerate and foreclose on thrice-delinquent special assessments. Since this condition was not met, the city attorney's power to foreclose paving district No. 395 never arose, and its inclusion in case No. 7203 was without legal effect. Consequently, the city attorney's dismissing the case with prejudice was void as to paving district No. 395, 10 E. McQuillin, The Law of Municipal Corporations § 29.17 (3d ed. rev. 1981); see, also, *Helleberg v. City of Kearney*, 139 Neb. 413, 297 N.W. 672 (1941), and his action affords no basis for a plea of res judicata as against paving district No. 395.

SHANAHAN, J., joins in this concurrence.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 244, APPELLANT, V. LINCOLN ELECTRIC SYSTEM, APPELLEE.

385 N.W.2d 433

Filed April 25, 1986. No. 85-004.

1. **Commission of Industrial Relations: Appeal and Error.** In reviewing a decision of the Commission of Industrial Relations, this court will consider whether the

decision is supported by substantial evidence, whether the commission acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable.

2. **Administrative Law: Evidence: Witnesses: Appeal and Error.** It is not for the Supreme Court to resolve conflicts in the evidence. Credibility of witnesses and the weight to be given their testimony are for the administrative agency as a trier of fact.
3. **Labor and Labor Relations: Employer and Employee.** Supervisory personnel cannot be represented in the same bargaining unit with rank and file employees.
4. _____: _____. Supervisory or managerial personnel may not retain the same bargaining agent as the employees' union because that would be tantamount to permitting them to enter the same bargaining unit.
5. _____: _____. The mere fact that each local union can be traced back to a common international union will not be enough to show that the locals are affiliated with each other. There must be a positive showing that the national has authority and power to exercise control over both locals and that it is actually exercising that control.

Appeal from the Nebraska Commission of Industrial Relations. Affirmed.

David D. Weinberg of Weinberg & Weinberg, P.C., for appellant.

Douglas L. Curry, Soren S. Jensen, and J. Russell Derr of Erickson & Sederstrom, P.C., for appellee.

BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

WHITE, J.

Plaintiff-appellant, International Brotherhood of Electrical Workers Local 244 (Local 244) filed a petition with the Commission of Industrial Relations (CIR) in June of 1984 seeking recognition and representation of employees in a bargaining unit consisting of crew foremen employed in the operations department of respondent-appellee, Lincoln Electric System (LES). LES answered, stating that the bargaining unit was inappropriate because the title of crew foreman is not an appropriate unit for bargaining and if Local 244 became certified, the result would be that supervisory and nonsupervisory employees would be part of the same bargaining unit. Trial was held and the CIR dismissed Local 244's petition and request for an election. The CIR concluded

that since both locals were affiliated with the same international union, a conflict of interest could result.

The issue on appeal in this case is whether the CIR erred in dismissing appellant's petition because supervisors and the employees they supervise, represented by another union, belong to the same international union and the international union's control over the two unions creates the possibility of a conflict of interest and prevents the two local unions from acting independently in collective bargaining relationships with the same employer.

In reviewing a decision of the CIR, this court will consider whether the decision is supported by substantial evidence, whether the CIR acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable. *City of Omaha v. Omaha Police Union Local 101, ante* p. 197, 382 N.W.2d 613 (1986). It is not for the Supreme Court to resolve conflicts in the evidence. Credibility of witnesses and the weight to be given their testimony are for the administrative agency as a trier of fact. *In re Appeal of Levos*, 214 Neb. 507, 335 N.W.2d 262 (1983).

Crew foremen and crew leaders employed in the operations department of LES were formerly members of a bargaining unit represented by Local 1536 of the International Brotherhood of Electrical Workers, AFL-CIO (Local 1536). Local 1536 also represented the employees these crew foremen and crew leaders supervised, and LES challenged the status of the supervisors on the ground that a collective bargaining unit could not legally include both supervisory and nonsupervisory employees. This issue was resolved by this court in December of 1983 when it was decided that Local 1536 could not represent both the rank and file employees and their supervisors. *IBEW Local 1536 v. Lincoln Elec. Sys.*, 215 Neb. 840, 341 N.W.2d 340 (1983).

Following this decision, the supervisors, with the assistance of Ken Sawyer, the regional international representative of IBEW, attempted to organize themselves as a separate bargaining unit within Local 1536. When they were informed that LES would not recognize them in this capacity, they decided to attempt to make a group transfer to Local 244. Ken

Sawyer again assisted them in their efforts. In May of 1984 Local 244 agreed to accept the supervisors as a separate bargaining unit, and most of the supervisors have been members of Local 244 since June 1, 1984. The change in the bylaws of Local 244 necessary to accept the new members and the group transfer itself were both approved by the international union as required in the IBEW constitution and rules for local unions and councils under its jurisdiction (IBEW constitution). LES refused to recognize the supervisors as members of Local 244, and Local 244 petitioned the CIR for relief.

The CIR found that the crew foremen and crew leaders comprised an appropriate unit for collective bargaining under the criteria established by the CIR and this court. The CIR next considered whether the IBEW's control and influence over the supervisory employees, represented by Local 244, and the employees they supervise, represented by Local 1536, create the possibility of a conflict of interest between the two locals and prevent them from acting independently in their collective bargaining relationship with LES. The CIR concluded that IBEW's potential and actual control was sufficient to warrant a dismissal of Local 244's petition. We agree.

We decided in *City of Grand Island v. American Federation of S. C. & M. Employees*, 186 Neb. 711, 185 N.W.2d 860 (1971), that supervisory personnel cannot be represented in the same bargaining unit with rank and file employees. In *Nebraska Assn. of Pub. Emp. v. Nebraska Game & Parks Commission*, 197 Neb. 178, 247 N.W.2d 449 (1976), we held that supervisory or managerial personnel may not retain the same bargaining agent as the employees' union because that would be tantamount to permitting them to enter the same bargaining unit. The mere fact that each local union can be traced back to a common international union, however, will not be enough to show that the locals are affiliated with each other. There must be a positive showing that the national has authority and power to exercise control over both locals and that it is actually exercising that control. *Lincoln City Employees Union v. City of Lincoln*, 210 Neb. 751, 317 N.W.2d 63 (1982).

In this case there is sufficient evidence of control by the

international union and the possibility of a conflict of interest which could prevent independent collective bargaining to support the CIR's decision. Sawyer is the regional international representative for both locals. His duties, as an employee of IBEW, include assisting local unions in negotiation of contracts, handling arbitration cases, and investigating interunion matters as directed by the international president. His functions specifically include assisting local unions in developing bargaining strategy. The potential for a conflict of interest is apparent under these circumstances.

Both Local 244 and Local 1536 are chartered by the IBEW, governed by the IBEW constitution, and participate in the international convention through their elected delegates. The locals are allowed to adopt bylaws governing their affairs only with the approval of IBEW. Similarly, a member who desires to transfer from one local to another must have approval from the international organization. The IBEW constitution provides that "No L.U. [local union] shall allow its members to work for any employer in difficulty with any other L.U. of the I.B.E.W., providing the I.P. [international president] has recognized such difficulty." Control by the international union is amply demonstrated in the record of this case.

The decision of the CIR is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. TERRY HAVLAT, APPELLANT.

385 N.W.2d 436

Filed April 25, 1986. No. 85-374.

1. **Constitutional Law: Search and Seizure.** A person's capacity to claim the protection of article I, § 7, of the Nebraska Constitution as to unreasonable searches and seizures, like its counterpart, the fourth amendment to the U.S. Constitution, depends upon whether the person who claims such protection has a legitimate expectation of privacy in the invaded place.
2. _____: _____. The open fields doctrine of *Hester v. United States*, 265 U.S. 57, 44 S. Ct. 445, 68 L. Ed. 898 (1924), is applicable under our Constitution.
3. **Constitutional Law: Police Officers and Sheriffs: States.** Although a state may

not impose greater restrictions on police activity as a matter of federal constitutional law, a state may impose higher standards governing police practices on the basis of state law.

4. **Constitutional Law: Police Officers and Sheriffs: Search and Seizure.** Concerning the open fields doctrine, our state Constitution does not afford more protection than does the fourth amendment to the federal Constitution as interpreted in *Oliver v. United States*, 466 U.S. 170, 104 S. Ct. 1735, 80 L. Ed. 2d 214 (1984), and we decline to judicially impose higher standards governing law enforcement officers under the provisions of the state Constitution.
5. **Trial: Evidence.** Because of the wide variety of facts that may have circumstantial probative value, courts are liberal in admitting such evidence of facts which appear to have some degree of relevance to the matters in issue.
6. **Trial: Evidence: Presumptions.** When a case is tried to the court without a jury, it is presumed that the trial court considered only competent and relevant evidence in reaching its decision.
7. **Criminal Law: Appeal and Error.** 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 fact, and its 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 Seward County: BRYCE BARTU, Judge. Affirmed.

Kirk E. Naylor, Jr., for appellant.

Robert M. Spire, Attorney General, and Terry R. Schaaf, for appellee.

KRIVOSHA, C.J., BOSLAUGH, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

COLWELL, D.J., Retired.

Defendant, Terry Havlat, appeals his conviction of manufacturing a controlled substance, marijuana. Neb. Rev. Stat. § 28-416(1)(a) (Cum. Supp. 1984). The marijuana was growing in a rural area when seized during a warrantless search. Havlat was sentenced to 20 to 40 months in the Nebraska Penal and Correctional Complex and fined $1,000.

On July 26, 1983, while Officers Roy Svoboda and Dean Heiden of the Nebraska State Patrol were making a low-level photographic investigative air flight over parts of Seward County, Nebraska, searching for unlawful growths of marijuana, they observed suspected marijuana plants on a

250-acre farm later determined to be owned by Lumir and Valerie Havlat, the defendant's parents. The farm was a grain and livestock operation of Lumir and defendant under an oral agreement having general terms that the defendant described as a partnership. The owners lived in the farmhouse. The property was fenced, with its gates closed and posted against trespassers.

On July 28 Officers Heiden and Billy Hobbs of the State Patrol entered the farm through a fence from a public road at a point distant from the farm buildings. They did not have a search warrant. The officers discovered four patches of growing marijuana, located more than one-quarter mile from the farm buildings, near a small creek that meandered through the farm. There was a heavy growth of trees, underbrush, and weeds on each side of the creek; the marijuana could not be seen from the road. A hay field and milo field were nearby.

The term "manufacture" includes cultivating marijuana. Neb. Rev. Stat. § 28-401(22) (Cum. Supp. 1984). The ground around the marijuana plants had been disturbed, and the weeds had been eradicated. Plastic garden-type hoses ran from the creek to the plants, conveying water pumped from the creek by a small, gasoline-powered pump from which the defendant's palm print was later taken and identified. Havlat testified that he had recently used the pump to clean out a cistern on the farm.

Patrol officers continued their investigation by succeeding warrantless intrusions on July 29 and August 2, 4, 5, and 8, 1983. In the late evening of August 8, the officers arrested Havlat when he appeared at the growing area. The following day, the officers seized 600 pounds of marijuana plants. A subsequent search of the defendant's home and garage in Milford, Nebraska, pursuant to a search warrant, produced two seed-starter trays, marijuana seeds, and other miscellaneous marijuana paraphernalia, not described since this evidence was later suppressed at the close of the trial.

On February 22, 1984, the trial court granted the defendant's pretrial motion to suppress evidence seized in the warrantless search. A single judge of this court reversed the order in the State's interlocutory appeal, as provided in Neb. Rev. Stat. § 29-824 (Cum. Supp. 1984). *State v. Havlat*, 217 Neb. 791, 351

N.W.2d 86 (1984). Later, the trial court, on its own motion, again suppressed the same evidence, and again that order was reversed in an interlocutory appeal. *State v. Havlat*, 218 Neb. 602, 357 N.W.2d 464 (1984).

Prior to trial, the State dismissed count II of the indictment charging Havlat with conspiracy to violate § 28-416(1)(a), and Havlat executed a written waiver of his right to a jury trial. At trial the evidence seized in the warrantless search was admitted over the defendant's objection. At the conclusion of the evidence, the trial judge made complete and detailed findings concerning the crime charged, the elements thereof, and the State's burden of proof. The trial court also made findings with regard to the testimony of witnesses which supported the State's burden of proof, the circumstantial nature of some of the evidence and its probative force, and the fact that the land was under the defendant's control. The court specifically noted that the suppressed evidence seized at the defendant's home pursuant to a search warrant was disregarded. The court then found Havlat guilty of cultivating marijuana in violation of § 28-416(1)(a).

In his first assignment of error, Havlat contends that the single judge of this court erred when he twice reversed the district court's orders suppressing the warrantless search evidence and that the trial court erred when it admitted this evidence over the defendant's motion to suppress. Havlat claims that the evidence was seized in violation of state and federal constitutional provisions guaranteeing the right to be free from unreasonable searches and seizures. His argument is directed to the first-impression question of whether article I, § 7, of the Nebraska Constitution, guaranteeing the right to be free from unreasonable searches and seizures, should have a broader interpretation than its federal counterpart, the fourth amendment to the U.S. Constitution, when applying it to fact scenarios considered under the "open fields doctrine." Defendant urges a broad and separate state standard because Nebraska is an agrarian state dominated by large areas of farm and ranch land operations, the businesses within which should be accorded the same protection as those enclosed in buildings or walls.

The State counters that an open field is not an "effect" within the meaning of either the fourth amendment or article I, § 7, and even if it were, warrantless entries into open fields are still reasonable because no legitimate expectation of privacy exists in activities conducted in the open fields. What is "reasonable," the State posits, is to be measured not by the subjective expectations of the parties but by an objective test of what society considers a legitimate interest in privacy which warrants constitutional protection. The State also argues that the officers' actions were proper pursuant to Neb. Rev. Stat. § 28-429(1)(d) (Reissue 1979), which specifically permits law enforcement officers to enter onto property without a search warrant or consent for the purpose of locating and eradicating wild or illicit weeds from which a controlled substance could be extracted.

The U.S. Supreme Court first articulated the open fields doctrine in *Hester v. United States*, 265 U.S. 57, 59, 44 S. Ct. 445, 68 L. Ed. 898 (1924): "[T]he special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects,' is not extended to the open fields." Forty-three years later, in a telephone-booth electronic surveillance case, the same Court declared that the "Fourth Amendment protects *people, not places*." (Emphasis supplied.) *Katz v. United States*, 389 U.S. 347, 351, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967).

Recently, the U.S. Supreme Court reaffirmed the *Hester* open fields doctrine in *Oliver v. United States*, 466 U.S. 170, 104 S. Ct. 1735, 80 L. Ed. 2d 214 (1984). The facts in *Oliver*, except for the successive intrusions, were similar to the facts before us, including the warrantless trespass in a rural area enclosed by a fence and posted with no-trespassing signs. The *Oliver* Court held that, since *Katz*, the touchstone of fourth amendment analysis has been the question of whether a person has a constitutionally protected, reasonable expectation of privacy. This is not merely a *subjective* expectation of privacy but, rather, includes only those expectations that society is prepared to recognize as reasonable—in other words, an objective test of reasonableness. Based on this premise, the *Oliver* Court concluded that the open fields doctrine of *Hester*

retained its validity and was consistent with the holding in *Katz*. Further,

> No single factor determines whether an individual legitimately may claim under the Fourth Amendment that a place should be free of government intrusion not authorized by warrant. [Citation omitted.] In assessing the degree to which a search infringes upon individual privacy, the Court has given weight to such factors as the intention of the Framers of the Fourth Amendment [citation omitted], the uses to which the individual has put a location [citation omitted], and our societal understanding that certain areas deserve the most scrupulous protection from government invasion [citation omitted]. These factors are equally relevant to determining whether the government's intrusion upon open fields without a warrant or probable cause violates reasonable expectations of privacy and is therefore a search proscribed by the Amendment.
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> . . . .
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> . . . [O]pen fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance. There is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields. Moreover, as a practical matter these lands usually are accessible to the public and the police in ways that a home, an office, or commercial structure would not be. It is not generally true that fences or "No Trespassing" signs effectively bar the public from viewing open fields in rural areas. . . . For these reasons, the asserted expectation of privacy in open fields is not an expectation that "society recognizes as reasonable."

466 U.S. at 177-79.

While concluding that neither probable cause nor a warrant is required to effect police searches of open fields, the Court emphasized that the fourth amendment continues to protect other activities in the open fields which might involve an individual's privacy.

Although a state may not impose greater restrictions on

police activity as a matter of *federal* constitutional law, a state may impose higher standards governing police practices on the basis of *state* law. See, *Oregon v. Hass*, 420 U.S. 714, 95 S. Ct. 1215, 43 L. Ed. 2d 570 (1975); *Cooper v. California*, 386 U.S. 58, 87 S. Ct. 788, 17 L. Ed. 2d 730 (1967), *reh'g denied* 386 U.S. 988, 87 S. Ct. 1283, 18 L. Ed. 2d 243.

This court has not previously addressed the specific question of whether article I, § 7, of the Nebraska Constitution, which is phrased identically to the fourth amendment, affords greater protection against governmental searches and seizures involving open fields than does its federal counterpart.

Our decision in *State v. Cemper*, 209 Neb. 376, 307 N.W.2d 820 (1981), based on the fourth amendment to the federal Constitution, merely anticipated *Oliver*. Cemper, an employee of a farm lessee, was convicted of manufacturing marijuana. We held that although under *Katz* the right to claim the protection of the fourth amendment depended upon whether a person had a legitimate expectation of privacy in the invaded place, nevertheless the open fields doctrine of *Hester* remained applicable. Evidence of ownership or possessory rights (or in *Cemper*, the lack thereof) was a factor in determining the legitimate expectation of privacy. Further,

> In the rural areas of this state it would be difficult to find a landowner who would believe that no person would enter on his open field without permission. Hunters, fishermen, and other technical trespassers are so commonly expected in the rural areas of this state that a failure to post trespassing signs is regarded by many persons as almost an implied permission to enter.

Cemper, supra at 381-82, 307 N.W.2d at 823.

Applying *Cemper* to the Nebraska Constitution, we hold that a person's capacity to claim the protection of article I, § 7, of the Nebraska Constitution as to unreasonable searches and seizures, like its counterpart, the fourth amendment to the U.S. Constitution, depends upon whether the person who claims such protection has a legitimate expectation of privacy in the invaded place. Further, the open fields doctrine of *Hester v. United States*, 265 U.S. 57, 44 S. Ct. 445, 68 L. Ed. 898 (1924), is applicable under our Constitution.

Nowhere in our independent research of the state constitutional conventions do we find evidence that the framers intended the explicit language of article I, § 7, to encompass more than what it says. See, 2 Proc. Const. Conv. 1871, 93-96; 1 Proc. Const. Conv. 1871, 88-90.

There is no merit in the argument that Nebraska's agrarian economy requires a broader interpretation of article I, § 7, of the state Constitution. To the contrary, we note that a vast majority of the 50 states, regardless of population, have large areas of land devoted to farming, ranching, mining, and tree production.

Concerning the open fields doctrine, our state Constitution does not afford more protection than does the fourth amendment to the federal Constitution as interpreted in *Oliver v. United States*, 466 U.S. 170, 104 S. Ct. 1735, 80 L. Ed. 2d 214 (1984), and we decline to judicially impose higher standards governing law enforcement officers under the provisions of the state Constitution. Without a further recitation of the rationale set forth by the majority in *Oliver*, we find persuasive the reasons advanced in *Oliver* for concluding that no constitutional protection attaches to Havlat's activities occurring in the open fields, that Havlat had no legitimate expectation of privacy under the facts here, and that police could enter and search the open field without probable cause or a search warrant.

Accordingly, Havlat's first assignment of error is without merit. The trial court did not err when it admitted evidence at trial seized during a warrantless search of Havlat's property, and the single judge who ruled on the State's interlocutory motions was correct in reversing the trial court's order suppressing the evidence.

As Havlat's second assignment of error, he claims that the trial court erred in deciding Havlat's guilt on the basis of testimonial evidence of one Kenneth Witmuss, Jr. Havlat claims that this evidence, admitted at trial, was wholly lacking in relevance and probative value due to the State's failure to lay adequate foundation. The defendant and Witmuss had been friendly for several years prior to 1983. Witmuss had visited Havlat at his home and at the farm, the pair had traveled

together to California, and from 1979 to 1982 Witmuss had been a part-time mechanic employed by the defendant.

It is undisputed that Witmuss' testimony is circumstantial. " 'Circumstantial evidence is defined as the attendant facts and circumstances from which a principal fact may be inferred by the usual processes of reasoning. . . .' " *State v. Betts*, 210 Neb. 348, 350, 314 N.W.2d 257, 258 (1982).

Because of the wide variety of facts that may have circumstantial probative value, courts are liberal in admitting such evidence of facts which appear to have some degree of relevance to the matters in issue. Much discretion is left to the trial judge, and his or her rulings will be sustained if the evidence admitted tends to show that a fact in controversy did or did not exist. See, 1 C. Torcia, Wharton's Criminal Evidence § 155 (13th ed. 1972); 29 Am. Jur. 2d *Evidence* § 266 (1967). Further, the trial judge has wide discretion in the determination of foundation, that is, connecting or qualifying evidence, and "[i]n order to be admissible, evidence need not invariably appear to be relevant at the time when it is proffered." 1 S. Gard, Jones on Evidence §§ 4:59 and 4:60 at 512 (6th ed. 1972).

When a case is tried to the court without a jury, it is presumed that the trial court considered only competent and relevant evidence in reaching its decision. *State v. Tomes*, 218 Neb. 148, 352 N.W.2d 608 (1984). This court will not reverse a trial court's decision when there is otherwise sufficient material, competent, and relevant evidence to sustain the judgment. *Id.*

The long-standing rule in this state is that 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 fact, and its verdict 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); *State v. Thaden*, 210 Neb. 622, 316 N.W.2d 317 (1982); *State v. Meadows*, 203 Neb. 197, 277 N.W.2d 707 (1979).

Havlat claims that the trial court erred when it admitted certain testimony of Witmuss over objections of foundation,

relevancy, and lack of probative value. Witmuss testified that on one occasion in 1983 the defendant gave him marijuana which he, Havlat, took from a grain sack in the garage on the farm. From the known relationship of Witmuss and Havlat, the general nature of the testimony, and other evidence in the record, it was within the discretion of the trial judge to admit the evidence on the expectation of later connecting foundation. Such was not provided. Witmuss subsequently testified, without objection, that the defendant had once mentioned the growing of marijuana. Defendant did object to further similar testimony, and although the objection was overruled, that line of questioning ended. However, succeeding foundation evidence established that the conversation was remote in time, having occurred sometime prior to 1981. In each of these instances where either the connecting evidence was not provided or other evidence destroyed the relevancy of the evidence, such was subject to being stricken. Havlat made no motion to strike. In any event, there was no error, because Havlat himself later testified that he had given marijuana to Witmuss. No substantial right of the defendant was affected, and it is presumed that the trial judge disregarded the evidence.

Havlat's main concern relates to Witmuss' testifying over objection that in the winter prior to defendant's arrest, he and the defendant had talked about irrigation systems. Witmuss stated that Havlat expressed an interest in installing a drip irrigation system on his farm, but Havlat did not say that he planned to use it for watering marijuana. The time, place, and circumstances surrounding this conversation were sufficiently provided. As the trial court found, the testimony provided a thread of circumstantial evidence having probative value relating to the issue of cultivating marijuana. There was no error in admitting this evidence; its weight and credibility were for the trier of fact.

Havlat also claims in his second assignment of error that the trial court committed prejudicial error because it decided Havlat's guilt on the basis of Witmuss' testimony relating to irrigation systems. This assertion is contrary to the record. The trial judge's findings noted the testimony, but only as a circumstance supporting other evidence that the defendant was

cultivating marijuana plants. The other evidence included the observations of the investigating officers; the soil around the plants, which was disturbed and damp; the hoses and pump, which were in place and operable; the defendant's palm print on the pump; and the fact that the defendant controlled the area where the plants were growing. Even disregarding Witmuss' testimony, ample probative evidence existed to support the defendant's conviction.

We will not interfere with a guilty verdict based upon evidence in a criminal case unless the evidence is so lacking in probative force that it can be said as a matter of law that the evidence is insufficient to support a guilty verdict beyond a reasonable doubt. *State v. Thaden*, 210 Neb. 622, 316 N.W.2d 317 (1982). Here, the record discloses sufficient evidence which supports a rational theory of the defendant's guilt. Havlat's second assignment of error is therefore without merit.

For these reasons the judgment of the district court is in all respects affirmed.

AFFIRMED.

KRIVOSHA, C.J., dissenting.

I must respectfully dissent from the majority in this case. I do so because I believe that the facts of this case do not justify our saying that the defendant's right to be free of unreasonable searches and seizures under either the fourth amendment to the U.S. Constitution or Neb. Const. art. I, § 7, was not violated. I am persuaded in part by the dissent of Justice Marshall in *Oliver v. United States*, 466 U.S. 170, 104 S. Ct. 1735, 80 L. Ed. 2d 214 (1984), the case relied upon in part by the majority in this case. In his dissent in *Oliver*, Justice Marshall notes at 185-86:

> The first ground on which the Court rests its decision is that the Fourth Amendment "indicates with some precision the places and things encompassed by its protections," and that real property is not included in the list of protected spaces and possessions. *Ante*, at 176. This line of argument has several flaws. Most obviously, it is inconsistent with the results of many of our previous decisions, none of which the Court purports to overrule. For example, neither a public telephone booth nor a conversation conducted therein can fairly be described as

> a person, house, paper, or effect; yet we have held that the Fourth Amendment forbids the police without a warrant to eavesdrop on such a conversation. *Katz v. United States*, 389 U. S. 347 (1967). Nor can it plausibly be argued that an office or commercial establishment is covered by the plain language of the Amendment; yet we have held that such premises are entitled to constitutional protection if they are marked in a fashion that alerts the public to the fact that they are private. *Marshall v. Barlow's, Inc.*, 436 U. S. 307, 311 (1978); *G. M. Leasing Corp. v. United States*, 429 U. S. 338, 358-359 (1977).

It is difficult for me to perceive how we can, on the one hand, write out open fields surrounded by a locked fence and posted signs reading "No Trespass," and, on the other, read in public telephone booths and commercial places of business.

While the majority in *Oliver v. United States, supra* at 179, concludes that "open fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance," *Oliver*, nevertheless, teaches us:

> No single factor determines whether an individual legitimately may claim under the Fourth Amendment that a place should be free of government intrusion not authorized by warrant. [Citation omitted.] In assessing the degree to which a search infringes upon individual privacy, the Court has given weight to such factors as the intention of the Framers of the Fourth Amendment [citation omitted], the uses to which the individual has put a location [citation omitted], and our societal understanding that certain areas deserve the most scrupulous protection from government invasion [citation omitted]. These factors are equally relevant to determining whether the government's intrusion upon open fields without a warrant or probable cause violates reasonable expectations of privacy and is therefore a search proscribed by the Amendment.

Id. at 177-78.

As the majority in this case has done, I too would look to this court's earlier decision in *State v. Cemper*, 209 Neb. 376, 307

N.W.2d 820 (1981). I would not reach the same conclusion, however, regarding the holding of *Cemper*. In my view *Cemper* has not written out the open field from the protection of either the fourth amendment to the U.S. Constitution or Neb. Const. art. I, § 7. Rather, *State v. Cemper, supra* at 382, 307 N.W.2d at 823, indicates:

> The fourth amendment protects persons but it does not protect them in every circumstance and in every place, public or private. Ownership and possessory rights in "places" are still important in determining whether or not a particular person has a legitimate expectation of privacy in a particular place. The open fields doctrine is not completely dead. Its reincarnated substance is still a vital part of the broader constitutional concept of freedom from unreasonable searches and seizures.

Having said that, we then went on in *Cemper* to conclude that, under the circumstances in *Cemper*, the defendant could not have a legitimate expectation of privacy in *his particular* open field. The facts in *Cemper*, however, were that while there was a fence surrounding the area, there were unlocked, open gates and no signs posted. That is not the evidence presented to us in this case. Here, the evidence is that the officers had to crawl through a perimeter fence in order to get into the field. To suggest that a person who has placed a locked fence around a field and posted the fence with no trespassing signs has no expectation of privacy is to simply ignore the facts of the matter. I am simply not prepared to hold that under the provisions of Neb. Const. art. I, § 7, no one in Nebraska may have an expectation of privacy in an open field which is tightly fenced, locked, and signed against trespassers. I cannot imagine what more a person could do to evidence an expectation of privacy.

In my view, under the Nebraska Constitution, before a court can determine whether a citizen's right to privacy has been violated, a court must examine the facts to determine whether a person challenging a search or seizure has standing, i.e., a reasonable expectation of privacy. After having concluded that Havlat has shown that he had a reasonable expectation of privacy, I would then examine the facts and conclude that the search in the instant case was unreasonable and, thus, Havlat's

rights were violated. Neither the fourth amendment to the federal Constitution nor Neb. Const. art. I, § 7, bars all searches and seizures; they merely bar unreasonable searches and seizures. The most common and the most reliable method of showing that a search was reasonable is by proving at trial that a search warrant had properly been procured before the search. Thus, "a search or seizure carried out on a suspect's premises without a warrant is per se unreasonable unless the police can show that it falls within one of the carefully designated exceptions based on the presence of 'exigent circumstances.' " *State v. Weible*, 211 Neb. 174, 179, 317 N.W.2d 920, 923 (1982).

In the present case the evidence discloses that the officers flew over the area and took photographs. When the photographs were developed, the officers testified, they "felt that [the depicted vegetation near the haystack] was marijuana." There is nothing in the record to indicate that with that information the officers could not have obtained a warrant to search the area; there were no exigent circumstances shown here. By requiring officers to first obtain a warrant before intruding into a citizen's privacy, the Constitutions of both the United States and the State of Nebraska contemplate that some impartial arbitrator in the form of a magistrate will be afforded an opportunity to determine whether there is a reasonable basis for invading a citizen's otherwise protected privacy. By not doing so in this case, the State conducted an unreasonable search, in violation of both federal and state Constitutions.

While it is apparent that we must do all we can to combat the ever-growing problem created by drugs within our society, I am nevertheless reminded of the words of Sir Thomas More, who, after being told by Roper that he would cut down every law in England to get after the Devil, said, "And when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat?"

SHANAHAN, J., dissenting.

The majority has provided an investigative field day for law enforcement searches without a warrant.

The Havlat farm, where Terry Havlat's parents resided, lies

in parts of adjacent sections, Section 3 on the east and Section 4 on the west, with the farmstead in the northern part of Section 4. Farming operations, conducted by Terry Havlat in partnership with his father since 1977, included crops, hay production, and cattle operations. South of the farmstead, in the southeast quarter of Section 4, was a milo field. East of the farmstead was an alfalfa field, in the northwest quarter of Section 3, and pasture located in the southwest quarter of that same section. Woods and a creek, separating the alfalfa field from the pasture, ran east along the quarter section line to a north-south county road at the east side of the Havlat farm. The farm had perimeter fences and several "no trespassing" signs conspicuously posted. The wooded creek area provided shelter for cattle and calving operations in winter.

On the morning of July 26, 1983, for Trooper Heiden, an investigator in the division of drug control of the Nebraska State Patrol, there were "arrangements made to do some aerial flying of places where the possibility existed of being marijuana fields." That morning, from a State Patrol aircraft at an altitude between 500 and 700 feet, Heiden took several photographs of the Havlat farm and especially focused on the wooded creek area southeast of the farmstead. While photographing and aerially viewing the area without binoculars, Heiden noticed "green vegetation" growing around a haystack located in the southwest corner of the alfalfa field, near the west boundary of Section 3.

When the aerial photographs were developed and examined by him on July 27, Heiden "felt that [the depicted vegetation near the haystack] was marijuana." On July 28 Heiden, and another patrol investigator who saw the aerial photographs, decided "to hike into the area in question and check out the photographs" and to "determine whether, if those plants were marijuana, whether they were volunteer or planted." The two investigators drove to the east side of the Havlat farm, parked their car on the county road, observed a "no trespassing" sign, without Havlat permission crawled through a perimeter fence, and started their trek westward in the woods, with their destination being the haystack area a quarter mile away and not visible from the road. After walking west "close to a half a

mile," the investigators arrived at the haystack depicted in the aerial photographs. There is no explanation given for the troopers' walking a "half a mile" in the woods to reach the haystack area located a quarter mile from the road—a site fixed with precision in the aerial photographs. Notwithstanding their somewhat nomadic approach, the investigators finally arrived at the haystack and verified that the vegetation, observed by Heiden on July 26, was cultivated marijuana. The State Patrol obtained additional aerial photographs on July 29, and that same day three patrol investigators, again without Havlat permission, entered the farm from the county road on the east, walked to the haystack, and then, for an "hour or two," searched for marijuana growing outside the immediate vicinity of the haystack.

On August 2 investigators of the State Patrol entered the Havlat farm for the third time, without permission, and set up a "surveillance camera" near the haystack. Investigators, still without Havlat permission, entered the premises on August 4 for the fourth time and changed film in the surveillance camera, which was finally removed by patrol investigators on August 5 during the fifth entry without permission. On August 8 Heiden and another investigator, lacking permission from Havlat, entered the farm again to set up personal surveillance, perhaps to catch Terry Havlat green-handed. The troopers carried their surveillance equipment, which included a sawed-off shotgun. Near the haystack, one trooper placed the shotgun under a tree, and the troopers momentarily left their equipment to reconnoiter and photograph the area. When they returned to the location of their equipment, the troopers observed "[a] subject sitting with our equipment, with a dog holding a shotgun that belonged" to one of the troopers. Perhaps Havlat, accompanied by his dog, was holding the shotgun. In any event, one of the troopers directed Terry Havlat to "put the shotgun down." Havlat complied, supplied his identification to the troopers, and was arrested. The troopers later removed marijuana plants for evidence. Based on an affidavit containing information obtained through the various nonconsensual entries between July 28 and August 8, the county court, on August 9, issued a warrant to search Terry

Havlat's town residence, and on September 21 issued a search warrant pertaining to the wooded creek area of the Havlat farm.

Skeptics might say that the itinerant investigators, in walking a half mile to reach the haystack pinpointed by aerial photographs at a location 1,320 feet west of the county road, were on a general, investigatory expedition rather than a realistic route to the haystack. Others might surmise that, given additional time and the intensity of persistent pedestrian traffic by law enforcement on the Havlat farm, the entire question about the search would become moot on account of the investigators' prescriptive right-of-way acquired on the premises. However, the question concerning admissibility of the evidence obtained by the investigators is not moot and must be addressed.

As expressed by the U.S. Supreme Court in *Katz v. United States*, 389 U.S. 347, 350-51, 353, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967):

> [T]he correct solution of Fourth Amendment problems is not necessarily promoted by incantation of the phrase "constitutionally protected area." . . . [An] effort to decide whether or not a given "area," viewed in the abstract, is "constitutionally protected" deflects attention from the problem presented by this case. For the Fourth Amendment protects people, not places. . . .
>
> . . . .
>
> . . . [A]nd once it is recognized that the Fourth Amendment protects people—and not simply "areas"—against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.

Concurring in *Katz*, Justice Harlan stated: "[T]here is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.' " *Id.* at 361.

The majority of this court has greatly emphasized and adopted the view expressed in *Oliver v. United States*, 466 U.S.

170, 179, 104 S. Ct. 1735, 80 L. Ed. 2d 214 (1984): Because open fields "are accessible to the public and the police in ways that a home, an office, or commercial structure would not be . . . the asserted expectation of privacy in open fields is not an expectation that 'society recognizes as reasonable.' "

In *Oliver* the U.S. Supreme Court also observed: "It is clear, however, that the term 'open fields' may include any unoccupied or undeveloped area outside of the curtilage." 466 U.S. at 180 n.11. This leads to the constitutional converse that the phrase "open fields" may not include any occupied or developed area outside the curtilage.

The more plausible test in determining whether a particular site is a constitutionally protected area is found in the two-part test suggested by Justice Harlan in *Katz v. United States, supra*: (1) Has the person exhibited a reasonable expectation of privacy? If the preceding is answered in the affirmative, (2) Has such expectation of privacy been violated by unreasonable governmental intrusion? Such two-part test has been adopted by state courts answering questions about law enforcement's search and seizure of citizens. See, *State v. Brady*, 406 So. 2d 1093 (Fla. 1981); *People v. Edwards*, 71 Cal. 2d 1096, 458 P.2d 713, 80 Cal. Rptr. 633 (1969); *State v. Byers*, 359 So. 2d 84 (La. 1978).

In its attempt at an upright position, the majority opinion leans on *State v. Cemper*, 209 Neb. 376, 307 N.W.2d 820 (1981), adopted by two judges of this court, with the remaining five judges concurring in the result. In *Cemper* the real estate involved was not posted, was accessible through at least one fence-gate which was never closed, and was land "owned by one company, of which [Cemper] was an employee, and farmed by another company, with which [Cemper] had no connection, in a rural area and on land on which no one resided." 209 Neb. at 381, 307 N.W.2d at 823. Even seeking strained similarities, one is compelled to conclude there is a drastic difference between the facts in *Cemper* and the present case. The statement in *State v. Cemper, supra* at 382, 307 N.W.2d at 823, "Hunters, fishermen, and other technical trespassers are so commonly expected in the rural areas of this state that a failure to post trespassing signs is regarded by many persons as almost an

implied permission to enter," is quixotic, a questionable concept for constitutional law, and an inaccurate characterization of the situation encountered by one without consent hunting and emerging from a field of cornstalks to find a scowling landowner who does not view the interloper as a recreational licensee.

In the present case the Havlat land was entirely fenced private property, accessible only with consent or by trespass, was conspicuously posted with "no trespassing" signs, and constituted an occupied and developed farm unit. Short of constructing some opaque and impenetrable structure around the farm, it is difficult to envision what other measures could have been reasonably utilized to assert and preserve the right of privacy on the Havlat land. Havlat demonstrated a subjective expectation of privacy protectable against unreasonable government intrusion. Acquisition of physical evidence in the present case is the result of an invasion upon and violation of Havlat's reasonable expectation of privacy, an unreasonable search, and should have been excluded.

There is, however, an additional reason for excluding the physical evidence in the present case. Although the majority euphemistically calls the officers' entries "warrantless intrusions," the investigators' six entries were, nonetheless, trespasses.

> A person commits second degree criminal trespass if, knowing that he is not licensed or privileged to do so, he enters or remains in any place as to which notice against trespass is given by:
>
> (a) Actual communication to the actor; or
>
> (b) Posting in a manner prescribed by law or reasonably likely to come to the attention of intruders; or
>
> (c) Fencing or other enclosure manifestly designed to exclude intruders.

Neb. Rev. Stat. § 28-521(1) (Reissue 1979).

Conviction for violation of the foregoing criminal statute is punishable by imprisonment, a fine, or both imprisonment and fine. Neb. Rev. Stat. § 28-106(1) (Cum. Supp. 1984).

In construing the Nebraska Constitution, 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," we should not unquestioningly follow an analysis tendered by the U.S. Supreme Court regarding its construction of the fourth amendment to the U.S. Constitution. As the majority recognizes, this court is not inextricably bound to federal decisions which provide less restriction on searches and seizures than may be appropriate for the citizens of Nebraska. We still have the capacity, as well as the obligation, to exercise independence in determining any exclusionary rule regarding admission of evidence questioned under the provisions of the Nebraska Constitution. When called upon to construe the Nebraska Constitution, this court should not exhibit some pavlovian conditioned reflex in an uncritical adoption of federal decisions as the construction to be placed on provisions of the Nebraska Constitution analogous to the U.S. Constitution's.

The conduct of law enforcement, in obtaining physical evidence in this case, involved repeated trespasses and, therefore, violations of the criminal code of Nebraska. A judicial rule for exclusion of evidence tainted by violation of the criminal code would undoubtedly deter future illegal conduct by law enforcement in investigations or gathering evidence. As a more fundamental consideration, by allowing admission of evidence obtained through law enforcement's illegal activity, courts encourage continued violation of law as a method of obtaining evidence to convict an accused, and "no distinction can be taken between the Government as prosecutor and the Government as judge." *Olmstead v. United States,* 277 U.S. 438, 470, 48 S. Ct. 564, 72 L. Ed. 944 (1928) (Holmes, J., dissenting). At that point the imperative of judicial integrity evaporates. As expressed by Justice Brandeis, also dissenting in *Olmstead v. United States, supra* at 485: "To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face." When law enforcement has contempt for laws of the people, inevitably people will have contempt for enforcement of laws.

Professor George E. Dix has pointed out:

> If state courts are to fulfill their responsibility as state tribunals, it will be necessary that they acknowledge state law issues as ones requiring independent analysis. Supreme Court analyses and results are, of course, available as potential models. In view of the nature of the issues presented by state law exclusionary sanction claims, however, state courts are obligated to exercise great care before deferring to these models.

Dix, *Exclusionary Rule Issues as Matters of State Law*, 11 Am. J. Crim. L. 109, 148 (1983).

If this court views the rights of Nebraska's citizens only in the light of some federal and less protective decisions, then, truly, we will see such rights "through a glass, darkly."

JERRY D. SHOECRAFT, APPELLEE, V. CATHOLIC SOCIAL SERVICES BUREAU, INCORPORATED, A NONPROFIT NEBRASKA CORPORATION, AND JOHN DOE AND MARY DOE, REAL AND TRUE NAMES UNKNOWN, APPELLANTS, DEPARTMENT OF SOCIAL SERVICES, STATE OF NEBRASKA, APPELLEE.

385 N.W.2d 448

Filed April 25, 1986. No. 85-657.

1. **Parental Rights: Constitutional Law: Minors.** The relationship between parent and child is constitutionally protected.
2. **Parental Rights.** The status of an unwed father is readily distinguishable from that of a separated or divorced father.
3. **Parental Rights: Adoption: Minors.** Disparate treatment of an unwed father and of an unwed mother in child adoption proceedings is a suspect classification.
4. **Parental Rights: Minors.** The state has a compelling interest in the well-being of all children, whether born in or out of wedlock.
5. **Parental Rights: Adoption: Minors.** The transfer of children by relinquishment from unwed mothers and the adoption of those children are compelling state interests.
6. **Parental Rights: Child Custody.** Custody cannot be taken from an unwed mother absent evidence of unfitness and that the removal is in the best interests of the child.
7. _____: _____. The unwed father has no automatic right to custody.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Reversed and remanded with directions to dismiss.

James M. Kelley, and Patrick W. Healey of Healey, Brown, Wieland, Kluender, Atwood & Jacobs, for appellants.

Roger C. Lott, for appellee Shoecraft.

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

WHITE, J.

This is an appeal from an order of the district court for Lancaster County holding that Neb. Rev. Stat. §§ 43-104.02 et seq. (Reissue 1984) are void as violative of the U.S. and Nebraska constitutional guarantees of due process and equal protection. Section 43-104.02 provides in part:

> (1) Relinquishment or consent for the purpose of adoption given only by a mother of a child born out of wedlock pursuant to section 43-104 shall be sufficient to place the child for adoption and the rights of any alleged father shall not be recognized thereafter in any court unless the person claiming to be the father of the child has filed with the Department of Social Services on forms provided by the department, within five days after the birth of such child, a notice of intent to claim paternity.

Section 43-104.04 provides:

> If a notice of paternity is not filed within five days, the mother of a child born out of wedlock or an agent specifically designated in writing by the mother may request, and the Department of Social Services shall supply, a certificate that no notice of intent to claim paternity has been filed with the department and the filing of such certificate pursuant to section 43-102 shall eliminate the need or necessity of a consent or relinquishment for adoption by the natural father of such child.

Petitioner, the father of a baby boy born out of wedlock on February 19, 1985, filed a notice acknowledging paternity of the child on February 28, 1985, nine days after the birth. The

child was relinquished by the mother to appellant Catholic Social Services Bureau, Incorporated, thereafter, and custody was placed with the prospective adoptive parents, designated as John and Mary Doe.

The action was cast in the form of an application for writ of habeas corpus alleging paternity, acknowledgment, and subsequent relinquishment by the mother. Habeas corpus is an appropriate action to test the legality of custody and best interests of a minor, including the rights of fathers of children born out of wedlock. *In re Application of Schwartzkopf*, 149 Neb. 460, 31 N.W.2d 294 (1948); *Christopherson v. Christopherson*, 177 Neb. 414, 129 N.W.2d 113 (1964).

The parties were students at the University of Nebraska at the time the mother became pregnant. The fact of the pregnancy was communicated to the appellee father as soon as it was verified by the mother. Appellee suggested a second examination, and the pregnancy was confirmed and communicated to appellee, "[p]ositively [in] June" 1984.

During the period of the pregnancy, the parties remained in contact with one another. Extended discussions were had concerning the prospective birth and the fate of the child. As long as 3½ to 4 months prior to the birth, the appellee father knew that arrangements were made by an agency to place the mother in a home outstate and of the mother's possible plans to relinquish the child at the hospital.

The appellee father did not pay any of the expenses connected with the residence of the mother before the birth nor any of the costs of the hospital and physician. During the period before the birth, medical questionnaires were submitted and presumably sent to the appellee father by the mother. Appellee did not complete the questionnaires, nor did he return them to the mother.

The appellee father was notified of the birth on the date of the birth and visited the mother shortly after the birth. Appellee points out that he executed no consent to an adoption or relinquishment. He also asserts that he was under the impression that he had no right to object to the relinquishment by the mother.

In the analysis of the claims to equal protection, we first must

ascertain the nature of the right asserted to be entitled to the protection of the U.S. and Nebraska Constitutions. We note that "the relationship between parent and child is constitutionally protected." (Citations omitted.) *Quilloin v. Walcott*, 434 U.S. 246, 255, 98 S. Ct. 549, 54 L. Ed. 2d 511 (1978). However, the status of an unwed father is "readily distinguishable from [that] of a separated or divorced father, and [we] accordingly believe that the State could permissibly give appellant less veto authority than it provides to a married father." *Quilloin, supra* at 256.

We observe that while the language in *Quilloin* and other cases does not use the exact terms which comport with the "strict scrutiny" required of a "fundamental right," we nevertheless apply that test. Obviously, the legislation is not primarily economic or social in nature. *State v. Michalski*, 221 Neb. 380, 377 N.W.2d 510 (1985). However, we also observe that disparate treatment of an unwed father and of an unwed mother in child adoption proceedings is a suspect classification. *Caban v. Mohammed*, 441 U.S. 380, 99 S. Ct. 1760, 60 L. Ed. 2d 297 (1979).

In *State v. Michalski, supra* at 385, 377 N.W.2d at 515, we observed:

> If the legislative classification involves either a suspect class, *Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967) (race), or a fundamental right, *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 86 S. Ct. 1079, 16 L. Ed. 2d 169 (1966) (voting), courts will analyze the statute with strict scrutiny. Under this test, strict congruence must exist between the classification and the statute's purpose. The end the legislature seeks to effectuate must be a compelling state interest, and the means employed in the statute must be such that no less restrictive alternative exists.

That the state has a compelling interest in the well-being of all children, whether born in or out of wedlock, and of their proper nurture and care, is accepted. Further, that the transfer of children by relinquishment from unwed mothers and the adoption of those children are also compelling state interests is clear. Given these compelling state interests, what means has the

Legislature adopted to effectuate these interests?

The statutory scheme here requires the father of a child born out of wedlock to declare himself as such within 5 days after the birth of the child and to assume the financial obligations of that status. The Nebraska statutory scheme does not provide for notification to the father of the birth of the child.

That omission might well, in a particular case, render constitutionally suspect as violative of due process the termination of the father's rights. See *Caban v. Mohammed, supra*. However, the facts in this case clearly demonstrate that the appellee father knew of the pregnancy as soon as the condition could be medically verified. He knew the whereabouts of the mother and was advised of the birth on the date of occurrence. Except for conversations relating to the disposition of the child, no manifestation of his intention to assert rights was made known. The record is completely devoid of any financial contribution to the expenses of maintenance during pregnancy or of other medical expenses. The lack of a provision for notice in the statutes does not render the scheme unconstitutional as to the appellee father.

We will therefore discuss only the other asserted deficiency, that of requiring an unwed father to acknowledge paternity within 5 days of the birth.

Fairly obviously, a considerable difference in the treatment of an unwed father and an unwed mother exists in § 43-104.02. The unwed mother is entitled to custody of the child, and, indeed, custody cannot be taken from her absent evidence of unfitness and that the removal is in the best interests of the child. The custody is automatic unless terminated after notice and fair hearing.

The unwed father, on the other hand, has no automatic right to custody: he must acknowledge the paternity within 5 days after birth and must establish paternity in a judicial proceeding. In the event of a proposed relinquishment by the mother, the unwed father must establish that he "is a fit person, is able to properly care for the child, and that the child's best interests will be served by granting custody" in order to successfully contest the proposed relinquishment. § 43-104.06(1).

The section appears to apply only where there is an adoption proceeding after relinquishment by the mother and does not limit the rights of a custodial unwed mother to seek support for the child at any time during the minority of the child.

The Legislature, in the passage of §§ 43-104.02 et seq., was concerned about the problems facing an unwed mother as to the retention of custody of the child or the relinquishment of the child to an agency for placement in an appropriate home. The 5-day period after birth was selected, in the words of the introducer, "primarily because this is pretty much a standard length of time that a child and the mother might be kept in the hospital anyway." Judiciary Committee Hearing, L.B. 224, 84th Leg., 1st Sess. 2 (Jan. 29, 1975) (statement of Sen. Anderson). An unwed mother would then know at the time she is likely to be released from the hospital whether the father will step forward, claim his own flesh and blood, and assume the responsibilities he biologically created. If not, the mother may then make the painful decision alone and not be left in the terrible limbo of growing attachment and love for the child, awaiting either the outcome of a judicial proceeding with its attendant notoriety or the decision of the amorous Hamlet in the wings, pondering whether he should assume his responsibility.

It is further obvious that the Legislature exercised a judgment favoring adoption of children of unwed couples as soon as possible after birth, concluding that the placement of the child in a home with persons anxious to have, love, and rear the child is to be preferred over a battleground where the mother must either depend on social agency support or on the outcome of a judicial support proceeding to compel the father to assume his responsibility.

The Legislature also considered (in view of the extended testimony) the views of the licensed child placement agencies that rapid determination of the rights, if any, of an unwed father to object to a relinquishment and subsequent adoption is in the best interests of the child, the relinquishing mother, and of the prospective adoptive parents. That prospective adoptive parents would assume custody of a newborn with the prospect of later having to surrender the child is questionable. That the

Legislature accomplished those goals with the passage of the act is clear. It is further clear that the problems of unwed births and adoptions are legitimate concerns of the Legislature.

In consideration of the countervailing claims of this appellee father, we must note that, until after the birth, he exhibited (at least financially) no responsibility for the child or the mother. This is not a case where he lived with the child and nurtured and supported it and the mother. Thus, his rights, as Justice Marshall observed in *Quilloin v. Walcott*, 434 U.S. 246, 256, 98 S. Ct. 549, 54 L. Ed. 2d 511 (1978), "are readily distinguishable from those of a separated or divorced father, and [we] accordingly believe that the State could permissibly give appellant less veto authority than it provides to a married father."

We are not impressed with the excuse that the appellee father did not know of the 5-day limitation. In this matter he is presumed, as are all citizens, to know the law. Statutes of limitation bar evenly the claims of the wary and the unwary and the just and the unjust.

As we have concluded that the statute as applied is not unconstitutional, the cause is remanded with directions to dismiss the application for writ of habeas corpus.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

KRIVOSHA, C.J., dissenting.

I must respectfully dissent from the majority opinion in this case. I do so because, in my view, Neb. Rev. Stat. § 43-104.02 (Reissue 1984) violates both U.S. Const. amend. XIV, § 1, and Neb. Const. art. I, § 3.

While I concede that the cases decided by the U.S. Supreme Court on this issue have not always been consistent, I believe, nevertheless, that a common thread does run throughout the cases. In my view, pulling out that common thread unravels the validity of the statute in question.

The majority opinion argues that the purpose of the act is to facilitate the adoption of children born out of wedlock. In order to facilitate adoptions the act treats fathers of children born out of wedlock differently than mothers. I believe the U.S. Supreme Court, in its various decisions, has held that

objectionable. In *Caban v. Mohammed*, 441 U.S. 380, 99 S. Ct. 1760, 60 L. Ed. 2d 297 (1979), the U.S. Supreme Court, in striking down a New York statute which granted an unwed mother the authority to block the adoption of her child simply by withholding her consent but did not give an unwed father a similar right, said at 388: "Gender-based distinctions 'must serve important governmental objectives and must be substantially related to achievement of those objectives' in order to withstand judicial scrutiny under the Equal Protection Clause." The Court went on further to say at 389: "Contrary to appellees' argument and to the apparent presumption underlying § 111, maternal and paternal roles are not invariably different in importance." The State of New York in *Caban, supra*, as is true in the instant case, argued that this cutting off of rights was critical in order to assist in bringing about adoptions. In rejecting that argument the U.S. Supreme Court said in *Caban* at 391:

> The State's interest in providing for the well-being of illegitimate children is an important one. We do not question that the best interests of such children often may require their adoption into new families who will give them the stability of a normal, two-parent home. Moreover, adoption will remove the stigma under which illegitimate children suffer. But the unquestioned right of the State to further these desirable ends by legislation is not in itself sufficient to justify the gender-based distinction of § 111. Rather, under the relevant cases applying the Equal Protection Clause it must be shown that the distinction is structured reasonably to further these ends. As we repeated in *Reed v. Reed*, 404 U.S., at 76, such a statutory "classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' [Citation omitted.]"

The *Caban* Court went on to say at 391-92:

> We find that the distinction in § 111 between unmarried mothers and unmarried fathers, as illustrated by this case, does not bear a substantial relation to the State's interest in

providing adoptive homes for its illegitimate children. It may be that, given the opportunity, some unwed fathers would prevent the adoption of their illegitimate children. This impediment to adoption usually is the result of a natural parental interest shared by both genders alike; it is not a manifestation of any profound difference between the affection and concern of mothers and fathers for their children. Neither the State nor the appellees have argued that unwed fathers are more likely to object to the adoption of their children than are unwed mothers; nor is there any self-evident reason why as a class they would be.

Similarly, in *Stanley v. Illinois*, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972), the U.S. Supreme Court declared unconstitutional an Illinois statute under which an unwed father is not included in the statutory definition of "parent" and thus is subject to being deprived of the custody of his illegitimate children by dependency proceedings in which he is not entitled to a hearing as to his fitness as a parent, but, in effect, is presumed to be unfit. In declaring the act unconstitutional the U.S. Supreme Court said in *Stanley, supra* at 656:

> Despite *Bell* and *Carrington*, it may be argued that unmarried fathers are so seldom fit that Illinois need not undergo the administrative inconvenience of inquiry in any case, including Stanley's. The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

And, further, in *Stanley* at 658 the Court said:

> The State of Illinois assumes custody of the children of married parents, divorced parents, and unmarried

> mothers only after a hearing and proof of neglect. The children of unmarried fathers, however, are declared dependent children without a hearing on parental fitness and without proof of neglect. Stanley's claim in the state courts and here is that failure to afford him a hearing on his parental qualifications while extending it to other parents denied him equal protection of the laws. We have concluded that all Illinois parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody. It follows that denying such a hearing to Stanley and those like him while granting it to other Illinois parents is inescapably contrary to the Equal Protection Clause.

While it is true that in the instant case the statute does not automatically deny the father the right to notice and hearing, nevertheless it does seek to accomplish a similar end. The statute requires that the father must, within 5 days after birth, acknowledge paternity in a narrow, limited manner, to wit, by filling out a form provided by the Department of Social Services. The father must also file the form with the Department of Social Services. In my view this statutory scheme unconstitutionally discriminates against the father.

This 5-day filing requirement is, in my view, a denial of equal protection. For a host of reasons, one may intend to acknowledge paternity, pay the hospital bills, hand out cigars, and tell the world of the birth of a child, and yet, unless the individual can find the form specifically prescribed by the Department of Social Services and cause that form to be filed, presumably in Lincoln, within 5 days after birth, if the mother unilaterally chooses to place the child for adoption, the father is forever precluded from making any claim to the child. Moreover, should the unilateral decision to permit adoption to take place occur at some later time, the father is forever barred from receiving any notice or other due process. In the instant case the putative father filed the proper document with the proper agency 9 days after birth. Yet, we forever bar his rights because the filing was 4 days late.

I recognize that attempting to chart a course that will place a marker on an appropriate cutoff date is extremely dangerous.

Nevertheless, I believe that setting a 5-day limit should be recognized by anyone as being too short. We even permit certain buyers of goods 3 days in which to rescind a purchase order. See Neb. Rev. Stat. § 69-1603 (Reissue 1981).

Furthermore, the provisions of § 43-104.02 are wholly inconsistent with other provisions of the law still in full force and effect in Nebraska. Neb. Rev. Stat. § 13-109 (Reissue 1983) provides:

> A person may state in writing that he is the father of a child or perform acts, such as furnishing of support, which reasonably indicate that he considers himself to be the father of such child, and in such case he shall be considered to have acknowledged the paternity of such child.

And Neb. Rev. Stat. § 13-102 (Reissue 1983) provides that the father of a child whose paternity is established either by judicial proceedings or by acknowledgment shall be liable for its support to the same extent and in the same manner as the father of a child born in lawful wedlock is liable for his child's support. The net effect is to say that even though the father may acknowledge in writing that he is in fact the father and thereby remain liable for the child's support, he nevertheless is not entitled to any rights insofar as the adoption of his child is concerned unless he has, within 5 days of the child's birth, made that writing on a form prescribed by the Nebraska Department of Social Services. Even then the inconsistencies do not end. While the father has but 5 days under § 43-104.02 to establish his paternity, the mother has 4 years. See Neb. Rev. Stat. § 13-111 (Reissue 1983). Even though the mother may determine not to relinquish the child for a period of 4 years and even though the father may acknowledge in writing, though not on the proper form, that he is the father, and even though he may provide support, nevertheless if the magic writing has not occurred on the prescribed form and been properly filed within 5 days of birth, all of the mother's rights continue, but the father's rights are terminated.

Even after the father's rights are so quickly terminated, the adoption may not, under Nebraska law, proceed. Before a child may be adopted, the child must reside with the adoptive parents

for at least 6 months. See Neb. Rev. Stat. § 43-109 (Reissue 1984). While, indeed, it can be argued that most adoptive parents who take a child into their home believe that, at the completion of 6 months, the adoption will become final, nevertheless the statute makes no such assurances.

It is difficult to conceive why, if the parties first married and the father then immediately left, a period of 6 months must expire before abandonment can be established, but if the parties failed to marry before the child was born and the father did not leave, after 5 days he could be denied any right.

The act under attack does not require that the father provide any support, either financially or emotionally, in order to acquire rights. All he need do is file a prescribed form within 5 days. That strikes me as being unreasonable.

The majority opinion observes that the appellee father in this case exhibited no financial responsibility for the child or the mother prior to birth. The majority observes:

> This is not a case where he lived with the child and nurtured and supported it and the mother. Thus, his rights, as Justice Marshall observed in *Quilloin v. Walcott*, 434 U.S. 246, 256, 98 S. Ct. 549, 54 L. Ed. 2d 511 (1978), "are readily distinguishable from those of a separated or divorced father, and [we] accordingly believe that the State could permissibly give appellant less veto authority than it provides to a married father."

But how can this father, or any father, under § 43-104.02, live with the child, nurture it, and support it if his rights to the child can be terminated during the time that the mother and child are in the hospital and before he is afforded any opportunity to establish those necessary ties?

In my view the provisions of § 43-104.02 do not withstand strict scrutiny. I would have affirmed the decision of the district court which found the act unconstitutional.

STATE OF NEBRASKA, APPELLEE, V. VIVIAN E. TATE, ALSO KNOWN AS VIVIAN E. JOHNSON, APPELLANT.

385 N.W.2d 456

Filed April 25, 1986. No. 85-669.

1. **Criminal Law: Forgery.** The elements of the crime of uttering a forged instrument are (1) the offering of a forged instrument with the representation by words or acts that it is true and genuine, (2) the knowledge that the same is false, forged, or counterfeited, and (3) the intent to defraud.
2. **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.
3. **Directed Verdict.** A trial court is justified in directing a verdict of not guilty only where there is a total failure of competent proof to support a material allegation in the information, or when the testimony adduced is of so weak or doubtful a character that a conviction based thereon could not be sustained.
4. **Sentences: Appeal and Error.** Information as to an alleged discriminatory sentencing not appearing in the record may not be considered by this court on appeal.
5. _____: _____. The Nebraska Supreme Court is not required to disturb on appeal an otherwise entirely appropriate sentence solely because someone else was treated more leniently.
6. _____: _____. Absent an abuse of discretion, this court will not disturb a sentence imposed within statutory limits.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Affirmed.

Thomas J. Garvey of Hascall, Jungers & Garvey, for appellant.

Robert M. Spire, Attorney General, and Laura L. Freppel, for appellee.

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

CAPORALE, J.

A jury found defendant, Vivian E. Tate, also known as Vivian E. Johnson, guilty of second degree forgery. She was thereupon so adjudged and thereafter sentenced to imprisonment for a term of not less than 3 nor more than 10 years. Subsequently, she was granted post conviction relief by being permitted to file this appeal on the ground she had been

improvidently deprived of her right to a timely direct appeal. Defendant assigns as errors to the court trying her (1) the failure of that court to dismiss the charge at the close of the State's case and (2) the sentence, claiming it to be excessive and disproportionate. The conviction and sentence being without error, we affirm.

The first assignment of error rests on the premise that since there was insufficient evidence to convict her as of the close of the State's case, the court trying the matter erred in not dismissing the case pursuant to defendant's motion at that point in the trial.

The trial evidence adduced by the State establishes that at approximately 10 a.m. on September 9, 1983, a witness saw a man enter the mailbox at the apartment of Ingrid and Del Stites in Bellevue, Nebraska. The box contained a piece of outgoing mail which included checks drawn on the Stites' account at the First National Bank of Bellevue. This man was then seen joining another man and a woman, who was wearing a bandanna on her head, in a Chevette automobile bearing license No. 1-TR282. The other man was in the driver's seat of the automobile. The witness reported the incident to the police and provided them the vehicle's license number.

At approximately 10:30 a.m. a woman wearing a bandanna on her head and driving a Chevette with the partial license No. 1-T attempted to cash a $580 check at one of the drive-in lanes of the First National Bank of Bellevue, which is located approximately 2½ blocks from the Stites' apartment. The check was drawn on the account of an Omaha attorney, was payable to the order of Ingrid Stites, and purported to have been endorsed by her. The endorsement also bore the Stites' account number.

The teller to whom the check was presented considered the presentation to be suspicious and went to a supervisor to discuss the matter. By the time the teller and supervisor returned to the teller's window, the vehicle and its occupants were gone.

At approximately that same time a Bellevue police officer saw, in the vicinity of the bank, an automobile which bore the license number and otherwise matched the description of the automobile and its occupants, as reported in connection with

the event at the Stites' apartment. The officer pursued the automobile for a short distance and stopped it. He then noticed that the occupants had changed their seating positions. The woman who had been driving was then sitting in the passenger seat, and the man who had been in the right front seat had moved over to the driver's side. The woman produced identification as Vivian Tate, and while the officer was at the automobile, removed the bandanna from her head and held it in her lap.

A search of the automobile revealed a yellow gymnasium bag containing a check embosser used to imprint amounts on checks, together with several checks belonging to an Omaha attorney on whose account the check presented to the bank was drawn. No one in the automobile claimed ownership of the bag, embosser, or checks.

While a documents examiner could not testify that defendant wrote anything on the check tendered to the bank, he did testify that the amount of the check had been embossed by the same machine which was found in the automobile.

The attorney on whose account the check was drawn testified that a number of checks had been taken from his office, that he had not written his apparent signature on the check, and that he had not authorized anyone else to sign his name to it. Moreover, he did not know Ingrid Stites.

Although no bank employee could identify defendant as the woman presenting the check, the officer who had stopped the automobile identified her as the person who had been the driver when he first saw the vehicle he later stopped.

Defendant contends that the State failed to prove a prima facie case of second degree forgery because there was no testimony positively identifying her as the person who attempted to cash the check, as the owner of the bag or its contents, or as the person who had forged the instrument.

Neb. Rev. Stat. § 28-603(1) (Reissue 1979) provides:

> Whoever, with intent to deceive or harm, falsely makes, completes, endorses, alters, or utters any written instrument which is or purports to be, or which is calculated to become or to represent if completed, a written instrument which does or may evidence, create,

transfer, terminate, or otherwise affect a legal right, interest, obligation, or status, commits forgery in the second degree.

In *State v. Addison*, 196 Neb. 768, 246 N.W.2d 213 (1976), we defined the elements of the crime of uttering a forged instrument to be (1) the offering of a forged instrument with the representation by words or acts that it is true and genuine, (2) the knowledge that the same is false, forged, or counterfeited, and (3) the intent to defraud.

It was therefore not necessary that defendant be shown to have been the owner of the check embosser or that she was the one who actually prepared the check which was presented to the bank. It was only necessary to prove that by her acts she offered a forged check as true and genuine, knowing it to be otherwise, with the intent to defraud. Although the evidence is all circumstantial, it was more than sufficient to so establish.

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. Schott, ante* p. 456, 384 N.W.2d 620 (1986); *State v. Piskorski,* 218 Neb. 543, 357 N.W.2d 206 (1984); *State v. Buchanan,* 210 Neb. 20, 312 N.W.2d 684 (1981).

A woman wearing a bandanna arrived at the bank, driving the automobile seen at the Stites' apartment. That woman presented the bank with a check which proved to be forged. While the bank teller pondered over the check, the automobile drove away. A police officer saw it driven by a woman wearing a bandanna, recognized it as the one reported seen at the Stites' apartment, and stopped it. The automobile contained checks taken from the office of the attorney on whose account the forged check was drawn. The automobile also contained the embosser which imprinted the amount on the forged check. The forged check bore the account number of the Stites' account, a number disclosed by the contents of the Stites' mailbox. Those facts more than justify a finding by a trier of fact that defendant was the person who presented to the bank a check she knew to be forged, for the purpose of obtaining money that did not belong to her, that is, with the intent to defraud. Indeed, one

would have to be more than ordinarily doltish not to so conclude.

A trial court is justified in directing a verdict of not guilty only where there is a total failure of competent proof to support a material allegation in the information, or when the testimony adduced is of so weak or doubtful a character that a conviction based thereon could not be sustained. *State v. Smith*, 219 Neb. 176, 361 N.W.2d 532 (1985). As we have seen, this is not such a case. Accordingly, the court trying defendant was correct in not sustaining her motion to dismiss.

In her second and final assignment of error, defendant claims the court trying her abused its discretion by sentencing her to a period of incarceration which is "potentially substantially more severe than the sentence imposed on a co-defendant for the same violation."

Defendant was sentenced to imprisonment for not less than 3 nor more than 10 years. Second degree forgery when the amount involved is $300 or more is a Class III felony, which carries a maximum term of imprisonment of 20 years and a minimum term of 1 year. Thus, the sentence is well within the statutory limits.

Defendant's presentence report reveals a lengthy criminal record involving theft-related charges. The court, in sentencing her, indicated that it had reviewed her record and determined that imprisonment was necessary because there was a substantial risk that she would again engage in criminal acts and because a lesser sentence would depreciate the seriousness of the crime.

Defendant complains that her sentence is excessive compared with that received by a coperpetrator. In sentencing defendant the judge mentioned that one of her coperpetrators received a prison sentence of 6 years and 6 months. That is the only mention of the coperpetrator's sentence in the record. We have before us no transcript of this individual's sentencing proceeding and no information concerning his past criminal conduct, if any. It therefore is not possible for us to compare the coperpetrator's background and prior record with those of defendant. Information as to an alleged discriminatory sentencing not appearing in the record may not be considered

by this court on appeal. *State v. Evans*, 214 Neb. 432, 334 N.W.2d 5 (1983).

More importantly, as recently reaffirmed in *State v. Whitmore*, 221 Neb. 450, 378 N.W.2d 150 (1985), this court is not required to disturb on appeal an otherwise entirely appropriate sentence solely because someone else was treated more leniently. Thus, even if defendant were sentenced more harshly than her coperpetrator, a matter which is far from certain, there was no abuse of discretion in the sentence imposed upon defendant. Absent an abuse of discretion, this court will not disturb a sentence imposed within statutory limits. *State v. Whitmore, supra.*

There being no merit to defendant's assignments of error, the conviction and sentence are affirmed.

AFFIRMED.

JOHN H. PABST, APPELLEE, V. FIRST AMERICAN DISTRIBUTING, INC., A CORPORATION, AND DENNIS KRASSER, APPELLANTS.

386 N.W.2d 422

Filed May 2, 1986. No. 84-847.

1. **Records: Appeal and Error.** Where the bill of exceptions in a case is not filed with this court as required by Neb. Ct. R. 5C(5) (rev. 1983), the judgment appealed from will be affirmed if the pleadings in the case support the judgment.
2. **Promissory Notes: Pleadings: Summary Judgment.** In an action on a promissory note in which defendants fail to plead affirmative defenses, such as lack of consideration or any other defense that would controvert the amount due, no issue of fact is presented for determination and plaintiff is entitled to summary judgment.

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

John M. DiMari of Respeliers & DiMari, for appellants.

Steven E. Guenzel of Barlow, Johnson, DeMars & Flodman, for appellee.

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

GRANT, J.

Plaintiff-appellee, John H. Pabst, brought an action in three counts against defendants-appellants, First American Distributing, Inc., a corporation, and Dennis Krasser, based on a purchase agreement and promissory note executed on September 7, 1983. After hearing, the trial court granted plaintiff's motion for summary judgment on the first count and denied such motion as to counts two and three. Defendants appeal, alleging that the court erred in granting summary judgment when an amended answer set forth in detail an affirmative defense, and in entering judgment for $9,000 when "prior to the hearing the parties entered into a written stipulation that called for payments totalling $6,500.00 in return for dismissal of the action." We affirm.

We note initially that there is no bill of exceptions filed in this court as required by Neb. Ct. R. 5C(5) (rev. 1983). Accordingly, we examine only the transcript filed in this court to determine if the pleadings therein support the judgment entered. *Snyder v. Nelson*, 213 Neb. 605, 331 N.W.2d 252 (1983).

In the first count of his petition against defendants, filed on December 27, 1983, Pabst alleged that on September 7, 1983, First American executed and delivered to Pabst a promissory note in the amount of $10,000 in connection with a purchase agreement for the sale of Pabst's business to First American. Krasser personally guaranteed the performance of the contract by First American and personally guaranteed the promissory note. The note was to be paid in nine consecutive monthly installments of $1,000, beginning on September 27, 1983. Although Pabst's petition alleged the note was for $10,000, the note itself discloses it was for $9,000, and the purchase agreement shows the total price was $10,000 with $1,000 paid down and the remainder represented by the $9,000 promissory note.

The petition further alleged that demand had been made on each defendant, that defendants were in default, and that Pabst had elected to declare the note due and the outstanding balance of $9,000 payable at once, as authorized by the terms of the

note.

On February 21, 1984, defendants filed their answer generally denying the allegations of the petition.

On March 20, 1984, Pabst served on defendants a request for admission of facts and genuineness of documents. In that request Pabst sought defendants' admissions that Krasser had personally guaranteed the note and that Pabst had demanded payment of the note from defendants. On May 9, 1984, Pabst filed a motion for summary judgment based in part on defendants' failure to respond to Pabst's request for admissions. On May 18, 1984, defendants filed their answers to Pabst's request. In those answers defendants admitted the facts set out above.

No hearing was held on Pabst's summary judgment motion. On June 1, 1984, all parties entered into a stipulation in which defendants acknowledged they owed $6,500 to Pabst, agreed to pay that sum to Pabst on or before June 21, 1984, and agreed that if defendants did not so pay, the stipulation could be used as a confession of judgment in the amount of $6,500. Pabst agreed to dismiss the suit if that payment were made.

No payment was made pursuant to this stipulation. On August 1, 1984, Pabst filed a second motion for summary judgment. In that motion Pabst stated the above stipulation had been entered into but that since no payments had been made he elected to repudiate that compromise, and sought judgment in the original amount of $9,000. This motion was set for hearing on August 27, 1984. On August 28, 1984, defendants filed an amended answer to Pabst's petition. This amended answer generally denied the allegations of the petition and, for the first time, alleged an affirmative defense "that there was a failure of consideration . . . for any note alleged to be executed" by defendants.

On October 2, 1984, the trial court entered its order reciting that the matter came on for hearing on August 27, 1984, and granted Pabst's motion for summary judgment as to the promissory note and denied the motion as to the second and third causes of action. The trial court entered judgment in favor of Pabst and against defendants "in the sum of $9,000.00, together with interest at the legal rate from and after October 7,

1983."

The pleadings clearly support the judgment as entered. An affirmative defense was raised by an answer filed the day after the summary judgment was submitted. Such a filing is a nullity insofar as prior proceedings are concerned. The case was properly considered to be submitted on plaintiff's petition and defendants' general denial. The petition alleged that a copy of the note was attached and the signature of defendants was admitted. In an action on a promissory note in which defendants fail to plead affirmative defenses, such as lack of consideration or any other defense that would controvert the amount due, no issue of fact is presented for determination and plaintiff is entitled to summary judgment. *Center Bank v. Mid-Continent Meats, Inc.*, 194 Neb. 665, 234 N.W.2d 902 (1975); *Columbus Bank & Trust Co. v. High Country Stable*, 202 Neb. 724, 277 N.W.2d 81 (1979). Summary judgment was properly granted to plaintiff.

With regard to appellants' second assignment of error, they seem to claim the right to use an instrument they refused to comply with. Pabst had the right to choose not to be bound by an offer of settlement not complied with.

The judgment is affirmed.

AFFIRMED.

STAUFFER SEEDS, INC., A MINNESOTA CORPORATION, APPELLANT, V. NEBRASKA SECURITY BANK, DESHLER, NEBRASKA, A NEBRASKA CORPORATION, APPELLEE.

386 N.W.2d 2

Filed May 2, 1986. No. 84-916.

1. **Uniform Commercial Code: Banks and Banking: Negotiable Instruments: Waiver.** The statutory rule that a payor bank is accountable for a demand item presented to it and not settled for, paid, returned, or a notice of dishonor sent before the midnight deadline may be varied or waived by agreement. Neb. U.C.C. §§ 4-302, 4-103 (Reissue 1980).
2. **Banks and Banking: Debtors and Creditors.** A bank may set off the funds of a depositor to pay a debt due the bank from the depositor.

Appeal from the District Court for Thayer County: ORVILLE L. COADY, Judge. Affirmed.

Gerald D. Warren of Whitney, Newman, Mersch, Otto & Warren, for appellant.

Joseph H. Murray of Germer, Koenig, Murray, Johnson & Daley, for appellee.

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

BOSLAUGH, J.

This case arises out of a dispute concerning a check in the amount of $10,000 drawn on the account of Larry Heinrichs in the defendant, Nebraska Security Bank, and payable to the plaintiff, Stauffer Seeds, Inc.

The plaintiff deposited the check in its bank, Farmers State Bank & Trust Co. It was received by the defendant in a federal cash letter on or about December 31, 1982. Since the funds in the Heinrichs account were insufficient to pay the check, it was marked "insufficient funds" and returned to the plaintiff's bank on January 3, 1983, the next business day.

The depositary bank then resubmitted the check by mailing it directly to the defendant, accompanied by a notice instructing the defendant to handle the check for collection. The notice sent with the resubmitted check contained the following language. In the upper left-hand corner there was an "X" typed in front of the statement "WE ENCLOSE THE FOLLOWING ITEM(S) FOR COLLECTION AND RETURNS WHEN ACTUALLY PAID." In a box entitled "DUE," the collecting bank had typed "Sôght [sic]," and under "SPECIAL INSTRUCTIONS," the statement "Please remit by your draft" was typed.

On January 6, 1983, the defendant bank received the resubmitted check together with the depositary bank's instructions. On January 7, 1983, a deposit was made to the account of Larry Heinrichs in the amount of $29,766.65. At that time Heinrichs was indebted to the defendant for a sum in excess of $200,000. Upon receipt of the deposit the defendant bank exercised its right of setoff to the entire sum deposited.

On February 1, 1983, the defendant closed the Heinrichs

account, marked the collection letter "insufficient funds," and returned it to the plaintiff's bank.

The plaintiff commenced this action to recover the amount of the check. The trial court found that the case was controlled by our decision in *Idaho Forest Industries, Inc. v. Minden Exch. Bank & Trust Co.*, 212 Neb. 820, 326 N.W.2d 176 (1982), and entered judgment for the defendant. The plaintiff has appealed.

The plaintiff's theory of the case is that the defendant bank was accountable under Neb. U.C.C. § 4-302 (Reissue 1980) for violation of the midnight deadline rule after the check had been resubmitted and because a deposit sufficient to cover the check had been made after the defendant had received the resubmitted check. The plaintiff contends the trial court erred in finding (1) that the midnight deadline rule did not apply, (2) that the language on the notice sent with the re-presented check came within the direction of the decision in *Idaho Forest Industries, supra*, (3) that the re-presented check was not a demand item, and (4) that the defendant bank acted in good faith when it exercised its right of setoff in favor of a third party while failing to pay plaintiff's check which was being held when a sufficient deposit was made.

A check returned for insufficient funds can be re-presented to the payor bank and upon such re-presentment is still a demand item subject to the midnight deadline rule. See *Graubart v Bank Leumi Trust*, 48 N.Y.2d 554, 399 N.E.2d 930, 423 N.Y.S.2d 899 (1979). See, generally, Annot., 22 A.L.R.4th 10 (1983). However, the provisions of the U.C.C., including the midnight deadline rule, may be modified by agreement of the parties. Neb. U.C.C. § 4-103 (Reissue 1980). See *Graubart, supra*.

In *Idaho Forest Industries, supra*, the issue was whether the defendant bank was strictly liable for violating the midnight deadline rule by following the instructions on a collection memorandum sent to the payor bank with a previously returned check. We held that the defendant bank was not liable because the midnight deadline rule had been waived by agreement of the parties. The agreement consisted of the instruction memorandum which accompanied the re-presented

item and stated, "Hold 10 days if necessary"; "Deliver documents only on payment"; and "Advise nonpayment by mail." *Idaho Forest Industries, supra* at 821, 326 N.W.2d at 177.

We relied on *Western Air & Refrigeration v. Metro Bank of Dallas*, 599 F.2d 83 (5th Cir. 1979), and *Graubart, supra*, cases in which the midnight deadline rule had been suspended by agreement of the parties. The language on the notice in the present case is nearly identical to that on the instruction memo accompanying the re-presented item in the *Graubart* case. Both notices or memos indicate that the item is to be returned "when paid" and direct how the funds are to be remitted after the check has been paid.

The *Idaho Forest Industries* case is controlling so far as the plaintiff's first contention is concerned. The defendant bank cannot be held accountable under § 4-302 for the amount of the re-presented check because the midnight deadline rule was waived by the language on the notice instructing the defendant bank as to the handling of the resubmitted check.

The plaintiff's other contention is that the defendant should be held accountable for lack of good faith and exercise of ordinary care. The plaintiff contends there is evidence of bad faith because the defendant bank debited the Heinrichs account in favor of a third party while failing to pay the plaintiff's check which was then being held. However, the evidence is uncontroverted that the defendant bank in fact set off the entire sum of the January 7 deposit. Then, after having exercised its right of setoff, the bank gave a portion of the proceeds to a third party. The parties stipulated,

> That on January 7, 1983 a withdrawal from that account was made by The Nebraska Security Bank in the amount of $29,766.65 and of that amount $14,883.33 was paid to The Nebraska Security Bank to reduce indebtedness of Larry Heinrichs and $14,883.32 was paid to Superior Deshler, all as accurately reflected by a true and correct copy of a debit memo which is attached hereto as Exhibit "E" and made a part hereof by this reference.

There was some evidence that the $29,766.65 check represented proceeds from a corn crop upon which

Superior-Deshler Company held a lien for fertilizer supplied to Heinrichs.

A bank may set off the funds of a depositor to pay a debt due the bank from the depositor. Neb. U.C.C. § 4-303 (Reissue 1980); *State, ex rel. Davis, v. Farmers & Merchants Bank*, 114 Neb. 378, 207 N.W. 666 (1926).

The issue here is who had priority as between the parties to this lawsuit with respect to the deposit made to the Heinrichs account. Resolution of this issue does not depend upon the propriety of the defendant's actions following the setoff or the rights of a third party not a party to this action.

The plaintiff concedes that "[w]hether or not that exercise of set off [was] appropriate is not disputed by the Plaintiff." Brief for Appellant at 18. There is no evidence that the defendant bank violated any U.C.C. priority rules as to the prescribed order in which items may be charged or certified. See § 4-303. Nor is there evidence that the failure to pay the re-presented check upon sufficient deposit, in and of itself, constituted bad faith.

The judgment of the district court was correct, and it is affirmed.

AFFIRMED.

WHITE, J., concurring.

Nebraska Security Bank, like all banks in this state, maintains a debtor-creditor relationship with its depositors. A bank's contract with its depositor drawer is to pay all items that are "properly payable." Neb. U.C.C. § 4-401 (Reissue 1980). Upon breach of this obligation a bank's liability runs to its customer. Neb. U.C.C. § 4-402 (Reissue 1980).

A bank has no obligation to a payee or other holder unless the bank "signs" the check, either by acceptance or certification. Neb. U.C.C. § 3-401(1) (Reissue 1980) ("No person is liable on an instrument unless his signature appears thereon"). Absent special circumstances not present in this case, a check is not an assignment to the payee of the debt owed by the bank. Neb. U.C.C. § 3-409 (Reissue 1980). *Atlantic Cement Co. v. South Shore Bank*, 730 F.2d 831 (1st Cir. 1984). This is so even if the depositor and payee arrange by contract to have the check operate as an assignment, if the bank has no

knowledge of the agreement. Even with such knowledge, a bank's duties to a third party are derived only from its duties to the depositor, and any claim a third party might have against the bank is subject to the bank's claims against the depositor. *People's Nat. Bank v. Swift*, 134 Tenn. 175, 183 S.W. 725 (1915).

In this case Nebraska Security Bank never accepted or certified the check held by Stauffer Seeds. After Heinrichs deposited $29,766.65 in his account on January 7, 1983, Nebraska Security properly exercised its right of setoff. At no point in the transactions did a duty on the bank's part arise to Stauffer Seeds, the payee of the dishonored check. Nothing in the Uniform Commercial Code prevented the bank from then transferring its funds to the third-party lienholder.

SHANAHAN, J., joins in this concurrence.

BENARD SMITH, APPELLANT, V. RONALD E. SORENSEN, COMMISSIONER OF LABOR, STATE OF NEBRASKA, AND CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLEES.

386 N.W.2d 5

Filed May 2, 1986. No. 84-940.

1. **Employment Security Law: Appeal and Error.** Appeals to this court under the provisions of the Nebraska Employment Security Law, Neb. Rev. Stat. §§ 48-601 to 48-669 (Reissue 1984), are reviewed de novo on the record.
2. **Employment Security Law: Words and Phrases.** "Misconduct" under Neb. Rev. Stat. § 48-628(b) (Cum. Supp. 1982) is defined as " 'behavior which evidences (1) wanton and willful disregard of the employer's interests, (2) deliberate violation of rules, (3) disregard of standards of behavior which the employer can rightfully expect from the employee, or (4) negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard of the employer's interests or of the employee's duties and obligations.' " *McCorison v. City of Lincoln*, 215 Neb. 474, 476, 339 N.W.2d 294, 295-96 (1983).
3. **Employment Security Law.** The falsifying of entries by an employee on his employer's work records constitutes "misconduct" under Neb. Rev. Stat. § 48-628(b) (Cum. Supp. 1982).
4. _____. In order for a violation of an employer's work rule to constitute

"misconduct," it is necessary that the rule be a reasonable one.

5. **Employment Security Law: Labor and Labor Relations.** As a general rule, a labor contract is irrelevant to the determination of what constitutes "misconduct" under the Nebraska Employment Security Law, Neb. Rev. Stat. §§ 48-601 to 48-669 (Reissue 1984).

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

Sheri E. Long, for appellant.

Paul D. Kratz, for appellee Sorensen.

Herbert M. Fitle, Omaha City Attorney, and Kent N. Whinnery, for appellee City of Omaha.

BOSLAUGH, CAPORALE, SHANAHAN, and GRANT, JJ., and BRODKEY, J., Retired.

BRODKEY, J., Retired.

Benard Smith appeals from an order of the district court for Douglas County affirming a decision of the Nebraska Department of Labor Appeal Tribunal, which affirmed a decision of the Nebraska Department of Labor, division of employment, which had ordered a 9-week reduction in Smith's unemployment benefits. Smith's unemployment was caused by his dismissal from the public works department of the City of Omaha, which dismissal was affirmed by the personnel board of the City of Omaha. We affirm the district court's order.

By way of background, it appears that Smith commenced working for the City of Omaha in 1963, and his most recent position with the city was that of a semiskilled laborer. His duties included the inspection, repair, and replacement of road barricades. It was Smith's duty to keep certain records in connection with his employment, including a logsheet indicating his activity during working hours and a book indicating where barricades had been placed and which barricades had been repaired.

During November 1982, it appears that Smith's supervisors had received numerous complaints concerning the frequent parking of the truck used by Smith at a 27th Street address, during working hours, for periods of 15 to 45 minutes. These stops were not recorded on Smith's records. On November 29,

1982, Smith's immediate supervisor and the city's assistant traffic engineer followed Smith for 3 1/2 hours. Smith's activities during this period did not conform to his notations on his logsheet. As a result, he was terminated for falsifying city records. This termination, however, was later reduced to a 6-day suspension. The assistant traffic engineer testified that at that time he warned Smith that further failure to make correct entries on his logsheet could result in the termination of his employment.

Smith's employer continued to receive complaints about Smith, however, and therefore the assistant traffic engineer again followed Smith, on December 29, 1982. Smith had again parked at the 27th Street address, but Smith's logsheet for that evening listed no entries for over 2 hours which included the period in question. On January 30, 1983, the city's labor relations director followed Smith and found that he made no work stops during a period of time for which Smith's records showed four work stops.

In addition, evidence revealed that on January 25, 1983, Smith attempted to collect a personal debt during his working hours, but his logsheet did not reflect this stop.

Smith was subsequently terminated following a suspension, such dismissal being for "falsifying city records" and "offensive conduct toward the public." *Smith v. City of Omaha*, 220 Neb. 217, 369 N.W.2d 67 (1985). It appears that according to the collective bargaining agreement between the City of Omaha and Smith's union, both "falsifying city records" and "offensive conduct toward the public" are grounds for dismissal. Smith, it appears, appealed to the City of Omaha's personnel board, which affirmed his termination.

In April 1983 the Nebraska Department of Labor, division of employment, notified Smith that he would not receive unemployment benefits for a 9-week period because he conducted personal business on company time and did not perform according to standards rightly expected of him by the city. Smith then appealed to the Nebraska Appeal Tribunal, Department of Labor. The issue in that appeal was whether there was sufficient evidence to disqualify Smith from 9 weeks' unemployment benefits pursuant to Neb. Rev. Stat.

§ 48-628(b) (Cum. Supp. 1982). Section 48-628(b) of the Nebraska Employment Security Law provides that one shall be disqualified for receiving benefits for "the week in which he or she has been discharged for misconduct connected with his or her work . . . for not less than seven weeks nor more than ten weeks which immediately follow such week, as determined by the commissioner . . . according to the seriousness of the misconduct . . . ." The appeal tribunal affirmed the Department of Labor's decision, reasoning that under the Employment Security Law, the 9-week disqualification was proper because Smith was guilty of "misconduct," having deliberately disregarded the standards of behavior which the city, as his employer, had a right to expect.

Smith then appealed to the district court on the basis that his "misconduct, if any, was not a willful, deliberate disregard of the employer's best interests or of the standards of behavior which the employer [had] a right to expect of its employees." The district court affirmed the Nebraska Appeal Tribunal's decision.

The appeal to this court then followed. Two issues are raised: (1) Whether Smith was guilty of the "misconduct" required to invoke § 48-628(b); and (2) Whether the district court erred in finding that the labor agreement was irrelevant to the State's determination of the issue of misconduct. As previously noted above, this court has previously reviewed the basic facts of this case; and in doing so, held that the city had the authority to discharge Smith for whatever reason it chose. *Smith v. City of Omaha, supra*. It appears to be the general rule that state legislatures possess the power to determine procedures to be followed in appealing actions arising under *unemployment* laws. See 81 C.J.S. *Social Security* § 157 (1977). Under the Nebraska statutes, appeals to this court under the provisions of the Employment Security Law are reviewed de novo on the record (Neb. Rev. Stat. §§ 48-601 to 48-669 (Reissue 1984)). It is therefore clear that the scope of review in cases such as this is to "retry the issues of fact involved in the findings complained of and reach an independent conclusion thereof." *Snyder Industries, Inc. v. Otto*, 212 Neb. 40, 44, 321 N.W.2d 77, 80 (1982). See, also, *Stuart v. Omaha Porkers*, 213 Neb. 838, 331

N.W.2d 544 (1983); *Heimsoth v. Kellwood Co.*, 211 Neb. 167, 318 N.W.2d 1 (1982); § 48-640 (Supp. 1985).

It is necessary to first determine whether Smith was guilty of "misconduct" as that term is used in § 48-628(b). The Employment Security Law does not define the term "misconduct." When an unemployment compensation statute neglects to define a specific term, it then becomes necessary to resort to judicial interpretation of that term. 81 C.J.S., *supra* § 158. Our court has frequently and consistently defined the term "misconduct" as it appears in § 48-628(b). In *McCorison v. City of Lincoln*, 215 Neb. 474, 475-76, 339 N.W.2d 294, 295-96 (1983), we stated:

> We have previously defined misconduct as referred to in § 48-628(b). Specifically, in *Stuart v. Omaha Porkers*, 213 Neb. 838, 840, 331 N.W.2d 544, 546 (1983), we recently said: "While the term 'misconduct' is not specifically defined in the statute, it has generally been defined to include behavior which evidences (1) wanton and willful disregard of the employer's interests, (2) deliberate violation of rules, (3) disregard of standards of behavior which the employer can rightfully expect from the employee, or (4) negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard of the employer's interests or of the employee's duties and obligations." See, also, *Snyder Industries, Inc. v. Otto*, 212 Neb. 40, 321 N.W.2d 77 (1982); *Bristol v. Hanlon*, 210 Neb. 37, 312 N.W.2d 694 (1981).

We conclude that the findings of the Nebraska Department of Labor that Smith failed to perform according to standards rightfully to be expected of him by his employer, the City of Omaha, were correct. Moreover, we agree with the appeal tribunal that Smith deliberately disregarded those standards and therefore is guilty of "misconduct" under § 48-628(b). We agree that what conduct constitutes "misconduct" in a given case is a fact question. Generally, a single act is not sufficient to fall within the definition of "misconduct"; nor is a series of acts, for example, if the employer tolerated those actions without warning the employee of possible consequences. See 81 C.J.S., *supra* § 224. While there do not appear to be any

Nebraska cases squarely on point from a factual standpoint, nevertheless it appears that cases from other jurisdictions have been based upon very similar facts and support our decision in this case. For example, in *Raiskin Unempl. Compensation Case*, 202 Pa. Super. 60, 195 A.2d 147 (1963), an employee was found to have breached her duty to her employer for purposes of the Pennsylvania Unemployment Compensation Law. The employee did so by her failure to comply with office procedures and work hours, as well as her failure to correct her infractions pursuant to her employer's warning. In *Sopko Unempl. Compensation Case*, 168 Pa. Super. 625, 82 A.2d 598 (1951), the court explained that "willful misconduct" under the same Pennsylvania statute interpreted in the *Raiskin* case is readily constituted by the "inexcusable and unexplained failure, neglect, or refusal of claimant to perform the duties assigned to him, especially where he had been warned relative to his conduct by his employer . . . ." *Sopko, supra* at 628, 82 A.2d at 599. Applying the above interpretations of "willful misconduct" to the present case, it is clear that Smith's numerous incidents of falsifying entries on his logsheets, even after receiving two warnings and one suspension for the same infraction, clearly constitute "misconduct" under § 48-628(b).

Smith contends that his limited reading ability, a result of his attaining only a fifth-grade education level, as well as a visual impairment, renders his misconduct, if any exists, unintentional. We reject this contention, however, and agree with the appeal tribunal that Smith knew enough to request the assistance of others when he needed to read or understand things and that the record did not indicate that Smith had difficulty distinguishing between right and wrong. In fact, we note that Smith possessed reading and writing abilities sufficient to note locations on his logsheet which he never even visited, as least at the times noted.

We have required that in order for a violation of an employer's rules to constitute misconduct, it is necessary that the rule be a reasonable one. In other words, the rule must " 'bear a reasonable relationship to the employer's interests . . . .' " *Snyder Industries, Inc. v. Otto,* 212 Neb. 40, 43-44, 321 N.W.2d 77, 80, quoting *Gregory v. Anderson,* 14 Wis. 2d 130,

109 N.W.2d 675 (1961). Certainly, accurate recordkeeping by a municipal employee who is required to document frequent work stops and the work accomplished during those stops bear a reasonable relationship to the interests of the employer, the city public works department.

We believe the labor contract is irrelevant to the determination of the existence of misconduct, as it appears that, generally, private labor agreements may not render an unemployment compensation law ineffectual. See, *Gianfelice Unempl. Compensation Case*, 396 Pa. 545, 153 A.2d 906 (1959); *Soricelli v. Board of Review, &c.*, 46 N.J. Super. 299, 134 A.2d 723 (1957). This conclusion is inferentially supported in Nebraska by *Strauss v. Square D Co.*, 201 Neb. 571, 270 N.W.2d 917 (1978). In *Strauss* the use of a collective bargaining agreement was not permitted to determine whether an employee was guilty of misconduct under § 48-628(b). However, the agreement was used to determine whether the employer violated the applicable employment rule.

A review of the record convinces us that the evidence supporting the determination that Smith's actions constituted misconduct is supported not merely by "competent evidence" but, rather, by overwhelming evidence, and we therefore affirm the action of the district court.

AFFIRMED.

STEVEN R. NEWTON ET AL., APPELLEES, V. LESLIE T. BROWN ET AL., APPELLANTS, AND THE FEDERAL LAND BANK OF OMAHA, APPELLEE.

386 N.W.2d 424

Filed May 2, 1986. No. 85-071.

1. **Equity: Reformation: Intent.** Equitable relief by reformation depends on whether an instrument to be reformed expresses the intent of the parties. The remedy of reformation is designed to correct an erroneous instrument and, by such correction, reflect the real intent of the parties regarding that instrument.
2. **Reformation.** Reformation is based on the premise that the parties had reached

an agreement concerning an instrument, but while reducing their agreement to a written form, and as the result of mutual mistake or fraud, some provision or language was omitted from, inserted, or incorrectly stated in the instrument intended to be an expression of the actual agreement of the parties.

3. **Reformation: Evidence: Proof.** Before reformation of an instrument will be allowed, the party seeking such reformation on a claim of mutual mistake must, by clear and convincing evidence, prove existence of such mistake in reference to the instrument to be reformed.
4. **Evidence: Words and Phrases.** Clear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of the fact to be proved.
5. **Reformation: Words and Phrases.** A mutual mistake is a belief shared by the parties, which is not in accord with the facts. A mutual mistake is one common to both parties in reference to the instrument to be reformed, each party laboring under the same misconception about their instrument.
6. **Reformation: Intent.** If incorrect language or wording is inserted by mistake, including a scrivener's mistake, into an instrument intended to reflect the agreement of the parties, such mistake is mutual and contrary to the real intention and agreement of the parties.
7. _____: _____. An erroneous omission or deletion, even by a scrivener, from an instrument intended to reflect the agreement of the parties is a mutual mistake and is contrary to the real intention and agreement of the parties.
8. **Reformation: Limitations of Actions.** The statute of limitations for reformation of an instrument, as prescribed by Neb. Rev. Stat. § 25-207 (Reissue 1979), contains a discovery rule.
9. **Deeds: Merger: Fraud.** Upon the execution, delivery, and acceptance of an unambiguous deed, such being the final acts of the parties expressing the terms of their agreement with reference to the subject matter, all prior negotiations and agreements are deemed merged therein. The doctrine of merger does not apply where there has been fraud or mistake.
10. **Equity: Interest.** Interest is sometimes allowed by courts of equity, in the exercise of a sound discretion, when interest would not be recoverable at law. A court of equity, in its discretion, may allow interest when, under all the circumstances of a case, assessment of interest is equitable and just. As compensation to the one who has been deprived of the use of money, interest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness.
11. **Trial: Appeal and Error.** A judicial abuse of discretion does not denote or imply improper motive, bad faith, or intentional wrong by a judge, but requires the reasons or ruling of a trial judge to be clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition through a judicial system.

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

Bert E. Blackwell, for appellants.

William T. Wright of Parker, Grossart, Bahensky & Wright, for appellees Newton et al.

BOSLAUGH, CAPORALE, SHANAHAN, and GRANT, JJ., and BRODKEY, J., Retired.

SHANAHAN, J.

Leslie and Anna Brown appeal the judgment of the district court for Red Willow County, reforming their deed to the north half of Section 22, Township 2 North, Range 28 West of the 6th P.M., in Red Willow County, Nebraska, to conform with a contract for the sale of that real estate. We affirm.

A proceeding to reform a written instrument is an equity action. *Hohneke v. Ferguson*, 196 Neb. 505, 244 N.W.2d 70 (1976). On appeal to the Supreme Court, an equity action is a trial de novo on the record, requiring this court to reach a conclusion independent of the findings of a trial court but subject to the rule that, where credible evidence is in conflict on material issues of fact, the Supreme Court will consider the fact that the trial court observed the witnesses and accepted one version of the facts over another. See, Neb. Rev. Stat. § 25-1925 (Reissue 1979); *In re Estate of Lienemann, ante* p. 169, 382 N.W.2d 595 (1986).

Originally, Marie Esch owned the half section described in Brown's reformed deed, which was subject to a lease for oil and gas production. According to the producers' unit agreement for Section 22, there were four producing oil wells on Marie's half section. Marie's son-in-law, Herbert Newton, farmed the land as her tenant. In 1970 Herbert and his wife, Betty, sold their south half of Section 22, adjacent to Marie's half section, to Leslie and Anna Brown but reserved the mineral rights on that half section until 1977. Herbert and his family moved to Indiana in 1971. Marie died in 1972. Each of Herbert's three children—Steven E. Newton, Diana Newton Norman, and Regina C. Newton—inherited an undivided one-third interest in their grandmother Marie's half section. Because Regina's age was then 5 years, Herbert became guardian for Regina. Herbert managed his children's inherited half section, which was thereafter leased to the defendant Leslie Brown. When Brown became the Newton children's tenant, oil wells were still

producing on the half section, and Brown knew the Newton children were receiving royalties from oil companies as mineral lessees. For oil production on their half section, the children monthly received two royalty checks, one from Husky Oil and the other from Koch Oil Company.

Herbert periodically inspected his children's farm in Nebraska. On one such occasion, in the fall of 1975 at the McCook sale barn, Herbert visited with Leslie Brown about Brown's possible purchase of the children's farm, but no terms for a sale were reached. When he was back home in Indiana, Herbert telephoned Brown in January 1976 concerning a possible sale of the children's half section. Herbert suggested a price of $155,000 but told Brown "[n]o oil or mineral or gas rights would go with it [the children's half section]; that was the desire of their grandmother that [sic] would never be sold." Brown said he would "think it over."

During a March visit to Nebraska, Herbert met Brown and his wife, Anna, at a McCook restaurant, where the Browns and Herbert agreed, generally, on terms for a sale of the children's land. After Herbert had contacted his son, Steven, and his daughter, Diana, who lived in Kearney, all parties convened on the morning of March 30, 1976, in the office of Herbert's attorney. While the attorney was reading aloud a proposed and typed draft of the contract, namely, a provision that the "sellers reserve all oil, gas, mineral rights in or under the ground as long as production exists," Anna Brown remarked: "I don't like that in or under the ground." Anna Brown further commented: "If we were to drill an irrigation well, we would have to pay those kids for the water." The attorney reassured Anna that the reservation did not relate to water of the tract being acquired, but Anna stated that she would not sign any contract, unless the phrase "or under the ground" was deleted.

The attorney directed his secretary to retype the contractual provision regarding the mineral reservation, the phrase "or under the ground" was deleted, and the retyped contract contained the following:

RESERVATIONS

> The sellers expressly reserve unto themselves all of the oil, gas and mineral interests in said real estate as long as

production exists.

The parties, including Herbert, as guardian for Regina, signed the revised contract which, among its other terms, specified a purchase price of $155,000, namely, $65,000 to be paid as soon as Browns obtained a loan from the federal land bank; $60,000 due on September 1, 1976; and $30,000 as a final installment payment of the purchase price. Immediately after signing the revised contract and as provided in that written agreement, Herbert, again as guardian for Regina, and the Newton children executed a warranty deed for conveyance of the children's half section to the Browns. The deed did not contain any reservation of mineral interests. When they signed the contract and, subsequently, the deed, the parties never noticed the discrepancy between the contract and the deed, that is, omission of the mineral reservation from the deed. The attorney informed the parties that the signed contract and executed deed would be kept in escrow at a McCook bank pending payment out of proceeds received by Browns from their federal land bank loan. Neither Herbert nor his children received a copy of the contract and deed. On June 10, 1976, Browns obtained a loan from the federal land bank, made a part payment to the Newtons from such loan proceeds, and received their deed to the Newton children's half section. Also, Browns gave Newtons a real estate mortgage as collateral for the unpaid balance of the purchase price, which mortgage was subordinated to the federal land bank mortgage and was due in September 1982. Browns recorded their deed on July 1, 1976.

Husky Oil and Koch Oil Company continued to issue monthly checks to the Newton children in payment of royalties from the producing wells on the half section acquired by Browns. Regina's royalty payments were placed in certificates of deposit at a minimum annual rate of interest at 10.5 percent, while royalties paid to Diana were placed in a "cash management fund" paying interest at a minimum rate of 10 percent per annum. Browns farmed the half section after their acquisition in 1976 and on September 1, 1982, made their last payment for the Newton land. On February 10, 1983, the attorney who had prepared the contract and deed on March 30, 1976, died.

In early March 1983 Steven, who had moved to Kansas, contacted a Kansas bank to obtain a loan for which his oil royalties from the half section would be collateral. The bank balked at accepting Steven's royalty payments as collateral because the deed given to Browns did not contain any mineral reservation in favor of Steven or his sisters. Steven telephoned Herbert about the omission of any mineral reservation in the Brown deed. Steven also contacted Browns about the mineral reservation discrepancy involving the contract and deed, and sought a quitclaim deed from Browns regarding the mineral interests on the half section. Browns declined to sign that quitclaim deed. Herbert returned to Nebraska in an attempt to correct the situation. On March 15 Browns' attorney, by letter to Koch Oil Company, demanded that future payment of royalties be made directly to Browns. In response to that letter Koch Oil Company, in March 1983, suspended all payment of royalties "until such time as the dispute between the various parties is resolved." From 1976 to March 1983 the wells on the half section produced 1,328,410 barrels of oil (a barrel equals 42 gallons), and Koch Oil Company paid royalties of $108,364 to the Newton children. Between September 1, 1982, and March 1983, there were 72,381 barrels pumped from the half section, resulting in royalty payments of $14,308 to the Newton children.

Later in 1983, Herbert as guardian for Regina, Steven, and Diana filed suit against Browns, seeking that the warranty deed to Browns be reformed to include the mineral reservation contained in the March 30, 1976, contract of sale, which reservation had been omitted through alleged mutual mistake of the parties. As a second cause of action in their petition, Herbert and his children requested that Browns be charged with interest on account of Browns' action in causing suspension of royalty payments from Koch Oil Company. In their amended answer the Browns acknowledged execution of the March 30, 1976, contract and deed, but denied any mistake in the deed given by the Newton children. As an affirmative defense, Browns alleged that the statute of limitations, Neb. Rev. Stat. § 25-207 (Reissue 1979), barred the remedy of reformation.

George Fisher, a "terrible good friend" of Leslie Brown and

87 years old, testified for the Newton family. Sometime before Brown had purchased the half section from the Newton children, Fisher had sold a farm to Brown. In "kidding" with Brown during a conversation within a few months after the Newton sale in 1976, Fisher said that Brown had "treated [the Newton children] a little better than you did me," referring to the fact that, in the Fisher-Brown sale, Fisher retained only one-half of the mineral rights. In response, Brown stated that, while he had been renting from the Newtons, he had known the Newton children were receiving royalties and that as a part of the sale to Brown "[the Newton children] keep all of the mineral rights; they kept it all." In another and subsequent conversation, Brown mentioned to Fisher, "I'll never get the oil, any oil on it. They kept it as long as there is any oil . . . . The kids kept their oil as long as there was any oil there for production."

In the course of his testimony, Leslie Brown admitted that his first notice of any discrepancy between the contract and the deed came from Steven Newton in March 1983. In reference to the sale from the Newton children, Leslie Brown testified "the Newton children would keep the mineral rights for as long as production existed" and that in acquiring the children's half section, Brown was interested in a "place to live. I wasn't interested in the oil."

Anna Brown testified that her notice of the discrepancy between the contract and deed came from Steven Newton in 1983 and acknowledged that Herbert Newton's attorney "may have" changed the "wording of the clause," referring to the mineral reservation contained in the initial draft of the contract on March 30, 1976. Leslie and Anna Brown testified that they believed all mineral rights became theirs when the warranty deed was delivered to them.

Payment of royalties suspended by Koch Oil Company from March 1983 until trial in September 1984 were $41,480 for the half section Browns acquired from the Newton children.

The district court concluded that when the contract and deed were signed on March 30, 1976, it was the intention of the parties that the "sellers would reserve unto themselves the oil, gas and mineral rights in [the half section] as long as production

exists" and "the intention of the parties was correctly expressed in the contract but through an error and oversight of the scrivener was not correctly expressed in the deed." The court entered judgment reforming the deed, namely, that the deed "be reformed to contain the following reservation: 'Sellers expressly reserve unto themselves all of the oil, gas, and mineral interests in said real estate as long as production exists.' " Additionally, the district court, in view of its disposition by reformation, entered judgment that the "Plaintiffs have been deprived of the use of the oil royalty money from Koch Oil Company" and ordered Browns to pay $789.98 to each of the Newton children as interest on the suspended and unpaid royalties.

Browns allege the district court erred in (1) granting reformation and (2) awarding interest on unpaid royalties from Koch Oil Company.

Equitable relief by reformation depends on whether an instrument to be reformed expresses the intent of the parties. The remedy of reformation is designed to correct an erroneous instrument and, by such correction, reflect the real intent of the parties regarding that instrument. See *Waite v. Salestrom*, 201 Neb. 224, 266 N.W.2d 908 (1978). In situations involving a sale, an equitable proceeding to reform an instrument, such as a written contract for sale of real estate, serves to recover for a seller something "from which [the seller] did not intend to be parted." 6A. R. Powell, The Law of Real Property ¶ 894 at 81-115 (1984).

Reformation is based on the premise that the parties had reached an agreement concerning an instrument, but while reducing their agreement to a written form, and as the result of mutual mistake or fraud, some provision or language was omitted from, inserted, or incorrectly stated in the instrument intended to be an expression of the actual agreement of the parties. See, *Schweitz v. State Farm Fire & Cas. Co.*, 190 Neb. 400, 208 N.W.2d 664 (1973); Restatement (Second) of Contracts § 155 (1981). In some instances reformation may be granted where there is unilateral mistake on one side and fraud or inequitable conduct on the other. See, *Johnson v. Stover*, 218 Neb. 250, 354 N.W.2d 142 (1984); *Waite v. Salestrom, supra*.

However, the case before us involves a claim of mutual mistake. Before reformation of an instrument will be allowed, the party seeking such reformation on a claim of mutual mistake must, by clear and convincing evidence, prove existence of such mistake in reference to the instrument to be reformed. *Johnson v. Stover, supra*; *Cunningham v. Covalt*, 204 Neb. 512, 283 N.W.2d 53 (1979). Clear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of the fact to be proved. *In re Estate of Lienemann, ante* p. 169, 382 N.W.2d 595 (1986); *Castellano v. Bitkower*, 216 Neb. 806, 346 N.W.2d 249 (1984).

For the purpose of reformation, when is a mistake mutual? A mutual mistake is a belief shared by the parties, which is not in accord with the facts. See Restatement (Second) of Contracts § 151 (1981). A mutual mistake is one common to both parties in reference to the instrument to be reformed, each party laboring under the same misconception about their instrument. *Kear v. Hausmann*, 152 Neb. 512, 41 N.W.2d 850 (1950). "A mutual mistake exists where there has been a meeting of the minds of the parties and an agreement actually entered into, but the agreement in its written form does not express what was really intended by the parties." *Sierra Blanca Sales Co., Inc. v. Newco Industries, Inc.*, 84 N.M. 524, 530, 505 P.2d 867, 873 (1972).

If incorrect language or wording is inserted by mistake, including a scrivener's mistake, into an instrument intended to reflect the agreement of the parties, such mistake is mutual and contrary to the real intention and agreement of the parties. See *Lippire v. Eckel*, 178 Neb. 643, 134 N.W.2d 802 (1965). As a corollary of the foregoing principle, an erroneous omission or deletion, even by a scrivener, from an instrument intended to reflect the agreement of the parties is a mutual mistake and is contrary to the real intention and agreement of the parties. See *Thompson v. Bantz*, 136 Mont. 210, 346 P.2d 982 (1959) (reformation of a warranty deed, where a scrivener inadvertently and mistakenly omitted from a deed a reservation of a mineral interest specified in the contract for the deed reformed).

"The fact that one of the parties . . . denies that a mistake was made does not prevent a finding of mutual mistake nor prevent reformation." *Olds v. Jamison*, 195 Neb. 388, 393, 238 N.W.2d 459, 463 (1976). In *Lippire v. Eckel, supra*, we stated: " 'The negligent failure of a party to know or to discover the facts, as to which both parties are under a mistake does not preclude . . . reformation . . . .' " *Id.* at 649, 134 N.W.2d at 806-07.

Approximately 6 years before Browns' purchase from the Newton children, Herbert had sold a half section to Browns and reserved the mineral interests in the land sold, although that mineral reservation was restricted to a definite duration. Consequently, when the parties signed the contract on March 30, 1976, at least Herbert and the Browns were conversant with terminology for a reservation of mineral interests. During the conference at the attorney's office on March 30, Anna Brown inquired about the effect of the "RESERVATION" contained in the initial draft of the contract and objected to the phrase "or under the ground," apparently concerned that such phrase would constitute an impediment to irrigation operations on the land being acquired from the Newton children. At Anna's insistence the redrafted "RESERVATION" excluded the phrase troublesome to Anna. None of the parties dispute that their intent, as expressed by the written contract, included a reservation of mineral interests in favor of the Newton children. In an apparent atmosphere and setting of shuffling papers, reading instruments aloud to the parties, instructing a secretary about revisions in the initial draft of the contract—all with the parties in the attorney's office, awaiting signatures on instruments to conclude formalities of the sale—the attorney-scrivener failed to secure conformity between the written agreement and the deed given pursuant to that agreement. The mutual mistake occurred when the Newton family gave and Browns received the deed under the mutually mistaken belief by the parties that the deed corresponded to their uncontradicted contractual provisions.

During Leslie Brown's conversation with his neighbor, George Fisher, who had also sold real estate to Brown subject to a mineral reservation, Brown acknowledged the extent of the mineral interest reserved by the Newton children, namely: "The kids kept their oil as long as there was any oil there for

production." That acknowledgment underscored Brown's own testimony: "[T]he Newton children would keep the mineral rights for as long as production existed."

Although Leslie Brown had stated he "wasn't interested in the oil," at least near the time of the sale by the Newton children, perhaps 7 years' rhythmic rocking of the horse's head changed his mood about the crude. (A "horse's head" is the extremity of a pumping unit's walking beam, or crossbeam, above a well, moving up and down in pumping oil from the well.) Nevertheless, it is significant that, before the claim about the mistake in the deed, the Browns never sought any payment of royalties, especially from September 1, 1982 (when the purchase price had been paid in full to the Newton children), until March 1983 (when Browns demanded that Koch Oil Company pay the royalties to them, after their contact with Steven Newton about the mistake in their deed). Such inaction by Browns during known oil production on their land speaks loudly in support of the mineral reservation in favor of the Newton children.

The evidence clearly and convincingly establishes existence of a mutual mistake, namely, the parties erroneously believed that the deed conformed with their unequivocal and uncontradicted agreement regarding reservation of mineral rights by the Newton children. As a result of our de novo review of the record, we reach the only reasonable conclusion, the same as did the district court—the deed to Browns must be reformed to coincide with the agreement of March 30, 1976, regarding the reservation of mineral interests in favor of the Newton children.

Although the contract and deed were executed on March 30, 1976, the discrepancy between the two instruments was not discovered until March 1983. The relevant statute of limitations, § 25-207, provides: "The following actions can only be brought within four years: . . . an action for relief on the ground of fraud, but the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud . . . ."

In *Ainsfield v. More*, 30 Neb. 385, 46 N.W. 828 (1890), this court noted "mistake" was not included in a statutory predecessor of § 25-207, but held "these three, fraud, accident,

and mistake, have been always classed together as the three great fountains of equity jurisprudence." 30 Neb. at 403, 46 N.W. at 834. Relying on *Ainsfield*, this court in *Sweley v. Fox*, 135 Neb. 780, 284 N.W. 318 (1939), held that the then existing statute of limitations concerning reformation of an instrument, which was substantially the same as the present § 25-207, contained a discovery rule, namely:

> If the fraud or mistake ought to have been discovered, and would have been if reasonable diligence had been exercised by the plaintiff, the statute will run from the time such discovery ought to have been made, for a plaintiff cannot excuse delay in instituting suit of his cause of action if his failure to discover it is attributable to his own neglect.

Id. at 785, 284 N.W. at 320-21.

From 1976 until 1983 nothing transpired to alert the parties about the discrepancy between the contract and deed. Browns farmed their land and made their loan payments, and the Newton children continued to receive royalties from the oil producers on Browns' real estate. We find nothing from the conduct of any parties or attendant circumstances which indicates that the mutual mistake was discoverable by reasonable diligence before such mistake was actually discovered in 1983. The action was not barred by § 25-207.

Browns suggest delivery of the deed caused a merger, that is, all prior negotiations for the sale of the half section were merged in the deed given by the Newton family. As expressed in *Union Pacific Land Resources Corp. v. Park Towne, Ltd.*, 212 Neb. 83, 87, 321 N.W.2d 440, 443 (1982): " ' "[U]pon the execution, delivery, and acceptance of an unambiguous deed, such being the final acts of the parties expressing the terms of their agreement with reference to the subject matter, all prior negotiations and agreements are deemed merged therein . . . ." ' " However, in *Bibow v. Gerrard*, 209 Neb. 10, 13, 306 N.W.2d 148, 150 (1981), we held: "[T]he doctrine of merger does not apply where there has been fraud or mistake." As we have previously concluded, there is mutual mistake established by the facts in the present case. Therefore, the doctrine of merger is inapplicable in the present proceedings.

The Browns' second assignment of error is directed to the district court's order that interest be paid to the Newton children for the royalties which were suspended due to Browns' demand on Koch Oil Company. From March 1983 until trial, royalties which Koch Oil Company would have paid the Newton children, were it not for Browns' demand resulting in suspension of payments by Koch, amounted to $41,480. Whatever other means might have been utilized regarding Koch Oil Company as a stakeholder, Browns, nevertheless, sought to obtain direct payment of royalties to them.

As this court acknowledged in *Mid-States Equipment Co. v. Poehling*, 204 Neb. 791, 795, 285 N.W.2d 689, 691-92 (1979):

> "Nevertheless, interest is sometimes allowed by courts of equity, in the exercise of a sound discretion, when it would not be recoverable at law. These courts, it has been said, will, in their discretion, allow or withhold interest as, under all the circumstances of the case, seems equitable and just, except in cases where interest is recoverable as a matter of right."

In 47 C.J.S. *Interest & Usury* § 6 at 28 (1982) it is stated:

> Interest is charged not only because of the value to the one who uses money, but also as compensation to the one who has been deprived of the use of money. Interest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness; it is denied when its exaction would be inequitable.

There were approximately 19 months during which the Newton children did not receive their royalty payments, which had been interrupted as the result of Browns' demand letter. Browns must be held to account for suspension of those royalty payments. Reformation alone will not provide a remedy accomplishing equity under the circumstances. To avoid an inequitable, and therefore unjust, result, interest on the detained royalties is an equitable solution.

> A judicial abuse of discretion does not denote or imply improper motive, bad faith, or intentional wrong by a judge, but requires the reasons or rulings of a trial judge to be clearly untenable, unfairly depriving a litigant of a

> substantial right and denying a just result in matters submitted for disposition through a judicial system.

Bump v. Firemens Ins. Co., 221 Neb. 678, 689, 380 N.W.2d 268, 276 (1986).

We find no abuse of discretion by the district court in awarding interest under the circumstances.

The judgment of the district court is, therefore, affirmed.

AFFIRMED.

REXROAD, INC., APPELLANT, V. SANITARY AND IMPROVEMENT DISTRICT NO. 66 OF SARPY COUNTY, NEBRASKA, APPELLEE.

386 N.W.2d 433

Filed May 2, 1986. No. 85-075.

1. **Sanitary and Improvement Districts: Legislature: Political Subdivisions.** A sanitary and improvement district, existing pursuant to the sanitary and improvement districts act, Neb. Rev. Stat. §§ 31-727 et seq. (Reissue 1984), is a legislative creature, a political subdivision of the State of Nebraska.
2. **Standing.** Before one is entitled to invoke jurisdiction of a court, one must have standing—some real interest in a cause of action, a right (legal or equitable), title, or interest in the subject matter in controversy. To establish such standing, a litigant must demonstrate a danger of injury to the litigant, resulting from an action to be contested. Generally, sufficient standing as a party in litigation may not be based merely on a general interest common to all members of the public.
3. **Sanitary and Improvement Districts: Standing: Contracts.** Only a taxpayer of a sanitary and improvement district organized pursuant to the sanitary and improvement districts act, Neb. Rev. Stat. §§ 31-727 et seq. (Reissue 1984), has standing to contest validity of contractual obligations for expenditure of such district's funds.

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

Dean J. Jungers of Hascall, Jungers & Garvey, for appellant.

Mark A. Klinker, for appellee.

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

SHANAHAN, J.

Rexroad, Inc., appeals the judgment of the district court for Sarpy County denying relief to Rexroad and dismissing its petition which sought nullification of action taken by the board of trustees of Sanitary and Improvement District No. 66 of Sarpy County, Nebraska (S.I.D.), and an award of damages. We affirm.

Rexroad is engaged in garbage collection and collected from some S.I.D. residents for a fee of $5.50 per month for each resident served. Rexroad did not have a written agreement with its customers within S.I.D. Rather, as was the standard in the industry, oral service contracts for garbage collection were terminable at will.

S.I.D. existed and operated as a political subdivision pursuant to the sanitary and improvement districts act, Neb. Rev. Stat. §§ 31-727 et seq. (Reissue 1984). In 1982 S.I.D. assessed its residents to defray expenses for a garbage collection contract to be obtained by the district. On April 28, 1983, S.I.D. mailed its bid forms and specifications to prospective collectors, including Rexroad, and then, in a local newspaper of general circulation, published its specifications and solicitation for sealed bids regarding a contract for garbage collection from July 1, 1983, to June 30, 1984. S.I.D.'s board of trustees had not passed a resolution declaring the "advisability and necessity" for a garbage collection contract. See § 31-744. On May 24 S.I.D.'s board of trustees met in public session, opened bids for the collection contract, and, on the basis of such bids, awarded the collection contract to All Way Sanitation, the low bidder. A written agreement between S.I.D. and All Way was signed on June 30, requiring a collection fee of $4.45 per month for each resident served within the district. S.I.D. notified all its residents about All Way's collection service to be commenced on July 1 pursuant to the contract with the district. As a result of the All Way-S.I.D. contract, 23 S.I.D. residents terminated their service from Rexroad. Rexroad had no office as a place of business within S.I.D. and was not a taxpayer of S.I.D.

Rexroad filed suit against S.I.D. and alleged its loss of S.I.D. customers and the failure of S.I.D.'s trustees to pass a resolution of advisability and necessity concerning the contract sought for

garbage collection within the district. Rexroad claimed the action taken by the S.I.D.'s board of trustees was "ultra vires and outside of the authority" conferred by Nebraska law. Rexroad sought nullification of the garbage collection contract and requested damages attributable to loss of Rexroad's former customers within S.I.D. In its answer S.I.D. countered that Rexroad lacked standing to contest action taken by S.I.D.'s board of trustees regarding the contract in question, that is, Rexroad was "not a taxpayer or property owner" within S.I.D.

At conclusion of the trial the district court found that Rexroad was "not a taxpayer or property owner within [S.I.D.], and therefore [Rexroad] lacks standing to challenge [S.I.D.'s] actions." The district court dismissed Rexroad's petition with prejudice.

Rexroad's assignments of error are based on the premise that S.I.D.'s board of trustees acted outside authority existing under Nebraska law governing sanitary and improvement districts.

Purposes and powers of a sanitary and improvement district are found in § 31-727(1), namely,

> installing electric service lines and conduits, a sewer system, a water system, a civil defense warning system, a system of sidewalks, public roads, streets, and highways, public waterways, docks or wharfs, and related appurtenances, to contract for water for fire protection and for resale to residents of the district, to contract for police protection and security services, and to contract for gas and for electricity for street lighting for the public streets and highways within such proposed district, to construct and to contract for the construction of dikes and levees for flood protection for the district, and to acquire, improve, and operate public parks, playgrounds, and recreational facilities.

As authorized by statute, a majority of owners having an interest in real property within the limits of a proposed sanitary and improvement district may form such district by signing and properly filing "articles of association" with an appropriate petition praying that the district, so formed, be declared a sanitary and improvement district under Nebraska law. See § 31-727(1) and (4). As a consequence of the articles of

association for a sanitary and improvement district, the owners of real estate within the district, so formed, are obligated to pay taxes on their property within the district and pay special assessments on real estate within that district. See § 31-727(2). Owners of real estate within a proposed district who have not signed the articles of association may object to organization of a sanitary and improvement district. § 31-729. Initial trustees of a sanitary and improvement district must own real estate within the proposed district. §§ 31-727(3), 31-730. After a sanitary and improvement district becomes a "body corporate and politic," § 31-732, trustees for such district must be owners of real estate within the district and must have been elected by resident owners or owners of real estate, voters eligible by virtue of property ownership or lease. See § 31-735(1) and (2). No corporation is deemed a resident owner for purposes of voting for trustees of a sanitary and improvement district. See § 31-735(3). The common denominator of the preceding statutes for a voice in the conduct of a sanitary and improvement district's matters is a relationship to property subject to tax liability within a sanitary and improvement district.

A sanitary and improvement district is a legislative creature, a political subdivision of the State of Nebraska. *S.I.D. No. 95 v. City of Omaha*, 221 Neb. 272, 376 N.W.2d 767 (1985).

Sanitary and improvement districts have been termed "quasi-municipal corporations" by some commentators and courts. See, 1 E. McQuillin, The Law of Municipal Corporations §§ 2.27-2.29 (3d ed. 1971); C. Rhyne, The Law of Local Government Operations (1980); *Hampton Rds. San. Dist. Comm. v. Smith*, 193 Va. 371, 68 S.E.2d 497 (1952). McQuillin defines quasi-municipal corporations as "Certain public corporations, created by the legislature to exercise a special governmental function . . . ." 1 E. McQuillin, *supra* at § 2.27 at 166. In *S.I.D. No. 95 v. City of Omaha, supra*, we recognized analogous characteristics and relationship between a municipal corporation and a sanitary and improvement district as political subdivisions, to the extent that many principles applicable to a municipal corporation may also be applicable to a sanitary and improvement district.

Before one is entitled to invoke jurisdiction of a court, one

must have standing—some real interest in a cause of action, a right (legal or equitable), title, or interest in the subject matter in controversy. To establish such standing, a litigant must demonstrate a danger of injury to the litigant, resulting from an action to be contested. Generally, sufficient standing as a party in litigation may not be based merely on a general interest common to all members of the public. *Nebraska Sch. Dist. No. 148 v. Lincoln Airport Auth.*, 220 Neb. 504, 371 N.W.2d 258 (1985). An illustration of the preceding principle governing standing is found in *Niklaus v. Miller*, 159 Neb. 301, 303, 66 N.W.2d 824, 826 (1954): " '[A] resident taxpayer, as such, and without proof of peculiar interest or injury to himself, may enjoin the illegal expenditure of money by a public board or officer.' " In *Day v. City of Beatrice*, 169 Neb. 858, 101 N.W.2d 481 (1960), we held an unsuccessful bidder is not a proper party to bring an injunction suit to prevent unlawful expenditures of funds "unless he is also a taxpayer, which must be properly alleged and proved." *Id.* at 866, 101 N.W.2d at 488.

Requirement of taxpayer status as a basis for standing has been similarly applied in other jurisdictions. In *Alarm Applications Co. v. Simsbury Volunteer Fire Co.*, 179 Conn. 541, 548, 427 A.2d 822, 826-27 (1980), the Connecticut Supreme Court stated, "Absent the existence of [a] special legal relationship . . . this court has not recognized the capacity of an individual or a private corporation that has not alleged taxpayers' status to maintain an action challenging the propriety of the conduct of a municipal corporation." In *Williams, et al. vs. Wichita Water Co., et al.*, 41 Del. Ch. 429, 197 A.2d 731 (1964), nontaxpayer owners of rural land overlying a municipal water supply sued a water company, alleging the company charged a city an excessive price in a sale of the company's physical assets to the city. The Delaware Supreme Court held:

> [I]f the price paid . . . was in fact excessive, only the taxpayers of the City who paid the price will be heard to complain of that fact. These plaintiffs are not taxpayers of the City and, consequently, have no standing to contest the contract of purchase entered into by the City and approved by its electorate.

Id. at 433, 197 A.2d at 733-34.

If taxpayer status is indispensable for a litigant to contest a municipal expenditure incurred by contract, see *Niklaus v. Miller, supra*, and, generally, if principles applicable to a municipal corporation may be applied to a sanitary and improvement district, see *S.I.D. No. 95 v. City of Omaha, supra*, we believe the logical consequence is a principle that only a taxpayer of a sanitary and improvement district organized pursuant to the sanitary and improvement districts act, §§ 31-727 et seq., has standing to contest validity of a contractual obligation for expenditure of such district's funds. Cf. *Booth v. General Dynamics Corporation*, 264 F. Supp. 465, 467 n.1 (N.D. Ill. 1967) ("Only those . . . who reside within the corporate limits of the Sanitary District have standing to challenge the tax since only those taxpayers have tax liability to support district operations"). Cf., also, *Day v. City of Beatrice, supra* at 866, 101 N.W.2d at 488 ("The injury . . . resulting from the rejection of [a contractor's] bid fell upon the public and not upon [the contractor]").

Because Rexroad was not a taxpayer of S.I.D., Rexroad lacked standing to contest the validity of the contract in question. The district court was correct in its dismissal of Rexroad's action.

AFFIRMED.

BOSLAUGH, J., concurs in the result.

CAROL J. BISHOP, APPELLEE, V. STANLEY J. HOTOVY, APPELLANT.

385 N.W.2d 901

Filed May 2, 1986. No. 85-076.

1. **Undue Influence.** The undue influence which will void a gift is an unlawful and fraudulent influence which controls the will of the donor.
2. **Deeds: Conveyances: Undue Influence.** The court, in examining the matter of whether a deed was procured by undue influence, is not concerned with the

rightness of the conveyance but only with determining whether it was the voluntary act of the grantor.

3. **Undue Influence: Proof.** The elements necessary to be established to warrant the rejection of a written instrument on the ground of undue influence are (1) that the person who executed the instrument was subject to undue influence, (2) that there was opportunity to exercise undue influence, (3) that there was a disposition to exercise undue influence for an improper purpose, and (4) that the result was clearly the effect of such undue influence.
4. **Deeds: Undue Influence: Proof.** The burden is on the party alleging the execution of a deed was the result of undue influence to prove such undue influence by clear and convincing evidence.
5. **Liens: Proof.** A person claiming the existence of a lien has the burden of proving the existence of the lien.

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

Larry J. Karel of Karel Law Offices, for appellant.

George E. McNally, for appellee.

KRIVOSHA, C.J., BOSLAUGH, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

KRIVOSHA, C.J.

The appellant, Stanley J. Hotovy, appeals from a judgment entered by the district court for Colfax County, Nebraska, finding that Hotovy and the appellee, Carol J. Bishop, are each owners of an undivided one-half interest in the real estate involved in the action and ordering that a referee be appointed and the property partitioned. As the basis for his appeal, Hotovy maintains that the district court erred in failing to find that the property was obtained by undue influence exerted by Bishop upon Hotovy. Further, Hotovy maintains that the district court erred in failing to find that a certain document drafted by the parties and entitled "Rental Purchase Agreement" constitutes a lien or encumbrance upon the property in favor of Hotovy. For reasons set out herein we believe the judgment of the district court should be affirmed.

The record discloses that Hotovy, a 52-year-old man, was, at all times material to this action, living with his parents in Schuyler, Nebraska. In 1978 Hotovy met Bishop. At that time she was in the process of obtaining a divorce from what the

record reflects was a third marriage. Between 1978 and 1982, Bishop and Hotovy became close friends and developed an intimate relationship. During that same period of time, Hotovy apparently gave Bishop a sizable amount in both money and property. When Bishop's trailer home was repossessed, Hotovy paid off the loan so that Bishop could obtain possession of the trailer again. The record also reflects that during this period of time, Hotovy placed Bishop's name on certain certificates of deposit. Later, at the request of Hotovy's attorney, her name was removed. Bishop also voluntarily removed her name from certain savings accounts which Hotovy had established and which bore Bishop's name. An examination of Hotovy's checking account reflects that he began paying a large number of expenses for Bishop.

In 1982 Hotovy purchased a house and had the deed placed in the names of Hotovy and Bishop, as joint tenants. The sales agreement was executed on February 22, 1982, and the deed executed on March 9, 1982. Sometime later, Bishop and Hotovy executed a document entitled "Rental Purchase Agreement." At best, the document is extremely ambiguous and does little to assist us in this matter. The document provided as follows:

> RENTAL PURCHASE AGREEMENT
>
> I, the undersigned purchaser, hereby agree to purchase the property described as follows:
>
> Located at 709 E. 9th St., Schuyler, Nebraska. All of Lot three (3), in Block two (2), of South Schuyler, an addition to the City of Schuyler, Colfax County Nebraska.
>
> Purchase price of property $52,500.00, Carol J. Bishop and Stanley Hotovy are purchasers.
>
> Carol J. Bishop agrees to be one-half owner, by putting one-half of mobile home, ($5,000.00), as downpayment. The remainder of the home will be paid by $80.00 monthly payments for 25 years, to Stanley J. Hotovy.

The agreement was signed by both Carol J. Bishop and Stanley J. Hotovy as "UNDERSIGNED" and notarized.

The evidence is in conflict as to who initiated all of the gift giving: Bishop maintains that Hotovy did it of his own free will, and Hotovy claims that Bishop kept making demands upon him. Hotovy does, however, concede that Bishop did not make

any threats and did not say that she would do anything, e.g., leave him, if he did not buy her a house. According to Hotovy, if Bishop "wanted something . . . she just kept after me until I finally broke and did some of those things. You know, it just gets on a person's nerves if you sit there and they come after you and keep coming after you." The record, however, is simply devoid of any evidence to indicate that Hotovy was unduly pressured by Bishop or anyone else into buying the house. It appears that, at the time the house was purchased, Bishop and Hotovy had developed an intimate relationship and Hotovy was attempting to simply bestow favors upon Bishop.

In an effort to establish that Bishop had unduly influenced Hotovy, he offered the testimony of Sister Marilyn Uhing, a counselor with United Catholic Social Services, and Dr. Emmet Kenney, a psychiatrist. We believe, however, that the testimony is not sufficient to establish *undue* influence.

According to Sister Uhing, Hotovy described his relationship with Bishop as turbulent and stressful, and while Sister Uhing testified that Hotovy often got himself into a turmoil over personal relationships, he was still able to carry on business transactions such as buying a house. To the same effect, Dr. Kenney testified that while Hotovy had poor judgment in personal relationships and tried to use financial arrangements to solve his problems in these personal relationships, he was nevertheless unaffected in his business knowledge by these problems. Specifically, Dr. Kenney testified that, in buying a house on March 9, 1982, Hotovy would know the value of the house and the mechanics of the proceeding. Dr. Kenney testified: "[T]here's nothing wrong with his [Hotovy's] smarts, there's nothing wrong with his day-to-day knowledge and mechanics — the only true area of disfunction [sic] is when he draws an illogical conclusion about basic human relationships."

The record further discloses that Hotovy owns a number of farms which he manages himself along with property of his mother. Finally, the record discloses that Hotovy alone negotiated the purchase price of the house. It was also Hotovy who instructed the real estate agent to put the title in the house in joint tenancy and Hotovy who handled all loan arrangements for buying the house.

The difficulty with Hotovy's position in this case is that he seeks to equate *influence* with *undue influence*. They are not the same. In *Kolc v. Krystyniak*, 196 Neb. 16, 19, 241 N.W.2d 348, 350 (1976), we said: "[The] undue influence which will void a . . . (gift) is an unlawful and fraudulent influence which controls the will of the donor." And in *Rule v. Roth*, 199 Neb. 746, 751, 261 N.W.2d 370, 373 (1978), we said: "The court, in examining the matter of whether a deed was procured by undue influence, is not concerned with the rightness of the conveyance, but only with determining whether it was the voluntary act of the grantor."

In determining whether the act was voluntary and whether the party seeking to set aside the conveyance has sustained his or her burden, we said in *In re Estate of Saathoff. Saathoff v. Saathoff*, 206 Neb. 793, 798, 295 N.W.2d 290, 294 (1980):

> The elements necessary to be established to warrant the rejection of a written instrument on the ground of undue influence are: (1) That the person who executed the instrument was subject to undue influence; (2) that there was opportunity to exercise undue influence; (3) that there was a disposition to exercise undue influence for an improper purpose; and (4) that the result was clearly the effect of such undue influence.

See, also, *In re Estate of Wagner*, 220 Neb. 32, 367 N.W.2d 736 (1985).

The law is clear that the burden is on the party alleging the execution of a deed was the result of undue influence to prove such undue influence by clear and convincing evidence. *Craig v. Kile*, 213 Neb. 340, 329 N.W.2d 340 (1983). We are simply unable to hold that Hotovy has established by clear and convincing evidence that the influence exerted by Bishop upon Hotovy was undue, though we concede that undoubtedly their relationship played a significant role in Hotovy's action in this case.

Likewise, the district court's conclusion that the "Rental Purchase Agreement" does not constitute a lien upon the property was correct. A person claiming the existence of a lien has the burden of proving the existence of the lien. See *Columbus Fed. S. & L. Assn. v. Swails Constr. Co.*, 215 Neb.

287, 338 N.W.2d 593 (1983).

Hotovy maintains that the "Rental Purchase Agreement" provides that Bishop will purchase her half of the property by paying $80 per month for 25 years. Bishop, on the other hand, maintains that the "Rental Purchase Agreement" simply affords her the right to purchase Hotovy's half. Regardless of what the "Rental Purchase Agreement" may mean—and, at best, it is ambiguous—it does not in any way create by law or contract a lien upon the property. For these reasons the decision of the district court must in all respects be affirmed.

AFFIRMED.

WHITE, J., participating on briefs.

CHRISTIAN SERVICES, INC., A CORPORATION, APPELLANT, V. NORTHFIELD VILLA, INC., A CORPORATION, APPELLEE, GERING NATIONAL BANK & TRUST COMPANY, INTERVENOR-APPELLEE.

385 N.W.2d 904

Filed May 2, 1986. No. 85-193.

1. **Corporations: Actions: Time.** Under the provisions of Neb. Rev. Stat. § 21-20,121 (Reissue 1983), objection to a nonauthorized corporation's maintaining a lawsuit may be raised at any time during the pendency of such litigation, and the court may, in its discretion, limit the time that the plaintiff can have for procuring the necessary certificate of authority.
2. **Pleadings: Appeal and Error.** Permission to amend pleadings is addressed to the sound discretion of the trial court, and absent an abuse of discretion, its decision will be affirmed.

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

Steven W. Olsen of Raymond, Olsen, Ediger & Ballew, P.C., for appellant.

Paul E. Hofmeister of Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, for appellee Northfield Villa.

KRIVOSHA, C.J., BOSLAUGH, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

HASTINGS, J.

Plaintiff has appealed from a summary judgment in favor of the defendant, Northfield Villa, Inc., based on the incapacity of the plaintiff, a foreign corporation, to maintain a legal action in this state because of the lack of a certificate of authority. We affirm.

The original petition seeking damages in contract was filed on July 2, 1981, in which plaintiff alleged that it was a Missouri corporation. The petition contained no allegation that it possessed a certificate of authority to conduct business in Nebraska, as required by Neb. Rev. Stat. § 21-20,121 (Reissue 1983).

Successive answers filed by the defendant, Northfield, on September 16, 1981, September 29, 1983, and January 18, 1984, all admitted the allegation of the petition relating to plaintiff's characterization of itself as a Missouri corporation. However, on October 10, 1984, defendant filed a third amended answer in which, for the first time, paragraph 1 of the petition, alleging that plaintiff was a Missouri corporation, was denied. The trial court granted defendant leave to file this particular amended answer.

On October 18, 1984, defendant filed a motion for summary judgment, to which was attached a certain affidavit identifying certified copies of various records of the Secretaries of State of both Nebraska and Missouri, which were also received into evidence on the hearing on the motion for summary judgment. Those records disclose that although a certificate of authority to transact business in Nebraska had been issued, the corporation was dissolved on August 4, 1980, for nonpayment of corporate taxes. Additionally, it appears of record that the corporate status of the plaintiff had been forfeited under the laws of the State of Missouri as of January 1, 1983, for failure to file an annual report. There is no dispute as to those facts.

On November 13, 1984, plaintiff filed a motion to continue the hearing on defendant's motion for summary judgment. Certain evidence was received in support of the motion for summary judgment, and the court then sustained the motion for continuance and granted the plaintiff until December 31, 1984, to comply with the provisions of § 21-20,121 regarding a

certificate of authority.

Pursuant to order of the court, further hearing was set for January 9, 1985. At that time, and pursuant to request of the plaintiff's counsel, the hearing was continued to January 21, 1985. Additional evidence was received at that time, but there was nothing offered by the plaintiff in support of any showing that it possessed a certificate of authority to do business in Nebraska. Accordingly, upon submission of the cause to the court, the motion for summary judgment was sustained.

The plaintiff claims error on the part of the trial court in allowing the defendant to amend its pleadings and in granting defendant's motion for summary judgment.

Section 21-20,121 provides in part as follows: "No foreign corporation transacting business in this state without a certificate of authority . . . shall be permitted to maintain any action . . . in any court of this state, until such corporation shall have obtained a certificate of authority." The interpretation of this section as it applies to the pending case is determined by *Rigid Component Systems v. Nebraska Component Systems, Inc.*, 202 Neb. 658, 276 N.W.2d 659 (1979).

According to *Rigid Component Systems, supra*, objection to a nonauthorized corporation's maintaining a lawsuit may be raised at any time during the pendency of such litigation, and the court may, in its discretion, limit the time that the plaintiff can have for procuring the necessary certificate of authority. Here, the plaintiff was allowed in excess of 60 days to obtain the necessary proof, and when time ran out, it did not request any extension. There was no abuse of discretion on the part of the trial court.

The same may be said of the ruling by the district court granting defendant leave to file its third amended answer. Permission to amend pleadings is addressed to the sound discretion of the trial court, and absent an abuse of discretion, its decision will be affirmed. *First Nat. Bank v. Schroeder*, 218 Neb. 397, 355 N.W.2d 780 (1984).

The judgment of the district court is affirmed.

AFFIRMED.

WHITE, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. STEVA MAXINE BOSTWICK, APPELLANT.

385 N.W.2d 906

Filed May 2, 1986. Nos. 85-237, 85-238.

1. **Evidence: Words and Phrases.** 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. Neb. Evid. R. 401 (Neb. Rev. Stat. § 27-401 (Reissue 1979)). Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Neb. Evid. R. 403 (Neb. Rev. Stat. § 27-403 (Reissue 1979)).
2. **Criminal Law: Evidence.** While prosecutorial need alone does not mean probative value outweighs prejudice, the more essential the evidence, the greater its probative value, and the less likely that a trial court should order the evidence excluded.
3. **Motions for Mistrial.** A mistrial results in nullification of a pending jury trial. In order to prevent defeat of justice or to further justice during a jury trial, a mistrial is generally granted at the occurrence of a fundamental failure preventing a fair trial in the adversarial process.
4. **Motions for Mistrial: Appeal and Error.** A motion for a mistrial is addressed to the sound discretion of the trial court, and its ruling will not be disturbed in the absence of a showing of an abuse of discretion.
5. **Constitutional Law: Double Jeopardy.** The constitutional prohibition against double jeopardy does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment.
6. _____: _____. In a given case the double jeopardy clause bars a criminal prosecution only where (1) jeopardy has attached in a prior criminal proceeding, (2) the defendant is being tried for the same offense prosecuted in that prior proceeding, and (3) the prior proceeding has terminated jeopardy.
7. **Motions for Mistrial: Constitutional Law: Double Jeopardy.** Where the governmental conduct in question is intended to goad the defendant into moving for a mistrial, a defendant may raise the bar of double jeopardy to a second trial after having succeeded in aborting the first trial on the defendant's own motion.
8. _____: _____: _____. Generally, a motion by a defendant for a mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error.
9. _____: _____: _____. So long as a trial court has not abused its discretion in determining that a jury is deadlocked, a declaration of mistrial resulting from a jury's inability to reach a verdict does not bar reprosecution under the double jeopardy clause of state and federal Constitutions.

Appeal from the District Court for Douglas County: LAWRENCE CORRIGAN, Judge. Affirmed.

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

Robert M. Spire, Attorney General, and LeRoy W. Sievers, for appellee.

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

SHANAHAN, J.

Steva Maxine Bostwick appeals convictions for second degree forgery and possession of a forged instrument after a jury trial in the district court for Douglas County. We affirm.

In November 1982 Bostwick entered employment as a bookkeeper for Commercial Enterprises, Ltd., a trucking company owned and managed by Gail Hammitt. Commercial is a "general commodities carrier" which, on a "strictly for-hire" basis, hauls freight throughout the continental United States. Bostwick was hired to "maintain all of [Commercial's] accounts receivable, take care of the accounts payable, keep a general ledger, keep track of expenses that [Commercial] had on each vehicle, [and] keep track of the drivers' expenses and their income." Bostwick was responsible for maintaining the check ledgers, balancing all the checking accounts, and keeping track of all canceled checks.

When Bostwick was hired, Commercial had checking accounts at First National Bank of Woodbine, Iowa, and Norwest Bank in Omaha. In February 1983, when Commercial's financial situation deteriorated, the company started borrowing significant amounts from the Woodbine bank. By the fall of 1983, Commercial's financial condition had not improved, and, on October 3, 1983, Commercial filed a Chapter XI bankruptcy.

In conjunction with the bankruptcy proceedings, Commercial opened a new checking account at First National Bank of Omaha and on October 19 ordered an initial set of check forms, numbered 1001 through 1501. On October 24 First National received a second order for the same numbered

checks for Commercial. On the day after Commercial had picked up its first set of checks, the second requested set was delivered to Commercial's office, and Bostwick, stating "she would handle it," took the second order of checks to her office.

Shortly after arrival of the second set of checks, Hammitt "received word" that Commercial "might have a problem" with its accounting. On November 2 Hammitt "started going through the books" and discovered that "the first six months of the check vouchers and all of the canceled checks" pertaining to the Norwest Bank account were missing. The next day, Hammitt confronted Bostwick about the missing checks. Bostwick claimed she had no idea what Hammitt was talking about, stated that "[y]ou are not going to hang this one on me," and "stomped out the door."

On November 4 Hammitt contacted the Douglas County Sheriff's Department and reported Bostwick had "possibly been involved in some wrongdoing in [his] business." Hammitt received a call from Officer Charles Armstrong of the Omaha Police Department on November 7, who informed Hammitt that police had "picked up a check" which was dated November 2, 1983, payable to Bostwick in the sum of $1,000 and apparently signed by Hammitt. The check, numbered 1065 and drawn on Commercial's account at the Omaha First National Bank, had been deposited in the account of Bostwick's husband, Harry. That deposit was made on November 7 by a middle-aged woman who was "similar in appearance" to Bostwick. Hammitt examined Commercial's records, learned there were duplicate checks for the Omaha First National account, and uncovered a canceled check, numbered 1065, which was signed by Hammitt's wife, Pat, and was payable to one of Commercial's drivers. Hammitt informed Officer Armstrong that there "were two sets of checks" and instructed First National to stop payment on check 1065 payable to Bostwick.

On January 5, 1984, Officers Armstrong and Darrell D. Hollingshead proceeded to Bostwick's residence to execute a warrant for Bostwick's arrest. The officers "set up a surveillance" from a police cruiser in a parking lot located across the street from Bostwick's residence and waited.

Bostwick eventually came out of her house, looked in the general direction of the police cruiser, and began running through the snow, away from the cruiser's location. Officer Hollingshead, after informing Bostwick that he was a police officer, chased Bostwick for approximately a block, apprehended her, and placed her under arrest. During that chase, Bostwick carried a purse, which Officer Hollingshead seized and turned over to Officer Armstrong, who examined the contents and found five checks "shoved in the top of the purse." The five checks were payable to Bostwick and bore Hammitt's apparent signature. Three of the checks were dated December 18, 1983, and were drawn on the Omaha First National Bank for the sums of $1,500, $900, and $300. The other two checks were dated November 3, 1983, and each was drawn on Norwest Bank for the sum of $300.

Two separate informations were filed on April 20, 1984, and charged Bostwick with second degree forgery (see Neb. Rev. Stat. § 28-603(1) (Reissue 1979)) and possession of a forged instrument (see Neb. Rev. Stat. § 28-604(1) (Reissue 1979)). Each information also alleged Bostwick was a habitual criminal (see Neb. Rev. Stat. § 29-2221 (Reissue 1979)), referring to Bostwick's prior convictions for forgery and grand larceny. The State proceeded on the informations in a consolidated trial.

The State had retained Patrick Bolan, a "questioned document examiner" with extensive experience in analyzing handwriting. To provide Bolan with a sample of Bostwick's handwriting, Officer Armstrong visited Bostwick on June 28 and requested that she fill out the standard Omaha Police Department handwriting exemplar. The exemplar contained the words "Omaha Police Division Handwriting Exemplar" at the top of the document and indicated the date on which the exemplar was given. Bostwick agreed to fill out one exemplar, but when asked pursuant to police standard practice to complete another, stated: "Well, you have lots of my handwriting. One is all I'm going to fill out."

Before her trial on September 11, 1984, Bostwick filed a motion in limine to exclude evidence of her prior convictions for forgery and grand larceny. The district court sustained Bostwick's motion regarding her 1968 conviction for forgery

but overruled the motion pertaining to Bostwick's 1975 and 1976 convictions for grand larceny. After a jury had been empaneled, sworn, and some State's witnesses had testified and touched upon Bostwick's prior activities, the court reversed itself and sustained Bostwick's motion in limine in its entirety concerning exclusion of all prior convictions. On Bostwick's motion the court declared a mistrial.

Bostwick's second trial commenced on October 15, 1984. The jury began deliberating on October 19 and continued deliberation on October 22, 23, and 24. At 12:28 p.m. on October 25, the jury informed the court that a verdict could not be reached and asked to be discharged. Notwithstanding the court's instruction for further deliberation, the jury, approximately 2 hours later, again indicated that there was a "hopeless deadlock." The court declared a mistrial and discharged the jury.

On January 8, 1985, the State embarked upon a third trial of Bostwick. Before trial Bostwick had moved to dismiss the action on the ground that a third trial violated Bostwick's constitutional right against double jeopardy. The district court overruled Bostwick's motion, finding "that no misconduct on the part of the State caused the mistrial in this case on either occasion."

In the third trial the State called Hammitt, who testified that he had not signed the checks in question and had never authorized Bostwick to sign company checks. Hammitt also testified that Commercial's financial problems were tied to Bostwick's employment, noting: "Prior to Mrs. Bostwick coming to work for me, I really hadn't had any financial problems other than what you would have in a normal business." Hammitt's testimony was generally corroborated by other personnel from Commercial.

The State then called Patrick Bolan, who expressed his "conclusive opinion" that Hammitt had not signed the checks in question and that Bostwick had endorsed her name on the back of the check deposited in her husband's account on November 7. Bolan relied on five handwriting exemplars given by Bostwick to the police in 1975, the exemplar Bostwick provided Officer Armstrong in 1984, and Bostwick's entries on

Commercial's check ledger. Bostwick objected to the admission of the 1975 handwriting exemplars, contending that receipt of those exemplars as evidence would "emasculate" the trial court's previous ruling in the September 11 trial, excluding Bostwick's 1975 and 1976 convictions for grand larceny. During his testimony, Bolan emphasized the importance of having "enough known writing to be compared" and noted that an adult's handwriting remains "pretty much" unchanged by time. Bolan further testified that the 1984 exemplar Bostwick gave to Officer Armstrong contained "grotesque letter formations," indicating an "intentional distortion" in the exemplar. The format of the 1975 exemplars was similar but not identical to the 1984 exemplar. Printed type in the preprinted 1975 forms was different from the 1984 printed form for the exemplar. Although the 1975 forms did not indicate any relationship to any criminal activity under investigation and were not labeled or identified as a police department form, the 1975 completed exemplars were countersigned by a "Sgt. A. Temin." The 1975 exemplars did recite that Bostwick was then employed as an "accountant" for "G & T Drywall, Inc." The district court overruled Bostwick's objection, stating that the exemplars were "of sufficient probative value that they outweigh any prejudice that they might create." Based on all handwriting samples from Bostwick, Bolan concluded that Bostwick had, "within a very high degree of probability," forged Hammitt's name on the checks involved in prosecution of Bostwick.

Bostwick's defense rested on the theory that Commercial had never been financially sound, that Hammitt had engaged in improper financial practices to keep Commercial solvent, and that, after the bankruptcy, Hammitt had used Bostwick as a "scapegoat" for Commercial's financial problems. During cross-examination of Hammitt, Bostwick introduced numerous balance sheets and income statements of Commercial for the year 1982, all suggesting that Commercial had been suffering from serious cash-flow problems before Bostwick's employment with Commercial. Specifically, the balance sheets reflected deficits as large as $22,000, while income statements showed net losses as great as $17,000. Bostwick also introduced 11 overdraft notices sent to

Commercial by the Woodbine bank for checks drawn in the summer of 1983 for amounts ranging from $62.80 to $18,743.80. In response to evidence regarding Commercial's financial situation, Hammitt noted that all the overdrafts had been paid and pointed his finger at Bostwick, stating: "I didn't have any cash flow problems until I hired Steva Bostwick." During cross-examination of Hammitt, the following occurred:

> Q [Bostwick's counsel] Mr. Hammitt, you have talked to us all day long about the cash flow problems that you were experiencing during the year of 1983, is that correct?
>
> A Yes, but I didn't have any cash flow problems until I hired Steva Bostwick.
>
> Q None whatsoever?
>
> A None that I couldn't handle; none that I wasn't handling quite well.
>
> Q Okay, she is responsible for everything that happened to your company, is that what you are saying?
>
> A I am saying that she is responsible for all of the cash flor [sic] problems I had in 1983. When somebody takes $50,000.00 out of your account and you don't know about it, it is pretty hard to get a cash flow.

Bostwick immediately objected, requested that Hammitt's answer be stricken, and moved for a mistrial. The court overruled the motion for a mistrial, noting that "the defense in this case is that Mr. Hammitt has gotten himself into trouble with overexpansion in whatever form or manner and it is quite obvious to the jury and everybody else that we are talking about more than $2,500." The court instructed the jury to "disregard the last part of [Hammitt's] response."

Bostwick also called Allan Eich, a vice president of the Woodbine bank, who testified about Commercial's financial difficulties and suggested that Commercial may have engaged in some suspect financial practices to avoid payments to that bank. On cross-examination Eich testified that Commercial's serious financial problems had not developed before Bostwick's employment, and noted that, during the summer of 1983, he had informed Hammitt concerning a possible "leak in his business."

Finally, Bostwick, testifying in her own behalf, stated that

the checks in question were given as payment of Bostwick's disputed claim for back wages and overtime. According to Bostwick, all checks were signed by Hammitt. During cross-examination, Bostwick admitted that she had twice been convicted of a felony punishable by imprisonment in excess of 1 year. See Neb. Evid. R. 609(1)(a) (Neb. Rev. Stat. § 27-609(1)(a) (Reissue 1979)).

In its instruction to the jury on the issue of reasonable doubt, the court employed NJI 14.08, which provides in pertinent part that the jury "may find an accused guilty upon the strong probabilities of the case, provided such probabilities are strong enough to exclude any doubt of his guilt that is reasonable." Bostwick objected to the instruction on the ground that it "lessens the burden of proof which the Constitution has placed upon the State." The jury returned a verdict of guilty on both charges, and the district court, after holding an enhancement hearing pursuant to § 29-2221, regarding punishment of a habitual criminal, sentenced Bostwick to imprisonment for concurrent terms of 15 to 25 years.

Bostwick claims the district court erred in (1) admitting the 1975 handwriting exemplars as evidence, (2) refusing to grant Bostwick's motion for a mistrial on account of Hammitt's response on cross-examination, (3) failing to dismiss the informations for the reason that Bostwick was being placed in jeopardy twice for the same offense, and (4) overruling Bostwick's objection to the court's jury instruction pertaining to reasonable doubt.

Regarding Bostwick's first assignment of error concerning admissibility of the 1975 handwriting exemplars in conjunction with Bolan's opinion concerning forgery of the questioned checks, Bostwick contends, in the light of her testimony that she had been twice convicted of a felony, reception of the 1975 handwriting exemplars indicating her occupation as an accountant raised "a rather obvious implication that those convictions were for similar forgery or embezzlement charges and that the handwriting exemplars given in 1975 arose out of those incidents." Although conceding that the exemplars "may have been relevant" for an analysis of her handwriting, Bostwick argues that admitting the exemplars "emasculated

[the court's] prior ruling in refusing to admit testimony or evidence of other crimes" and "clearly prevented [her] from having a fair trial."

"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." Neb. Evid. R. 401 (Neb. Rev. Stat. § 27-401 (Reissue 1979)). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Neb. Evid. R. 403 (Neb. Rev. Stat. § 27-403 (Reissue 1979)). "The admission or exclusion of evidence is a matter left largely to the sound discretion of the trial court, and its ruling will be upheld absent an abuse of discretion." *State v. Norfolk*, 221 Neb. 810, 822, 381 N.W.2d 120, 129 (1986).

"Probative value is a relative concept; the probative value of a piece of evidence involves a measurement of the degree to which the evidence persuades the trier of fact that the particular fact exists and the distance of the particular fact from the ultimate issues of the case." Dolan, *The Prejudice Rule in Evidence*, 49 S. Cal. L. Rev. 220, 233 (1976). In assessing the probative value of evidence claimed by a criminal defendant to be prejudicial, courts have often focused on the prosecutor's need for the evidence, noting that "[w]hen the government has ample evidence to establish an element of the crime, the probative value of the [potentially prejudicial] evidence is greatly reduced . . . ." *United States v. Dolliole*, 597 F.2d 102, 106 (7th Cir. 1979). See, also, *United States v. Check*, 582 F.2d 668 (2d Cir. 1978); *United States v. Spletzer*, 535 F.2d 950 (5th Cir. 1976). "[W]hile prosecutorial need alone does not mean probative value outweighs prejudice . . . the more essential the evidence, the greater its probative value, and the less likely that a trial court should order the evidence excluded." *United States v. King*, 713 F.2d 627, 631 (11th Cir. 1983).

In the present case Bolan's testimony was obviously crucial in establishing the ultimate fact to be proved by the State, namely, Bostwick had forged Hammitt's name on the checks. The

record discloses, moreover, that the five 1975 exemplars were very important, if not essential, to Bolan's testimony. Bolan noted the need for having as many handwriting samples as possible and indicated how a person's handwriting remained constant notwithstanding passage of time. Although asked prior to trial to provide two handwriting exemplars, Bostwick prepared only one, which, according to Bolan, contained "grotesque letter formations" suggesting an "intentional distortion." Without the 1975 exemplars, Bolan would have had to base his opinion solely on Bostwick's entries in Commercial's check ledger. Under such circumstances the district court could legitimately conclude that the prosecutorial need for the exemplars was great and, thus, that the exemplars possessed significant probative value. With respect to possible prejudice from the admission of the 1975 exemplars, such 1975 forms were not specifically identified as police department exemplars. The State, in introducing the exemplars, made no reference to their being part of any prior criminal investigation of Bostwick or any other person. Although individual members of the jury may have perceived a connection between Bostwick's statement on cross-examination that she had twice been convicted of a felony and the 1975 exemplars, the "responsibility for maintaining the delicate balance between the probative and prejudicial effect of evidence lies largely within the discretion of the trial court." *State v. Hitt*, 207 Neb. 746, 748, 301 N.W.2d 96, 99 (1981). Under the facts of this case, we conclude that the district court did not abuse its discretion in determining that possible prejudice to Bostwick did not substantially outweigh the 1975 exemplars' high probative value.

Bostwick next argues Hammitt's response on cross-examination, that Bostwick may have removed $50,000 from Commercial's accounts, was "unduly prejudicial" and that the district court's refusal to grant a mistrial "was an abuse of discretion."

> A mistrial results in nullification of a pending jury trial. In order to prevent defeat of justice or to further justice during a jury trial, a mistrial is generally granted at the occurrence of a fundamental failure preventing a fair trial

> in the adversarial process. Some examples are an egregiously prejudicial statement by counsel, the improper admission of prejudicial evidence, or the introduction of incompetent matters to the jury, to the extent that any damaging effect cannot be removed by proper admonition or instruction to the jury.

State v. Archbold, 217 Neb. 345, 351, 350 N.W.2d 500, 504 (1984). "A motion for a mistrial is addressed to the sound discretion of the trial court, and its ruling will not be disturbed in the absence of a showing of an abuse of discretion." *State v. Ammons*, 208 Neb. 812, 813, 305 N.W.2d 812, 814 (1981).

In assessing Hammitt's testimony on cross-examination, such testimony must be placed in the context of all the evidence adduced by the parties concerning Commercial's financial condition. The cornerstone of Bostwick's defense was Commercial's serious financial problems before Bostwick entered employment with Commercial in November 1982. To demonstrate that point, Bostwick introduced balance sheets and income statements from 1982 indicating that Commercial was operating at a significant deficit. The State, in turn, attempted to show that Commercial's financial difficulties were directly related to Bostwick's employment. Allan Eich testified, without objection, that he had informed Hammitt during the summer of 1983 of a possible "leak" in Commercial's finances. Prior to his remark about the $50,000, Hammitt had stated, without objection, that Commercial had no cash-flow problems until he "hired Steva Bostwick" and that she was responsible for "all of the cash flow problems" Commercial had in 1983. The jury, moreover, was aware of the missing checks which precipitated Hammitt's confrontation with Bostwick on November 2. In the light of such evidence, the jury could hardly be surprised to hear that Hammitt held Bostwick responsible for appropriating a significant sum of money during her employment with Commercial.

Bostwick had opened the door for evidence regarding the source and extent of Commercial's financial problem. Although Hammitt's suggestion that Bostwick appropriated $50,000 is unsubstantiated, in the context of all evidence existing when Hammitt made such suggestion, the prejudice

resulting was slight when considered with the other evidence tending to show Bostwick's culpability for Commercial's financial woes. The district court sustained Bostwick's motion to strike the suggestive part of Hammitt's testimony and admonished the jury to disregard that testimony. Under the facts of this case, we find no abuse of discretion in the district court's judgment that such instruction and admonition removed the damaging effect, if any, from Hammitt's testimony.

Bostwick also maintains that she was "placed in jeopardy twice for the same offense" in violation of the double jeopardy clause of the fifth amendment to the U.S. Constitution and article I, § 12, of the Nebraska Constitution.

As a general principle, the constitutional prohibition against double jeopardy protects "an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." *Green v. United States*, 355 U.S. 184, 187, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957). "The double-jeopardy provision of the Fifth Amendment, however, does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment." *Wade v. Hunter*, 336 U.S. 684, 688, 69 S. Ct. 834, 93 L. Ed. 974 (1949). In a given case the constitutional double jeopardy clause bars only a retrial in a criminal prosecution where (1) jeopardy has attached in a prior criminal proceeding (see *Illinois v. Somerville*, 410 U.S. 458, 93 S. Ct. 1066, 35 L. Ed. 2d 425 (1973)); (2) the defendant is being retried for the same offense prosecuted in that prior proceeding (see *Brown v. Ohio*, 432 U.S. 161, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977)); and (3) the prior proceeding has terminated jeopardy (see *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294, 104 S. Ct. 1805, 80 L. Ed. 2d 311 (1984)). In a case tried to a jury, jeopardy attaches when the jury is empaneled and sworn. See *Illinois v. Somerville, supra*. Obvious examples of events triggering termination and, thus, precluding reprosecution include (1) an acquittal by a jury or by a trial judge sitting as a fact finder (see *Arizona v. Washington*, 434 U.S. 497, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978)); (2) a directed verdict of acquittal by the trial judge for insufficient evidence (see *Hudson v.*

Louisiana, 450 U.S. 40, 101 S. Ct. 970, 67 L. Ed. 2d 30 (1981)); and (3) a conviction reversed, as a matter of law, for insufficient evidence to support the conviction (see *Burks v. United States*, 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978)). A declaration of mistrial, on the other hand, does not, in every case, result in termination of jeopardy. Although a defendant has a "valued right to have his trial completed by a particular tribunal," such right "must in some instance be subordinated to the public's interest in fair trials designed to end in just judgments." *Wade v. Hunter, supra* at 689.

In the present case there is no question that jeopardy attached in each of the three prosecutions against Bostwick. As a result of the third prosecution, Bostwick was being tried for the same offenses for which she had been previously placed in jeopardy. The precise issue raised by Bostwick is whether jeopardy had terminated in either of the two prior prosecutions, thus triggering the constitutional prohibition against double jeopardy.

Bostwick's first trial ended when the district court, during trial, reversed its position on admissibility of evidence regarding Bostwick's prior convictions and granted Bostwick's motion for a mistrial. In *State v. Munn*, 212 Neb. 265, 266-67, 322 N.W.2d 429, 431 (1982), this court stated:

> "Prosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on defendant's motion . . . does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause. A defendant's motion for a mistrial constitutes 'a deliberate election on his part to forego his valued right to have his guilt or innocence determined before the first trier of fact.' . . . Only where the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion." [Quoting *Oregon v. Kennedy*, 456 U.S. 667, 102 S. Ct. 2083, 72 L. Ed. 2d 416 (1982).]

Although Bostwick claims that the mistrial in the first prosecution resulted from prosecutorial "overreaching," the

record discloses only that the State sought to introduce evidence of Bostwick's prior convictions pursuant to Neb. Evid. R. 404 (admissibility of evidence regarding character, trait, or other crimes, wrongs, or acts) (Neb. Rev. Stat. § 27-404 (Reissue 1979)). In Bostwick's first trial the district court had initially denied Bostwick's motion in limine and allowed admission of the evidence, but after some State witnesses had testified about Bostwick's prior activities, the trial court reversed its position and ruled that evidence of Bostwick's prior convictions was inadmissible. The circumstances surrounding the mistrial in the first prosecution are hardly sufficient to establish prosecutorial intent designed to goad Bostwick into moving for a mistrial. Assuming the district court initially erred in deciding to admit evidence of Bostwick's prior convictions, generally "a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error." *United States v. Jorn*, 400 U.S. 470, 485, 91 S. Ct. 547, 27 L. Ed. 2d 543 (1971). Based on the first trial, Bostwick's double jeopardy claim has no support in the record.

Bostwick's second trial ended in a mistrial when the jury was unable to reach a verdict. As early as 1824, the U.S. Supreme Court, in examining the boundaries of the double jeopardy clause, recognized that a jury's inability to reach a verdict does not, itself, preclude a subsequent prosecution for the same offense. See *The United States v. Perez*, 22 U.S. 194 (9 Wheat. 579), 6 L. Ed. 165 (1824). "[W]ithout exception, the courts have [adhered to *Perez* and] held that the trial judge may discharge a generally deadlocked jury and require the defendant to submit to a second trial." *Arizona v. Washington*, 434 U.S. 497, 509, 98 S. Ct. 824, 54 L. Ed 2d 717 (1978). "The Government, like the defendant, is entitled to resolution of the case by verdict from the jury, and jeopardy does not terminate when the jury is discharged because it is unable to agree." *Richardson v. United States,* 468 U.S. 317, 326, 104 S. Ct. 3081, 82 L. Ed. 2d 242 (1984). So long as a trial court has not abused its discretion in determining that a jury is deadlocked, a declaration of mistrial resulting from a jury's inability to reach a verdict does not bar reprosecution under the double jeopardy

clause of the fifth amendment. See, *United States v. Ellis*, 646 F.2d 132 (4th Cir. 1981); *Arnold v. McCarthy*, 566 F.2d 1377 (9th Cir. 1978); *Ex parte Anderson*, 457 So. 2d 435 (Ala. App. 1984).

The applicable criteria to determine whether a trial court has abused its discretion in declaring a jury deadlocked are found in the answer to the question: Is there a "manifest necessity" for discharging the jury? See *United States v. Horn*, 583 F.2d 1124 (10th Cir. 1978); cf. *United States v. Perez, supra*. In *Arizona v. Washington, supra*, the U.S. Supreme Court discussed the deference accorded a trial court's decision to discharge a deadlocked jury:

> Moreover, in this situation there are especially compelling reasons for allowing the trial judge to exercise broad discretion in deciding whether or not "manifest necessity" justifies a discharge of the jury. On the one hand, if he discharges the jury when further deliberations may produce a fair verdict, the defendant is deprived of his "valued right to have his trial completed by a particular tribunal." But if he fails to discharge a jury which is unable to reach a verdict after protracted and exhausting deliberations, there exists a significant risk that a verdict may result from pressures inherent in the situation rather than the considered judgment of all the jurors. If retrial of the defendant were barred whenever an appellate court views the "necessity" for a mistrial differently from the trial judge, there would be a danger that the latter, cognizant of the serious societal consequences of an erroneous ruling, would employ coercive means to break the apparent deadlock. Such a rule would frustrate the public interest in just judgments. The trial judge's decision to declare a mistrial when he considers the jury deadlocked is therefore accorded great deference by a reviewing court.

434 U.S. at 509-10.

In *Arnold v. McCarthy, supra*, the Ninth Circuit Court of Appeals suggested several factors or considerations

> useful in determining whether a judge has properly exercised his discretion to declare a deadlocked jury. . . .

> (1) a timely objection by defendant, (2) the jury's collective opinion that it cannot agree, (3) the length of the deliberations of the jury, (4) the length of the trial, (5) the complexity of the issues presented to the jury, (6) any proper communications which the judge has had with the jury, and (7) the effects of possible exhaustion and the impact which coercion of further deliberations might have on the verdict.

566 F.2d at 1386-87. The court concluded that "[t]he most critical factor is the jury's own statement that it was unable to reach a verdict." 566 F.2d at 1387. See, also, *United States v. Cawley*, 630 F.2d 1345 (9th Cir. 1980); *United States v. Horn, supra*.

Bostwick, although generally contending that double jeopardy terminated in the second prosecution, makes no specific claim regarding the propriety of the district court's decision to discharge the jury. In any event, the record establishes that the jury deliberated almost 5 days before informing the court about the jury's impasse; that the court consulted with individual members of the jury and requested the jury to deliberate further; and that, when the jury was still unable to reach a verdict, the court again spoke with individual jurors, all of whom informed the court that they were unable to reach a verdict. Under the circumstances of this case, the court properly discharged the jury without prejudice to the State's retrial and continued prosecution of Bostwick in a subsequent proceeding. Bostwick's double jeopardy claim, based on the double jeopardy provisions of the state and federal Constitutions, is without merit.

Finally, Bostwick challenges the trial court's utilization of NJI 14.08, contending that the instruction "does not fairly and accurately convey the meaning of reasonable doubt." In *State v. Beard,* 221 Neb. 891, 897, 381 N.W.2d 170, 174 (1986), we recently rejected the identical claim that such instruction " 'unconstitutionally weaken[s] the burden of proof placed on the prosecution.' " For the reasons given in *State v. Beard, supra*, we conclude there is no error in the instruction given by the trial court on the issue of reasonable doubt.

The judgment of the district court is correct in all respects and is, therefore, affirmed.

AFFIRMED.

BARBARA BEAVERS, APPELLANT AND CROSS-APPELLEE, V. IBP, INC., APPELLEE AND CROSS-APPELLANT.

385 N.W.2d 896

Filed May 2, 1986. No. 85-278.

1. **Workmen's Compensation: Expert Witnesses: Appeal and Error.** Where the record in a workers' compensation case presents nothing more than conflicting medical testimony, the Nebraska Supreme Court will not substitute its judgment for that of the compensation court.
2. **Workmen's Compensation: Appeal and Error.** In testing the sufficiency of evidence to support findings of fact made by the compensation court after rehearing, the evidence, on appeal to the Nebraska Supreme Court, must be considered in the light most favorable to the successful party.
3. _____: _____. Factual determinations made by the compensation court will not be set aside on appeal unless such determinations are clearly wrong.
4. **Workmen's Compensation: Expert Witnesses.** A good faith self-contradiction of an expert presents a question of fact to be resolved by the compensation court.
5. **Workmen's Compensation: Attorney Fees.** Neb. Rev. Stat. § 48-125 (Reissue 1984) does not authorize the award of an attorney fee where there exists a reasonable controversy between the parties as to the entitlement of compensation.
6. **Workmen's Compensation.** Whether there was a reasonable controversy as to the entitlement to workers' compensation is a question of fact.
7. **Workmen's Compensation: Attorney Fees.** When the employer files an application for rehearing before a panel of the compensation court, it is the employer's failure to reduce the award on original hearing which triggers the taxing of a reasonable attorney fee as costs.

Appeal from the Nebraska Workmen's Compensation Court. Affirmed as modified, and cause remanded with direction. Cross-appeal dismissed.

LeRoy J. Sturgeon of Smith & Smith, for appellant.

Wayne E. Boyd of Smith & Boyd, for appellee.

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

CAPORALE, J.

Upon rehearing, the compensation court ordered defendant-appellee and cross-appellant, IBP, Inc., to pay plaintiff-appellant and cross-appellee, Barbara Beavers, certain workers' compensation benefits. In her appeal Beavers assigns as error (1) the finding that she is not totally disabled, (2) the calculation of her period of temporary total disability, (3) the reversal of the attorney fee awarded to her following the original hearing, and (4) the failure to award her an attorney fee upon rehearing. In its cross-appeal IBP assigns as error the award of benefits by a majority of the compensation court for a 30-percent loss of earning power, claiming the award to be excessive. We dismiss the employer's cross-appeal, affirm as modified the compensation court's award on rehearing, and remand for further proceedings.

Beavers is a 28-year-old woman whose formal education ended with the completion of high school. Prior to her employment by IBP in December of 1976, she had been employed as an assembly line worker. On March 15, 1984, Beavers sustained injury in an accident arising out of and in the course of her employment with IBP when she felt a sharp pain in her upper left back while pulling a bone out of a piece of meat. This deboning activity requires the pulling of meat pieces across a counter with a hook held in the left hand and cutting the meat in a curved pulling motion with a knife held in the right hand.

Following the accident, Beavers saw IBP's nurse and then went home. On the following day she saw her family physician, Dr. John Kissel. Concluding that she was not improving under Kissel's care, she next, on March 23, 1984, consulted a chiropractor, Dr. James D. Smith, who had previously treated her for a similar problem with her right side. However, after one visit to Smith, she, at IBP's request, put herself under the care

of an orthopedist, Dr. John J. Dougherty, who also had treated her approximately a year earlier for a similar complaint with her right side.

Dougherty first saw Beavers for her present condition on March 27, 1984, at which time she was complaining of left chest pain. Dougherty's examination revealed that Beavers' left chest was tender, but he found no nodules and was therefore not certain she was "tremendously tender there." Nonetheless, he prescribed a course of physical therapy treatments. Because of Beavers' continuing complaints of pain, Dougherty ordered a bone scan, which produced normal findings. Not knowing what else to do for her, Dougherty sent Beavers to an internist, Dr. William Blankenship. Blankenship reported the results of the tests he performed to be normal. Dougherty then released Beavers from his treatment on June 4, 1984. It was his opinion that she should either return to work and bear the pain or quit her job if she felt she could not tolerate the discomfort. Dougherty saw Beavers again on September 13, 1984, to evaluate her condition at that time. While she was still complaining of chest pain, Dougherty could find no cause for the complaint and was of the opinion Beavers had no disability.

Blankenship considered Beavers' chest wall syndrome to be multifaceted and due to the repetitive motions required by her work. While Blankenship thought the syndrome should go away with time and anti-inflammatory therapy, he questioned whether she should return to the same type of work, since she seemed susceptible to this type of problem.

After being released by Dougherty, Beavers put herself under the care of Dr. Horst G. Blume, a neurological surgeon, first seeing him on June 20, 1984. He was of the opinion she suffered from Tietze's syndrome, a condition wherein Beavers' pain originates at the point the cartilage joins the sternum on her left side at the level of the fifth and sixth thoracic vertebrae. Blume concluded that as of August 14, 1984, Beavers could do no bending, stooping, or reaching above her shoulders; neither could she lift weights of over 5 pounds nor perform repetitive grasping, pushing, or pulling motions with either arm or hand. She could, however, perform repetitive fine manipulative movements. On August 21, 1984, Blume concluded that

Beavers had reached maximum improvement and that she suffered a 15-percent permanent partial physical disability to the body as a whole, but a "much higher" industrial disability. Subsequent to expressing the opinion that Beavers could not be helped further, Blume acquired a new physical therapy machine which he wanted to try on Beavers in the hope of alleviating her pain. In Blume's opinion the March 15, 1984, incident aggravated Beavers' preexisting right-side condition. On October 23, 1984, Blume concluded that Beavers is totally disabled and unable to do any work. Blume is also of the opinion Beavers' condition is permanent.

When Beavers was released to work on August 21, 1984, she was, with Blume's express permission, put to work marking defects on boxes. She did that for a number of weeks until the job was eliminated. She was then, again with Blume's express permission, put to work sorting gloves, which required lifting no more than 2 pounds. The glove-sorting job was designed so Beavers would not have to stoop. Since it was suggested that she be able to sit with a back support, arrangements to enable her to do that were made, although she did not, according to IBP, always avail herself of that opportunity.

Beavers stopped working on October 23, 1984, and was complaining of chest and back pain as of the date of the rehearing before the compensation court, December 13, 1984, as well as a general feeling of being "hunched over" and tired.

We consider Beavers' first assignment of error, the failure of the compensation court to find that she is presently totally disabled, and IBP's cross-appeal, that the loss of earning power award is excessive, together, as they are but different aspects of the same issue.

Resolution of the extent of Beavers' disability and resultant loss of earning power, if any, involves an evaluation or weighing of the evidence. As we have often said and recently reaffirmed, where the record presents nothing more than conflicting medical testimony, this court will not substitute its judgment for that of the compensation court. *Vredeveld v. Gelco Express, ante* p. 363, 383 N.W.2d 780 (1986). Moreover, in testing the sufficiency of evidence to support findings of fact made by the compensation court after rehearing, the evidence must be

considered in the light most favorable to the successful party. *Badgett v. St. Joseph Hosp., ante* p. 467, 384 N.W.2d 302 (1986); *Vredeveld v. Gelco Express, supra*. Further, factual determinations made by the compensation court will not be set aside on appeal unless such determinations are clearly wrong. Neb. Rev. Stat. § 48-185 (Reissue 1984); *Badgett v. St. Joseph Hosp., supra; Snyder v. IBP, Inc., ante* p. 534, 385 N.W.2d 424 (1986).

The evidence ranges from Dougherty's opinion that Beavers suffers no disability to Blume's opinion that she is totally disabled. There exists no factor which compels acceptance of one of those opinions over the other. Consequently, it cannot be said the finding of the compensation court, on rehearing, that Beavers is not totally disabled is clearly wrong. Her first assignment of error therefore fails.

IBP seizes upon Blume's earlier opinion that Beavers suffered a 15-percent permanent partial disability of the body as a whole and ignores the other evidence; for example, Blume's opinion that Beavers' industrial disability was greater than her physical disability because of the activities Beavers could not perform without pain. IBP's claim that the majority of the compensation court ignored Blume's later deposition testimony and relied solely on his earlier report of August 14, 1984, in finding a 30-percent loss of earning power is, quite simply stated, not supported by the record. Blume expressly states in his deposition that he never lessened the restrictions imposed in his August report and further stated his opinion at the time of the deposition to be, as noted earlier, that Beavers was totally disabled. While the record could certainly have been clearer in regard to Beavers' loss of earning power, we cannot say, in view of the medical opinions ranging from no disability to total disability, that fixing the loss of earning power at 30 percent is clearly wrong. See *Mulder v. Minnesota Mining & Mfg. Co.*, 219 Neb. 241, 361 N.W.2d 572 (1985). Accordingly, IBP's cross-appeal must be, and hereby is, dismissed.

Beavers' second assignment of error, that her period of temporary total disability was miscalculated, is also without merit.

The compensation court on rehearing found that Beavers

was temporarily totally disabled from and after March 16, 1984, to and including August 21, 1984. Blume's August 21, 1984, opinion that Beavers had reached maximum improvement supports that finding. It is true that Blume later expressed the opinion that Beavers was totally disabled. However, as recently again pointed out in *Snyder v. IBP, Inc., supra*, and *Vredeveld v. Gelco Express, supra*, a good faith self-contradiction of an expert presents a question of fact to be resolved by the compensation court.

In her third assignment of error Beavers complains that the compensation court on rehearing, in reversing the $400 attorney fee she was awarded on initial hearing, considered an issue not properly before it.

The compensation court's pretrial order, entitled "Report of Settlement Conference Officer," states the issues on rehearing to be: "1. Extent of disability, temporary total and permanent partial. 2. Whether or not the plaintiff can refuse to return to light duty within her medical restrictions when released by her physician and continue to receive compensation benefits."

Rule XXIV of the rules of procedure of the Nebraska Workmen's Compensation Court, filed with the Clerk of this court on April 25, 1985, recites that one of the objectives of the settlement conference is to narrow and reduce the number of issues and to limit the rehearing to matters which are essential and material to the issues to be decided on appeal. The rule further provides that the pretrial order shall supersede all other pleadings and shall set forth a statement of the issues to be determined.

Beavers contends that since the propriety of awarding her an attorney fee on the original hearing was not specifically listed as an issue to be determined, the question could not, under the foregoing rule, be considered by the compensation court on rehearing.

IBP had terminated Beavers' temporary total disability payments on June 4, 1984, based on Dougherty's view that Beavers had reached maximum improvement as of that date. However, the single judge of the compensation court on original hearing found that Beavers suffered a 15-percent permanent partial disability of her body as a whole, entitling

her to benefits for a 15-percent permanent partial disability.

Neb. Rev. Stat. § 48-125 (Reissue 1984) provides in part: "Whenever the employer refuses payment, or when the employer neglects to pay compensation for thirty days after injury, and proceedings are held before the compensation court, a reasonable attorney's fee shall be allowed the employee by the court in all cases when the employee receives an award."

Smith v. Fremont Contract Carriers, 218 Neb. 652, 358 N.W.2d 211 (1984), holds, however, that the foregoing statutory language does not authorize the award of an attorney fee where there exists a reasonable controversy between the parties as to the entitlement of compensation. See, also, *Savage v. Hensel Phelps Constr. Co.*, 208 Neb. 676, 305 N.W.2d 375 (1981).

Therein lies the fallacy in Beavers' contention. The issues before the compensation court on rehearing concerned the extent of her permanent disability, if any, and when her temporary disability ended, if it had. As a part of making those determinations, the compensation court on rehearing was called upon to determine whether there existed a reasonable controversy as to the payment of compensation. In other words, just as issue No. 2 in the pretrial order was in fact part of issue No. 1 therein, so, too, was the question of the reasonableness of the controversy at the initial hearing a part of issue No. 1.

Whether there was a reasonable controversy is a question of fact. *Mulder v. Minnesota Mining & Mfg. Co.*, 219 Neb. 241, 361 N.W.2d 572 (1985). In view of Dougherty's opinion that Beavers could return to work on June 4, 1984, and Blume's opinion that she could return to restricted work on August 21, 1984, the evidence supports a finding that there did exist a reasonable controversy between the parties.

Lastly, Beavers assigns as error the failure of the compensation court to award her an attorney fee on rehearing.

IBP applied for a rehearing from the award to Beavers made following the original hearing. Section 48-125 provides in part:

> If the employer files an application for a rehearing before the compensation court from an award of a judge of the compensation court and fails to obtain any reduction in

> the amount of such award, the compensation court shall allow the employee a reasonable attorney's fee to be taxed as costs against the employer for such rehearing . . . .

As noted earlier, the compensation court on rehearing, while reversing the award of a $400 attorney fee, doubled the amount of permanent partial disability benefits from a 15-percent disability of the body as a whole to a 30-percent loss of earning power, thereby increasing IBP's potential liability for permanent partial disability from $9,798.97 to $19,597.95. Obviously, IBP did not, by its application for rehearing, obtain any reduction in the amount of Beavers' award on original hearing.

When the employer files an application for rehearing, it is the employer's failure to reduce the award on original hearing which triggers the taxing of a reasonable attorney fee as costs. *Mulder v. Minnesota Mining & Mfg. Co., supra.* Consequently, the compensation court should have awarded Beavers an attorney fee on rehearing.

We therefore affirm as modified the award of the compensation court on rehearing, remand the cause to that court for the purpose of awarding Beavers an attorney fee in connection with the rehearing, and dismiss IBP's cross-appeal.

Beavers is awarded $100 for the services of her attorney in this court. § 48-185.

AFFIRMED AS MODIFIED, AND CAUSE REMANDED WITH DIRECTION. CROSS-APPEAL DISMISSED.

DENNIS WOOD, APPELLANT, V. FRED TESCH AND THE COUNTY OF CASS, NEBRASKA, A POLITICAL SUBDIVISION, APPELLEES.

386 N.W.2d 436

Filed May 2, 1986. No. 85-346.

1. **Trial: Pleadings: Pretrial Procedure.** A motion for judgment on the pleadings by the defendant admits the truth of all the well-pleaded facts in the petition, together with all reasonable inferences to be drawn therefrom, and treats as untrue all the controverted facts contained in the answer.

2. **Pleadings.** In the absence of a reply, allegations contained in the answer must be considered denied by plaintiff.
3. **Administrative Law: Counties: Public Officers and Employees.** Statements of individual county commissioners acting separately do not constitute the statements of the county.
4. **Jurisdiction: Appeal and Error.** The Nebraska Supreme Court acquires no jurisdiction of a cause appealed from a tribunal which lacked subject matter jurisdiction.
5. **Administrative Law: Commission of Industrial Relations: Jurisdiction.** The Commission of Industrial Relations is an administrative agency empowered to perform a legislative function and, as such, has no power or authority other than that specifically conferred on it by statute or by a construction thereof necessary to accomplish the purposes of the act establishing the commission.
6. _____: _____: _____. The Commission of Industrial Relations has no authority to vindicate constitutional rights, nor to hear cases for breach of contract, nor to declare rights, duties, and obligations of the parties.
7. _____: _____: _____. Not every controversy concerning the terms, tenure, or conditions of employment is an industrial dispute which lodges jurisdiction in the Commission of Industrial Relations.
8. **Administrative Law: Commission of Industrial Relations: Jurisdiction: Termination of Employment.** A uniquely personal termination of employment does not constitute an industrial dispute notwithstanding the fact it may involve a controversy concerning terms, tenure, or conditions of employment.
9. **Constitutional Law: States: Due Process.** Freedom of speech and the right of assembly provided by the first amendment to the U.S. Constitution are among the fundamental liberties protected from state impairment by the due process clause of the fourteenth amendment to the U.S. Constitution.
10. **Constitutional Law: Public Officers and Employees: Termination of Employment.** While one who is a governmental at-will employee may be discharged for no reason at all, he or she may not be discharged on a basis that infringes upon constitutionally protected interests.
11. _____: _____: _____. A governmental employee may not constitutionally be compelled to relinquish his or her first amendment right to comment on matters relating to his or her employment which are of public concern.
12. _____: _____: _____. In discharging a governmental at-will employee who has exercised his or her right of free speech on matters of public concern, the interest of the governmental employee in commenting as a citizen upon such matters and the interest of the governmental employer in promoting the efficiency of the public services it performs through its employees must be balanced.
13. _____: _____: _____. The closeness of working relationships is a factor to be considered in balancing the governmental employee's constitutional right to free speech and the governmental employer's interest in efficiency.
14. _____: _____: _____. When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment in discharging an employee is appropriate; it is not necessary for an

employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships are manifest before taking action.

15. _____: _____: _____. The more substantially involved in matters of public concern is the employee's speech, the stronger must be the employer's showing as to the disruptive effect upon close working relationships and efficiency.
16. **Constitutional Law: Labor and Labor Relations.** The right to inform people about unions is protected by both the right to free speech and the right of assembly.
17. **Employer and Employee: Labor and Labor Relations.** It is unlawful to act adversely toward an employee because of his or her union membership or activity.

Appeal from the District Court for Cass County: RAYMOND J. CASE, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

John P. Fahey of Dowd, Fahey & Dinsmore, for appellant.

John W. Iliff and Edward G. Warin of Gross, Welch, Vinardi, Kauffman & Day, P.C., for appellees.

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

CAPORALE, J.

Plaintiff-appellant, Dennis Wood, sued defendants-appellees, Fred Tesch, the sheriff of Cass County, and said county, alleging that they wrongfully terminated his employment as a deputy sheriff. The district court sustained the defendants' motion for "summary judgment" and dismissed Wood's petition. In this appeal Wood assigns error to the district court's ruling that, as an at-will governmental employee, his employment could be terminated "at the will of the appointing officer," without reference to his right of free speech as provided by the first and fourteenth amendments to the U.S. Constitution and by article I, § 5, of the Nebraska Constitution, and his right of assembly as provided by the first and fourteenth amendments to the U.S. Constitution and article XV, § 13, of the Nebraska Constitution. We affirm the dismissal as to the county but reverse and remand for further proceedings as to Tesch.

The record before us consists only of the pleadings and of the lower court's ruling. The pertinent pleadings are Wood's

amended petition, the answer thereto of Tesch and the county, and the subject motion. Since no deposition or affidavits were presented in support of the motion, it was in fact one for judgment on the pleadings, notwithstanding its designation as something other than that. *Mueller v. Union Pacific Railroad*, 220 Neb. 742, 371 N.W.2d 732 (1985); Neb. Rev. Stat. §§ 25-1330, 25-1332 (Reissue 1979).

The well-pleaded facts in Wood's amended petition allege that in late 1980 he and other Cass County deputy sheriffs sought to organize a union for collective bargaining purposes. Thereafter, Tesch and certain unnamed members of the county's board of commissioners stated that the number of deputy sheriffs would be reduced if such efforts continued, but Wood and the others nonetheless persisted in their efforts. On January 29 and 30, 1981, Wood reported to the news media that in 1980 and early 1981 Tesch ordered the destruction of official police records, excluded the Weeping Water and Louisville Police Departments from a course conducted by the state in the use of an Intoxilyzer machine, and utilized persons who were not trained in law enforcement to conduct police raids. On February 1, 1981, Tesch summarily fired Wood for the stated reason that he had made the foregoing remarks to the news media. Wood prayed for reinstatement to his former position with seniority and other employment rights and for the recovery of insurance premiums.

In their answer Tesch and the county generally denied Wood's allegations and asserted that the court lacked subject matter jurisdiction, such being lodged in the Commission of Industrial Relations by Neb. Rev. Stat. § 48-810 (Reissue 1984), and, further, that any cause of action Wood may have had was barred by the 2-year period of limitations imposed by Neb. Rev. Stat. § 25-218 (Reissue 1979) on claims against the state.

Being one for judgment on the pleadings by the defendants, the motion admitted the truth of all the well-pleaded facts in Wood's amended petition, together with all reasonable inferences to be drawn therefrom, and treated as untrue all the controverted facts contained in the answer filed by Tesch and the county. *Mueller v. Union Pacific Railroad, supra.* Notwithstanding the apparent lack of a reply, the allegations of

the answer are considered to have been denied by Wood. *Snyder v. Fort Kearney Hotel Co., Inc.*, 182 Neb. 859, 157 N.W.2d 782 (1968), *aff'd after remand* 185 Neb. 476, 176 N.W.2d 686 (1970); Neb. Rev. Stat. § 25-820 (Reissue 1979).

In the posture of the case the ultimate task of this court is, as was that of the court below, to determine whether Wood has stated a cause of action against Tesch or the county. *Mueller v. Union Pacific Railroad, supra.*

As to the county, the answer is in the negative, for Wood's petition alleges only that certain members of the county's board of commissioners, in effect, as individuals, threatened to fire some deputy sheriffs, not necessarily Wood, if unionization efforts continued.

Irrespective of whatever other deficiencies there may or may not be with that allegation, it is clear that the statements of individual county commissioners acting separately do not constitute the statements of the county. *Morris v. Merrell*, 44 Neb. 423, 62 N.W. 865 (1895). See, also, *May v. City of Kearney*, 145 Neb. 475, 17 N.W.2d 448 (1945). There is no allegation that the county said or did anything through its board of commissioners acting as its legislative body.

Consequently, the court below was correct in dismissing Wood's action against the county.

The questions concerning whether the court below acquired subject matter jurisdiction and whether Wood has stated a viable cause of action against Tesch, however, require further analysis.

To answer those questions we begin by addressing Tesch's affirmative defenses, that the court below lacked subject matter jurisdiction and that any cause of action which may have existed is time barred.

If the lower court lacked jurisdiction of the subject matter, this court lacks jurisdiction as well. *Bammer v. Jensen, ante* p. 400, 384 N.W.2d 263 (1986); *Riedy v. Riedy, ante* p. 310, 383 N.W.2d 742 (1986). Consequently, we are required to consider Tesch's jurisdictional challenge notwithstanding the fact that he did not cross-appeal on that issue.

Section 48-810 provides in part, "All *industrial disputes* involving governmental service . . . or other disputes as the

Legislature may provide *shall* be settled by invoking the jurisdiction of the Commission of Industrial Relations . . . ." (Emphasis supplied.) Industrial dispute is defined in Neb. Rev. Stat. § 48-801(7) (Reissue 1984) as "any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, or refusal to discuss terms or conditions of employment."

The Commission of Industrial Relations is, however, an administrative agency empowered to perform a legislative function. *Transport Workers of America v. Transit Auth. of City of Omaha*, 205 Neb. 26, 286 N.W.2d 102 (1979). As such, it has no power or authority other than that specifically conferred on it by statute or by a construction thereof necessary to accomplish the purposes of the act establishing the commission. *NAPE v. Game & Parks Comm.*, 220 Neb. 883, 374 N.W.2d 46 (1985); *Lincoln Electric System v. Terpsma*, 207 Neb. 289, 298 N.W.2d 366 (1980); *Nebraska P. P. Dist. v. Huebner*, 202 Neb. 587, 276 N.W.2d 228 (1979). It has no authority to vindicate constitutional rights. See *Transport Workers of America v. Transit Auth. of City of Omaha, supra*, which notes that as a general rule administrative agencies have no general judicial powers notwithstanding that they may perform some quasi-judicial duties, and holds that the commission has no judicial powers and has no authority to hear cases for breach of contract, nor to declare rights, duties, and obligations of the parties.

This court has recognized that not every controversy concerning the terms, tenure, or conditions of employment is an industrial dispute which lodges jurisdiction in the commission. *Transport Workers of America v. Transit Auth. of City of Omaha, supra*, holds that a "uniquely personal" termination of employment does not constitute an industrial dispute notwithstanding the fact it may involve a controversy concerning terms, tenure, or conditions of employment. Accord *Nebraska Dept. of Roads Employees Assn. v. Department of Roads*, 189 Neb. 754, 205 N.W.2d 110 (1973) (holding that the commission lacked jurisdiction over a suit

alleging wrongful discharge from employment not arising from antiunion animus).

An inference to be drawn from the facts alleged by Wood is that his termination was uniquely personal, for it resulted, as stated by Tesch, from Wood's reports to the news media. Since that inference can be drawn, and since Wood seeks to vindicate his constitutional rights to free speech and assembly, the court below acquired subject matter jurisdiction.

The second Tesch defense is not properly before us; having not cross-appealed, he has assigned no error to the lower court's failure to find that any cause of action Wood may have had is time barred. Thus, we do not concern ourselves with that allegation.

We move on, then, to the question of whether Wood has stated a cause of action. The first amendment to the U.S. Constitution provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble . . . ." Freedom of speech and the right of assembly have been held to be among the fundamental liberties protected from state impairment by the due process clause of the fourteenth amendment to the U.S. Constitution. *Lloyd Corp. v. Tanner*, 407 U.S. 551, 92 S. Ct. 2219, 33 L. Ed. 2d 131 (1972); *Stromberg v. California*, 283 U.S. 359, 51 S. Ct. 532, 75 L. Ed. 1117 (1931). Moreover, article I, § 5, of the Nebraska Constitution provides in relevant part: "Every person may freely speak . . . on all subjects, being responsible for the abuse of that liberty . . . ." Additionally, article XV, § 13, provides in relevant part: "No person shall be denied employment because of membership in or affiliation with . . . a labor organization . . . ."

It is well established that while one who is a governmental at-will employee may be discharged for no reason at all, see, *Smith v. City of Omaha*, 220 Neb. 217, 369 N.W.2d 67 (1985), and *Patteson v. Johnson,* 721 F.2d 228 (8th Cir. 1983), *appeal after remand* 787 F.2d 1245 (8th Cir. 1986), he or she may not be discharged on a basis that infringes upon constitutionally protected interests. *Mt. Healthy City Board of Ed. v. Doyle,* 429 U.S. 274, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977); *Perry v. Sindermann,* 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570

(1972); *Pickering v. Board of Education,* 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968).

It is further well established that a governmental employee may not constitutionally be compelled to relinquish his or her first amendment right to comment on matters relating to his or her employment which are of public concern. *Pickering v. Board of Education, supra*; *Mt. Healthy City Board of Ed. v. Doyle, supra*. Thus, whether Wood's employment was at will or otherwise is immaterial to our inquiry.

As the *Pickering* Court declared, the problem in such a case is to arrive at a balance between the interest of the governmental employee in commenting as a citizen upon matters of public concern and the interest of the governmental employer in promoting the efficiency of the public services it performs through its employees. This balancing approach has been applied by numerous courts in various governmental employment termination cases. *Patteson v. Johnson, supra*; *O'Connor v. Peru State College*, 605 F. Supp. 753 (D. Neb. 1985); *Brasslett v. Cota*, 761 F.2d 827 (1st Cir. 1985); *McMullen v. Carson*, 754 F.2d 936 (11th Cir. 1985); *Brockell v. Norton*, 732 F.2d 664 (8th Cir. 1984).

This court recently applied the approach in *Devine v. Dept. of Public Institutions,* 211 Neb. 113, 317 N.W.2d 783 (1982). Devine, a staff psychologist employed at the drug and alcohol treatment center of the Hastings Regional Center, delivered a series of lectures to patients which were critical of the philosophy of the program. These statements contradicted those of other staff members, thereby leading to confusion among the patients. The director of psychology at the center placed Devine on administrative probationary status for 90 days, a decision that the State Personnel Board later affirmed. Relying primarily on the fact that the recipients of Devine's lectures were people with serious problems whose cooperation was essential for there to be any hope of a successful treatment, the court determined that the first amendment protections did not outweigh the applicable governmental interests.

In *Nebraska Dept. of Roads Emp. A. v. Department of Roads*, 364 F. Supp. 251 (D. Neb. 1973), an action under the Civil Rights Act, 42 U.S.C. § 1983 (1982), the court held that an

employee's statement that the director of the department was not particularly qualified for the position was constitutionally protected speech. In so ruling the court noted the absence of an evidentiary showing that the employee had a close day-to-day working relationship with the director, such as to demand personal loyalty, confidence, or harmony, or that the statement tended in fact to produce disharmony among other employees.

The U.S. Supreme Court has noted that the closeness of the working relationships involved is a factor to be considered in balancing the governmental employee's constitutional right to free speech and the governmental employer's interest in efficiency. In *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983), that Court stated that when close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate. Furthermore, it is not necessary for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships are manifest before taking action. The Court cautioned, however, that the more substantially involved in matters of public concern is the employee's speech, the stronger must be the employer's showing as to the disruptive effect upon the close working relationships and efficiency.

The U.S. Court of Appeals for the Eighth Circuit recently confronted this problem in *Patteson v. Johnson, supra*. On April 2, 1986, it affirmed, on appeal after remand, the U.S. District Court's ruling that a deputy state auditor's right to free speech had been impermissibly abridged. As deputy state auditor, Patteson ranked next to the State Auditor and in his absence might act in his place. Patteson had attended a legislative hearing at the request of the Nebraska Society of Certified Public Accountants, a group of which he was a member, in support of legislation which would require the State Auditor to be a certified public accountant, as was the then State Auditor. During questioning in the course of the hearing, Patteson responded that, contrary to custom, he had refused to sign an audit of the Governor's office because in his opinion it was incomplete.

Wood also claims an abridgment of his right of assembly, a

right which obviously overlaps the right of free speech. As noted in *Henderson v. Huecker*, 744 F.2d 640 (8th Cir. 1984), the right to inform people about unions is protected by both the right to free speech and the right of assembly. Such constitutional protection extends to governmental employees. *Perry v. Sindermann*, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972), also mentions that the government cannot deny benefits to a person because of the individual's exercise of his constitutionally protected rights to speech or association.

Concerning the state constitutional provision relating to the right of assembly as pled by Wood, this court, in *Mid-Plains Education Assn. v. Mid-Plains Nebraska Tech. College*, 189 Neb. 37, 39, 199 N.W.2d 747, 749 (1972), stated, "If the employee can demonstrate that adverse action against him was motivated by a desire to discourage or retaliate for union membership or activity, the action is unlawful."

It is clear, therefore, that Wood has pled a cause of action against Tesch for an alleged wrongful termination of his employment which evidence may or may not establish.

Accordingly, the judgment of the court below is affirmed as to the county but reversed and remanded for further proceedings as to Tesch.

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

LINDA K. SMITH, APPELLEE, V. HASTINGS IRRIGATION PIPE CO., A NEBRASKA CORPORATION, APPELLANT.

386 N.W.2d 9

Filed May 2, 1986. No. 85-443.

1. **Workmen's Compensation: Appeal and Error.** In reviewing workmen's compensation cases this court does not reweigh the facts. Our standard of review accords to the findings of fact made by the Nebraska Workmen's Compensation Court after rehearing the same force and effect as a jury verdict in a civil case.

Such findings will not be reversed or set aside unless clearly wrong.

2. **Workmen's Compensation: Evidence: Appeal and Error.** In testing the sufficiency of the evidence to support the findings of fact made by the Nebraska Workmen's Compensation Court after rehearing, every controverted fact must be resolved in favor of the successful party, and the successful party is given the benefit of every inference that can reasonably be drawn from the evidence.
3. **Workmen's Compensation.** The right of an injured workman to vocational rehabilitation depends upon his inability to perform work for which he has previous training and experience.
4. _____. Whether an injured workman is entitled to vocational rehabilitation is ordinarily a question of fact to be determined by the compensation court.

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

Walter E. Zink II of Baylor, Evnen, Curtiss, Grimit & Witt, for appellant.

Douglas Pauley of Conway, Connolly and Pauley, P.C., for appellee.

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

GRANT, J.

This action was brought by appellee, Linda K. Smith, to recover workmen's compensation benefits from the appellant, Hastings Irrigation Pipe Co. (Hastings Pipe). Smith was injured while working for Hastings Pipe on October 10, 1983, and filed a petition with the Nebraska Workmen's Compensation Court on July 12, 1984. After rehearing, a three-judge panel of the Workmen's Compensation Court, with one judge dissenting, modified a single-judge order and found that Smith was entitled to the costs of certain medical treatment by Dr. John L. Greene, together with temporary total disability payments during that treatment, and that Smith was entitled to rehabilitation services. Hastings Pipe appeals from that order, assigning as error the findings set out above.

Evidence adduced before the panel on rehearing showed the following. On October 10, 1983, Smith was in the employ of Hastings Pipe as a punch press operator in Hastings, Nebraska. She was working in the antenna production department, making ends for antenna dishes. Smith's job required her to

take a piece of metal in her left hand and put it in a press machine with the right hand while holding the metal with a pair of pliers. She then pushed down on a foot pedal, thus activating the press and stamping the piece of metal.

Smith testified that on the day of her injury the press she was operating was malfunctioning. The machine would activate without Smith's pushing the pedal. Smith testified that she told her supervisor about this, but he said he "would take care of it at the end of the night." The press continued to operate improperly, and Smith again reported this. Again, nothing was done. Smith further testified, "the next thing I knew, it came down and took my fingers."

The injury sustained by Smith was a partial amputation of the distal phalanges of the third and fourth fingers on her left hand. Smith was admitted to the Mary Lanning Memorial Hospital in Hastings, Nebraska, and was initially treated by Dr. Elmer E. Glenn. Dr. Glenn cleaned and reconstructed Smith's fingers and gave her medication for pain. While hospitalized at Mary Lanning, Smith complained of severe pain in her left hand and arm, radiating up to her left shoulder. Smith was released from the hospital on October 16, 1983, and continued in Dr. Glenn's care for the remainder of 1983 and through most of 1984.

Smith returned to work on January 9, 1984. Smith testified that when she returned to work she was experiencing hot, burning sensations in her hand that felt like hot needles going up into her arm. As a result of this pain, Smith had difficulty performing the assigned duties of her job. Smith testified that she had to receive help from a fellow employee to perform many aspects of a job that required two good hands. She further testified that it was not normal for two people to work together and that one person is supposed to be able to handle the whole job alone. Also, she indicated that her productivity at this time when she attempted to work was very low compared to other employees who had the use of both of their hands and arms.

Smith was terminated by Hastings Pipe by way of a letter dated February 24, 1984, which stated she had to be replaced because of "business necessity." Smith's last day at work was

February 7, 1984. She left early that day because of a kidney stone problem.

Smith continued to see Dr. Glenn during February 1984. Dr. Glenn recommended revision of her fingers. This procedure requires the shortening of the bones in the injured fingers. The revision was not done at that time, but, rather, Dr. Glenn referred Smith to Dr. Terry Newman. Dr. Newman administered 14 stellate ganglion block injections to Smith in May and June 1984 in an attempt to control and alleviate the pain Smith was experiencing. The stellate ganglion block was used to block the sympathetic nervous system supply to Smith's left upper extremity. By administering these blocks, the sensation of pain subsided and provided relief to Smith for anywhere from 6 to 8 hours.

Smith continued to suffer, almost continuously, from a burning, aching, tingling-like feeling beginning in her left hand and arm and radiating up through her left arm into the shoulder region. She was referred to Dr. Robert Hacker, a neurosurgeon, in Omaha, Nebraska. Dr. Hacker administered two stellate ganglion blocks to Smith in June 1984. These injections again only provided temporary relief. In addition, Smith suffered a small pneumothorax (punctured lung) with the second stellate ganglion injection. Dr. Hacker then conferred with Dr. John Edney, a plastic surgeon. Smith was hospitalized at Nebraska Methodist Hospital in Omaha, and Dr. Edney felt that the pain Smith was experiencing could be reduced with a revision of the fingertip stumps. At the time of Smith's hospitalization on this occasion, Dr. Edney stated that "the bony ends of both fingers were found to be pushing into the overlying skin." Dr. Edney performed surgery for revision of the finger stumps on June 26, 1984. During this surgical procedure, Dr. Edney inadvertently cut the tip of the little finger of Smith's left hand, which up until that time was injury-free.

As a result of her feelings concerning the punctured lung and cut finger, Smith testified, she did not return to Dr. Hacker or Dr. Edney. Smith testified that she still had very limited use of her left hand and arm after the surgery, because of continual pain.

Smith returned to the care of Dr. Glenn and Dr. Newman. Dr.

Newman referred her to Dr. John Greene, a neurosurgeon. Dr. Greene first saw Smith on September 17, 1984, and took a medical history from her on that date. Dr. Greene testified that based upon his physical findings, a discussion with Dr. Newman, and Smith's past medical history, he determined that Smith should undergo a surgical procedure known as a sympathectomy. This procedure entails the removal of a cluster of nerve fibers, known as ganglia. By removing the ganglia the sequence of propagation of a nerve impulse is interrupted. The theory of this procedure is to stop the pain Smith feels in her left upper extremity. The sympathectomy is designed to accomplish the same thing as the stellate ganglion block injections, but to give permanent relief. Smith was admitted to Bishop Clarkson Memorial Hospital in Omaha, and surgery was performed on September 19, 1984. While Dr. Greene testified that the surgery had objective findings of being a success, Smith testified that she still had pain in her left upper extremity. She testified that the only change in her condition since Dr. Greene's surgery is that her hand is now dry, rather than sweaty, and that the left upper part of her body does not sweat at all. She testified she still had the same limitations of the use of her hand and arm as she had before the surgery, which basically amounts to a left arm that is useless because of the pain.

Lastly, at the request of Hastings Pipe, Smith was examined by Dr. Chingren, an orthopedic surgeon, on January 21, 1985. Dr. Chingren is a Hastings, Nebraska, physician who, after his examination of Smith, prescribed some pain medication as well as the percussing of her finger stumps in an attempt to alleviate the pain Smith was still experiencing. It is Dr. Chingren's opinion that part of Smith's pain is real and part nonreal. In that connection Dr. Greene testified that his operation should or usually does relieve causalgia pain, but "It would be fair to say that if she [Smith] continues to have causalgia-like pain, even on a psychological basis whether she is consciously aware of it, it's still pain."

In reviewing workmen's compensation cases this court does not reweigh the facts. Our standard of review accords to the findings of fact made by the Nebraska Workmen's Compensation Court after rehearing the same force and effect

as a jury verdict in a civil case. Such findings will not be reversed or set aside unless clearly wrong. *Wilson v. City of North Platte*, 221 Neb. 90, 375 N.W.2d 134 (1985). We have also said that in testing the sufficiency of the evidence to support the findings of fact made by the Nebraska Workmen's Compensation Court after rehearing, every controverted fact must be resolved in favor of the successful party, and the successful party is given the benefit of every inference that can reasonably be drawn from the evidence. *Wilson v. City of North Platte, supra*; *Buck v. Iowa Beef Processors, Inc.*, 198 Neb. 125, 251 N.W.2d 875 (1977).

Hastings Pipe first contends that the Workmen's Compensation Court erred in finding that "the plaintiff's [Smith's] treatment by Dr. John L. Greene and the temporary total disability during that treatment was compensable" and "the medical expenses of Dr. Greene . . . including certain hospital services ordered by him were compensable." In support of its position, Hastings Pipe points out that the present case involves a subjective problem (pain), rather than an objective problem. While it is true that Smith's pain was subjective, Smith had suffered partial amputation of two fingers. The purpose of Dr. Greene's surgery was to alleviate the pain she was experiencing as a result of that injury. Dr. Greene's surgery was merely another effort to treat the same problem that Smith had been treated for by Drs. Newman, Hacker, and Edney—all of which medical bills Hastings Pipe paid.

Hastings Pipe relies on *Mack v. Dale Electronics, Inc.*, 209 Neb. 367, 307 N.W.2d 814 (1981), and *Powell v. W. G. Pauley Lumber Co.*, 217 Neb. 707, 350 N.W.2d 556 (1984). Both cases stand for the proposition that where an injury is not of an objective nature, a causal connection between the accident and the disability must be established by expert medical testimony. Hastings Pipe argues that the best that can be concluded from the testimony of Drs. Greene and Chingren is that there *could* have been a causal connection between the accident and Smith's pain at the time of Dr. Greene's surgery. In connection with this, Hastings Pipe states in its brief at 11-12 that "plaintiff clearly has not met her burden of establishing a causal connection between her alleged injury, the employment, and the disability

by competent medical testimony as required by the standards set forth in *Mack* [and] *Powell* . . . ." For this reason Hastings Pipe maintains that Smith is only entitled to be compensated for a schedule injury to each of her fingers and not for disability or medical expenses associated with Dr. Greene's surgery.

We do not agree. The issues raised by Hastings Pipe simply pertain to the sufficiency of the evidence in this case. Smith has presented evidence showing a continuous condition existing since her injury of October 10, 1983. Such evidence, when coupled with the history of Smith's treatment and the doctors' opinions, constitutes sufficient evidence to support the award made by the three-judge panel.

The record before us shows that from the very first day of her injury Smith complained of pain in her left hand, left arm, and left upper extremity, radiating up into the shoulder area. Smith received almost continual treatment for her injury and the pain she was experiencing. Both Dr. Hacker's medical report and Dr. Greene's deposition support the finding that Smith's pain was caused by her work-related accident. The majority opinion of the three-judge panel acknowledges that Dr. Greene's testimony, standing alone, is not sufficient to sustain Smith's burden of proof on the issue of medical causation. The order goes on to say that

> considering all the evidence and the opinions of the other physicians, including the final diagnosis of Dr. Hacker . . . the Court finds that the evidence is sufficient to sustain the plaintiff's burden of proving that her course of treatment starting in May, 1984 and continuing until November, 1984, was causally related to said accident and injury of October 10, 1983. This treatment [Dr. Greene's] was necessitated by the symptoms of the plaintiff that existed from the time of said accident and injury.

As we view the record, the Workmen's Compensation Court was not clearly wrong in finding Dr. Greene's services and related medical expenses were compensable. Smith is also entitled to disability.

In its other assignment of error, Hastings Pipe contends the Workmen's Compensation Court erred "In finding that the plaintiff [Smith] was entitled to vocational rehabilitation

services." The record shows that Smith has a 12th-grade education and is currently attending Hastings Central Community College and taking classes which will enable her to do managerial-type duties in the retail horticultural field.

In *Evans v. American Community Stores, ante* p. 538, 540, 385 N.W.2d 91, 93 (1986), we held:

> The right of an injured workman to vocational rehabilitation depends upon his inability to perform work for which he has previous training and experience. § 48-162.01; *Behrens v. Ken Corp.,* 191 Neb. 625, 216 N.W.2d 733 (1974). This is ordinarily a question of fact to be determined by the compensation court. *Pollock v. Monfort of Colorado, supra* [221 Neb. 859, 381 N.W.2d 154 (1986)].

Smith testified her arm still is essentially useless. Prior to her employment at Hastings Pipe, Smith held jobs which required two good hands and arms. Most, if not all, of these jobs were minimum-wage-type jobs. Smith's vocational training will allow her to obtain a job which will not require constant use of two good hands and arms. The Workmen's Compensation Court found vocational rehabilitation training was authorized under Neb. Rev. Stat. § 48-162.01(6) (Reissue 1984).

The dissenting judge of the three-judge panel felt that the "loss of her long and ring fingers . . . is [not] sufficient to entitle her to vocational rehabilitation . . . particularly . . . in view of the plaintiff's work history which shows that she has experience and training in several jobs that she can do." It is true that in her 10 years in the work force, Smith had jobs as a worker in the kitchen and dining room of a retirement home, as a filing clerk with an insurance company, as a waitress in bars and a restaurant, and as a sales clerk in various retail establishments. Smith testified, however, that each of these jobs required the use of both hands and both arms and that, although she had done such jobs in the past, she was unable to do them after her injury. Smith's testimony as to the physical requirements of each of her jobs, and her inability to perform the jobs after her injury, constituted sufficient evidence to support the findings of the majority of the panel, which found that Smith had suffered a reduction in her earning power as a result of her

accident and injury and determined that Smith was entitled to rehabilitation in an effort to increase her earning capacity. The evidence before the panel was sufficient to support those findings.

We determine that the evidence before the three-judge panel was sufficient to support the award entered by the court. The judgment of the compensation court is affirmed, and Smith is allowed the sum of $1,000 for the services of her attorney in this court.

AFFIRMED.

MID CITY BANK, INC., A NEBRASKA CORPORATION, APPELLEE, V. OMAHA BUTCHER SUPPLY, INC., A NEBRASKA CORPORATION, APPELLEE, AND DOUGLAS COUNTY BANK & TRUST CO., A NEBRASKA CORPORATION, APPELLANT.

385 N.W.2d 917

Filed May 2, 1986. No. 85-692.

1. **Uniform Commercial Code: Contracts: Debtors and Creditors: Security Interests.** Under an authorized hypothecation agreement a debtor may confer a right on a creditor in property belonging to another sufficient to create a security interest in such property which may be perfected under the Uniform Commercial Code.
2. **Uniform Commercial Code: Debtors and Creditors: Security Interests.** Under the Uniform Commercial Code a financing statement is sufficient in describing the collateral stated in the financing statement if it sets out an address of the secured party from which information concerning the security interest may be obtained, gives a mailing address of the debtor, and contains a statement indicating the types, or describing the items, of collateral, and reasonably defines the collateral.

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

William G. Dittrick of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, for appellant.

William J. Lindsay and William J. Lindsay, Jr., of Lindsay & Lindsay, for appellee Mid City Bank.

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

GRANT, J.

This case was brought by Mid City Bank, Inc., a Nebraska banking corporation, against Omaha Butcher Supply, Inc., a Nebraska corporation, and Douglas County Bank & Trust Co., a Nebraska banking corporation. Mid City sought to replevy from Douglas County Bank certain personal property of Omaha Butcher Supply, which property both Mid City and Douglas County Bank claimed as collateral security pledged by Omaha Butcher Supply to each of the banks, and which property Douglas County Bank had earlier replevied from Omaha Butcher Supply. After the suit was commenced, and after a court hearing, the trial court gave possession of the property to Mid City pending trial. Before trial, the property was sold for $21,570.82, and Mid City retained the proceeds pending resolution of the dispute between Mid City and Douglas County Bank. Omaha Butcher Supply took no further part in the proceedings.

After trial to the court, without a jury, the matter was submitted on a stipulation of facts and the record of the earlier hearing on temporary possession.

The trial court rendered judgment on July 10, 1985, allowing Mid City to retain the $21,570.82 in its possession and entered a judgment in favor of Mid City and against Douglas County Bank for $21,570.82. On July 18, 1985, Douglas County Bank filed a motion for a new trial or, "in the alternative, to modify the judgment of this Court entered on July 10, 1985." This pleading pointed out that a judgment against Douglas County Bank was improper because the case was a replevin action and Mid City already had the proceeds of the replevin in its hands. On July 29, 1985, the trial court entered an order which vacated the July 10, 1985, order, found that Mid City was entitled to retain the proceeds, and overruled the motion for new trial. On August 27, 1985, Douglas County Bank filed its notice of appeal "from judgment of this Court dated July 10, 1985, and the order of this Court of July 29, 1985, overruling this Defendant's motion for a new trial."

Douglas County Bank assigns three errors which may be considered as two: (1) That the trial court erred in finding that Mid City had a security interest in the collateral; and (2) That the trial court erred in finding that any security interest of Mid City was superior to that of Douglas County Bank and that Mid City was, therefore, entitled to the collateral sale proceeds of $21,570.82. For the reasons hereinafter set out, we affirm.

Appellee Mid City first contends that this court has no jurisdiction of the appeal because a notice of appeal must be from an existing judgment or from the denial of a motion for new trial. Mid City contends that the notice of appeal states it is from the "judgment . . . dated July 10, 1985" (which judgment was vacated by the trial court), and from the order of the trial court "of July 29, 1985, overruling this Defendant's motion for a new trial." Mid City contends that there is no notice of appeal from any existing judgment. We do not agree.

A similar situation was presented to this court in *Brandt v. Mayer*, 196 Neb. 751, 246 N.W.2d 203 (1976). In that case the trial court sustained the defendant's motion for new trial in part and amended an error in the judgment to which the new trial motion was directed. The trial court entered an amended judgment reducing the judgment awarded to the plaintiff from $8,176.90 to $4,432.92. Defendant did not file another motion for new trial but appealed from the $4,432.92 judgment. This court stated at 754, 246 N.W.2d at 204-05:

> Defendants contend it was necessary for the plaintiff to file a motion for a new trial before processing this appeal. We determine it was not. The purpose of a new trial motion is to give the trial court an opportunity after judgment to review and correct alleged errors in the previous proceeding. [Citation omitted.]
>
> The court did correct alleged errors on defendants' motion for a new trial. Another motion for a new trial would merely address the same points already passed on in the defendants' motion for new trial. To again require the trial court to review the record would be a useless gesture. We hold the appeal is properly before us. Where a modified judgment is entered after a trial court rules on a motion for new trial, another motion for new trial on the

modified judgment is not required.

Similarly, in the case at bar the trial court granted a portion of Douglas County Bank's motion for new trial and corrected the obvious error in its earlier judgment. A new judgment was entered on the docket in abbreviated form on July 29, 1985, and appellant timely filed its notice of appeal on August 27, 1985, from the "order of this Court of July 29, 1985." The phrase "overruling this Defendant's motion for a new trial" followed both the reference in the motion to the judgment of July 10 and the order of July 29, and was surplusage. The notice of appeal as filed by Douglas County Bank was sufficient to give this court jurisdiction of this appeal.

The record shows the following. Mid City's security interest was created by a promissory note and security agreement dated October 27, 1978, a hypothecation agreement dated October 27, 1978, and a financing statement filed with the Douglas County clerk on November 1, 1978, as required at that time by Neb. U.C.C. § 9-401(1)(c) at 562 (Reissue 1980). The promissory note and security agreement and the financing statement were signed by Calvin C. Campbell and Agnes E. Campbell, the sole stockholders, and the president and secretary, respectively, of Omaha Butcher Supply. The financing statement identified the debtor as Omaha Butcher Supply, Inc. The hypothecation agreement was directed to Mid City and stated that the agreement authorized

> Calvin C. and Agnes E. Campbell (herein called Debtor) to hypothecate, pledge and/or deliver the securities described below belonging to the undersigned . . . . The undersigned further agrees that said securities shall be subject to disposition in accordance with the terms and conditions of the instruments evidencing such indebtedness . . . of Debtor . . . .

The hypothecation agreement was signed "Omaha Butcher Supply Co. Inc. By: Calvin C. Campbell, President, By: Agnes E. Campbell." The money borrowed from Mid City was entirely for the business of Omaha Butcher Supply.

The hypothecation agreement, the promissory note to Mid City, and the financing statement filed by Mid City all describe the collateral as "All equipment, supplies, and parts of Omaha

Butcher Supply Inc. now owned and hereafter acquired, since July 13, 1977."

On June 21, 1982, Omaha Butcher Supply, by Calvin C. Campbell as president and Agnes E. Campbell as secretary, executed a promissory note to Douglas County Bank. This note recited that its payment was "secured by a Mortgage of even date herewith on real estate . . . inventory, accounts receivable, equipment, personal guarantees, and financial statements." On June 21 Omaha Butcher Supply also executed a "Financing Statement and Security Agreement" in favor of Douglas County Bank. On June 28, 1982, Douglas County Bank filed a "Financing Statement" with the Nebraska Secretary of State, as then required by Neb. U.C.C. § 9-401(1)(c) at 564 (Reissue 1980). The "Financing Statement and Security Agreement" and the "Financing Statement" name as collateral "All inventory, accounts receivable, and equipment now owned or hereafter acquired . . . ."

The balance due on both the Mid City Bank loan and the Douglas County Bank loan exceeds the value of the collateral. Each bank's note was declared due and payable before the action was commenced.

Omaha Butcher Supply, a Nebraska corporation, operated a business which sold, installed, and repaired equipment for grocery stores, supermarkets, restaurants, and related businesses. Parts and supplies were also sold. The items sold included "everything from knives and forks and spoons up to slicers and verticals, cutters, and mixers, cutting tables," and included the selling of "All equipment in the [grocery] store with the exception of cash registers." The business was operated with, as described by the corporation president, three profit centers: equipment, supplies, and parts. The items sold through each of the profit centers constituted the inventory of the company.

Douglas County Bank was aware of the existence of the Mid City loan. The record does not show any Uniform Commercial Code search made by Douglas County Bank. Douglas County Bank did not produce any evidence to show that it had known of the existence of the Mid City financing statement. The Mid City financing statement, with the Douglas County filing

stamp, named Omaha Butcher Supply as the debtor, the same company which later borrowed from Douglas County Bank. The Mid City Bank financing statement was also later filed with the Nebraska Secretary of State.

With regard to Douglas County Bank's first assignment of error—that is, the trial court erred in finding that Mid City had a security interest in the collateral—Douglas County Bank contends that Mid City does not have a perfected security interest in the collateral because the collateral was owned by Omaha Butcher Supply and the Mid City promissory note and security agreement were executed by the Campbells in their individual capacities. In that connection we recognize that, as contended by Douglas County Bank, the Uniform Commercial Code states that "a security interest is not enforceable against the debtor or third parties with respect to the collateral and does not attach unless (a) . . . the debtor has signed a security agreement which contains a description of the collateral . . . and . . . (c) the debtor has rights in the collateral." Neb. U.C.C. § 9-203 (Reissue 1980). Neb. U.C.C. § 9-105(1)(d) (Reissue 1980) states, in defining debtor,

> Where the debtor and the owner of the collateral are not the same person, the term "debtor" means the owner of the collateral in any provision of the article dealing with the collateral, the obligor in any provision dealing with the obligation, and may include both where the context so requires.

In Neb. U.C.C. § 9-112 (Reissue 1980), the code sets out the rights of the parties where the collateral is not owned by the debtor. This court has recognized the right to encumber the property of another when we held in *Val-U Constr. Co. v. Contractors, Inc.*, 213 Neb. 291, 295, 328 N.W.2d 774, 777 (1983), "Although the code permits a security interest to be taken in property owned by a third party, the authority to encumber the property must be established under other rules of law." In *Val-U Constr. Co., supra*, the authority of the president of that corporation to encumber the property of the corporation was not established. In the case at bar, such authority was established.

The hypothecation agreement signed by Omaha Butcher

Supply, by its terms, gives the Campbells authority to encumber Omaha Butcher Supply's property. Such a hypothecation agreement is defined in 42 C.J.S. at 370 (1944) as

> a contract of mortgage or pledge in which the subject matter is not delivered into the possession of the pledgee or pawnee; or, conversely, a right which a creditor has over a thing belonging to another, and which consists in a power to cause it to be sold in order to be paid as claim out of the proceeds.

It is the latter part of the definition we are here concerned with, since the right of Mid City to the collateral depends on the right of the Campbells to encumber the property of Omaha Butcher Supply. The concept of hypothecation was recognized by the court in *Sederstrom v. Burge*, 216 Neb. 512, 513, 343 N.W.2d 770, 771 (1984), where the facts showed that property owned by the Burges had been given by trust deed to a lending agency "as additional security and collateral for the Lucht loan pursuant to a hypothecation agreement." See, also, *Reeves v. Habersham Bank*, 254 Ga. 615, 331 S.E.2d 589 (1985); *Ocean Nat. Bank of Kennebunk v. Diment*, 462 A.2d 35 (Me. 1983).

Under the ruling in *Val-U Constr. Co. v. Contractors, Inc., supra* at 295, 328 N.W.2d at 777, the authority of the Campbells to encumber Omaha Butcher Supply's property has been established by "other rules of law." Those other rules of law in this case are the laws determining the rights under authorized hypothecation agreements. We hold that under an authorized hypothecation agreement a debtor may confer a right on a creditor in property belonging to another sufficient to create a security interest in such property which may be perfected under the Uniform Commercial Code. The Campbells had an interest in the collateral described in the financing statement of Mid City, and Mid City had an enforceable security interest in that collateral.

With regard to the second assignment of error—that is, that the trial court erred in finding that the security interest of Mid City was superior to the security interest of Douglas County Bank—Douglas County Bank contends that it is entitled to the proceeds of the sale of the collateral in question because it had a perfected security interest in the "inventory" of Omaha

Butcher Supply, while Mid City had a security interest in "equipment, supplies, and parts," not "inventory." It is Mid City's position that the words used in its security agreement ("equipment, supplies, and parts") describe the same collateral as the word used in Douglas County Bank's security agreement ("inventory") and that Mid City's security interest was perfected. If Mid City's contention is correct, Mid City would have priority over Douglas County Bank, since the Mid City filing was prior to the filing of the Douglas County Bank. Neb. U.C.C. § 9-312(5)(a) (Cum. Supp. 1984).

The issue of the perfecting of Mid City's security interest, in this case, is determined by the sufficiency of the description of the collateral in the Mid City financing statement. Neb. U.C.C § 9-110 (Reissue 1980) provides: "For the purposes of this article any description of personal property or real estate is sufficient whether or not it is specific if it reasonably identifies what is described." Neb. U.C.C. § 9-402 (Reissue 1971), in effect at the time of the filing of the financing statements of Mid City, provides in part:

> (1) A financing statement is sufficient if it is signed by the debtor and the secured party, gives an address of the secured party from which information concerning the security interest may be obtained, gives a mailing address of the debtor and contains a statement indicating the types, or describing the items, of collateral.

Section 9-402 (Reissue 1980), in effect at the time of the financing statement filed by Douglas County Bank, requires essentially the same information, except in the current statute the statement did not have to be signed by the secured party. We are here concerned with the sufficiency of the description with regard to giving notice to Douglas County Bank at the time that the bank took a security interest in the same property which Mid City contends was described in its financing statement. We hold the description "all equipment, supplies, and parts," set out in the Mid City statement, was sufficient to identify all the inventory held for sale by Omaha Butcher Supply.

The evidence shows that at the time Calvin C. Campbell borrowed money from Douglas County Bank, he told the loan officer of that bank that he was going to pay off all loans from

Mid City covering all equipment, supplies, and parts, and that that loan officer had a list of that property. Of course, at that time Mid City's financing statement had been on file in Douglas County more than 3 years. That statement disclosed the same information. The Mid City financing statement also gave the name of the debtor as "Omaha Butcher Supply Inc., 14623 Industrial Rd., Omaha, Nebraska 68144." Any cursory examination made by Douglas County Bank as to Mid City's financing statement, together with the additional information available to it, would make it certain that "all equipment, supplies, and parts" were the "inventory" of Omaha Butcher Supply and had been the subject of a security interest in Mid City for more than 3 years. We hold that under the Uniform Commercial Code a financing statement is sufficient in describing the collateral stated in the financing statement if it sets out an address of the secured party from which information concerning the security interest may be obtained, gives a mailing address of the debtor, and contains a statement indicating the types, or describing the items, of collateral, and reasonably defines the collateral.

Mid City had a prior security interest in the collateral, and the order of the trial court granting the proceeds of the sale of that collateral to Mid City was correct and is affirmed.

AFFIRMED.

CAPORALE, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. DANIEL G. PERDUE, APPELLANT.

386 N.W.2d 14

Filed May 2, 1986. No. 85-767.

1. **Mentally Disordered Sex Offender: Appeal and Error.** The granting of a motion for additional evaluation as to whether a defendant is a mentally disordered sex offender is addressed to the sound discretion of the trial court, and absent an abuse of that discretion, there is no error in refusing such request.
2. **Sentences: Appeal and Error.** This court will not modify on appeal a sentence

imposed within the statutory limits, absent an abuse of discretion on the part of the trial court.

Appeal from the District Court for Richardson County: ROBERT T. FINN, Judge. Affirmed.

Willis G. Yoesel, for appellant.

Robert M. Spire, Attorney General, and Laura L. Freppel, for appellee.

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

HASTINGS, J.

Following a plea of guilty to a charge of incest, a Class III felony, the defendant was found not to be a mentally disordered sex offender and was sentenced to a term of imprisonment of 20 years. The defendant has appealed, assigning as error the failure of the trial court to allow the defendant to receive additional evaluation as to his mental status, and excessiveness of the sentence. We affirm.

The record indicates that the incident to which the defendant pleaded guilty was an act of sexual intercourse with his 18-year-old daughter on February 12, 1985. There is also information in the file which indicates this sexual relationship had been going on for at least 4 years and that defendant requested his 17-year-old daughter to have sex with him, which request was denied.

Because of some inconsistent statements made by the defendant during the early stages of his arraignment, the court ordered the defendant to the Lincoln Regional Center for an evaluation to determine whether he was competent to enter a plea. Because of a misunderstanding, the examination dealt with the subject of whether defendant was a mentally disordered sex offender, and the diagnostic team concluded that he was not. Defense counsel was aware of that report shortly after May 23, 1985.

The court again requested an examination to determine if defendant was mentally competent to enter a plea. A letter of May 29, 1985, concluded that he was competent. Defendant's plea of guilty was accepted, and he was referred to the Lincoln Regional Center for a current sex offender evaluation.

A letter dated June 19, 1985, from the same diagnostic team determined that defendant did not meet the criteria of a mentally disordered sex offender. This letter was introduced into the record at the July 18 sentencing proceedings. Defendant's counsel indicated that he had had an opportunity to review the report and had no objections to its reception into evidence.

Just prior to sentencing, defendant's counsel requested a second mental evaluation, as follows:

> Your Honor, I don't believe the statute provides for this, but we would like to make a special request to the Court and would move that the Court transfer Mr. Perdue to some other institution for further psychological evaluation than has been made in the report that's received now. . . . It's the feeling of counsel that the evaluation that's delivered in that report is not accurate, and that further evaluation of the defendant should be done to further determine whether or not he is a mentally-disordered sex offender.

This request was denied by the court, which, after hearing arguments as to sentencing from both the defendant and his counsel, imposed a sentence of 20 years' imprisonment.

Defendant filed a motion to set aside the sentence, upon which hearing was had on July 25. His argument was based primarily upon Neb. Rev. Stat. § 29-2913 (Reissue 1979), which provides in part as follows:

> If the defendant, or counsel for the defendant, disagrees with the conclusions of the court-appointed panel he or she may file a motion with the court requesting an additional evaluation by two other physicians of the defendant's choice . . . . Such additional evaluation shall be made part of the presentence investigation and shall be filed with the court at least ten days prior to the date set for sentencing.

It is the State's position that the granting of such request is within the sound discretion of the court, and, in any event, if such report must be filed with the court 10 days prior to sentencing, a request for such evaluation made on the date for sentencing is obviously too late.

Defendant's counsel makes a rather weak argument that he could not have requested the evaluation any sooner because it was not until the date of sentencing that he was permitted to examine the State's report. This is not accurate. The court made the following statement at the hearing on the motion to set aside the sentence:

> All right, then the Court received a report from the diagnostic — or the Regional Center, and that report was dated May 13th, 1985. The envelope was marked filed May 23rd of '85. And apparently the Regional Center misunderstood our request and they examined Mr. Perdue and concluded as early as May 13, 1985, that he was not a mentally-disordered sex offender.

Counsel replied, "That's correct. That report was submitted in error. . . . Yes, Your Honor, I've read that report. . . . Yes, I reviewed that report."

Additionally, defendant's counsel admitted that he was informed by the clerk of the court sometime around the 1st of July that the letter dated June 19 had been received in his office but that it was sealed. He admitted that he had never requested of the court that he be allowed to see the letter. He also agreed that he had "a presumption that the second report [June 19] would not be dramatically changed from the first report [May 13]."

The record discloses that sentencing in this case was originally set for July 11, some 10 days or so after defendant's counsel was aware that the evaluation report was on file in the clerk's office. Even though he was reasonably certain as to the contents of that report, he made no effort to "file a motion with the court requesting an additional evaluation by . . . physicians of the defendant's choice . . . ."

The statute also requires that the evaluation shall be at the defendant's expense unless otherwise ordered by the court. No representation that he could pay those expenses was ever made by the defendant. He did not request the court to order the expenses paid by the State. He made no "choice" as to who the examiners would be.

Defendant had known since the middle of May that the examiners at the Lincoln Regional Center did not believe him to

be a mentally disordered sex offender. Yet he made no effort to secure a different examination for practically 60 days. Neb. Rev. Stat. § 29-2261 (Cum. Supp. 1984) provides as to presentence investigations that "[t]he court *may* allow fair opportunity for an offender to provide additional information for the court's consideration." Clearly, this implies the use of discretion by the sentencing court. There was no abuse of discretion in this instance on the part of the court in denying the 11th-hour request for additional information. In any event, there is nothing to prohibit the defendant from requesting further evaluation at any time during his period of incarceration.

This court will not modify on appeal a sentence imposed within the statutory limits, absent an abuse of discretion on the part of the trial court. *State v. Christensen*, 213 Neb. 820, 331 N.W.2d 793 (1983).

Defendant was sentenced to 90 days in jail for breaking and entering in 1956, and in 1962 was sentenced to 4 years imprisonment on each of two felony counts, assault with intent to do great bodily harm and robbery. Although charged with but one count of incest, there seems little doubt that he subjected his daughter to 4 years of abuse to the extent that in her statement describing the most recent encounter, she ventured that "I hope I never ever see him again."

There was no error in these proceedings and no abuse of discretion on the part of the trial court. Its judgment is affirmed.

AFFIRMED.

IN RE APPLICATION OF REGENCY LIMO, INC.
REGENCY LIMO, INC., APPELLEE, V. CELEBRITY LIMOUSINE SERVICE AND OLD MARKET LIMOUSINE SERVICE, INC., APPELLANTS.

386 N.W.2d 444

Filed May 2, 1986. No. 85-882.

1. **Public Service Commission: Motor Carriers.** The determination of public convenience and necessity is a matter peculiarly within the discretion and expertise of the Public Service Commission.
2. **Public Service Commission: Appeal and Error.** The standard of review on an appeal to the Nebraska Supreme Court from an order of the Public Service Commission granting a certificate of public convenience and necessity is limited to determining whether the commission acted within the scope of its authority and whether the order in question was reasonable and not arbitrarily made.
3. **Public Service Commission: Motor Carriers.** The controlling questions in determining public convenience and necessity are whether the proposed operation will serve a useful purpose responsive to a public demand or need; whether this purpose can or will be served as well by existing carriers; and whether the purpose can be served by the applicant in a specified manner without endangering or impairing the operations of existing carriers contrary to the public interest.

Appeal from the Nebraska Public Service Commission. Reversed.

Marshall D. Becker, for appellants.

Bruce C. Rohde and David H. Roe of McGrath, North, O'Malley & Kratz, P.C., for appellee.

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

CAPORALE, J.

The Nebraska Public Service Commission granted the applicant-appellee, Regency Limo, Inc., a corporation, authority to operate as a common carrier for the purpose of transporting "passengers by stretch limousines or other luxury type automobiles between points in the Omaha Metropolitan area and between points in Omaha, on the one hand, and, on the other hand, points in Nebraska over irregular routes." The protestants-appellants, Celebrity Limousine Service and Old Market Limousine Service, Inc., which hold authority for

similar service in the Omaha area, appeal and assign as error, among others, the commission's findings that the proposed service is or will be required by the present or future public convenience and necessity. That assignment being meritorious, we reverse.

Regency proposes to rent its single well-equipped 1985 Lincoln Continental stretch limousine at $45 per hour for a minimum of 2 hours to nonsmokers only. It is its intention to promote its business by personally soliciting, through its sole stockholder and director, businesses which have not used limousines in the past and persuade them to do so in the future. It is of the opinion that the newness, equipment, and extra length of its vehicle justify the $10 more per hour it intends to charge than do the other existing Omaha limousine services. Regency presented no documentation in support of its statement that its market research led to the conclusion there was a need for the service it proposes. By Regency's own admission, however, its research was not thorough enough to reveal that it needed a certificate of public convenience and necessity from the commission to engage in its proposed business.

Regency presented three witnesses in support of its application, all from Omaha, notwithstanding its statement that the majority of its business would come from areas other than that city. One of these witnesses, who is the leasing agent for premises occupied by Regency's stockholder, admitted that it had "been a while" since he purchased limousine services, but he had ridden in Omaha limousines provided to him by others during the 6 months preceding the hearing before the commission. He stated those services "did a good job." Nonetheless, he is impressed with the newness and quality of Regency's limousine and testified there are "a couple of occasions" when he is certain he would use Regency's services.

The second witness operates an air charter service and has rarely purchased limousine services in the past. He had never been solicited before by a limousine service; however, Regency's presentation has persuaded him to use limousines in the future. If Regency is not successful in its application, he would listen to other providers of the service.

The third witness is also involved in an air transport service, as well as being president of another business. He has never hired a limousine service but has concluded that his air transport service would have some use for such, although he did not know how extensively. There might be as many as "a dozen occasions in which we could *potentially* be a user." (Emphasis supplied.) He has ridden in Omaha limousines at the expense of others and thought those limousines "were pretty bad." He did not, however, know who owned them.

The evidence of the protestants establishes that Omaha, with a population of 569,614, has eight limousine services. The ratio of limousine services to population in other cities is as follows:

Cities	Population	Number of Limousine Services
Jacksonville, FL	737,541	Nine
Grand Rapids, MI	601,680	Three
Spartanburg, SC	569,066	Three
Youngstown, OH	531,350	Four
Fresno, CA	514,621	Eight
Wichita, KS	411,313	Two
Des Moines, IA	338,048	Four

There is no city in the foregoing comparison of a population similar to that of Omaha which has more limousine services than it does, and two which have less than half that number. While a comparison of the number of limousines available for hire in each city would have been more helpful, the foregoing comparison, standing without contradiction, is nonetheless some evidence that Omaha is not lacking in limousine services.

The two protestants together have 15 limousines which were manufactured from 1973 through 1984 and include a 1984 and a 1983 stretch Lincoln limousine which, although 17 inches shorter than Regency's limousine, are well equipped. Each of the protestants testified it is difficult to utilize all of its limousines. One of the protestants testified that the vast majority of its business is transporting visiting entertainers, some of which is done with the very same individual whose

business Regency said it expected to obtain.

Neb. Rev. Stat. § 75-311 (Reissue 1981) provides in pertinent part: "A certificate shall be issued . . . if . . . required by the present or future public convenience and necessity; otherwise such application shall be denied."

We have held that the determination of the public convenience and necessity is a matter peculiarly within the discretion and expertise of the commission. *In re Application of Red Carpet Limo. Serv., Inc.*, 221 Neb. 340, 377 N.W.2d 91 (1985). *Red Carpet* reaffirmed that our standard of review on an appeal from an order of the commission granting a certificate is limited to determining whether the commission acted within the scope of its authority and whether the order in question was reasonable and not arbitrarily made.

The only question present in this case is whether the commission's order is unreasonable and thus arbitrary.

The controlling questions in making that determination, as again reaffirmed in *In re Application of Red Carpet Limo. Serv., Inc., supra*, are whether the proposed operation will serve a useful purpose responsive to a public demand or need; whether this purpose can or will be served as well by existing carriers; and whether the purpose can be served by the applicant in a specified manner without endangering or impairing the operations of existing carriers contrary to the public interest.

The evidence in this case, as a matter of law, falls short of supporting the commission's order. The evidence simply does not rise to the level of showing that the proposed operation will serve a useful purpose responsive to a public demand or need, nor that this purpose cannot or will not be served as well by the existing carriers.

In view of the foregoing determination it is unnecessary to address the protestants' other assignments of error.

Accordingly, the order of the commission is reversed.

REVERSED.

WHITE, J., dissenting.

Neb. Rev. Stat. § 75-311 (Reissue 1981) provides that an applicant for a certificate of public convenience and necessity bears the burden of showing that the authority it seeks is required by the public convenience and necessity. *In re*

Application of Red Carpet Limo. Serv., Inc., 221 Neb. 340, 377 N.W.2d 91 (1985). We have defined public convenience and necessity to include: whether the operation will serve a useful purpose responsive to a public demand or need; whether this purpose can or will be served as well by existing carriers; and whether this purpose can be served by the applicant in a specified manner without endangering or impairing the operations of existing carriers contrary to the public interest. *In re Application of Greyhound Lines, Inc.*, 209 Neb. 430, 308 N.W.2d 336 (1981).

The determination of the issue of public convenience and necessity is peculiarly within the discretion and expertise of the Public Service Commission. *Red Carpet Limo. Serv., Inc., supra*. As the majority recognizes, the standard of review in this court for cases of this kind is well established. Upon an appeal from an order of the commission granting a certificate, this court decides only whether the commission acted within the scope of its authority and whether the order in question was reasonable and not arbitrary. As we stated in *Red Carpet Limo. Serv., Inc., supra* at 342, 377 N.W.2d at 93: "If there is evidence to sustain the finding of the commission, this court cannot intervene. *It is only where the findings of the commission are against all the evidence that this court may hold that the commission's finding on the evidence is arbitrary*." (Emphasis supplied.)

The evidence presented to the commission in this case met all the requirements for a certificate of public convenience and necessity. First, Regency Limo presented evidence that its proposed operation would serve a useful purpose responsive to a public demand or need. Regency Limo, Inc., proposed to provide round-the-clock luxury limousine services to celebrities, dignitaries, and businesspersons visiting Omaha and points outside the city. This is unlike the situation in *Red Carpet Limo. Serv., Inc.*, where the applicant's proposed services would have provided limousine transportation from the Omaha airport to points in the city, such services being identical to those already offered by Omaha taxi and limousine companies. Regency's president and sole stockholder testified that he and his financial backers perceived the need for a

more personalized and luxurious limousine service after entertainers visiting Omaha complained to them about the quality of existing limousine services. After further investigation into the feasibility of the venture, Regency concluded that a clientele existed for the type of service it proposed.

Regency subsequently purchased a 1985 Lincoln "stretch" limousine, complete with color television, stereo, VCR, telephone, and intercom. In the record the protestants conceded that Regency's limousine was superior to theirs in features and luxurious appointments which presumably would appeal to the clientele Regency believed existed and hoped to attract.

Regency also demonstrated to the commission that its proposed services could not be offered by existing limousine services. As noted earlier, the protestants acknowledged the superiority of Regency's "stretch" limousine, a type of vehicle which no other Omaha-based limousine service currently owned or operated at the time Regency made its application. Without major expenditures for new and better-equipped vehicles (Regency testified that its stretch Lincoln cost $48,000), existing limousine services did not have the capability to serve the limited clientele to which Regency's services were to be directed.

Finally, the fact that Regency met the first two requirements for a certificate of public convenience perforce establishes that it met the third requirement—that is, Regency's purpose could be served in a specified manner without endangering or impairing the operations of existing carriers contrary to the public interest. The protestants conceded that they were not currently engaged in the type of business Regency proposed, in part because they lacked the luxurious vehicles needed for such an offering. That the protestants may have in the future been willing to expand their services to accommodate Regency's targeted clientele does not establish that their existing services would somehow be harmed by Regency's proposed offering. The simple fact is Regency developed an innovative marketing concept in the limousine service field that the other carriers had not considered. The commission's granting of a certificate of public convenience and necessity to Regency Limo should have

been affirmed.

BOSLAUGH, J., joins in this dissent.

EDWARD A. JAKSHA, PLAINTIFF, V. STATE OF NEBRASKA; ROBERT KERREY, GOVERNOR OF THE STATE OF NEBRASKA; AND DONNA KARNES, TAX COMMISSIONER OF THE STATE OF NEBRASKA, DEFENDANTS.

385 N.W.2d 922

Filed May 2, 1986. No. 86-014.

1. **Constitutional Law.** In construing provisions of a constitution, courts may examine debates and proceedings of a constitutional convention to determine the framers' intended meaning of words, phrases, or clauses of a constitution.
2. _____. The Constitution as amended must be construed as a whole. Every clause in a constitution has been inserted for a useful purpose and should receive even broader and more liberal construction than statutes.
3. _____. The purpose of the Governor's proclamation, calling a special session of the Legislature pursuant to Neb. Const. art. IV, § 8, is notice to the public regarding subjects to be considered at such legislative session and specification of the boundaries for the area of legislation which may be enacted during that special session of the Legislature.
4. _____. Neb. Const. art. IV, § 8, as part of the power of the executive branch of government, permits the Governor to determine when an extraordinary occasion exists, necessitating convention of a special session of the Nebraska Legislature.
5. _____. The subject matter restriction envisioned in Neb. Const. art. IV, § 8, empowers the Governor to set the boundaries of legislative action permissible at a special session of the Nebraska Legislature.
6. _____. Under Neb. Const. art. IV, § 8, the Governor may, during the Legislature's special session convened pursuant to a gubernatorial proclamation, submit by an appropriate amended proclamation any additional subjects for valid legislation to be enacted at such special session of the Legislature.

Original action. Judgment for defendants.

Patrick W. Healey of Healey, Wieland, Kluender, Atwood & Jacobs, for plaintiff.

Robert M. Spire, Attorney General, and L. Jay Bartel, for defendants.

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

SHANAHAN, J.

Pursuant to leave granted by this court, see, Neb. Const. art. V, § 2, and Neb. Rev. Stat. § 24-204 (Reissue 1979), Edward A. Jaksha, a Nebraska citizen and taxpayer, has filed an original action to determine the constitutionality of 1985 Neb. Laws, L.B. 35, 89th Leg., 2d Spec. Sess., a revenue measure enacted on November 15, 1985. By L.B. 35, which amended Neb. Rev. Stat. § 77-2701.01 (Cum. Supp. 1984), the Nebraska Legislature increased the rate of income tax, namely, from 19 percent to 20 percent, for every individual resident of Nebraska, effective for the tax year commencing January 1, 1985. See Neb. Rev. Stat. §§ 77-2715 (Cum. Supp. 1984) (imposition of tax on income of a resident individual) and 77-2715.01 (Cum. Supp. 1984) (rate of income tax determined by Legislature).

On October 15, 1985, as authorized by Neb. Const. art. IV, § 8, Governor Robert Kerrey issued a proclamation to convene an "extraordinary session" of the Nebraska Legislature on October 17, 1985, for the purpose of "considering and enacting legislation" relating to nine itemized and specific subjects, none of which involved or referred to an increase in the rate of income tax for individual residents of Nebraska.

In response to the Governor's proclamation, the Legislature convened in special session on October 17. On the first day of the special session, L.B. 10 was introduced: "A BILL FOR AN ACT relating to revenue and taxation; to amend section 77-2701.01, Revised Statutes Supplement, 1984; to change the income tax rate; to provide an operative date; to repeal the original section; and to declare an emergency." As reflected in L.B. 10, a resident individual's rate of income tax increased from 19 percent to 20 percent at January 1, 1985.

On inquiry by the introducer of L.B. 10, the State's Attorney General rendered an opinion raising doubt that L.B. 10's tax rate increase was within the purpose contained in the Governor's proclamation of October 15.

On November 6, 1985, while the Legislature was in the 10th

day of the special session pursuant to the Governor's initial proclamation, the Governor issued an "AMENDED PROCLAMATION" which referred to convention of the Legislature in extraordinary session on October 17 and included the identical nine subjects contained in the initial proclamation but added a tenth subject or item: "10. Increase the Income Tax rate for 1985." After such amended proclamation, L.B. 35, substantially similar to L.B. 10, was introduced on November 6 and, after final reading on the 16th day of the special session, was passed with an emergency clause on November 15. L.B. 35 was signed by the Governor on November 15, amended § 77-2701.01, and increased every resident individual's rate of income tax from 19 percent to 20 percent for the tax year commencing on January 1, 1985.

As stated in the stipulation of the parties, the questions submitted for answer by this court are:

> QUESTION NO. 1 - Whether the "Amended Proclamation" issued by the Governor on November 6, 1985, was legally sufficient to allow the valid enactment of L.B. 35, passed on November 15, 1985, by the 89th Legislature, Second Special Session of 1985.
>
> QUESTION NO. 2 - In the event the answer to Question No. 1 is in the negative, whether L.B. 35 constituted valid legislative business under the scope of the "Proclamation" of the Governor issued on October 15, 1985.

Among sections of the Nebraska Constitution applicable in the present case are:

> The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted.

Neb. Const. art. II, § 1; and

> The Governor may, on extraordinary occasions, convene the Legislature by proclamation, stating therein the purpose for which they are convened, and the Legislature shall enter upon no business except that for

which they were called together.

Neb. Const. art. IV, § 8.

Jaksha contends that after the Legislature has convened in special session in response to the Governor's proclamation calling such special session, Neb. Const. art. IV, § 8, does not empower the Governor to alter the proclamation by adding any subject not designated in the original, or initial, proclamation. Because the Governor's original, or initial, proclamation of October 15, 1985, did not refer to any rate for income taxation, Jaksha argues, any increase in the tax rate pursuant to the Governor's proclamation is outside the purpose of the special session and is, therefore, invalid. The State counters that Neb. Const. art. IV, § 8, does not preclude the Governor's amending a proclamation calling a special legislative session, adding matters for the Legislature's consideration, after a special legislative session has been commenced.

Neb. Const. art. IV, § 8, was adopted as a result of Nebraska's constitutional convention of 1875. In construing provisions of a constitution, courts may examine debates and proceedings of a constitutional convention to determine the framers' intended meaning of words, phrases, or clauses of a constitution. See *Elmen v. State Board of Equalization and Assessment*, 120 Neb. 141, 231 N.W. 772 (1930).

Although some committee reports and some minutes of Nebraska's 1875 constitutional convention are parts of the archives of the Nebraska State Historical Society, recorded debates of that convention are unavailable. The explanation for the missing record of debates is found in the "Preface" for volume 1 of Nebraska Constitutional Conventions, which relates an account by Mr. H.H. Wheeler, "formerly of the Supreme Court office":

> "In the fall of 1889, some days after the death of Guy A. Brown, Clerk of the Nebraska Supreme Court, (which occurred Oct. 27th of that year), I went into the basement vault of the Clerk of the Supreme Court in the state capitol to get some articles belonging to me. On the stairway I met David C. Crawford, one of the state house janitors, [and his] helper named Henry, conveying a cracker box with a lot of papers in it upstairs. I instantly recognized the

> papers as the manuscript report of the debates in the constitutional convention of 1875. I told the janitors that they were very valuable papers and ought to be preserved. When I came up from the vaults a few minutes later I stepped into the office of the Secretary of State, and told Nelson McDowell, Chief Clerk, and O. C. Bell, Deputy Secretary of State, what I had seen; called their attention to the value of the papers, and that they properly belonged in the custody of the Secretary of State. I have never seen the debates since, although I have made diligent personal search for them in the state house, having an important law suit involving a constitutional question which the debates would have shed light upon. I have never found any one who has seen those manuscripts since that day."

1 Neb. Const. Convs. 7 (1906).

Sic transit gloria mundi [so passes away the glory of the world]—in a cracker box, somewhere. Consequently, we must apply other rules for construction of Neb. Const. art. IV, § 8.

Jaksha and the State refer to *Tennant's Case*, 3 Neb. 409 (1873), where this court construed the constitutional predecessor of Neb. Const. art. IV, § 8, and held that the Governor has the constitutional power to revoke a proclamation calling a special session of the Legislature before commencement of the special legislative session responsive to the proclamation for convention.

Because *Tennant's Case, supra*, involved the status of a Governor's proclamation before a special legislative session had convened, *Tennant's Case* has insignificant precedential value regarding the particular question presented to this court for the first time: After commencement of the Legislature's special session called by the Governor's proclamation, can the Governor constitutionally amend the original, or initial, proclamation by adding a subject not designated in that original, or initial, proclamation?

For those matters within the particular province of the executive branch of government, the Governor's authority is unfettered, "supreme executive power," subject only to constitutional and valid statutory limitations. See Neb. Const. art. IV, § 6.

In *Elmen v. State Board of Equalization and Assessment*, 120 Neb. 141, 148, 231 N.W. 772, 776 (1930), this court acknowledged and adopted a cardinal principle of constitutional construction:

> "The (state) Constitution is a limitation upon the powers of the legislative department of the government; but it is to be regarded as a grant of powers to the other departments. Neither the executive nor the judiciary, therefore, can exercise any authority or power, except such as is clearly granted by the Constitution." [Citation omitted.]

In construing provisions of the Nebraska Constitution, we are guided by other fundamental and long-established principles: " 'The Constitution as amended must be construed as a whole.' " *Elmen v. State Board of Equalization and Assessment, supra* at 149, 231 N.W. at 776. See, also, *Dwyer v. Omaha-Douglas Public Building Commission*, 188 Neb. 30, 195 N.W.2d 236 (1972); *State ex rel. Johnson v. Chase*, 147 Neb. 758, 25 N.W.2d 1 (1946). Every clause in a constitution has been inserted for a useful purpose and should receive even broader and more liberal construction than statutes. See, *Anderson v. Tiemann*, 182 Neb. 393, 155 N.W.2d 322 (1967); *Carpenter v. State*, 179 Neb. 628, 139 N.W.2d 541 (1966).

A contention similar to that made by Jaksha appears in *Stickler v. Higgins*, 269 Ky. 260, 106 S.W.2d 1008 (1937). In *Stickler* the Governor of Kentucky issued a proclamation to convene a special session of the Kentucky legislature. Ky. Const. § 80 provided: "[The Governor] may, on extraordinary occasions, convene the [Legislature] . . . . When [the Governor] shall convene the [Legislature] it shall be by proclamation, stating the subjects to be considered, and no other shall be considered." When the Kentucky Governor issued his proclamation for the special legislative session, the proclamation misdescribed certain legislation to be submitted for repeal. After the special legislative session had begun, the Governor amended his original call by referring to the error in his original proclamation, designating the specific act to be repealed at the special session, and correcting the erroneous identification contained in the original proclamation. The

legislation identified in the amended proclamation was repealed. As a citizen-taxpayer, Stickler contended that the Governor, under § 80 of the Kentucky Constitution, lacked power to amend the original proclamation calling the special legislative session.

In *Stickler v. Higgins, supra*, the court held:

> "The purpose of this provision [the last sentence of section 80, supra] is to give notice to the public of the subjects to be considered, in order that persons interested may be present if they desire, and also it is a check upon legislative action, that no matters outside the proclamation shall be acted on." [Citing and quoting from *Richmond v. Lay*, 261 Ky. 138, 87 S.W.2d 134 (1935).]

269 Ky. at 264, 106 S.W.2d at 1010.

> Another reason given in the cases cited, and others that might be cited, is, that it was not the desire of the makers of the Constitution that an extraordinary session when convened should have the authority to legislate within the almost limitless field that a regular session may do, but to confine enactments at such extraordinary sessions to such subjects as the Governor might set before the law making body in the manner prescribed in the Constitution, i.e., by a proclamation, thereby conferring upon him the power and authority to limit in that manner the subjects that the Legislature might consider at such extraordinarily called session. Those reasons are undoubtedly the ones prompting such constitutional provisions, and the purpose thereof is accomplished just as effectually if the additional proclamations submitting other subjects are issued after the extraordinary session is convened, as would be if they were issued within the time intervening between the original proclamation and the convening of the session.

269 Ky. at 264-65, 106 S.W.2d at 1011.

The language of the Kentucky Constitution in reference to convention and business of a special legislative session is substantially similar to Neb. Const. art. IV, § 8. We find the reasoning of the Kentucky court persuasive in reaching an answer to Jaksha's question about the Governor's amended

proclamation in the case before us.

First, we note that the Nebraska Constitution does not limit the number of special sessions of the Legislature which may be called by the Governor's proclamation in accordance with Neb. Const. art. IV, § 8. The Governor's proclamation is a vehicle for publicizing business to be conducted at a special legislative session. A supplemental or amended proclamation serves the same function of notice to the public and those interested in the particular subject or subjects to be considered by the Legislature in special session. Thus, those notified by the amended proclamation are afforded the same opportunity to express themselves—for or against any measure to be considered at the special legislative session—as are those who wish to express themselves in response to an initial, or original, proclamation issued by the Governor. In this manner the opportunity for popular expression about potential legislation is preserved in either situation. Second, we observe there is no question concerning the adequacy of the amended proclamation or the introduction of the revenue measure (L.B. 35) after the amended proclamation. The amended proclamation and introduction of L.B. 35 occurred the same day, November 6, thus supplying 8 full days for consideration and expression about L.B. 35 before passage of that legislation on November 15. In considering any legislation, suggested or introduced, during a special session of the Legislature called by the Governor, legislators are likely to be autonomous, not automatons, but well aware of the wishes of their constituents in our constitutional form of government.

As an additional consideration, Jaksha's suggested construction of Neb. Const. art. IV, § 8, frustrates practicalities desirable in governmental activities. If Jaksha's construction were accepted, only after termination of one special legislative session, having been called by a Governor's proclamation, would the Governor then have authority to reconvene the Legislature in another special session. Such requisite termination of business at one special legislative session and reconvention, after intervention of unnecessarily elapsed time and expense incurred by legislators living outside Lincoln, are inconsistent with efficiency and economy as objectives for any

government. As an additional consequence of Jaksha's impractical construction of Neb. Const. art. IV, § 8, if another "extraordinary occasion" arose during pendency of a special legislative session, the Governor would be precluded from submitting that postconvention but current "extraordinary occasion" to the Legislature. Deferral of appropriate action and unnecessary delay are incongruous with expeditious disposition of an "extraordinary occasion."

We, therefore, hold that the purpose of the Governor's proclamation, calling a special session of the Legislature pursuant to Neb. Const. art. IV, § 8, is notice to the public regarding subjects to be considered at such legislative session and specification of the boundaries for the area of legislation which may be enacted during that special session of the Legislature.

We conclude that Neb. Const. art. IV, § 8, as part of the power of the executive branch of government, permits the Governor to determine when an extraordinary occasion exists, necessitating convention of a special session of the Nebraska Legislature. The subject matter restriction envisioned in Neb. Const. art. IV, § 8, empowers the Governor to set the boundaries of legislative action permissible at a special session of the Nebraska Legislature. As a consequence of such authority under Neb. Const. art. IV, § 8, the Governor may, during the Legislature's special session convened pursuant to a gubernatorial proclamation, submit by an appropriate amended proclamation any additional subjects for valid legislation to be enacted at such special session of the Legislature.

There is no question that 1985 Neb. Laws, L.B. 35, 89th Leg., 2d Spec. Sess., came within the scope of the Governor's amended proclamation. In view of our affirmative answer to question No. 1 submitted by the parties, we need not answer question No. 2. Therefore, judgment is entered against Jaksha on his petition and in favor of the defendants.

JUDGMENT FOR DEFENDANTS.

IN RE ESTATE OF ROY A. WAGNER, DECEASED. DELPHINE WAGNER, PERSONAL REPRESENTATIVE OF THE ESTATE OF ROY A. WAGNER, DECEASED, APPELLANT, V. NICHOLAS J. LAMME, APPELLEE.

386 N.W.2d 448

Filed May 9, 1986. No. 84-937.

1. **Decedents' Estates: Appeal and Error.** In reviewing a probate case on appeal from the county and district courts, our review, like that of the district court, must be confined to an examination for errors appearing on the record.
2. **Decedents' Estates: Wills: Attorney and Client: Words and Phrases.** There is no such position known as "attorney of an estate." When an attorney is employed to render services in securing the probate of a will or settling of an estate, he or she acts as attorney for the personal representative and not for the estate.

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

William G. Line of Kerrigan, Line & Martin, for appellant.

Lawrence H. Yost and Nicholas J. Lamme of Yost, Schafersman, Yost, Lamme & Hillis, P.C., for appellee.

BOSLAUGH, HASTINGS, CAPORALE, and GRANT, JJ., and BRODKEY, J., Retired.

HASTINGS, J.

Delphine Wagner, the personal representative of the estate of Roy A. Wagner, deceased, has appealed from the judgment of the district court which affirmed the order of the county court allowing Nicholas J. Lamme an attorney fee in that estate proceeding. A related case involving some of the facts forming the background for this appeal is *In re Estate of Wagner*, 220 Neb. 32, 367 N.W.2d 736 (1985) (a conservatorship).

The transcript contains nothing of the county court proceedings except for the application and order awarding fees. The bill of exceptions sheds little additional light as to the nature and extent of the services rendered. Unfortunately, a good portion of it is devoted to accusations and counteraccusations made by the two lawyers involved. In our review of the case, we, like the district court, are confined to an examination for errors appearing on the record. *In re Estate of Casselman*, 219 Neb. 653, 365 N.W.2d 805 (1985).

Although it does not appear in the record, appellee's brief suggests that Roy A. Wagner died on June 19, 1983, and shortly thereafter the firm of which Lamme was a member filed a petition for probate of the will and for appointment of the decedent's wife, Delphine Wagner, as personal representative.

Friction developed between four of the children on the one hand and Delphine and one or two other children on the other hand. This resulted in the filing on October 6, 1982, of a petition for appointment of a conservator for Delphine.

At the time these disputes developed, Lamme concluded that he could not represent Delphine personally but would continue to "represent the estate." He informed Delphine and her daughter Clarinda of that decision. He also wrote a letter to all of the heirs, dated October 3, 1983, canceling a meeting which he had scheduled with all of the heirs, and informing them that "[s]ince the Estate, as an entity, will need representation, I will endeavor to continue with that representation. I am, however, unwilling to represent one heir against another."

Shortly after writing that letter, Lamme did receive a short note from Delphine asking that he submit an itemized bill. It is quite apparent that he interpreted that as a request to terminate his services, because he then wrote her a letter, dated October 19, 1983. He stated in that letter:

> I am in receipt of your letter asking for an itemized bill. In consideration of the fact that there is an Application for Conservatorship for you pending, it is our intention to remain as attorneys of record in the Estate until that matter is resolved.
>
> If, after the trial the Court rules that a Conservatorship is not needed for you and if you then want us to bill and/or withdraw as attorneys of record for the Estate, we will do so at that time. Until then, we feel that is inappropriate to do so.

Lamme further explained his refusal to step down as the attorney for the personal representative because "I took the position at that time, as I had felt that she was under the . . . undue influence of her daughter."

Lamme testified in the conservatorship proceedings. He agreed that Delphine was competent generally. By order dated

January 13, 1984, the county court appointed the First National Bank and Trust Company, Fremont, Nebraska, as her conservator. The court found that she was not competent to manage and invest substantial assets. Although it does not appear in the record as such, the parties agree that Delphine was removed as personal representative of her husband's estate and the bank was appointed as successor personal representative. Lamme was then retained by the bank to proceed with the estate matters.

Lamme then became concerned that by reason of Neb. Rev. Stat. § 24-541.03 (Cum. Supp. 1982) ["In appeals in matters arising under the Nebraska Probate Code the appeal shall be a supersedeas for the matter from which the appeal is specifically taken, but not for any other matter"], the order of the county court removing Delphine as personal representative would not yet be effective. Consequently, the First National Bank could not function as successor personal representative. Therefore, he did ask the court to appoint the bank as a special administrator, which was accomplished on March 12, 1984.

Lamme testified that during that period of time, while representing the bank either as a successor personal representative or a special administrator, he continued to represent the estate, doing those things that were necessary, including the preparation of a federal estate tax return. He also said that at the request of attorney William Line he sent to Line the inventory and estate tax return for Delphine to sign on March 15, 1984. Although the letter requested that Delphine sign the documents and return them to Lamme, Line countersigned the estate tax return as attorney for the estate and filed it himself. It was not until then, Lamme claims, that he was informed not to proceed further with the estate.

As a result of the appeal to the district court, the order of the county court appointing a conservator for Delphine and removing her as personal representative of her husband's estate was reversed by order dated May 9, 1984. That action was affirmed by this court in the case of *In re Estate of Wagner*, 220 Neb. 32, 367 N.W.2d 736 (1985).

The parties stipulated during the county court proceedings on the fee matter that $11,275 plus costs had been paid into the

trust account belonging to Line's law firm and that such amount was a fair and reasonable fee for the total services rendered in the Roy A. Wagner estate proceedings. The county court ordered that Lamme's firm be paid 85 percent of the total fee and Line's firm 15 percent. There had been no appeal from the allowance to Line, and the order in that regard is final. The only question on this appeal relates to the fee awarded to Lamme.

Although appellant sets forth what she denominates as 11 assignments of error, the only one that has any substance is that Lamme had no authority to continue with the estate proceedings after being discharged in October of 1983.

Lamme insisted that although he understood that Delphine intended to discharge him in October, she was not competent to do so. However, he himself testified at her conservatorship proceedings that she was competent generally but was under the undue influence of her daughter. The fact remains, as previously stated, that upon appeal of the order removing Delphine as personal representative and appointing the bank to succeed her, that order was superseded under the provisions of § 24-541.03, and Delphine was still the personal representative. The reversal by the district court and the affirmance of that order by this court removed any doubt in that regard.

Lamme contends that he would not represent Delphine in the attack on her competency to continue as personal representative but would continue to "represent the estate." Attorneys represent people. There is no such position known as "attorney of an estate." When an attorney is employed to render services in securing the probate of a will or settling an estate, he acts as attorney for the personal representative and not for the estate. *In re Ogier*, 101 Cal. 381, 35 P. 900 (1894). See, also, *In re Estate of Cromwell*, 522 S.W.2d 36 (Mo. App. 1975).

Neb. Rev. Stat. § 30-2476(21) (Reissue 1979) empowers the personal representative to employ an attorney to assist in the performance of the administrative duties of the representative. The appellee concedes this proposition, as well as the corollary that such representative also has the power to discharge the attorney.

It seems apparent that under certain circumstances a court would be authorized to appoint a special personal representative to serve, perhaps under the very circumstances of a case like this. However, there is no indication of any services performed by Lamme in this capacity. Tom Kelly, an employee of the bank, in his testimony as a witness for the appellee, stated that he was not aware of any services performed in regard to the estate proceedings between the time Mrs. Wagner was removed as personal representative and the bank was appointed as successor representative. He testified to no services that Lamme performed.

The only services which the record would support were performed by Lamme after the appointment of Delphine Wagner as the personal representative were the preparation of an inventory and a federal estate tax return. It is difficult to determine whether this was done before or after the bank was appointed as special administrator. Although it is claimed by the appellant that both of those documents were erroneous and had to be corrected by Line, which is conceded by Lamme, the record suggests that the errors were not of such import as to make them totally worthless.

However, we believe it quite apparent that from the time of Lamme's discharge by Delphine and his employment by the bank as special administrator, he had no client and no authority to perform any services in this proceeding. Any allowance of fees for purported services rendered during that period of time was without authority and constituted error on the part of the trial court. However, he would be entitled to payment for work performed for the special administrator.

Accordingly, with this as a guideline, the judgment is reversed and the cause is remanded to the district court with directions to remand to the county court for further proceedings. The county court should determine the amount of any fee to which Lamme may be entitled for services legitimately rendered to the personal representative prior to October of 1983, and to the First National Bank as special administrator after March 12, 1984, and until its discharge.

REVERSED AND REMANDED WITH DIRECTIONS.

ARCADIA STATE BANK, A NEBRASKA CORPORATION, APPELLANT, V. CARL R. NELSON ET AL., APPELLEES.

386 N.W.2d 451

Filed May 9, 1986. No. 85-226.

1. **Replevin.** Replevin is an action for possession only and does not properly lie against one who is not, at the time of the commencement of the action, in possession of any of the property sought to be recovered.
2. **Replevin: Liability.** The object of an action of replevin is to recover specific personal property, and liability for the value of the property accrues only if a return of the property cannot be had.
3. **Replevin: Parties.** One who claims title to or the right to the possession of property replevied, adversely to the plaintiff, is not a necessary party.
4. _____: _____. The person in possession of the property sought to be replevied is ordinarily the proper and only necessary party defendant.
5. _____: _____. Replevin will not lie against one who is not detaining the property when the writ is sued out. It is the condition of things when the suit is commenced which furnishes the ground for the action.
6. **Replevin.** As a general rule, since the main issue in a replevin action is one of title and right to possession, all matters foreign thereto must be excluded from consideration and are not available as defenses.
7. **Replevin: Proof.** The burden is on the plaintiff in replevin to establish facts necessary for him to recover, and these must be shown to have existed at the time the action was commenced. The gist of a replevin action is the unlawful detention of the property at the inception of the suit and the rights of the parties with respect to possession of the property at that time.
8. **Replevin.** The cardinal question in every replevin action is whether the plaintiff therein was entitled to the immediate possession of the property replevied at the commencement of the action.
9. _____. A plea of the right to possession in a third person cannot be sustained unless the right is an absolute one.
10. **Summary Judgment: Pretrial Procedure.** Where a party properly serves a request for admission of relevant matters of fact or the genuineness of relevant documents, and all objections thereto are heard and appropriately denied by the court, and the other party has been ordered to respond thereto, his failure to do so within the time allotted constitutes an admission of the facts sought to be elicited. In such situation a motion for summary judgment is appropriate and may be granted if admissions made or failure to deny as required by the statute, together with the pleadings, show that there is no genuine issue as to any material fact or that the court is without jurisdiction of the subject matter.
11. **Pretrial Procedure: Rules of the Supreme Court.** When a request for admission is made under Neb. Ct. R. of Disc. 36 (rev. 1983), the party served must answer, even though he has no personal knowledge, if the means of obtaining the information are available to him. It is not a sufficient answer that he does not

know, when it appears that he can obtain the information. It is immaterial that the plaintiff is acquainted with the facts as to which admission is sought. The purpose of the rule is to expedite the trial and to relieve parties of the cost and inconvenience of proving facts which will not be disputed on the trial, the truth of which can be ascertained by reasonable inquiry.

12. **Pretrial Procedure.** A bad response to a request for admission is treated as no response at all, and hence as an admission.

Appeal from the District Court for Valley County: RONALD D. OLBERDING, Judge. Affirmed in part, and in part reversed and remanded with directions.

Curtis A. Sikyta, for appellant.

No appearance for appellees.

KRIVOSHA, C.J., BOSLAUGH, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

KRIVOSHA, C.J.

The instant case once again points up how some cases are destined to go from bad to worse no matter how much effort the trial court may exert in attempting to assist the parties. The appellant, Arcadia State Bank (Bank), commenced this action by filing a petition in replevin in the district court for Valley County, Nebraska, seeking the immediate possession of certain items of personal property previously pledged to the Bank by the apparent owner, Carl Nelson, all of which were in the possession of Carl Nelson at the time suit was commenced. At the time that the petition in replevin was filed by the Bank, the records in the office of the clerk of Valley County, Nebraska, disclosed that the debtor, Carl Nelson, had executed a financing statement in favor of his son, an appellee in this case, Jerry Nelson. Jerry Nelson's claim, therefore, to the personal property sought to be replevied by the Bank apparently was some interest in the property acquired by reason of a financing statement and not by reason of any ownership interest. It is difficult for us to be certain as to this, however, as Jerry Nelson did not file a brief in this court. On March 2, 1984, both Carl Nelson and Jerry Nelson filed answers consisting of a general denial. Carl Nelson's wife, Ann, also filed an answer. She has not, however, appealed from the judgment entered against her,

and for the purposes of this appeal can hereafter be disregarded.

Thereafter, on May 24, 1984, the Bank served requests for admission and interrogatories on both the debtor, Carl Nelson, and his son, Jerry Nelson. Neither party filed answers to these filings, and on September 18, 1984, the Bank filed a motion seeking to have the court determine that the requests for admission were deemed admitted by reason of the Nelsons' failure to file answers. See Neb. Ct. R. of Disc. 36 (rev. 1983). At that time the Bank also moved the court to compel answers to interrogatories, which had previously been served and were unanswered, and for attorney fees and sanctions pursuant to Neb. Ct. R. of Disc. 37 (rev. 1983). Additionally, the Bank filed a motion seeking summary judgment against all defendants. A hearing on all of these motions was held on October 31, 1984, a hearing at which Jerry Nelson failed to appear.

The motion for summary judgment was supported by the Bank's petition and its affidavit in replevin, as well as by a host of documents, including the affidavit of Robert L. Sestak, vice president of the Arcadia State Bank. All that the Nelsons filed in response to the motion for summary judgment were their previous answers, which consisted of a general denial. The district court, in its order, recites the fact that the court advised the defendant Carl Nelson, the only defendant appearing at the hearing, that if he did not present further evidence the court would have no option but to find the matters requested to be deemed admitted, and then to probably grant the plaintiff's motion for summary judgment. The order then goes on to provide:

> When the Defendant continued to state to the Court that this matter was one that should be determined by the Federal District Court and that he did not did [sic] get proper representation from his attorney and did not understand the proceedings, the Court determined that the Defendant should be given a very short period of time to file any Answers to the Requests for Admissions and Interrogatories.

The order then provides that "the Defendant, Carl R. Nelson, as well as the Defendants, Jerry Nelson and Ann Nelson shall

be given until 5:00 p.m. on November 2, 1984, to Answer to the Requests for Admissions and Interrogatories served upon them by Plaintiff on or about May 24, 1984 . . . ." This was done even though Jerry Nelson never asked for additional time. The court then continued the matter until November 5, 1984, at 1 p.m. On November 2, 1984, the defendants Carl Nelson and Jerry Nelson filed what they represented to be answers to the requests for admission. Additionally, they filed answers to the interrogatories. However, the answers to interrogatories were not offered in evidence and must therefore be disregarded. Another hearing was held before the district court on November 5, 1984, and once again Jerry Nelson failed to appear.

Following the hearing on November 5, 1984, the district court entered a journal entry which provided in part as follows:

> Having now reviewed the exhibits, and all evidence presented at the hearing of November 5, 1984, the Court finds that the Defendant, Carl R. Nelson has failed to specifically deny his signature on the notes offered by the Plaintiff, and pursuant to Uniform Commercial Code, Section 3-307, the signatures are deemed admitted and, further, that the promissory notes are valid and enforceable due to the Defendant's failure to allege defenses as necessary under U.C.C., Section 3-307. The Court further finds that the stated Defendant has failed to raise defenses to the financing statements presented by the Plaintiff and the same are, therefore, valid and enforceable.

The order then goes on, however, to provide: "As to the other Defendants named, however, there has been an issue raised by their pleadings as to whether Jerry Nelson and Ann A. Nelson may have some interest in the specific property claimed by the Plaintiff." In fact, the answers filed by Jerry Nelson and Ann Nelson were virtually identical to the answer filed by Carl Nelson. Each denied that Carl Nelson was the sole owner of the property sought to be replevied.

The order then concludes by finding that judgment should be entered against Carl R. Nelson in favor of the plaintiff. The balance of the motion as to the other defendants, including

Jerry Nelson, however, was denied.

An examination of the purported admissions ultimately filed by Jerry Nelson on November 2, 1984, more than 5 months after the request was served upon him, reveals that they are, at best, evasive and inconclusive. Many of the requests for admission are denied on the basis that Nelson does not have sufficient knowledge to form an opinion as to the truth of the matter, contrary to Rule 36. Several of the requests for admission are objected to because the admissions call for legal conclusions. And still others purport to deny the request but do not give sufficient information to explain the basis for the denial, other than a claim that Jerry Nelson has some ownership interest in some, but not all, of the property. In neither his answer nor his answers to the Bank's request for admission did Jerry Nelson make any claim that, at the time of the commencement of the replevin action, any of the property in question was in his possession or that he was entitled to immediate possession from Carl Nelson. It is fair to say that Nelson's answers to the request for admission were generally not in accord with the rules promulgated by this court in the Nebraska Discovery Rules for All Civil Cases.

Trial was set for December 31, 1984. On December 24, 1984, one week before trial, Jerry Nelson moved for leave to file an amended answer in which, for the first time, he claimed to be the owner of some of the items. The amended answer did not claim that Jerry Nelson was entitled to the immediate possession of the property, but only that he had an ownership interest in some of the property in the possession of Carl Nelson. Over the objection of the Bank, Nelson was permitted to file the amended answer immediately prior to trial on December 31, 1984. A jury trial was held and, afterward, instructions given to the jury. The district court instructed the jury, in part, as follows: "JURY INSTRUCTION NO. 2 . . . . This action involves a question of ownership of property claimed by Plaintiff under security agreements and financing statements." Instruction No. 2 then went on in part to provide:

> Before the Plaintiff can recover against the Defendant, Jerry Nelson on its petition in this action, the burden is on the Plaintiff to prove by a preponderance of the evidence

that the property specifically listed in Exhibits 13 & 41, is subject to its security agreements and financing statements.

This may be shown by any of the following:

1. The property is solely owned by Carl Nelson.

2. The interest of Jerry Nelson in any property described on Exhibits 13 and 41 was acquired by Jerry Nelson after the date on which the security agreement of Exhibit 7 was filed with the Valley County Clerk.

The court then instructed the jury that "[i]f the Plaintiff has failed to establish any one or more of the foregoing numbered propositions by a preponderance of the evidence, your verdict will be for the Defendant, Jerry Nelson, as to such property."

The court then went on to further instruct the jury as follows:

JURY INSTRUCTION NO. 4

If you find after reviewing the Requests for Admissions and the Answers to the same that Jerry Nelson reasonably understood the Request and admitted to the same, you must then find that the matter admitted is conclusively established for all purposes in your determination of the issues.

Instruction No. 5 then advised the jury: "A secured creditor may not take possession of collateral in which the creditor holds a security interest in only an undivided interest."

Instruction No. 7 advised the jury: "The Arcadia State Bank has the burden of proof and must recover on the strength of its right in or to the property and not upon the weakness of Jerry Nelson's title to the property." Nowhere in the instructions was the jury advised that judgment had already been entered against Carl Nelson and in favor of the Bank. As we shall explain herein, the instructions of the court to the jury, as set out above, were erroneous and misstated the law to the jury.

Unfortunately, part of this confusion was created because the Bank made Jerry Nelson a party defendant when no property was in Jerry Nelson's possession. Replevin is an action for possession only and does not properly lie against one who is not, at the time of the commencement of the action, in possession of any of the property sought to be recovered. In

Coomes v. Drinkwalter, 183 Neb. 564, 566-67, 162 N.W.2d 533, 536 (1968), we said:

> "The object of an action of replevin is to recover specific personal property, and liability for the value of the property accrues only if a return of the property cannot be had." Clark v. Oldham, 166 Neb. 672, 90 N.W.2d 329.
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> One who claims title to or the right to the possession of property replevied, adversely to the plaintiff, is not a necessary party. Annotation, 145 A.L.R. 905.
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> . . . .
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> "The person in possession of the property sought to be replevied is ordinarily the proper and only necessary party defendant, * * *." 77 C.J.S., Replevin, § 90, p. 57. See, also, Bellows v. Goodfellow, 276 Mich. 471, 267 N.W. 885; Koch v. Mack Motor Truck Corp., 201 Md. 562, 95 A.2d 105.

We then went on in *Coomes, supra* at 567, 162 N.W.2d at 536, to say:

> The evidence in this case, as advanced by the defendants, shows that Roland Drinkwalter acquired the cattle in question, placed upon them his own, his son's, and his sister's brands, pastured them on his own land part of the time, and arranged for the pasturing of the cattle on the land of a neighbor where he, Roland Drinkwalter, exercised supervision over them the balance of the time. It is apparent that Roland Drinkwalter was the party in actual possession of the cattle, notwithstanding that his sister and son may have claimed some form of constructive possession by reason of their claim of ownership of a portion of the animals. As the party in actual possession of the replevied property, Roland Drinkwalter was the only necessary party and although his son and sister may have been entitled to intervene under such claim of ownership, their presence in the action was not necessary to a determination of the right to possession thereof.

In *Frank v. Stearns*, 111 Neb. 101, 106, 195 N.W. 949, 952 (1923), *modified on rehearing*, 111 Neb. 109, 198 N.W. 480 (1924), we said: " 'Replevin will not lie against one who is not

detaining the property when the writ is sued out. It is the condition of things when the suit is commenced which furnishes the ground for the action.' " See, also, *Cromwell v. Ward*, 192 Neb. 178, 219 N.W.2d 446 (1974). By adding Jerry Nelson as a party defendant in order to attempt to resolve the extent of his alleged security interest, the Bank merely confused the issues, thereby resulting in some of the problems involved in this case.

Once the district court entered summary judgment in favor of the Bank and against Carl Nelson, the only party in possession of the property sought to be replevied, the lawsuit was at an end. Had Jerry Nelson properly intervened in the lawsuit, the burden would have been upon him to show that by reason of his ownership he was, at the commencement of the action, entitled to sole possession of the property and, therefore, judgment could not have been entered in favor of the Bank and against Carl Nelson. But Jerry Nelson failed to establish, either by way of pleading or evidence, that he had a superior right of possession in the property then being held by Carl Nelson and being replevied by the Bank. As noted in 77 C.J.S. *Replevin* § 77 at 47 (1952): "As a general rule, since the main issue in a replevin action is one of title and right to possession, all matters foreign thereto must be excluded from consideration and are not available as defenses." Even if the property in fact had been owned by both Carl Nelson and Jerry Nelson, the result would not here be different. That is because Jerry Nelson, not having a superior right of possession at the time of the commencement of the action, could not himself have replevied the property from Carl Nelson.

> "Generally, where a personal chattel is owned by several persons, one part owner cannot maintain replevin for it, for the reason that all joint owners, unless there is an agreement to the contrary, * * * are equally entitled to possession of the property, and neither has the right to the immediate and exclusive possession of the property as against the other."

First Nat. Bank v. Morgan, 172 Neb. 849, 852, 112 N.W.2d 26, 29 (1961).

Had this property been in the possession of Jerry Nelson and not Carl Nelson, then perhaps the alleged claim of ownership

by Jerry Nelson may have been relevant. But where, as here, the evidence conclusively establishes that all of the property sought to be replevied was then in the custody of Carl Nelson, Jerry Nelson's interest was of no moment and should not have been submitted to the jury. All that the Bank was seeking to do was to obtain possession. The replevin did not give it a right to dispose of the property, only the right to have possession. Its right to dispose of the property came by reason of the security agreement signed by Carl Nelson. If, indeed, the Bank did not have the right to dispose of the property, once having acquired possession, Jerry Nelson was at liberty to bring an appropriate action to bar such disposition. That, however, was a part of a separate action and not properly a part of the replevin action.

Contrary to the instruction given by the district court to the jury, the issue in replevin is not *ownership* of the property, as suggested by the instruction, but the *right to immediate possession at the time of the commencement of the action*. As noted by the court, the right to possession is dependent upon the strength of the Bank's right to immediate possession and not upon the weakness of the title in the person having possession, in this case Carl Nelson and not Jerry Nelson.

As we noted in *Ballard v. Davenport*, 178 Neb. 293, 296, 133 N.W.2d 13, 15 (1965): "It is a fundamental rule in replevin that a plaintiff must recover on the strength of his right in or to the property and not upon any weakness of the interest of the defendant therein." The defendant in a replevin action, however, is the person in possession and not an intervenor claiming an ownership interest.

As we noted in *Bank of Keystone v. Kayton*, 155 Neb. 79, 88, 50 N.W.2d 511, 516 (1951):

> The burden is on the plaintiff in replevin to establish facts necessary for him to recover, and these must be shown to have existed at the time the action was commenced. The gist of a replevin action is the unlawful detention of the property at the inception of the suit and the rights of the parties with respect to possession of the property at that time.

Even if Jerry Nelson had an ownership interest in the property, he was not entitled to immediate possession from Carl

Nelson. Since Jerry Nelson was not entitled to immediate possession, then the Bank, which was entitled to immediate possession, could replevin the property from Carl Nelson.

This has been the law in Nebraska since the very beginning. One hundred years ago, in the case of *Blue Valley Bank v. Bane & Co.*, 20 Neb. 294, 30 N.W. 64 (1886), this court was presented with a situation not dissimilar to that in the instant case. In the *Blue Valley Bank* case one Tessier was the general owner of a stock of goods and was in debt. The bank was the owner and holder of two chattel mortgages on the stock of goods given to secure the debts which were past due. For the purpose of foreclosing the mortgages, the bank seized and took possession of the stock of goods. At or about this point of time, several firms which were general creditors of Tessier sued out writs of attachment seeking to levy upon the same stock of goods being replevied by the bank. Following trial, the court entered a judgment in favor of the bank and against the defendants for possession. The court, however, went on to find that the property replevied had a value in excess of the debt then owing to the bank and that the excess value should have been turned over to the other creditors, and therefore entered judgment for the other creditors in that amount.

On appeal this court affirmed that portion of the trial court's decree which found that the bank was, at the time of the commencement of the action, entitled to possession. This court then went on to say at 299, 30 N.W. at 67:

> The action of replevin, or, as it is, I think, more appropriately termed in our state, the action for the delivery of personal property, is a statutory action, every proceeding in which is specially provided for by statute. It cannot be changed into a suit in equity, nor into one for money had and received; neither does off-set or counter-claim lie against it.

Accordingly, this court then reversed that portion of the judgment assessing damages against the bank and in favor of the other creditors for the surplus funds.

Similarly, in *Kavanaugh v. Brodball*, 40 Neb. 875, 876, 59 N.W. 517, 517-18 (1894), we held: "The cardinal question in every replevin action is whether the plaintiff therein was entitled

to the immediate possession of the property replevied at the commencement of the action." And in *Brown v. Hogan*, 49 Neb. 746, 69 N.W. 100 (1896), we again held: "The question for determination in an action of replevin, under the practice in this state, is that of the rights of the parties with respect to the possession of the property at the time of the commencement of the action." (Syllabus of the court.) In *Brown* the appellee Hogan sued to recover possession of three horses, a wagon, and a harness. It appears that Brown had previously mortgaged the property to one Boyer as security for a note. Apparently, at the time the mortgage was executed the property was actually in the possession of Hogan. Under the terms of the mortgage, Hogan was permitted to retain possession of the property until maturity. The note further provided:

> "In case the mortgagee shall at any time deem himself unsafe, then, and in that case, it shall be lawful for the said mortgagee, or his assigns, by himself or agent, to take immediate possession of said goods and chattels wherever found, the possession of these presents being his sufficient authority therefor."

Brown, supra at 747, 69 N.W. at 101. At some point in time, Boyer assigned the note and mortgage to Brown. Thereafter, Brown maintained that the security was being impaired by reason of Hogan's neglect, and Brown took possession of the property and was proceeding to sell the property in satisfaction of the mortgage debt when it was taken from him by replevin.

On appeal this court affirmed the action of the district court granting possession to Hogan. The basis for doing so was that Brown was unreasonable in claiming that the security was not being properly cared for, and therefore Hogan was entitled to immediate possession at the time the suit was commenced. This court said in *Brown, supra* at 748, 69 N.W. at 101:

> It follows that the defendant in error was entitled to the possession of the property at the date of the commencement of the action, and that the judgment in his favor is right, unless, as contended by plaintiffs in error, a different result should have been reached by reason of the maturity of the mortgage debt pending the trial of the cause upon its merits.

Appellants in *Brown* argued that even though their taking of the property at the time of the commencement of the action was improper, the note subsequently became delinquent and therefore the trial court should have taken that fact into account. Rejecting that argument, we said in *Brown, supra* at 748-49, 69 N.W. at 101:

> It is by section 191, Code of Civil Procedure, provided that in all cases where the property has been delivered to the plaintiff and the jury shall find upon issue joined for the defendant, they shall find whether the defendant had the right of property or right of possession only at the commencement of the suit, and if they find either in his favor, they shall assess such damages against the plaintiff as they may deem right and proper, for which, with costs of suit, the court shall render judgment. Section 191*a*, in substance, provides that the judgment in case of a failure of the plaintiff to prosecute, or in case of a verdict for the defendant upon the merits when the property has been delivered to the plaintiff, shall be for the return of the property or the value thereof in case a return cannot be had, or the value of the possession of the same, and damages for withholding the property, and costs of suit, while section 192 declares that where the property has been delivered to the plaintiff and the jury shall find for the plaintiff, on issue joined, or on inquiry of damage upon a judgment by default, they shall assess adequate damages in his favor for the illegal detention of the property, for which, with costs of suit, the court shall enter judgment. These requirements have, as a rule, been held mandatory, and a compliance therewith essential in order to sustain judgments rendered in actions of replevin. [Citations omitted.] They also, as has been frequently said by this court, contemplate that the question to be determined in a controversy of this character is that of the rights of the parties with respect to the possession of the property at the time the action was commenced.

The judgment of the district court was therefore affirmed.

Unless Jerry Nelson could establish that at the time of the commencement of the replevin, he, Jerry Nelson, was entitled

to possession of the property, as opposed to either Carl Nelson or the Bank, Jerry Nelson could not recover, and the judgment in his favor in that regard was in error.

"A plea of the right to possession in a third person cannot be sustained unless the right is an absolute one." 66 Am. Jur. 2d *Replevin* § 48 at 865 (1973). See, also, *Conrad Mercantile Co. v. Siler*, 75 Mont. 36, 241 P. 617 (1925); *Rankine v. Greer, Adm'r*, 38 Kan. 343, 16 P. 680 (1888).

Permitting the jury to return a verdict finding that Jerry Nelson had an undivided one-half interest in the disputed property and to be the sole owner of certain other property was irrelevant to the issue in the case. Once the district court entered summary judgment in favor of the Bank and against Carl Nelson, who was, according to the record, the only person in possession of the property at the time the replevin was commenced, the lawsuit was at an end and nothing further was required. That was so even though the Bank made Jerry Nelson a party defendant. By making Jerry Nelson a party defendant, the Bank could not change the nature of the action in replevin. The only issue to be determined was who was entitled to immediate possession at the time of the commencement of the action. The district court did not have jurisdiction to try the issue of Jerry Nelson's interest, if any, so long as the evidence was clear that at the time of the replevin Jerry Nelson did not have possession of the property sought to be replevied or the right to immediate possession of such property. The Bank was entitled to possession of all of the subject property in Carl Nelson's possession at the commencement of the action.

While our decision herein effectively disposes of the case, nevertheless the Bank has raised several issues which we believe it is entitled to have resolved. While it is generally true that permission to either amend pleadings or have additional time in which to answer requests for admission is addressed to the sound discretion of the trial court, and absent an abuse of discretion will not be reversed, see, *First Nat. Bank v. Schroeder*, 218 Neb. 397, 355 N.W.2d 780 (1984), and *Craig v. Kile*, 213 Neb. 340, 329 N.W.2d 340 (1983), the record in this case discloses that the district court did in fact abuse its discretion in granting to Jerry Nelson both additional time in

which to answer the request for admission and to thereafter file an amended answer just before trial. Jerry Nelson already had more than 5 months to file answers, had failed to appear at any hearing, and had filed only a general denial. Furthermore, he had not asked for additional time to file answers to the Bank's request for admission. He had displayed complete lack of interest in the case, just as he did in this court. The trial court's suggestion in its order of October 31, 1984, that Carl Nelson believed that his failure to answer the Bank's request for admission should not be grounds for ordering the requests admitted because of some matter pending in the U.S. District Court, evidence of which was not before the district court, was certainly no basis for denying the Bank's request that Jerry Nelson's failure to answer should be deemed an admission of the request filed by the Bank.

When the Bank moved to have the answers deemed admitted, the district court should have sustained that motion. In *Kissinger v. School District No. 49*, 163 Neb. 33, 37, 77 N.W.2d 767, 770 (1956), we reviewed Neb. Rev. Stat. § 25-1267.41 (Cum. Supp. 1955), the forerunner of Rule 37, and said:

> "Section 25-1267.41, R. S. Supp., 1951, is identical with Rule 36 of the Federal Rules of Civil Procedure. Its provisions are not merely directory, but substantial compliance therewith is required. However, they are not self-executing, and the party claiming admissions for failure to deny must prove service of a proper request in compliance therewith and failure to appropriately respond thereto. In that connection, the applicable rule here is that where a party properly serves a request for admissions of relevant matters of fact or the genuineness of relevant documents, and all objections thereto are heard and appropriately denied by the court, and the other party has been ordered to respond thereto, his failure to do so within the time alloted [sic] constitutes an admission of the facts sought to be elicited. In such situation a motion for summary judgment is appropriate and may be granted if admissions made or failure to deny as required by the statute, together with the pleadings, show that there

is no genuine issue as to any material fact or that the court is without jurisdiction of the subject matter. . . ."

We went on further in *Kissinger, supra* at 37-38, 77 N.W.2d at 770, to say:

> It will be noted that the answers given to the requests for admissions are equivocal and fail to meet the requirements of the statute. It is the contention of the defendant that it may answer requests for admissions in any one of three ways, to wit, either (1) admit or deny, (2) set forth reasons why it cannot admit or deny, or (3) make objections. No proper objections appear to have been made. The attempts of defendant's counsel to explain why he could neither admit nor deny do not meet the requirements of the act. Counsel for defendant appears to have a misconception as to the duty imposed when request for admissions is served upon him under the statute. When a request for admissions is made under this section, the party served must answer even though he has no personal knowledge if the means of obtaining the information are available to him. It is not a sufficient answer that he does not know, when it appears that he can obtain the information. The information here sought was in the possession of the secretary of the district or the county treasurer of Clay County. It is immaterial that the plaintiff is acquainted with the facts as to which admission is sought. The purpose of the rule is to expedite the trial and to relieve parties of the cost and inconvenience of proving facts which will not be disputed on the trial, the truth of which can be ascertained by reasonable inquiry.

We concluded in *Kissinger, supra* at 39, 77 N.W.2d at 771, by saying: "A bad response is treated as no response at all and hence as an admission." See, also, *Mueller v. Shacklett*, 156 Neb. 881, 58 N.W.2d 344 (1953); *Geyer v. The Walling Co.*, 175 Neb. 456, 122 N.W.2d 230 (1963).

At the time that the Bank's motion for summary judgment was filed against both Carl Nelson and Jerry Nelson, an examination of the pleadings, including Jerry Nelson's answer, which consisted of a general denial and the unanswered requests for admission which therefore should have been

deemed admitted, established that there was no genuine issue of fact and that the Bank was entitled to judgment as a matter of law. Although Jerry Nelson was not a necessary party, once he filed an answer the district court had the authority to resolve the issues regarding his interest as a matter of law. The district court properly entered judgment in favor of the Bank and against Carl Nelson but failed to do so with regard to Jerry Nelson. In that respect the district court was in error. Parties who choose to represent themselves in whole or in part must be held to the same standards as are all others who appear before the courts. As we said in *Dobrovolny v. Dunning*, 221 Neb. 67, 72, 375 N.W.2d 123, 126 (1985): "If one chooses to represent himself or herself before a tribunal, one must accept the consequences of one's own failure to properly present sufficient evidence to sustain one's burden." No justification was established for denying the Bank's right to have its motions sustained, and, to that extent, the district court abused its discretion.

We further note in passing that the district court's instruction No. 4 is, likewise, not a correct statement of the law. It is not for the jury to determine whether the party upon whom a request for admission has been served reasonably understood the request and admitted the same. That is a question of law to be determined by the trial court. Thereafter, the jury should be instructed to use the admissions for such appropriate purpose as the trial court shall direct. See Rule 36.

The judgment of the district court is in part set aside and the cause remanded with directions to enter judgment granting to the Bank the right of immediate possession of the property sought to be replevied.

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

WHITE, J., participating on briefs.

BOSLAUGH and HASTINGS, JJ., concur in the result.

STATE OF NEBRASKA, APPELLEE, V. PAUL DOLAN, APPELLANT.

386 N.W.2d 462

Filed May 9, 1986. No. 85-635.

Appeal from the District Court for Hall County: JOSEPH D. MARTIN, Judge. Remanded with directions.

Thomas A. Wagoner, for appellant.

Robert M. Spire, Attorney General, and Jill Gradwohl, for appellee.

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

PER CURIAM.

Defendant, Paul Dolan, appeals from a jury verdict convicting him of manslaughter and from a sentence by the Hall County District Court of incarceration in the Nebraska Penal and Correctional Complex for not less than 6 years and 8 months to not more than 20 years. Dolan was originally charged with second degree murder and attempted second degree murder as a result of the death of Robert Nelson and the injury of Kevin Coffin. Nelson was killed and Coffin injured when the car Dolan was driving rammed Nelson's motorcycle from behind. Nelson was driving the motorcycle and Coffin was his passenger. The incident took place near Grand Island, Nebraska, following a fight and a high-speed chase.

Dolan has been incarcerated at the Nebraska Penal and Correctional Complex since June 25, 1985, awaiting appeal. *State v. Roth, ante* p. 119, 382 N.W.2d 348 (1986), controls the disposition of this case. Dolan has served the maximum time authorized by Neb. Rev. Stat. § 39-669.20 (Reissue 1984) for manslaughter resulting from the operation of a motor vehicle. It is therefore ordered that he be released immediately.

REMANDED WITH DIRECTIONS.

ANN HAHN TAYLOR, APPELLANT, V. RICHERT TAYLOR, APPELLEE.

386 N.W.2d 851

Filed May 16, 1986. No. 84-810.

1. **Property Division: Alimony.** While the criteria for reaching a reasonable division of property and a reasonable award of alimony may overlap, the two serve different purposes and are to be considered separately. The purpose of a property division is to distribute the marital assets equitably between the parties. The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances and the other criteria enumerated in this section make it appropriate. Neb. Rev. Stat. § 42-365 (Reissue 1984).
2. **Property Division: Alimony: Appeal and Error.** The division of property and the awarding of alimony in marriage dissolution cases are matters initially entrusted to the sound discretion of the trial judge, which matters, on appeal, will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion. In a de novo review by the Supreme Court, where the evidence is in conflict, the Supreme Court will give weight to the fact that the trial judge observed and heard the witnesses and accepted one version of the facts rather than another.
3. **Alimony.** The ultimate test for determining correctness in the amount of alimony is reasonableness.
4. **Goodwill: Words and Phrases.** Goodwill is the advantage or benefit which is acquired by an establishment beyond the mere value of the capital, stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices.
5. **Property Division: Alimony.** While earning capacity or expectations of income may properly be considered in an allowance of alimony, they are not proper considerations in determining the appropriate division of property.
6. **Property Division.** To be properly within the purview of Neb. Rev. Stat. § 42-365 (Reissue 1984) as property divisible and distributable in a dissolution proceeding, goodwill must be a business asset with value independent of the presence or reputation of a particular individual, an asset which may be sold, transferred, conveyed, or pledged.
7. **Goodwill.** Whether goodwill exists and whether goodwill has any value are questions of fact.
8. **Property Division.** The ultimate test for determining an appropriate division of marital property is reasonableness.
9. _____. A division of marital property is not subject to a precise mathematical formula but, rather, turns upon the circumstances of a particular case and upon a careful case-by-case examination of the criteria set forth in Neb. Rev. Stat. § 42-365 (Reissue 1984).

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

Joseph B. Muller and D.C. Bradford of Bradford & Coenen, and Warren S. Zweiback of Zweiback, Flaherty, Betterman & Lamberty, P.C., for appellant.

Joseph K. Meusey and Kenneth W. Sharp of Fraser, Stryker, Veach, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellee.

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

SHANAHAN, J.

Ann Hahn Taylor appeals the decree of the district court for Douglas County dissolving her marriage with Richert Taylor and claims that alimony decreed and her distributive share of the marital estate are incorrect. We affirm.

Ann, 30 years old and a widow with two children (ages 8 and 5), married Richert, age 37, in 1969. When she married Richert, Ann was a physician's assistant with inherited property which had an approximate value of $130,000. Ann was also the beneficiary of a testamentary family trust created by her first husband.

At his marriage to Ann, Richert had already developed a successful practice as an obstetrician and gynecologist; had $125,000 in bank accounts, including $100,000 in certificates of deposit held jointly with his parents; and owned $18,000 in securities and three tracts of real estate valued in the vicinity of $100,000.

Generally, assets brought into the marriage by Ann and Richert were not commingled with assets accumulated during their marriage. No child was born of the marriage between Ann and Richert. Ann's two children lived in the Taylor home. With the exception of limited activity as an interior decorator, Ann did not pursue a career outside the Taylor home, while Richert's work schedule usually consisted of 12-hour days, 7 days a week.

In 1979 Richert formed GYN-CYTO LAB, P.C., an incorporated laboratory business confined to reading Pap smears. As a sole practitioner in 1980, Richert incorporated his

medical practice as Richert J. Taylor, M.D., P.C., and is the sole shareholder of that professional corporation. In 1983 Richert's income from his medical practice was $305,390. In March 1984 GYN-CYTO LAB's balance sheet reflected a net worth of $78,816, and the balance sheet for Taylor's professional corporation showed a net worth of $230,466. Cash assets of Ann and Richert were derived from the medical practice, laboratory business, and securities owned separately or jointly during their marriage. Throughout Ann's marriage to Richert, the testamentary trust, from its accrued interest, made partial annual distributions of $5,200 to Ann and had $23,831 as accrued but undistributed interest available to Ann when the district court heard the Taylors' case. During their marriage, the parties had separated twice—once briefly in 1973 and for 15 months in 1978 and 1979. The parties' final separation commenced in August 1982. Ann filed a petition for dissolution in March 1983. In 1984, when the district court heard this matter, Taylors' home had a value of $241,500.

Ann testified about various items of her monthly living expenses, including mortgage payments on the family residence—$300; utilities—$435; real estate taxes—$258; and insurance on the family home—$167. Monthly expenses for her three automobiles totaled $450. Ann's children, who had reached their majority, did not permanently reside in the Taylor home at the date of the district court hearing for a decree of dissolution.

To establish a value for Richert's medical practice and GYN-CYTO LAB, Ann called an expert witness who gave his opinion based on a "capitalization of excess earnings" for Richert's professional corporation and laboratory. Essential to the opinion expressed by Ann's expert witness was the concept of excess earning power—"earning power that can be generated over and above what the average or normal person can do in his particular industry." Without referring to earnings of physicians in Omaha, Ann's expert computed Richert's "excess earning power," which was based on a national average for physicians, capitalized such amount, and determined that the "capitalized excess earnings" were $338,348 for Richert's medical practice and $106,253 for GYN-CYTO LAB. By

adding "net cash" and "accounts receivable" to the capitalized figures, Ann's expert valued Richert's medical practice at $573,335 and GYN-CYTO LAB at $182,695. Throughout his testimony, Ann's expert witness referred to "goodwill," namely, Richert's "good name, his capable staff and personnel, [and] his reputation for superior services." Ann's expert valued goodwill of Richert's medical practice at $338,348, a figure which another physician might pay for Richert's practice, provided that Richert would participate in some form of postsale transition, including personal introduction to Richert's patients and Richert's staying "around for a year."

An expert witness testifying for Richert rejected the notion of goodwill as an asset of any value in Richert's medical practice, noting "[w]hen the doctor is gone, the practice is gone." Richert's expert witness assigned values to the two professional businesses, namely, $78,816 for GYN-CYTO LAB and $230,466 for the medical practice as a professional corporation.

Richert testified concerning the certificates of deposit held jointly with his parents but did not offer any documentation to corroborate the existence or amount of such certificates. (The record lacks any indication that the Nebraska Discovery Rules were invoked to obtain documentation regarding such joint accounts.)

In its decree of dissolution the district court set off to each party a sum equal to the value of each party's assets brought into the marriage. As a setoff from the marital estate, Ann received cash and various items of personal property closely approximating the value of the assets owned before her marriage to Richert. To Richert the court set off $165,758 for Richert's premarital estate, specifically finding "that at the time of the marriage the value of [Richert's] CD's listed as held jointly with parents is $50,000.00." After the setoff to each party, the court determined that the net value of the marital estate was $1,194,945. The court found that GYN-CYTO LAB had a value of $78,816 and Richert's medical practice had a value of $230,466. The court ordered Richert to pay Ann "alimony in the amount of [$2,000] per month, for a period of sixty (60) months," and set over to Ann from the marital estate

various items of personal property valued at $71,194, as well as the family residence valued at $241,500. The $71,194 in personal property awarded to Ann included the value of three vehicles retained by her and $23,831—the accumulated but undistributed interest income held by the testamentary trust created by Ann's former husband. The court ordered distribution of the balance of the marital estate to Richert.

Ann contends that the alimony decreed is incorrect and that the marital property distributed to her is incorrect because (1) the court erred in determining the property to be set off to each party regarding the marital estate and (2) the court erred in the value determined concerning Richert's medical practice and GYN-CYTO LAB. Ann also argues that the court should not have included the joint certificates of deposit in the setoff to Richert, asserting that Richert's testimony about the certificates "cannot be accepted as a basis for any judicial conclusion." Brief for Appellant at 21. Ann does not maintain that any existing joint certificates should not have been part of Richert's setoff, but argues that Richert's testimony about the joint certificates was incredible and should have been disregarded by the court.

> When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party. . . .
>
> While the criteria for reaching a reasonable division of property and a reasonable award of alimony may overlap, the two serve different purposes and are to be considered separately. The purpose of a property division is to distribute the marital assets equitably between the parties. The purpose of alimony is to provide for the continued maintenance or support of one party by the other when

> the relative economic circumstances and the other criteria enumerated in this section make it appropriate.

Neb. Rev. Stat. § 42-365 (Reissue 1984).

> [T]he division of property and the awarding of attorney fees in marriage dissolution cases are matters initially entrusted to the sound discretion of the trial judge, which matters, on appeal, will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion. In our de novo review, where the evidence is in conflict, we will give weight to the fact that the trial judge observed and heard the witnesses and accepted one version of the facts rather than another.

Guggenmos v. Guggenmos, 218 Neb. 746, 748-49, 359 N.W.2d 87, 90 (1984). See, also, *McCollister v. McCollister*, 219 Neb. 711, 365 N.W.2d 825 (1985) (award of alimony). "[W]e do not defer to the findings of the trial judge in determining whether there has been an abuse of discretion, but, rather, make our own appraisal of the record to determine whether the results obtained are untenable such as to have denied justice." *Guggenmos v. Guggenmos, supra* at 748, 359 N.W.2d at 90.

As a part of her complaint concerning the value of property set off to each party, that is, excluded as a party's property brought into the marriage, Ann asserts that the court should have disbelieved Richert's testimony about the certificates of deposit held jointly by Richert and his parents. As a result of such disbelief, Ann argues, the certificates of deposit must be included in the marital estate to be divided rather than set off to Richert. However, we dispatch Ann's contention by acknowledging that the district court "accepted one version of the facts rather than another." *Guggenmos v. Guggenmos, supra*. Notwithstanding the absence of corroborative documentation for the joint accounts, we find no abuse of discretion in the district court's excluding the certificates of deposit from Taylors' marital estate.

Concerning Ann's question about the amount of alimony decreed, Ann suggests the alimony is inadequate because the "parties enjoyed a high station in life." Brief for Appellant at 14. However, we evaluate the amount of such alimony in reference to the factors contained in § 42-365. In an alimony

decree a court should consider, in addition to the specific criteria listed in § 42-365, the income and earning capacity of each party as well as the general equities of each situation. See, *Gleason v. Gleason*, 218 Neb. 629, 357 N.W.2d 465 (1984); *Carruth v. Carruth*, 212 Neb. 124, 321 N.W.2d 912 (1982); *Buker v. Buker*, 205 Neb. 571, 288 N.W.2d 732 (1980). The ultimate test for determining correctness in the amount of alimony is reasonableness. *Gleason v. Gleason, supra*; *Pittman v. Pittman*, 216 Neb. 746, 345 N.W.2d 332 (1984); *Whitney v. Whitney*, 214 Neb. 565, 334 N.W.2d 799 (1983). Although one policy underlying § 42-365 is to "minimize any substantial and unnecessary disruption in the lives of the parties occasioned by reason of the dissolution of marriage," *Pyke v. Pyke*, 212 Neb. 114, 118, 321 N.W.2d 906, 909 (1982), that statute does not necessarily guarantee a spouse, by payment of alimony, the same standard of living as such spouse may have enjoyed during the course of the marriage. We do not believe that adequacy of alimony must be measured by the level or rate of spending displayed by the spouse seeking alimony. Again, the ultimate test for adequacy of alimony is reasonableness. Considering the factors affecting alimony in this case, we note that Richert had income of approximately $305,000 in 1983 and obviously has a significant earning capacity. Ann, on the other hand, is 45 years of age and has indicated she is capable of earning an income. Ann is educated, has worked in the interior decorating business, has adroitly retained substantial assets from her prior marriage, and is the beneficiary of a trust generating an average income of $5,200 a year. The alimony decreed is adequate for reasonably necessary expenses associated with Ann's continued maintenance under the circumstances. Consequently, we conclude that the alimony decreed does not constitute an abuse of discretion requiring reversal by this court.

Next, we address Ann's claim regarding the valuation of Richert's medical practice and GYN-CYTO LAB. Ann contends that every business has goodwill beyond its tangible assets. Before considering Ann's contention, we must reexamine the nature of goodwill.

"Good-will is the advantage or benefit which is acquired

> by an establishment beyond the mere value of the capital, stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices."

Haverly v. Elliott, 39 Neb. 201, 204, 57 N.W. 1010, 1011 (1894).

The preceding characterization of goodwill raises a fundamental question: When is goodwill an asset with value and, therefore, property to be judicially divided pursuant to § 42-365 in a dissolution proceeding?

Whether goodwill in a professional business organization may constitute property subject to division in a dissolution proceeding has produced a sharp division among several jurisdictions which have considered that question. Some courts have held that goodwill of a professional practice or business is a business asset with a determinable value—marital property subject to division in a dissolution proceeding. See, *Dugan v. Dugan*, 92 N.J. 423, 457 A.2d 1 (1983); *In re Marriage of Foster*, 42 Cal. App. 3d 577, 117 Cal. Rptr. 49 (1974); *In re Marriage of Fenton*, 134 Cal. App. 3d 451, 184 Cal. Rptr. 597 (1982); *In re Marriage of White*, 98 Ill. App. 3d 380, 424 N.E.2d 421 (1981); *In re Marriage of Fleege*, 91 Wash. 2d 324, 588 P.2d 1136 (1979); *In re Marriage of Nichols*, 43 Colo. App. 383, 606 P.2d 1314 (1979); *Levy v. Levy*, 164 N.J. Super. 542, 397 A.2d 374 (1978). Other courts have held that professional goodwill does not constitute property and, therefore, is not considered in dividing a marital estate through a dissolution proceeding. See, *Powell v. Powell*, 231 Kan. 456, 648 P.2d 218 (1982); *Holbrook v. Holbrook*, 103 Wis. 2d 327, 309 N.W.2d 343 (1981); *Nail v. Nail*, 486 S.W.2d 761 (Tex. 1972).

Virtually any income-producing entity, regardless of the nature of the business organization, may have an asset of recognized value beyond the tangible assets of such entity, an intangible asset generally characterized as goodwill. To the extent that such intangible asset's value results from recurrent

customer patronage, there is no question that goodwill is property which may be considered as a part of the marital estate for the purpose of a dissolution proceeding. See Family Law Comment, *The Recognition and Valuation of Professional Goodwill in the Marital Estate*, 66 Marq. L. Rev. 697 (1983). However, difficulty may arise in valuing a professional practice, because goodwill is likely to depend on the professional reputation and continuing presence of a particular individual in that practice. See Note, *Treating Professional Goodwill as Marital Property in Equitable Distribution States*, 58 N.Y.U. L. Rev. 554, 564 (1983) ("[p]rofessional goodwill has been viewed as inhering more in the individual than in the business, since it is the individual's service which is the 'product' offered to customers").

The particularized question becomes: Is professional goodwill, solely dependent on the presence of a specific individual, marital property within § 42-365 and subject to equitable division in a dissolution proceeding?

Courts answering that question in the affirmative have generally adopted a method of evaluation involving capitalization of excess earnings to determine the extent of goodwill as an asset in a professional practice; for example, in *Dugan v. Dugan, supra* at 439-40, 457 A.2d at 9-10, a New Jersey court suggested a capitalization of excess earnings method as follows: (1) "[A]scertain what [a professional] of comparable experience, expertise, education and age would be earning as an employee in the same general locale"; (2) Determine and average the professional's "net income before federal and state income taxes for a period of years, preferably five"; (3) Compare the "actual average" with the "employee norm"; and (4) Multiply the "excess" by a capitalization factor. See, also, *Levy v. Levy, supra*. When only a capitalization of excess earnings method of evaluation is applied to a professional practice, the value determined, characterized as professional goodwill, represents an entity's earning capacity but does not necessarily represent an asset which may be sold, transferred, or assigned.

Other courts have answered the question posed by rejecting professional goodwill as property. Illustrative is *Holbrook v.*

Holbrook, supra at 350, 309 N.W.2d at 354, where a Wisconsin court stated:

> The concept of professional goodwill evanesces when one attempts to distinguish it from future earning capacity. Although a professional business's good reputation, which is essentially what its goodwill consists of, is certainly a thing of value, we do not believe that it bestows on those who have an ownership interest in the business, an actual, separate property interest. The reputation of a law firm or some other professional business is valuable to its individual owners to the extent that it assures continued substantial earnings in the future. It cannot be separately sold or pledged by the individual owners. The goodwill or reputation of such a business accrues to the benefit of the owners only through increased salary.

In *Nail v. Nail, supra* at 486 S.W.2d at 763-64, the court noted:

> The distinction has been drawn that professional good will is not so much fixed or as localized as the good will of a trade, and attaches to the person of the professional man or woman as a result of confidence in his or her skill and ability. [Citation omitted.]
>
> . . . [I]t cannot be said that the accrued good will in the medical practice of Dr. Nail was an earned or vested property right at the time of the divorce or that it qualifies as property subject to division by decree of the court. It did not possess value or constitute an asset separate and apart from his person, or from his individual ability to practice his profession. It would be extinguished in event of his death, or retirement, or disablement, as well as in event of the sale of his practice or the loss of his patients, whatever the cause.

See, also, *Powell v. Powell*, 231 Kan. 456, 648 P.2d 218 (1982).

In *Andersen v. Andersen*, 204 Neb. 796, 798, 285 N.W.2d 692, 694 (1979), involving a consultant to lending institutions and real estate developers, we held:

> While earning capacity or expectations of income may properly be considered in an allowance of alimony, they are not proper considerations in determining the

> appropriate division of property. [Citations omitted.] The court was in error in considering the unearned income of [Andersen] as a property capable of being divided and considered in its property division.

Consequently, where goodwill is a marketable business asset distinct from the personal reputation of a particular individual, as is usually the case with many commercial enterprises, that goodwill has an immediately discernible value as an asset of the business and may be identified as an amount reflected in a sale or transfer of such business. On the other hand, if goodwill depends on the continued presence of a particular individual, such goodwill, by definition, is not a marketable asset distinct from the individual. Any value which attaches to the entity solely as a result of personal goodwill represents nothing more than probable future earning capacity, which, although relevant in determining alimony, is not a proper consideration in dividing marital property in a dissolution proceeding. As expressed in *Holbrook v. Holbrook*, 103 Wis. 2d 327, 351, 309 N.W.2d 343, 355 (1981): "There is a disturbing inequity in compelling a professional practitioner to pay a spouse a share of intangible assets at a judicially determined value that could not be realized by a sale or another method of liquidating value."

Accordingly, to be properly within the purview of § 42-365 as property divisible and distributable in a dissolution proceeding, we conclude that goodwill must be a business asset with value independent of the presence or reputation of a particular individual, an asset which may be sold, transferred, conveyed, or pledged. In so characterizing goodwill as marital property for the purpose of § 42-365, we neither state nor imply that goodwill, as a salable or marketable business asset, may never exist in a professional practice. See Parkman, *The Treatment of Professional Goodwill in Divorce Proceedings*, 18 Fam. L.Q. 213 (1984). If a party produces appropriate evidence establishing salability or marketability of goodwill as a business asset of a professional practice, professional goodwill may be considered in determining value of property in a marital estate to be divided in a dissolution proceeding. Also, we do not reject in all cases capitalization of excess earnings as a method to

determine earning capacity.

As demonstrated in the present case, professional qualities of a practitioner are often critical to the existence and continuation of professional goodwill. Professional goodwill may be personal in nature and, therefore, not a readily salable or marketable item. Under such circumstances goodwill has no existence independent of the professional generating that goodwill. Ann's expert acknowledged that in a sale of Richert's practice, the purchasing physician would require some postsale association with Richert for introduction and transition of Richert's patients to the purchasing physician. In that case, return of patients would be reasonably attributable to Richert's presence after the sale and prospects of personal care and treatment from Richert. Because the goodwill for Richert's professional businesses depended on Richert's continued presence, there is a serious question whether goodwill, in its true sense, existed in the present case. See *Haverly v. Elliot*, 39 Neb. 201, 57 N.W. 1010 (1894) (characterization of goodwill). Here, there is a marked difference in the opinions of the expert witnesses concerning existence and value of goodwill inherent in Richert's medical practice through his professional corporation. Whether goodwill exists and whether goodwill has any value are questions of fact. See, *In re Marriage of Foster*, 42 Cal. App. 3d 577, 117 Cal. Rptr. 49 (1974); *Levy v. Levy*, 164 N.J. Super. 542, 397 A.2d 374 (1978); B. Goldberg, Valuation of Divorce Assets § 8.3 (1984). The opinions expressed by the expert witnesses in this case were diametrically opposed and resulted in a question of fact to be resolved. The district court heard the expert witnesses, viewed Richert's expert witness as the more credible, and gave more weight to testimony from Richert's expert witness. See *Guggenmos v. Guggenmos*, 218 Neb. 746, 359 N.W.2d 87 (1984). We agree with the district court in its conclusion resolving the conflict in testimony, namely, Richert's professional business did not have any goodwill as an asset constituting property to be divided in the Taylors' dissolution proceeding.

Next, Ann claims that, even if the valuations of Richert's practice and the laboratory are accepted, her share of marital property is incorrectly determined under § 42-365 (factors

affecting a reasonable division of marital property). In applying § 42-365 we have repeatedly held that the ultimate test for determining an appropriate division of marital property is reasonableness. See *Burger v. Burger*, 215 Neb. 699, 340 N.W.2d 400 (1983). Although generally adhering to a rule authorizing a property division between one-third and one-half, *Rockwood v. Rockwood,* 219 Neb. 21, 360 N.W.2d 497 (1985), and *Martin v. Martin,* 215 Neb. 508, 339 N.W.2d 754 (1983), we have been careful to state that a division of marital property is not subject to a precise mathematical formula but, rather, turns upon the circumstances of a particular case and, in particular, upon a careful case-by-case examination of the criteria set forth in § 42-365. See, *Rockwood v. Rockwood, supra*; *Choat v. Choat*, 218 Neb. 875, 359 N.W.2d 810 (1984). In *Koubek v. Koubek*, 212 Neb. 2, 321 N.W.2d 55 (1982), we affirmed a property award of considerably less than one-third of the net marital estate and stated that the general guideline of an award of one-third to one-half is of particular significance when "the marriage is of long duration and the parties are the parents of all the children involved." *Id.* at 5, 321 N.W.2d at 58; *Knigge v. Knigge,* 204 Neb. 421, 282 N.W.2d 581 (1979).

The net value of the Taylor marital estate, computed by the district court, was $1,194,945. Ann's share of the marital estate was approximately $313,000, or over 26 percent of the Taylor marital estate. Ann contends that $23,831, the undistributed interest income held by the testamentary trust, should have been set off and not included in the marital estate to be divided. Even if the $23,831 of undistributed trust income were set off before dividing the marital property, we are still unable to conclude that there was an abuse of discretion by the district court regarding the division of property decreed.

Ann and Richert were married for 14 years but were separated for significant periods during their marriage. Taylors had no child from their marriage, although Richert financially supported Ann's children by her prior marriage. Ann did not forgo a personal career or educational opportunity to provide for the domestic needs of the family and did not use any of the distributed trust income for Richert's benefit. Considering the factors or considerations itemized in § 42-365, we cannot

conclude that the district court's award of property was an abuse of discretion.

In our de novo review on the record concerning alimony and the property division decreed by the district court, we find no abuse of discretion by the district court. Therefore, the judgment of the district court is affirmed.

AFFIRMED.

SANDRA L. REMELIUS, APPELLANT, V. GERALD A. RITTER, APPELLEE.

386 N.W.2d 860

Filed May 16, 1986. No. 85-276.

1. **Summary Judgment.** A party is entitled to summary judgment if it is shown that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. In considering a motion for summary judgment, the evidence is to be viewed most favorably to the party against whom the motion is directed, giving to that party the benefit of all the favorable inferences which may reasonably be drawn from the evidence.
2. _____. The party moving for summary judgment has the burden of showing that no genuine issue as to any material fact exists; that party must therefore produce enough evidence to demonstrate his entitlement to a judgment if the evidence remains uncontroverted, after which the burden of producing contrary evidence shifts to the party opposing the motion.
3. **Trial: Courts: Judgments.** Where the facts adduced on an issue are such that reasonable minds can draw but one conclusion, the court must decide the question as a matter of law rather than submit it to the jury for determination.
4. **Motor Vehicles: Negligence.** A motorist has the right to assume that other motorists will act in a lawful manner, and until he has warning, notice, or knowledge to the contrary, he is entitled to govern his actions in accordance with that assumption.
5. _____: _____. The failure to see an approaching vehicle is negligence as a matter of law where such vehicle is indisputably located in a favored position.

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

H.E. Hurt of Hurt, Gallant & Flores, for appellant.

Donald D. Schneider of Simmons & Schneider, P.C., for appellee.

KRIVOSHA, C.J., BOSLAUGH, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

This is an appeal from an order sustaining a motion for summary judgment. The plaintiff below appealed a judgment denying damages for personal injury arising from an automobile accident which occurred on February 1, 1984. At approximately 8:30 a.m. plaintiff, Sandra L. Remelius, was proceeding westbound on Sherman Street in the city of West Point in her 1978 Ford automobile. Defendant, Gerald A. Ritter, was driving his 1982 Chevrolet pickup truck southbound on Oak Street. The vehicles collided at the intersection of Sherman and Oak Streets. Plaintiff suffered injuries and sued defendant in the district court for Cuming County for damages for personal injuries, medical expenses, loss of wages, and pain and suffering. On February 12, 1985, the court found no genuine issue as to any material fact and that plaintiff was more than slightly negligent as a matter of law in failing to yield the right-of-way to the defendant. The defendant was granted summary judgment. Plaintiff's motion for a new trial was overruled and this appeal followed.

Plaintiff asserts the trial court erred in determining that there was no genuine issue of material fact with respect to the speed at which defendant's vehicle was traveling and that plaintiff's negligence, as a matter of law, was more than slight and sufficient to bar her recovery. We find that the trial court acted properly, and we affirm.

The evidence offered in support of the motion for summary judgment included the depositions of the plaintiff, the defendant, and the police officer who investigated the accident. The plaintiff offered her affidavit and that of her attorney. A party is entitled to summary judgment if it is shown that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Neb. Rev. Stat. § 25-1332 (Reissue 1979).

In considering a motion for summary judgment, the evidence is to be viewed most favorably to the party against whom the motion is directed, giving to that party the benefit of

all the favorable inferences which may reasonably be drawn from the evidence. The party moving for summary judgment has the burden of showing that no genuine issue as to any material fact exists; that party must therefore produce enough evidence to demonstrate his entitlement to a judgment if the evidence remains uncontroverted, after which the burden of producing contrary evidence shifts to the party opposing the motion. *Gall v. Great Western Sugar Co.*, 219 Neb. 354, 363 N.W.2d 373 (1985). Where the facts adduced on an issue are such that reasonable minds can draw but one conclusion, the court must decide the question as a matter of law rather than submit it to the jury for determination. *Hennings v. Schufeldt, ante* p. 416, 384 N.W.2d 274 (1986).

In plaintiff's deposition she testified that the intersection is open and unmarked and that it was daylight at the time of the collision. She was traveling at 10 to 15 miles per hour as she approached the intersection, looked to the left and right, but did not see any approaching vehicles. Plaintiff first noticed the defendant's vehicle when her car was over halfway into the intersection and immediately accelerated and swerved to the left in order to avoid a collision. Plaintiff stated that she heard the brakes squeal on defendant's vehicle immediately after she saw it. Plaintiff declined the investigating police officer's offer to call the rescue squad, but was treated and released from the hospital later that morning. Immediately after the collision, plaintiff told defendant that she was concerned that her 5-year-old son was home alone, and she used a nearby phone to call her father to ask him to pick up her son. In her deposition plaintiff stated that she did not observe defendant's vehicle long enough to form an opinion as to its speed.

Defendant stated in his deposition that he was traveling at 20 miles per hour and that the speed limit is 25 miles per hour. He looked to the left and the right, looked again to the left, observed plaintiff's vehicle approaching, and took his foot off the accelerator when her car was about 10 feet from the intersection. About 2 seconds later, defendant applied his brakes, heard them squeal, and then the front of his truck struck the right side of plaintiff's car. He and his young son sustained no injuries, but his truck was damaged. Defendant

stated that there was nothing wrong with his brakes on the day of the accident. He further testified that the sun rising in the east interfered slightly with his ability to observe traffic coming from the left.

The chief of police of the city of West Point investigated the collision. In his deposition he testified that the intersection where the collision occurred is in a residential neighborhood, that there were no obstructions to view, no vehicles parked nearby, that the streets are concrete, that it was a chilly day, and that the streets were dry. He confirmed that it was daylight and that the intersection is an open one with no traffic controls. The chief measured the skid marks made by defendant's vehicle and found them to be 20 feet in length. There was no evidence of drinking by either driver. The investigator concluded that neither vehicle had been traveling at an excessive rate of speed. No one other than the parties observed the collision.

The following statutes are applicable in this case. Neb. Rev. Stat. § 39-635 (Reissue 1984) states in part: "When two vehicles approach or enter an intersection from different roadways at approximately the same time, the driver of the vehicle on the left shall yield the right-of-way to the vehicle on the right." Neb. Rev. Stat. § 39-602(81) (Reissue 1984) provides: "Right-of-way shall mean the right of one vehicle or pedestrian to proceed in a lawful manner in preference to another vehicle or pedestrian approaching under such circumstances of direction, speed, and proximity as to give rise to danger of collision unless one grants precedence to the other."

Plaintiff initially pled that the collision was caused solely and proximately by the negligence of the defendant in the following respects: (1) In failing to keep his vehicle under reasonable control; (2) In failing to keep a reasonable and proper lookout for other vehicles lawfully using the street; (3) In driving his vehicle at a speed greater than was reasonable and prudent under the conditions then existing; and (4) In failing to yield the right-of-way to the vehicle driven by the plaintiff.

Defendant, as he approached the intersection to the right of plaintiff, had the right to assume that she would act in a lawful manner, and until he had warning, notice, or knowledge to the contrary, he was entitled to govern his actions in accordance

with that assumption. *Coyle v. Stopak*, 165 Neb. 594, 86 N.W.2d 758 (1957). The evidence gives no indication of negligence on his part. There is no evidence that he failed to control his vehicle, that he failed to keep a proper lookout, that his speed was excessive, or that he should have yielded the right-of-way to the vehicle driven by plaintiff.

On the other hand, there is no reasonable explanation for plaintiff's failure to see defendant's truck in time to yield the right-of-way, except that she did not keep a proper lookout. This court has consistently adhered to the rule that the failure to see an approaching vehicle is negligence as a matter of law where such vehicle is indisputably located in a favored position. *Krul v. Harless, ante* p. 313, 383 N.W.2d 744 (1986); *Mitchell v. Kesting*, 221 Neb. 506, 378 N.W.2d 188 (1985).

Defendant met his burden of producing enough evidence to demonstrate his right to a judgment as a matter of law, and plaintiff did not produce contrary evidence. Under these circumstances the trial court acted correctly in granting defendant's motion for summary judgment.

AFFIRMED.

WHITE, J., participating on briefs.

MARY YOUNG MEN'S CHRISTIAN ASSOCIATION OF BEATRICE, NEBRASKA, ALSO KNOWN AS YOUNG MEN'S CHRISTIAN ASSOCIATION OF BEATRICE, NEBRASKA, APPELLEE, V. INEZ E. HALL, APPELLANT.

386 N.W.2d 863

Filed May 16, 1986. No. 85-333.

1. **Judgments: Appeal and Error.** In an appeal in a law action, the findings of the trial court will not be disturbed unless clearly wrong.
2. **Contracts: Proof.** Where the contract contains no express condition precedent, a party who claims that the contract is subject to a condition has the burden to prove that the contract is conditional.

Appeal from the District Court for Gage County: WILLIAM B. RIST, Judge. Affirmed.

James L. Nelson of Carlson & Nelson, for appellant.

No appearance for appellee.

KRIVOSHA, C.J., BOSLAUGH, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

BOSLAUGH, J.

This was an action brought in the county court by the Mary Young Men's Christian Association of Beatrice, Nebraska, to recover the amount due on a pledge made by the defendant, Inez E. Hall, to the association.

The amended petition alleged that on September 25, 1979, the defendant signed a pledge card in which she agreed to contribute $2,500 to the plaintiff in quarterly installments over a 2-year period commencing in January 1981. The plaintiff further alleged that the defendant had made none of the payments and that the entire amount was now due.

The answer alleged that the plaintiff's signature on the pledge card had been obtained by false representations and that the plaintiff had failed to perform two conditions precedent in that it had failed to collect $150,000 from an anonymous donor and secure and collect pledges exceeding $150,000 within 90 days of August 24, 1979.

The county court found there was no evidence of false representations or that the pledge was subject to the conditions alleged in the answer and entered judgment for the plaintiff. Upon appeal to the district court the judgment was affirmed. The defendant has now appealed to this court.

The defendant has assigned as error that the court erred (1) in finding there was no evidence that the defendant's pledge was obtained through false and fraudulent representations and (2) in finding that the subscription agreement was not subject to any conditions precedent.

The record shows that the pledge made by the defendant was in connection with a campaign to obtain pledges to meet a challenge gift from an anonymous donor. There is no evidence that any false representation was made to the defendant by an agent of the plaintiff, and there is no evidence that the defendant's pledge was conditioned upon the fund campaign's

being successful.

There were no conditions expressed on the pledge card itself. The card merely provided as follows:

To Provide Funds To Build a New

BEATRICE YMCA

And in consideration of the gifts of others, I/we hearby subscribe to the

TOTAL SUM OF Twenty Five Hundred DOLLARS $ 2,500.00

Additional

PLEASE BILL: PAID -0-

Balance 2500.00

___ Monthly X Quarterly ___ Semi-Annually

___ Annually ___ Payroll Deduction ___ Other BEGINNING THE MONTH OF Jan 19[illegible]

Sept 25 1979 Date

Donor's Signature

Team

Campaigner

SOWING TODAY ....TO REAP TOMORROW

The person who solicited and obtained the pledge from the defendant testified specifically that he had not represented to anyone from whom he had obtained a pledge that in the event "the $150,000 was not matched," the pledge would not have to be paid. From the testimony of the defendant, the trier of fact could conclude that she had formed her impressions and understanding concerning the campaign by her interpretation of statements which had appeared in the news media.

In an appeal in a law action, the findings of the trial court will not be disturbed unless clearly wrong. *Havelock Bank v. Woods*, 219 Neb. 57, 361 N.W.2d 197 (1985); *South Sioux City Star v. Edwards*, 218 Neb. 487, 357 N.W.2d 178 (1984). In determining whether the evidence is sufficient to sustain the judgment, the evidence must be considered in a light most favorable to the successful party, with all conflicts resolved in his favor and giving him the benefit of every reasonable inference which is deducible therefrom. *Grubbs v. Kula*, 212 Neb. 735, 325 N.W.2d 835 (1982).

There is nothing in the record to show that the findings of the trial court were clearly wrong. The defendant's brief does not address the issue of fraud or false representation, and there is nothing in the record to show that defendant's pledge was obtained under fraudulent circumstances.

Since there were no express conditions whatsoever contained in the subscription contract, the defendant had the burden of proving the existence of the alleged conditions precedent. The defendant failed to show that the subscription was conditional, and the evidence shows that the defendant failed to pay any part of the pledge.

The judgment of the district court was correct, and it is affirmed.

AFFIRMED.

WHITE, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. SCOTT DONDLINGER, APPELLANT.

386 N.W.2d 866

Filed May 16, 1986. No. 85-501.

1. **Convictions: Appeal and Error.** In determining whether evidence is sufficient to sustain a conviction in a jury trial, the Supreme Court does not resolve conflicts of evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented to a jury—all of which is within a jury's province for disposition. A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict.
2. **Sexual Assault: Appeal and Error.** Where there is a genuine or real question of fact regarding a victim's lack of consent regarding an alleged first degree sexual assault, it is not within the province of the Supreme Court to reconsider the factual matters resolved by the jury in reaching a verdict that a defendant overcame the victim by force, threat of force, express or implied, coercion, or deception.
3. **Words and Phrases.** *Use* means to carry out a purpose or action by means of, or make instrumental to an end.
4. **Criminal Law: Sexual Assault: Weapons.** For use of a firearm, in violation of Neb. Rev. Stat. § 28-1205(1) (Reissue 1979), to subject a victim to sexual penetration by force or threat of force, Neb. Rev. Stat. § 28-319(1)(a) (Reissue 1979), it is only necessary that the victim be aware of the firearm's presence; that the assailant, in proximity to the firearm and knowing the firearm's location, has realistic accessibility to that firearm; and that the victim reasonably believes that the assailant will discharge the firearm to harm the victim unless the victim

submits to the act of the assailant.

5. **Jury Instructions: Appeal and Error.** Prejudicial error regarding jury instructions may not be predicated solely upon a particular sentence or phrase in an isolated instruction, but must appear from consideration of the entire instruction of which the questioned sentence or phrase is a part, as well as consideration of other relevant instructions given to the jury.
6. _____: _____. Jury instructions must be read together, and if the instructions taken as a whole correctly state the law, are not misleading, and adequately cover the issues, there is no prejudicial error.
7. **Judges: Recusal: Presumptions: Proof.** A party seeking to disqualify a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judical impartiality.
8. **Pretrial Procedure: Judges: Recusal: Appeal and Error.** A motion to disqualify a trial judge on account of prejudice is addressed to the sound discretion of the trial court. Generally, the ruling on a motion to disqualify a trial judge on the ground of bias and prejudice will be affirmed on appeal unless the record establishes bias and prejudice as a matter of law.

Appeal from the District Court for Thayer County: ORVILLE L. COADY, Judge. Affirmed.

Frank J. Daley, Jr., of Germer, Koenig, Murray, Johnson & Daley, for appellant.

Robert M. Spire, Attorney General, and Dale D. Brodkey, for appellee.

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

SHANAHAN, J.

Scott Dondlinger appeals convictions for first degree sexual assault, Neb. Rev. Stat. § 28-319(1)(a) (Reissue 1979), and use of a firearm to commit a felony, Neb. Rev. Stat. § 28-1205(1) (Reissue 1979). Dondlinger was convicted by a jury in the district court for Thayer County. We affirm.

The victim, a 16-year-old male, was visiting relatives in Chester during July 1984. On the evening of July 31, the victim, while walking in downtown Chester, encountered Dondlinger and three teenagers talking near Dondlinger's pickup. The victim introduced himself to Dondlinger and the others. After they had talked awhile the five decided to purchase some beer and climbed into Dondlinger's pickup. Dondlinger, age 20, purchased a case of beer and drove his four companions to a

field near Chester, where the five remained until shortly before midnight. Sometime after midnight the group went to Dondlinger's home outside Hebron. From Dondlinger's home the victim telephoned his relatives, who instructed the victim to return home immediately. Dondlinger offered to drive the victim home, and the two left in Dondlinger's pickup. After traveling various paved and dirt roads, Dondlinger stopped 4 or 5 miles south of Hebron on "Herb Weidel Road." The only light came from the pickup's headlights. There were no buildings nearby, and the victim was totally unfamiliar with the vicinity.

Dondlinger got out of the pickup on the driver's side, urinated in the middle of the road, returned to the pickup, produced a revolver, pointed that firearm at the victim, and directed the victim "to get out of the truck." The victim initially "thought [Dondlinger] was joking" but got out of the pickup on the passenger's side and walked in front of the pickup. When the victim reached the area in front of the vehicle, Dondlinger told the victim to "take [his] clothes off." Although not pointing the revolver directly at the victim, Dondlinger was brandishing the firearm, "shaking [it] around." The victim realized Dondlinger was "serious" and began running around the pickup, attempting to keep the vehicle between himself and Dondlinger. In circling the pickup, Dondlinger eventually reached a location where he had a "clear shot" at the victim, who then stopped and obeyed Dondlinger's commands to "get out in front of the truck" and "take your clothes off." As he was removing his clothing, the victim pleaded with Dondlinger to take him home. Dondlinger was 6 feet 1 inch tall and weighed approximately 180 pounds, while the victim was 5 feet 9 inches tall and weighed approximately 130 pounds.

Dondlinger placed the revolver on the vehicle's hood. The victim picked up the revolver, but Dondlinger "grabbed the gun" from the victim and stated, "You should have shot me while you could." At that point Dondlinger shoved the victim to the ground and performed sexual acts on the victim, including fellatio and digital penetration of the victim's anus. Dondlinger told the victim there would be "trouble" if the sexual acts were not performed. Throughout this time, the victim did not observe the location of the revolver previously brandished by

Dondlinger, but, while returning to town in the pickup, the victim saw the revolver on the seat next to Dondlinger, who was driving the vehicle. As soon as Dondlinger stopped his pickup near the house where the victim was staying, the victim got out and ran into the house, where he described the assault by Dondlinger. The victim's relatives contacted the sheriff's department and then drove the victim to a hospital for a medical examination and emergency treatment.

In response to the victim's complaint, three officers of the Thayer County Sheriff's Department drove to Dondlinger's home around 3 a.m. Officer Gerald Shepard knocked on the front door and, when Dondlinger answered, informed him that "he was under arrest for sexual assault." Dondlinger, partially clad, asked if he could get dressed. While Dondlinger was dressing, Shepard advised him of his *Miranda* rights, which Dondlinger acknowledged he understood. When Shepard asked about what had occurred earlier that night, Dondlinger replied: "Well, I guess you already know that or you wouldn't be here now," continuing, "probably something I should not have been doing . . . a little sexual abuse, that's what you call it, isn't it?" On inquiry about the gun involved in the incident, Dondlinger "said it was between the mattresses" in his bedroom and led the officers to the revolver.

At the "law enforcement center," Shepard asked Dondlinger "if he would write a statement as to what had happened that night." Dondlinger complied and wrote the following:

> Drove from my house . . . . Stopped and went to the bathroom told him to take off his Clothes and [perpetrated fellatio on the victim]. Never once did I hit or threaten him. I did have a pistol. It was never Loaded never aimed or pointed in anyone's direction. Got into pickup and took him home.

On August 30, 1984, the State charged Dondlinger in an information alleging Dondlinger's commission of two felonies—first degree sexual assault, § 28-319(1)(a) (subjecting another to sexual penetration and overcoming the victim by force, threat of force, express or implied, coercion, or deception), and use of a firearm to commit a felony, § 28-1205(1). On October 22 Dondlinger filed a "Motion

for Disqualification of Presiding Judge," claiming that the prospective trial judge had made a derogatory statement in March 1984 about Dondlinger during a "government day" attended in the district courtroom by some local high school students, school officials, and six members of the Thayer County Bar Association. At an evidentiary hearing on Dondlinger's motion, various participants of that "government day" testified regarding the nature of the judge's comment about Dondlinger. Generally, the witnesses recalled that the judge had remarked about the amount of teenage "partying" in the county, mentioned Dondlinger as a possible sponsor of the activity, and suggested that students avoid Dondlinger, because association with him might be "detrimental to their well being." In conjunction with his motion to disqualify the judge, Dondlinger argued that the district judge's presiding over Dondlinger's trial would "create an appearance of impropriety" and "create an atmosphere which is prejudicial to [Dondlinger] and which will deny [him] his right to a fair and impartial jury trial." On December 12 the district court overruled Dondlinger's motion for disqualification.

Dondlinger's jury trial commenced on February 6, 1985. The State first called the victim, who testified in detail about the events surrounding and comprising the sexual assault but conceded that he had not seen the revolver during the course of the various sexual acts with Dondlinger. In response to a question seeking an explanation for the victim's submission to Dondlinger's demands, the victim testified that he had submitted "[b]ecause if I didn't, I thought he'd shoot me and [I would] wind up dead someplace." The physician who had examined the victim at the hospital testified concerning the victim's physical injuries visible during such examination. Members of the sheriff's department testified concerning their contact with Dondlinger after the assault, including Dondlinger's statements made to the officers.

Dondlinger's defense focused primarily on the questions whether Dondlinger used force to achieve the sexual acts with the victim and whether the revolver was used to commit that first degree sexual assault. During his testimony, Dondlinger acknowledged that he had "pulled out a gun" and directed the

victim to remove his clothes but denied pointing the revolver at the victim. Dondlinger testified that the revolver was not loaded and that he did not intend to "hurt" or "threaten" the victim in any manner, including any threat with the revolver.

The court, over Dondlinger's objection, gave instruction No. 4 as follows:

> The Statutes of the State of Nebraska in full force and effect at the time alleged in the information provided, in substance, as follows:
>
> Sexual penetration shall mean sexual intercourse in its ordinary meaning, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of the accused's body . . . .
>
> Fellatio means an act committed with the mouth and male sex organ or an oral-genital contact.
>
> Victim shall mean the person alleging to have been sexually assaulted.
>
> Any person who subjects another person to sexual penetration and overcomes the victim by force, threat of force, express or implied, coercion, or deception is guilty of sexual assualt [sic] in the first degree. . . .
>
> . . . .
>
> Any person found guilty of such statutes shall be punished as provided by law.

The court also gave instruction No. 5, which, in pertinent part, provided:

> The material elements which the State must prove by evidence beyond a reasonable doubt in order to convict the defendant of sexual assault in the first degree are:
>
> 1. That [the victim] suffered sexual penetration;
>
> 2. That Scott Dondlinger subjected [the victim] to such penetration;
>
> 3. That Scott Dondlinger overcame [the victim] by force or by threat of force either expressed or implied; and
>
> 4. That such facts happened or were in existance [sic] on or about the thirty-first day of July, 1984, in Thayer County, Nebraska.
>
> The State has the burden of proving beyond a reasonable doubt each and every one of the foregoing

material elements.

The jury found Dondlinger guilty of both charges. On April 11, 1985, the district court sentenced Dondlinger to consecutive terms—3 to 10 years for first degree sexual assault and 1 year for use of a firearm in the commission of that sexual assault.

Dondlinger asserts six assignments of error, which can be condensed to three contentions: (1) The evidence is insufficient to sustain the convictions; (2) Instruction No. 4 is incorrect; and (3) The district judge should have disqualified himself from the proceedings against Dondlinger.

Dondlinger first argues that evidence is insufficient to sustain his conviction for first degree sexual assault, contending that the record does not support a finding that force was used to compel the victim's participation in the various sexual acts. Specifically, Dondlinger maintains that the revolver was not visible to the victim during the course of the sexual acts, that Dondlinger did not strike the victim, and that he did not threaten the victim's life once the sexual acts were commenced.

Section 28-319(1)(a) requires the State, in a prosecution for first degree sexual assault, to prove beyond a reasonable doubt that the defendant overcame the victim "by force, threat of force, express or implied, coercion, or deception."

> In determining whether evidence is sufficient to sustain a conviction in a jury trial, this court does not resolve conflicts of evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented to a jury—all of which is within a jury's province for disposition. A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict.

State v. Schott, ante p. 456, 462, 384 N.W.2d 620, 624-25 (1986).

Where there is a genuine or real question of fact regarding a victim's lack of consent regarding an alleged first degree sexual assault, it is not within the province of the Supreme Court to reconsider the factual matters resolved by the jury in reaching a verdict that a defendant overcame the victim "by force, threat of force, express or implied, coercion, or deception." See, *State v. Pankey*, 202 Neb. 595, 276 N.W.2d 233 (1979); *State v. Kelly*,

193 Neb. 494, 227 N.W.2d 848 (1975).

In his statement given to personnel of the sheriff's department and during his testimony in his own defense, Dondlinger admitted that fellatio, as sexual penetration, had taken place involving the victim and that Dondlinger had a revolver in his hand immediately before occurrence of the sexual act with the victim. Also, there was competent evidence before the jury that Dondlinger was some 50 pounds heavier than his victim, pointed the revolver at the victim, waved the weapon in a threatening manner, directed the victim to remove his clothes, grabbed and shoved the victim to the ground, demanded that the victim perform various sexual acts, and threatened the victim during the performance of the sexual acts. The victim testified that he complied with Dondlinger's sexual demands out of fear that Dondlinger would shoot and kill him. That the revolver was not at all times immediately visible to the victim throughout the course of sexual acts with Dondlinger does not, as a matter of law, preclude the trier of fact from reaching the conclusion that force was involved to achieve the sexual acts. There is ample evidentiary justification for the jury's verdict concluding that force or threat of force permeated the atmosphere surrounding the sexual acts and that Dondlinger overcame his victim "by force [or] threat of force, express or implied."

Dondlinger also maintains that the evidence does not support his conviction for use of a firearm to commit a felony in violation of § 28-1205(1). *Use* means "to carry out a purpose or action by means of : make instrumental to an end." Webster's Third New International Dictionary, Unabridged 2524 (1981). In order to subject a victim to the act of sexual penetration by force or threat through use of a firearm, it is not necessary that a victim stare pointblank into the barrel of a leveled firearm or experience such firearm pressed menacingly against the victim's body. For use of a firearm to subject a victim to sexual penetration by force or threat of force, § 28-319(1)(a), it is only necessary that the victim be aware of the firearm's presence; that the assailant, in proximity to the firearm and knowing the firearm's location, has realistic accessibility to that firearm; and that the victim reasonably believes that the assailant will

discharge the firearm to harm the victim unless the victim submits to the act of the assailant. Cf. *People v Davis*, 101 Mich. App. 198, 300 N.W.2d 497 (1980) (defendant, who had been carrying a rifle, sexually assaulted his victim while the rifle was lying 6 feet away during the assault; held, defendant was "armed with a weapon" to commit the sexual assault, a circumstance allowing conviction of first degree criminal sexual conduct in violation of Michigan's criminal code). Dondlinger admitted his possession of the revolver immediately before the sexual assault. The victim's testimony supplied additional factual basis for the jury's conclusion that Dondlinger had used a firearm in commission of a first degree sexual assault on the victim.

Next, Dondlinger contends the district court erred in giving instruction No. 4. Dondlinger argues that the instruction is "misleading and confusing" because the instruction suggested to the jury that "if the evidence showed that an act of fellatio had occurred, then a crime had been committed." Brief for Appellant at 11. To buttress his argument Dondlinger refers to the instruction's first sentence, which indicates that everything in the instruction is contained in Nebraska statutes, and the instruction's last sentence, "Any person found guilty of such statutes shall be punished as provided by law." Since the instruction also defined fellatio as an "act *committed* with the mouth and male sex organ" (emphasis supplied), Dondlinger maintains that the instruction allows the jury to mistakenly conclude that the act of fellatio, itself, constitutes a basis for finding Dondlinger guilty of sexual assault.

Prejudicial error regarding jury instructions may not be predicated solely upon a particular sentence or phrase in an isolated instruction, but must appear from consideration of the entire instruction of which the questioned sentence or phrase is a part, as well as consideration of other relevant instructions given to the jury. See *Meyer v. Moell*, 186 Neb. 397, 183 N.W.2d 480 (1971). As this court expressed in *State v. Bartholomew*, 212 Neb. 270, 275, 322 N.W.2d 432, 436 (1982): " 'All the instructions must be read together and if the instructions taken as a whole correctly state the law, are not misleading, and adequately cover the issues, there is no prejudicial error.' " See,

also, *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984).

Although instruction No. 4, as a definitional instruction, appears to equate performance of the sexual act with the element of force or threat of force necessary for first degree sexual assault, instruction No. 5 specifically and unambiguously delineates the separate elements of first degree sexual assault which the State is required to prove by evidence beyond a reasonable doubt, including: "3. That Scott Dondlinger overcame [the victim] by force or by threat of force either expressed or implied." Instruction No. 5 clearly states that the act of sexual penetration is only one of the elements which the State must prove beyond a reasonable doubt to convict Dondlinger of first degree sexual assault. When instructions Nos. 4 and 5 are read together and in their entirety, the instructions properly informed the jury concerning the elements which must be established by evidence beyond a reasonable doubt to permit a verdict of guilty on the charges alleged against Dondlinger.

Regarding instruction No. 4, Dondlinger also claims that the court erred in providing the jury with a definition of *fellatio*, a term contained in the statutory definition of "sexual penetration." See Neb. Rev. Stat. § 28-318(6) Cum. Supp. 1984). Dondlinger concedes that the court's instructional definition of *fellatio* is "essentially correct," but points out that fellatio is not statutorily defined and argues that it is "confusing to a jury" to use a definitional instruction based on nonstatutory sources to supply explanation for a statutory term. Brief for Appellant at 11. In substance, Dondlinger maintains that only definitions provided by statute should be used in jury instructions for criminal cases. Dondlinger was charged with a crime involving "sexual penetration," which may be accomplished by certain acts not having an "ordinary meaning," to use the language of the definitional statute pertaining to sexual assaults. See § 28-318(6). Although there may be lack of a correct definition statutorily prescribed or judicially dictated, it would be a paradox that an accused is unfairly prejudiced by an instruction correctly defining terms necessary to resolve an issue submitted to a jury. Without an adequate and correct definition of the elements to be proved,

the essential nature of a crime charged is not disclosed to a jury, a situation hardly conducive to a defendant's fair trial on the accusation of a crime. There is no error from the court's instruction No. 4 defining the term *fellatio* as an element of the crime charged against Dondlinger.

Finally, Dondlinger contends that the district court judge should have disqualified himself from presiding in Dondlinger's trial. Dondlinger does not contend that the district court judge was statutorily disqualified under Neb. Rev. Stat. § 24-315 (Reissue 1979), but maintains that the judge, "having taken a public position on [Dondlinger's] activities, should have recused himself from participating in [Dondlinger's] case and presiding over [Dondlinger's] trial." Brief for Appellant at 9.

" 'A party seeking to disqualify a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality.' " *State v. Gillette*, 218 Neb. 672, 677, 357 N.W.2d 472, 476 (1984).

> A motion to disqualify a trial judge on account of prejudice is addressed to the sound discretion of the trial court. [Citation omitted.] Generally, the ruling on a motion to disqualify a trial judge on the ground of bias and prejudice will be affirmed on appeal unless the record establishes bias and prejudice as a matter of law.

In re Estate of Odineal, 220 Neb. 168, 174, 368 N.W.2d 800, 804 (1985) (quoting *Kennedy v. Kennedy*, 205 Neb. 363, 287 N.W.2d 694 (1980)).

Although Dondlinger claims that the trial judge's pretrial statement about Dondlinger's activities establishes prejudice, Dondlinger has not directed our attention to any aspect of the proceedings indicating or demonstrating the trial judge's alleged prejudice or bias. The trier of fact in Dondlinger's case was a jury, not the district judge. Dondlinger has not raised any question regarding the sentence imposed. By any analysis, Dondlinger has not met his burden of establishing, with particularity, in what manner any judicial conduct resulted in prejudicial disposition of the charges and case against Dondlinger.

The judgment of the district court is correct in all respects and is affirmed.

AFFIRMED.

JOSEPH D. SMITH, APPELLEE, V. JANET K. SMITH, APPELLANT.

386 N.W.2d 873

Filed May 16, 1986. No. 85-604.

1. **Guardians Ad Litem: Fees: Appeal and Error.** The allowance, amount, and allocation of a guardian ad litem fee is a matter within the initial discretion of a trial court, involves consideration of the equities and circumstances of each particular case, and will not be set aside on appeal in the absence of an abuse of discretion by the trial court.
2. **Child Custody: Visitation: Testimony.** Although Neb. Rev. Stat. § 42-364(1)(b) (Reissue 1984) provides that a court, in determining custody and visitation, shall consider the desires and wishes of a child affected by a dissolution decree if such child is of an age of comprehension, such statute does not require that a court derive a minor child's wishes only from the child's testimony, as opposed to evidence from some source other than the child's testimony which adequately establishes the child's desire and wishes regarding custody and visitation.

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

Richard M. Black, for appellant.

Albert L. Feldman of Harris, Feldman Law Offices, for appellee.

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

SHANAHAN, J.

Janet K. Smith appeals an order of the separate juvenile court of Douglas County denying Janet's request for an attorney fee and requiring Janet to pay part of a guardian ad litem fee and, also, granting her former husband, Joseph, biweekly supervised visitation with Smiths' child.

On May 17, 1984, the district court for Douglas County entered a decree dissolving the marriage of Joseph and Janet. The decree granted Janet custody of their child, Jerry, age 11 years, and visitation rights to Joseph on the condition that Joseph and Jerry undergo psychiatric treatment. The dissolution decree also ordered Joseph to pay $200 a month as child support, $150 per month as alimony, and $500 as attorney fees. As part of Smiths' property division, Janet received the parties' marital dwelling, an equal share in a $63,000 joint bank

account, and various items of personal property. Joseph is an employee of the state Department of Roads and earns approximately $20,000 a year. Janet delivers phone books, which accounts for a yearly income of $3,000.

After the decree was entered Janet "actively discourage[d]" Jerry from visiting with his father, thus preventing Joseph from exercising his decreed right of visitation. On September 20, 1984, the district court, on its own motion, appointed a guardian ad litem for Jerry. Joseph subsequently sought enforcement of the decree, and, on December 24, 1984, the district court entered an order requiring Janet to "cooperate in providing [Joseph] reasonable visitation with [Jerry]." As a result of continuing problems with visitation, the guardian ad litem, on January 22, 1985, filed a motion to transfer the case to the Douglas County Separate Juvenile Court, which motion was granted by the district court. See Neb. Rev. Stat. § 43-2,113 (Reissue 1984) (district court may, "with the consent of the juvenile judge," transfer matters "arising under the provisions of Chapter 42, article 3, when the care, support, custody, or control of minor children under the age of eighteen years is involved").

On March 15, 1985, the juvenile court heard arguments regarding Joseph's alleged failure to pay the previously decreed alimony and attorney fee and Janet's failure to cooperate in Joseph's visitation of Jerry and to deliver personal property awarded to Joseph. Joseph and Janet also bickered over payment of the guardian ad litem fee and Janet's request that Joseph pay an additional attorney fee. During proceedings before the juvenile court, Janet testified Joseph had beaten Jerry on numerous occasions and that Jerry was, as a result, afraid of being near his father. The guardian ad litem, however, noted only one incident where the father had allegedly struck the boy, and testified:

> Well, your Honor, from all the conversations I have had with people related to Jerry, it is also my opinion that he is probably too scared to visit with his father right now and I believe that is through no fault of the father. That is from all the research that I have done. I see nothing in the father's behavior that justifies this fear and it's my

> considered opinion from all the talking that I have done to all of the various people involved that this fear of the father comes from his mother because she is afraid of him and she conveys that fear to Jerry and he has learned that fear from her.

In a separate report the guardian ad litem noted that Joseph was "very sad at the loss of communication with his son." The juvenile court also obtained services of a psychiatrist to examine Jerry and make recommendations regarding visitation. The psychiatrist observed that Jerry was "afraid of his father" and did not want "any visitation," and recommended that, if instituted, visitation should "be for a short period in a neutral environment under supervision." The juvenile court never interviewed Jerry or received testimony from Jerry regarding his desire to visit his father.

On July 9, 1985, the juvenile court ordered payment of a guardian ad litem fee of $840, requiring Janet to pay $240 of that fee; denied Janet's request for an additional attorney fee; and granted Joseph visitation of Jerry every other Sunday from 10:30 a.m. to 12 noon at the Hanscom Park United Methodist Church, under the supervision of two adults.

Janet first claims the juvenile court erred in ordering her to pay $240 of the guardian ad litem fee and in denying Janet's request for an additional attorney fee.

Initially, awarding an attorney fee in matters pertaining to marital dissolution is discretionary with a trial court and may depend on a variety of factors, including the amount of property divided and alimony granted, earning capacity of the parties, and general equities of each situation. See *Brown v. Brown*, 199 Neb. 394, 259 N.W.2d 24 (1977). "[T]he awarding of attorney fees in marriage dissolution cases [is a matter] initially entrusted to the sound discretion of the trial judge, which [matter], on appeal, will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion." *Guggenmos v. Guggenmos*, 218 Neb. 746, 748-49, 359 N.W.2d 87, 90 (1984). The allowance, amount, and allocation of a guardian ad litem fee is also a matter within the initial discretion of a trial court, involves consideration of the equities and circumstances of each particular case, and will not

be set aside on appeal in the absence of an abuse of discretion by the trial court. See, *Nye v. Nye*, 213 Neb. 364, 329 N.W.2d 346 (1983); *Copple v. Bowlin*, 172 Neb. 467, 110 N.W.2d 117 (1961); cf. *Guggenmos v. Guggenmos, supra*.

Viewing the equities in this case, we note that, notwithstanding disparity in the parties' earning capacity, Janet received a suitable property division under the decree and was granted alimony and child support. Services of the guardian ad litem and additional services by Janet's attorney were prompted, to a great extent, by Janet's own conduct in disrupting Joseph's visitation. Under the circumstances of this case, the juvenile court did not abuse its discretion in denying Janet's claim for an additional attorney fee and by requiring Janet to pay a portion of the guardian ad litem fee.

Janet also claims evidence does not show the ordered visitation is in the best interests of Jerry. Specifically, Janet maintains that, as a result of Jerry's fear of his father, any visitation with his father is detrimental to Jerry's well-being.

In *Koch v. Koch*, 219 Neb. 195, 196-97, 361 N.W.2d 548, 549 (1985), this court recently enunciated the rule governing visitation rights of a parent:

> In cases involving determination of visitation privileges of a parent with minor children, findings of a trial court, both as to the evaluation of the evidence and as to the matter of visitation privileges, will not be disturbed on appeal unless there is an abuse of discretion or the findings are contrary to the evidence. Such findings are subject to review by this court de novo on the record. [Citations omitted.]
>
> The right of access to one's children should not be denied unless the court is convinced such visitations are detrimental to the best interests of the child. In the absence of extraordinary circumstances, a parent should not be denied the right of visitation.

In *Koch* the minor children were in the custody of their mother and expressed a hostility toward their father. The father, moreover, was "guilty of some bad behavior in the presence of the children." *Koch, supra* at 198, 361 N.W.2d at 550. Nevertheless, we affirmed the district court's order affording

the father unsupervised visitation on every weekend.

The record in this case establishes that Jerry fears his father and does not wish to participate in the visitation ordered. The record also supports a finding, however, that Jerry's fear of his father is caused primarily by Janet's behavior, not by wrongful conduct on the part of Joseph. The court's order of supervised visitation was within the guidelines recommended by the psychiatrist's report. In the light of *Koch v. Koch, supra*, which sets forth a strong presumption in favor of visitation, we cannot conclude that the juvenile court abused its discretion in affording Joseph an hour and a half every other week for supervised visitation of Jerry.

Finally, Janet claims that the juvenile court erred in not taking testimony from or interviewing Jerry. Although Janet maintains that the trial court failed to directly verify Jerry's concerns regarding visitation with his father, it is clear that the court, through the testimony of witnesses other than Jerry, was well aware of Jerry's feelings and fears regarding Joseph and reflected such concerns by significantly restricting Joseph's visitation. Although Neb. Rev. Stat. § 42-364(1)(b) (Reissue 1984) provides that a court "shall consider" the "desires and wishes of the children if of an age of comprehension" in determining custody and visitation, *Deacon v. Deacon*, 207 Neb. 193, 297 N.W.2d 757 (1980), such statute does not require that a court derive a minor child's wishes only from the child's testimony, as opposed to evidence from some source other than the child's testimony which adequately establishes the child's desire and wishes regarding custody and visitation.

The judgment of the juvenile court is affirmed.

AFFIRMED.

CAPORALE, J., not participating.

IN RE INTEREST OF M.B., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. BRIAN F. AND DEBORA P., APPELLANTS.
IN RE INTEREST OF R.P., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. DEBORA P., APPELLANT.
IN RE INTEREST OF J.P., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. DEBORA P., APPELLANT.

386 N.W.2d 877

Filed May 16, 1986. Nos. 85-607, 85-608, 85-609.

1. **Parental Rights: Appeal and Error.** An appeal from an order terminating parental rights is reviewed by this court de novo on the record, giving weight to the fact that the trial court observed the parties and witnesses and judged their credibility.
2. **Parental Rights.** An order terminating parental rights must be based upon clear and convincing evidence.
3. **Parental Rights: Proof.** The burden of proof to establish parental abandonment of a child is that of clear and convincing evidence.
4. **Parental Rights.** There is no right to an opportunity for rehabilitation prior to termination of parental rights, but when such an opportunity is granted, the party must comply with the plan and satisfactorily complete it.
5. **Paternity: Parental Rights: Notice.** One who has not established paternity by either court proceedings or behavior has no right to notice of termination proceedings.
6. **Parental Rights.** The primary consideration in termination of parental rights proceedings is the best interests of the children.

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

John M. Gerrard of Domina & Gerrard, for appellant Debora P.

Ross A. Stoffer of Mueting, DeLay & Stoffer, for appellant Brian F.

W. Bert Lammli, Stanton County Attorney, and Richard D. Stafford, guardian ad litem, for appellee.

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

GRANT, J.

The county court for Stanton County, Nebraska, sitting as a juvenile court (and hereinafter referred to as the juvenile court) found clear and convincing evidence sufficient to terminate the parental rights of (1) the natural mother, Debora P., to her daughter, M.B., born to Debora P. and Brian F. out of wedlock on October 4, 1976, and to her two sons, J.P. and R.P., born in wedlock to Debora P. and James P. on May 6, 1978, and December 7, 1979, respectively; (2) Brian F., the natural father of M.B.; and (3) James P., the natural father of J.P. and R.P. While each case was separately filed and docketed, they were tried together and heard together on appeal in both the district court and this court. Debora P. appealed the juvenile court orders terminating her parental rights to all three children. Brian F. separately appealed the order terminating his parental rights to M.B. James P. did not appeal.

Debora P. alleges that the juvenile court erred in three respects: (1) In finding there was sufficient evidence to terminate Debora P.'s parental rights; (2) In finding that it was in the children's best interests to terminate her parental rights; and (3) In failing to order less restrictive alternatives which should have been used prior to termination of her parental rights. Brian F. alleges that the juvenile court erred in three respects: (1) In finding there was sufficient evidence to permanently terminate his parental rights; (2) In failing to find that his rights to due process and equal protection were violated by the State's failure to notify him of any proceedings and by the failure to allow him to participate in a rehabilitation plan; and (3) In finding that the best interests of the child are the proper standard in terminating parental rights. For the reasons herein set out, we affirm the orders of the district court affirming the judgments of the juvenile court.

An appeal from an order terminating parental rights is reviewed by this court de novo on the record, giving weight to the fact that the trial court observed the parties and witnesses and judged their credibility. *In re Interest of M. W.M.*, 221 Neb. 829, 381 N.W.2d 134 (1986). An order terminating parental rights must be based upon clear and convincing evidence, and termination of parental rights should be a last resort. *In re*

Interest of P.F., ante p. 44, 381 N.W.2d 921 (1986).

Juvenile court petitions were filed on September 16, 1981, in Stanton County, Nebraska, alleging that each child was within the meaning of Neb. Rev. Stat. § 43-202(2)(b) and (c) (Reissue 1978), in that each child lacked proper parental care and supervision in particular respects set out in each petition. Each petition alleges Debora P. was the mother of the child involved. The petitions concerning R.P. and J.P. alleged that James P. was their father. The petition concerning M.B. alleged her father was not known to the Stanton County attorney, who filed the petition. On September 30, 1981, the court ordered that care, custody, and control of the children was granted to "Multi-County Social Service Unit #141," with physical custody to be at the discretion of the unit, which left it with Debora P. On October 14 these orders were reviewed and continued. After a change in conditions the children were removed from Debora P.'s physical custody on October 22, 1981, and since that time they have not been returned to her. This action by the social worker was reviewed and affirmed by the court on November 4, 1981.

Supplemental juvenile court petitions were filed, and after a hearing on November 20, 1981, the court found the children to be within the meaning of § 43-202(2)(b) and (c) and placed the children in the custody of the Department of Public Welfare (the Department). The matters were set for review by the court on June 1, 1982, and specific orders were entered concerning the children and directing Debora P. to engage in specified activities in connection with her parenting and homemaking skills. On June 15, 1982, a review hearing was held, and Debora P. with her attorney, the children by their appointed guardian ad litem, and a representative of the Department appeared. After the hearing the court again ordered that custody of the children remain in the Department, granted Debora P. visitation rights, and ordered psychological and psychiatric evaluations of Debora P.

The matters were again reviewed in a review hearing on January 18, 1983. The orders issued after this hearing required that Debora P. receive counseling at a mental health center, attend a drug and alcohol evaluation center, obtain and

maintain a permanent type of residence, seek employment, and attend parenting classes. The evidence adduced at this hearing is not in the record before us, but the court orders provided in part:

> That Debora [P.] and James [P.] are hereby ordered that they shall not threaten or harass, verbally or physically, directly or indirectly, anyone connected with this case, including the Department of Public Welfare and its agents, the foster parents or anyone else connected with the care of the minor children, or any persons who may contact the Department of Public Welfare or the County Attorney concerning facts or evidence related to this case, and that if either Debora [P.] or James [P.] violates this provision of the order, they are hereby put on notice that the Court will consider such actions to be contempt of Court.

Another review hearing was held on June 21, 1983. Orders similar to the foregoing order were again entered.

On March 16, 1984, a "Supplemental Juvenile Court Petition" was filed in each case. These petitions sought termination of the parental rights of Debora P. to all three children, the termination of the parental rights of James P. to J.P. and R.P., and the termination of James P.'s rights as the stepfather of M.B. This latter petition alleged that the natural father of M.B. was unknown. A hearing on the petitions was set for May 16, 1984. "Notice of Termination of Parental Rights" regarding M.B. was published three times in an appropriate newspaper. An affidavit was filed on April 18, 1984, concerning mailing of notice of the termination hearing relating to M.B. to named interested parties, including, for the first time shown in the transcript, notice to Brian F. at a Sioux City, Iowa, address.

On May 16, 1984, a hearing was held in juvenile court. Debora P. and James P., together with their respective attorneys, were present at this hearing, as was the Stanton County attorney. Brian F. also was at this hearing and "in open Court alleged that he was the natural father of the minor child, [M.B.]." Brian F. requested that counsel be appointed for him and that the matter be continued. The court appointed an

attorney for Brian F. and continued the hearing until June 25, 1984. The court also ordered blood testing for the purpose of determining paternity, and ordered a home study be conducted of the residence of Brian F. and his wife, in Sioux City, Iowa. On June 20, 1984, a medical report was sent to the court indicating that Brian F. was the father of M.B.

On June 25, 1984, an "Amended Supplemental Juvenile Court Petition" was filed. This petition alleged that "the natural father of [M.B.] is unknown to the petitioner," the county attorney of Stanton County, and sought the termination of the parental rights of the "unknown father" because of abandonment of the minor child, and again sought termination of the parental rights of Debora P. and James P.

The hearing on termination of parental rights was conducted on June 25, 26, 27, 28, and 29, 1984. All parties were present with counsel including "[t]he admitted biological father" of M.B., Brian F. At the beginning of the hearing, the court found Brian F. to be the father of M.B. There was no contrary evidence in that regard. The hearing resulted in 765 pages of testimony as well as 25 exhibits. On June 29, 1984, the court entered its orders terminating the parental rights of Debora P., James P., and Brian F. Debora P. and Brian F. appealed to the district court, where the orders of the juvenile court were affirmed, and to this court.

With regard to the sufficiency of the evidence to support the termination of the parental rights of Debora P., the record shows the following.

When M.B. was born in 1976, Debora P. was 16 years old and Brian F., 17. The first contact that Debora P. had with Nebraska public authorities, insofar as shown by the record, was on November 13, 1980, when Debora P.'s case was reviewed by the Lancaster County Child Protective Services. At that time Debora P. had just moved from Sioux City, Iowa, to Lincoln, Nebraska, where her husband, James P., had been incarcerated in the Nebraska prison system. In Sioux City, Debora P. and the children had been under the supervision of the Iowa authorities for abuse and neglect of the children. The Lancaster County C.P.S. became involved with Debora P. regarding parenting skills. At this time J.P. was under the care of a Sioux City doctor

for a punctured eardrum. One of the children had a cigarette burn. The Lancaster County report indicated that Brian F. was M.B.'s father, but his name was misspelled in the report and his address in Sioux City, Iowa, was incorrect.

In January of 1981 Debora P. moved to Norfolk, Stanton County, Nebraska, with the children. There, an employee of the Department first met with Debora P. and the children on January 21, 1981, to investigate a report of possible child abuse and neglect. On this occasion Debora P.'s home was filthy, containing dog feces everywhere (some dried and some fresh), and unfit for proper care of the children. A homemaker was assigned to aid Debora P., but the homemaker had difficulty in contacting Debora P. on several occasions. In July 1981 the same employee of the Department again visited Debora P.'s home and found the same filthy conditions. The same filthy conditions were found to exist in August and September of 1981. As stated above, a juvenile court petition was filed September 16, 1981. The children were removed from Debora P.'s custody after she placed the children in the care of a couple who had had their parental rights to their own children terminated on two occasions. At this time Debora P. had had 14 different legally documented residences (in addition to "numerous undocumented moves") in the time from October of 1976 to October of 1981, in 8 different cities. Between October of 1981 and the hearing in June 1984, Debora P. had 12 different residences (including 4 separate times when she was a "transient" in Sioux City, Iowa). During much of the time, Debora P. was an assistant over-the-road truckdriver in the company of a man who had had four earlier sex-based convictions, including the molestation of children. The man was called "daddy" by M.B. when the child was visited by Debora P.

The testimony adduced at the 5-day, June 1984 hearing established beyond any doubt that prior to the children's being placed in a foster home, the home furnished for them by Debora P. was unsanitary, unhealthy, and totally unsatisfactory as a home in which children should be raised. After the children were placed in a foster home, the evidence shows that Debora P. was constantly given the opportunity to rehabilitate herself and

prepare to furnish her children a proper home. Over a period of 3 years, Debora P. either was unable to, or unwilling to, so conduct herself as to provide a proper home for her children. We affirm the findings of the juvenile court that the best interests of the three children require that the parental rights of Debora P. be terminated as to those children. We find that Debora P. has substantially and repeatedly neglected those children and has refused to give these juvenile children necessary parental care and protection. Neb. Rev. Stat. § 43-292(2) (Reissue 1984). We also find that the three children are as described in Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1984) and that reasonable efforts, under the direction of the juvenile court, have failed to correct the conditions leading to the determination that M.B., J.P., and R.P. are such children. § 43-292(6).

With regard to Brian F. the record reflects the following. Between the birth of M.B. on October 4, 1976, and the time when her mother married James P. in 1977, there were a few contacts between Brian F. and M.B. These few contacts were initiated by Debora P. and generally would occur when she would take M.B. to the place where Brian F. worked. The next contact between M.B. and Brian F. was in August of 1979. Between August 1979 and June 1984, a total of eight contacts occurred between the two. There was no contact between M.B. and Brian F. from October 1980 to October 1983. All contacts between M.B. and Brian F. were also initiated by Debora P. Brian F. did not support M.B. in any way nor help with the expenses of her birth. There is no evidence that he accepted any parental responsibility. Brian F. admitted that he requested that Debora P. not inform the authorities of his paternity to avoid paying child support. The original petition was filed on September 16, 1981, and the last contact Brian F. made with M.B. prior to that time was in October 1980.

The evidence indicates that during the first 8 years of the life of M.B., Brian F. did not in any way acknowledge paternity until the initiation of these proceedings. He did not initiate contacts with her, did not keep in any communication with her, and did not help to financially support her. Only at the time of these termination proceedings did he claim that he was the

father of M.B., and that claim was made only after he requested a blood test to determine if M.B. was his natural daughter.

The evidence is clear that before the filing of the juvenile court proceeding of September 16, 1981, Brian F. had abandoned M.B. for a period of more than 6 months—one of the specific conditions of termination of parental rights set out in § 43-292(1). Other evidence shows that although Brian F. and his wife, who were married in 1979, were successfully caring for their own child and the two children of his wife from before the marriage, the best interests of M.B. would not be served by injecting her into that new family in 1984.

Brian F.'s challenge to the sufficiency of the evidence to terminate his parental rights with regard to M.B. is without merit. The petition involved herein alleged that the unknown natural father of M.B. had abandoned her. The burden of proof to establish parental abandonment of a child is that of clear and convincing evidence. *In re Adoption of Simonton*, 211 Neb. 777, 320 N.W.2d 449 (1982). The evidence in this case is clear and convincing in all respects, and the lower court was correct. As we stated in *Simonton, supra* at 783-84, 320 N.W.2d at 454:

> Where there has been a protracted period of totally unjustified failure to exercise parental functions, an isolated contact or expression of interest does not necessarily negate the inference that a person no longer wishes to act in the role of parent to a child. [Citation omitted.] The parental obligation is a positive duty which encompasses more than a financial obligation. It requires continuing interest in the child and a genuine effort to maintain communication and association with that child. Abandonment is not an ambulatory thing the legal effects of which a parent may dissipate at will by token efforts at reclaiming a discarded child. [Citation omitted.]

The second error assigned by Brian F. raises equal protection and due process issues regarding the failure of the court to offer him a rehabilitation plan and in the failure to give him notice at an earlier time. In dealing with the issue of a rehabilitation plan, we note that the State is not required to "provide an opportunity of rehabilitation before terminating parental

rights, although the court may choose to do so." *In re Interest of M.W.M.*, 221 Neb. 829, 834, 381 N.W.2d 134, 138 (1986). There is no right to an opportunity for rehabilitation prior to termination of parental rights, but when such an opportunity is granted, the party must comply with the plan and satisfactorily complete it. There was no due process violation in this regard.

Brian F.'s equal protection claim is based upon the fact that Debora P., the natural mother, was provided an opportunity for rehabilitation while Brian F. was not. It is clear, however, that Debora P. and Brian F. were not similarly situated. See *Shoecraft v. Catholic Social Servs. Bureau, ante* p. 574, 385 N.W.2d 448 (1986). Brian F. had abandoned M.B. by the time he was asserting some interest in M.B., while Debora P. had made some attempt to fulfill her parental responsibilities from the birth of M.B.

Brian F. asserts that he had not abandoned M.B. because he did not receive notice of the juvenile court proceedings. However, Brian F. was not entitled to notice until he is found to be the father. One who has not established paternity by either court proceedings or behavior has no right to notice of termination proceedings. See *Stratman v. Hagen*, 221 Neb. 157, 376 N.W.2d 3 (1985). The amended supplemental petition sought termination of the parental rights of the natural father, who was unknown to petitioner. Brian F. was not established as the father at that time and had no right to notice.

The record shows, in any event, that when Brian F. appeared before the court, he was granted a continuance of the hearing and an attorney was appointed to represent him. Brian F. and his attorney took an active part in the 5-day trial. Brian F. requested no further continuance. Brian F. was not entitled to notice under this record and, in any event, was afforded due process by the juvenile court which more than adequately protected all his rights.

As stated above, the claim that Brian F. is entitled to an opportunity to rehabilitate because in other cases such an opportunity was afforded is erroneous. Brian F. fails to make out an equal protection claim, in that he had previously abandoned M.B. Brian F. was not established, in any manner, to be the father of M.B. until the lower court so declared on the

first day of the trial. Brian F. did not by his actions establish paternity as did the putative father in *In re Interest of Witherspoon,* 208 Neb. 755, 305 N.W.2d 644 (1981). Brian F. did not act in any way as M.B.'s father. See Neb. Rev. Stat. § 13-109 (Reissue 1983). See, also, *Shoecraft, supra.*

Brian F.'s third assignment of error is that the trial court used an incorrect standard when deciding the case based upon the best interests of the child rather than considering the rule that parental rights are terminated as a last resort when no reasonable alternative exists. The correct standard is that of the best interests of the child. A recent decision reiterated this long-standing rule that the burden of proof to establish parental abandonment of a child is that of clear and convincing evidence. *In re Interest of P.F., ante* p. 44, 381 N.W.2d 921 (1986). This standard means that the ultimate decision of the court, after sufficient evidence has been presented, must be rendered in the best interests of the child. We expressly reaffirm this standard, which is set out in § 43-292. Parental rights are subject to the paramount interest of society in protecting the rights of a child. *Linn v. Linn*, 205 Neb. 218, 286 N.W.2d 765 (1980). This standard is accompanied by the requirement of the factors set out in § 43-292. It is a combination of the best interests of the child and evidence of fault or neglect on the part of the parents that is required.

We conclude that there was sufficient evidence to support the decision of the trial court to terminate the parental rights of Debora P. and Brian F. to the children involved herein. The court used less restrictive alternatives long enough in regard to Debora P. "A child must not be made to await uncertain parental maturity." *In re Interest of V.B. and Z.B.*, 220 Neb. 369, 374, 370 N.W.2d 119, 123 (1985). The best interests of the children are our main concern, and those interests require a final disposition when rehabilitation has been ineffective and the prognosis is poor regarding both the purposes of rehabilitation and the conditions of neglect and dependency. *In re Interest of S. W.*, 220 Neb. 734, 371 N.W.2d 726 (1985). A child's future is too important to allow us to leave him or her suspended in foster care.

The decisions of the district court, affirming the judgments

of the juvenile court, were correct and are affirmed.

AFFIRMED.

MURIEL THIESSEN STACKLEY ET AL., HEIRS AT LAW OF THEODORE W. STACKLEY, DECEASED, APPELLANTS, V. STATE OF NEBRASKA, DEPARTMENT OF ENVIRONMENTAL CONTROL, AND RONALD E. SORENSEN, COMMISSIONER OF LABOR, STATE OF NEBRASKA, APPELLEES.

386 N.W.2d 884

Filed May 16, 1986. No. 85-667.

1. **Employment Security Law: Proof: Good Cause.** To avoid disqualification from unemployment benefits under Neb. Rev. Stat. § 48-628 (Reissue 1984), an employee, who has voluntarily left employment, has the burden of proving there was good cause for the employee's terminating an employment relationship.
2. **Employment Security Law: Appeal and Error.** In appeals regarding Neb. Rev. Stat. § 48-628 (Reissue 1984), the Supreme Court reviews the record de novo, retries the issues of fact involved in the findings challenged, and reaches an independent conclusion regarding such issues of fact.

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

Noel S. DeKalb, for appellants.

Jerry D. Slominski, for appellee Sorensen.

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

SHANAHAN, J.

The heirs of Theodore W. Stackley appeal the judgment of the district court for Lancaster County rejecting Stackley's claim that he voluntarily left his employment for "good cause" within the purview of Neb. Rev. Stat. § 48-628 (Reissue 1984). The district court's judgment affirmed a decision of the Department of Labor's appeal tribunal which had sustained an initial departmental order imposing an 8-week disqualification regarding Stackley's unemployment benefits. Stackley's heirs

properly revived this action when Stackley died shortly after testifying at the district court proceeding. See Neb. Rev. Stat. § 25-1410 (Reissue 1979).

The sole issue in this case is whether Stackley had "good cause" to voluntarily leave his employment. Under § 48-628 an individual is disqualified from receiving unemployment benefits "for not less than seven weeks nor more than ten weeks" following termination of employment if "he or she has left work voluntarily without good cause." To avoid disqualification from unemployment benefits under § 48-628, an employee, who has voluntarily left employment, has the burden of proving there was good cause for the employee's terminating an employment relationship. See *Taylor v. Collateral Control Corp.*, 218 Neb. 432, 355 N.W.2d 788 (1984). In appeals regarding § 48-628 the Supreme Court reviews the record de novo, retries the issues of fact involved in the findings challenged, and reaches an independent conclusion regarding such issues of fact. See, *Norman v. Sorensen*, 220 Neb. 408, 370 N.W.2d 147 (1985); *Taylor v. Collateral Control Corp., supra.*

Stackley began working as an "Engineer III" for the Nebraska Department of Environmental Control (NDEC) in April 1979. The job description for Stackley's employment with NDEC included the following examples:

1. Supervises and participates in the conduct of major environmental engineering investigations, surveys and studies; prepares reports on interpretation of findings.

2. Supervises and coordinates the work of subordinate engineers and specialists.

3. Confers with public officials, contractors, safety and consulting engineers and citizens regarding environmental engineering projects and studies; supervises and participates in the necessary investigations and negotiations; provides recommendations and information.

4. Plans and conducts training programs for technical or sub-professional personnel as required.

5. Presents talks before lay and professional groups to promote environmental programs.

6. Prepares technical correspondence and reports.

Stackley tendered his resignation from the department on October 12, 1983, after a series of disputes with the acting director of that department. The disputes involved different views of the proper role of professional engineers in the department's decisionmaking process. Specifically, Stackley believed that it was the responsibility of the department's engineering division to review any proposed modification in operation of waste water treatment facilities. During the last year of his employment, Stackley became concerned that nonprofessionals in the department's water and waste management division were making technical recommendations to the operators of treatment facilities without first consulting the department's engineering division. Stackley was "extremely depressed" over the situation and felt he was being "personally attacked" by the department's acting director.

The record establishes beyond question that Stackley left his employment with NDEC because he was dissatisfied with the acting director's perceived inability to properly coordinate the department's administrative decisionmaking process. While testifying before the district court, Stackley claimed, for the first time, that the departmental method of excluding professionals from initial stages of any decisionmaking process violates Nebraska statutes governing activities of professional engineers. See Neb. Rev. Stat. §§ 81-839 et seq. (Reissue 1981). The record, however, does not support a finding that such statutes were specifically considered or involved in the department's decisionmaking process. Stackley also testified that the department's decisionmaking process contravened certain provisions of the professional engineers' "code of practice." Again, however, the record does not reflect that Stackley was required to perform or approve any conduct which placed his professional license in jeopardy. At best, the record discloses Stackley's personal and professional concern that the acting director did not fully appreciate Stackley's status as a licensed professional engineer throughout the decisionmaking process of the department.

Under § 48-628 an employee has "good cause" for voluntarily leaving employment if the employee's decision to

leave is prompted by a circumstance which has "some justifiably reasonable connection with or relation to the conditions of the employment." *Glionna v. Chizek*, 204 Neb. 37, 40, 281 N.W.2d 220, 223 (1979). In *Sohler v. Director of Division of Employment Security*, 377 Mass. 785, 388 N.E.2d 299 (1979), the Supreme Judicial Court of Massachusetts considered a contention similar to that advanced by Stackley. In *Sohler* a professional nurse contended that she left her job because improper management of a hospital "made it impossible for her to carry out her professional responsibilities in an acceptable manner and to deliver good medical care." *Id.* at 788, 388 N.E.2d at 301. Nurse Sohler maintained there was "confusion over job assignments, lack of procedures for coordinating treatment among shifts, inadequate record keeping, failure to establish bowel and urinary voiding schedules, and other like phenomena which caused 'constant tension and frustration on the job' and which 'severely hurt her morale.' " *Id.* The nurse, however, did not show that the working conditions "were such that her affiliation with the hospital subjected her to professional sanction, criminal prosecution, or liability in tort." *Id.* at 789, 388 N.E.2d at 301. The court rejected the notion that "such general and subjective dissatisfaction" with one's job constituted "good cause" for leaving one's employment. *Id.* The court concluded: "The evidence she presented merely revealed her over-all disappointment with the manner in which the hospital was run and, perhaps, with the haphazard and less than adequate care being offered by other employees. Such disappointment does not rise to the level of good cause." *Id.* at 789, 388 N.E.2d at 302.

Under the facts of this case, we do not believe Stackley's personal and professional dissatisfaction with the NDEC's decisionmaking process rose to the level of good cause under § 48-628. The acting director's method of administering NDEC's programs may have pinched Stackley's professional pride, affected his morale, and diminished his effectiveness at his job. In this context, however, such circumstances did not constitute "good cause."

Stackley's heirs attempt to buttress their claim of "good

cause" regarding Stackley's reasons for leaving his employment by contending that the original conditions of Stackley's employment were unilaterally changed by his employer. Although a unilateral change in employment conditions may, in a given case, constitute "good cause" for voluntarily leaving one's employment, the evidence in this case falls far short of establishing any such unilateral change in the overall conditions of Stackley's employment. Stackley was never reassigned to any duties or job other than as set forth in the job description. The evidence shows a policy disagreement regarding the role of engineers in the department's decisionmaking process. Under the circumstances of this case, such disagreement, no matter how legitimate, did not provide Stackley with "good cause" for voluntarily leaving his employment.

The judgment of the district court is affirmed.

AFFIRMED.

JAMES M. WHITE, APPELLANT, V. ROBERT E. LOVGREN, M.D., ET AL., APPELLEES.

387 N.W.2d 483

Filed May 23, 1986. No. 84-860.

1. **Master and Servant: Negligence: Liability: Judgments.** Where there is no evidence that a master has been negligent other than through the imputation of the negligent conduct of his servant, based upon the doctrine of respondeat superior, as between the same parties, a judgment in favor of the servant on the merits renders invalid any judgment against the master.
2. **Verdicts: Appeal and Error.** Once a jury verdict has been rendered, the verdict should be upheld as against the challenge of an error in the proceedings unless the error was somehow prejudicial.
3. **Evidence: Appeal and Error.** Where evidence is objected to which is substantially identical with evidence admitted and not objected to, prejudicial error will not lie because of its admission.

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

Robert V. Roach and James R. Welsh of Welsh, Sibbernsen & Roach, for appellant.

William M. Lamson, Jr., and Joni R. Kerr of Kennedy, Holland, DeLacy & Svoboda, for appellees.

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

KRIVOSHA, C.J.

James M. White appeals following a jury verdict in favor of the appellees Jeanine Mercer, Beth Johns, and their employer, Drs. Lovgren & Olson, P.C. By his appeal appellant challenges an order earlier entered by the district court for Douglas County, Nebraska, dismissing the action as against the appellee Robert E. Lovgren, M.D., in his individual capacity.

In his amended petition White made specific allegations of negligence as to each of the individual defendants concerning the failure to properly examine, diagnose, care for, and treat White. Additionally, White alleged that Dr. Lovgren was negligent in failing to properly supervise the medical assistants. White claimed that as a result of these negligent acts he sustained permanent injury, for which he requested a judgment for damages.

In their answers to the amended petition, the appellees all denied that they were negligent and alleged that in any and all treatment rendered by them they exercised that degree of skill and care expected of health care providers in Omaha, Nebraska. Appellees further denied that their acts proximately caused any injury to White. Following a trial to a jury, and at the conclusion of all of the evidence, the district court determined that there was no evidence to establish any negligence on the part of Dr. Lovgren and, therefore, dismissed Dr. Lovgren from the action, with prejudice. The jury returned unanimous verdicts in favor of the appellees, and judgment was entered in accordance therewith.

In this appeal White maintains that the district court erred in one or more of the following respects: (1) In dismissing Dr. Lovgren from the suit at the close of the evidence; and (2) In refusing to withdraw from consideration by the jury a report prepared by a medical panel convened pursuant to the provisions of Neb. Rev. Stat. §§ 44-2840 et seq. (Reissue 1984). For reasons which we shall detail hereinafter, we believe the

judgment must be affirmed.

Briefly, the facts are as follows. On April 26, 1982, James M. White consulted Dr. Lovgren, an ear, nose, and throat specialist, regarding a throat problem. Dr. Lovgren prescribed a treatment known as Proetz displacement. Prior to undergoing the treatment, Dr. Lovgren's patients first inhale a Neo-Synephrine solution prepared, as necessary, and administered by one of Dr. Lovgren's aides. In Dr. Lovgren's office the solution typically consists of one part 1 percent Neo-Synephrine (the same as the concentration of Neo-Synephrine sold over the counter) and eight parts saline. However, on this particular day the solution specifications were inadvertently reversed by Jeanine Mercer, an aide to Dr. Lovgren and a defendant in this case. White alleged that all of his damages flowed from this mistaken mixture of the solution.

We turn first to the issue regarding whether the district court erred in dismissing the action as against Dr. Lovgren. White claims that Dr. Lovgren should not have been dismissed from the action either because he was personally negligent or because he was vicariously liable for the negligence of his servants under the doctrine of respondeat superior.

The law with respect to the evidence necessary to establish a prima facie case of medical malpractice is well established. This may be proven in one of two ways: either via expert testimony, *Kortus v. Jensen*, 195 Neb. 261, 237 N.W.2d 845 (1976), or by showing that the negligence of the professional was clearly within the comprehension of laymen, *Halligan v. Cotton*, 193 Neb. 331, 227 N.W.2d 10 (1975).

It is clear from the record that White was unable to show a prima facie case of negligence under either avenue. The record is totally devoid of any medical testimony to support any contention that Dr. Lovgren, in any manner, failed to meet the standard of care required in the community. Further, the acts of Dr. Lovgren simply do not constitute one of those rare cases where the fact of negligence is clearly within the comprehension of laymen. Cf. *Reifschneider v. Nebraska Methodist Hosp.*, *post* p. 782, 387 N.W.2d 486 (1986).

As to respondeat superior, the district court submitted to the jury the question of the negligence of Dr. Lovgren's agents, and

the jury determined that there was no negligence on their part. The law generally is to the effect that where there is no evidence that a master has been negligent other than through the imputation of the negligent conduct of his servant, based upon the doctrine of respondeat superior, as between the same parties, a judgment in favor of the servant on the merits renders invalid any judgment against the master. See Restatement (Second) of Judgments § 51 (1982). See, also, *Moncol v. Bd. of Edn.*, 55 Ohio St. 2d 72, 378 N.E.2d 155 (1978); *Vukelic v. Upper Third Street S. & L. Asso.*, 222 Wis. 568, 269 N.W. 273 (1936); *Morrison v. Kiwanis Club*, 52 N.C. App. 454, 279 S.E.2d 96 (1981), *review denied* 304 N.C. 196, 285 S.E.2d 100; *Torres v. Kennecott Copper Corporation*, 15 Ariz. App. 272, 488 P.2d 477 (1971).

Therefore, even if it can be argued that, under the provisions of the Nebraska Professional Corporation Act, Neb. Rev. Stat. §§ 21-2201 to 21-2222 (Reissue 1983), Dr. Lovgren should have remained a party to the suit because of the doctrine of respondeat superior, the determination by the jury that his agents were not in any manner negligent absolves Dr. Lovgren of any liability, including for his alleged failure to supervise, and makes the error, if any, nonprejudicial.

White argues that the effect of dismissing the action as to Dr. Lovgren was nevertheless prejudicial because the jury could then be led to believe that the appellees Mercer and Johns, if personally liable, would be required to pay the judgment alone. He further argues that the jury might be reluctant to return a verdict against the employees without Dr. Lovgren. However, instruction No. 7 clearly advised the jury that there were, in effect, three defendants remaining in the case, the two employees and the professional corporation of which Dr. Lovgren was a member. The instruction specifically provided in part:

> The Court has determined as a matter of law that the Defendants Jeanine Mercer and Beth Johns were employees of the Defendant, Drs. Lovgren & Olson, P.C., and were acting within the scope of their authority at the time of the treatment to the Plaintiff. As a result if you find Jeanine Mercer or Beth Johns were negligent, or both

> of them, you must find that the Defendant, Drs. Lovgren & Olson, P.C., was negligent.

We believe that this instruction effectively prevented any prejudice as claimed by White.

That leaves the final question of whether the district court erred in not sustaining White's motion to strike the report of the medical malpractice panel once Dr. Lovgren had been dismissed from the suit.

Again, we need not address that specific issue. On the basis of the record before us, at best the evidence of the report was merely cumulative. Dr. James Werth, an ear, nose, and throat specialist, who was one of the members of the medical liability panel, testified in person as to all of the matters included in the report. Even if the report had been excluded, the testimony of Dr. Werth would have properly remained and would have been considered by the jury. The fact that Dr. Werth's testimony was further documented by the report prepared by the panel upon which Dr. Werth sat does not, in our view, constitute prejudicial error. We have previously held that once a jury verdict has been rendered, the verdict should be upheld as against the challenge of an error in the proceedings unless the error was somehow prejudicial. See *Flakus v. Schug*, 213 Neb. 491, 329 N.W.2d 859 (1983). And in *Meyer v. Moell*, 186 Neb. 397, 406, 183 N.W.2d 480, 485 (1971), we held that "where evidence is objected to which is substantially identical with evidence admitted and not objected to, prejudicial error will not lie because of its admission." The most that can be said of the report is that it was identical with evidence admitted and not objected to, and, therefore, its admission does not constitute prejudicial error entitling White to a new trial.

The judgment of the district court is in all respects affirmed.

AFFIRMED.

BARBARA SMITH, PERSONAL REPRESENTATIVE OF THE ESTATE OF BABY BOY SMITH, DECEASED, APPELLANT, V. COLUMBUS COMMUNITY HOSPITAL, INC., A NEBRASKA CORPORATION, APPELLEE.

387 N.W.2d 490

Filed May 23, 1986. No. 84-891.

1. **Actions: Decedents' Estates: Wrongful Death: Damages: Minors.** A child born dead cannot maintain an action at common law for injuries received by it while in its mother's womb, and consequently the personal representative cannot maintain it under a wrongful death statute limiting such actions to those which would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof.
2. **Actions: Decedents' Estates: Wrongful Death.** The right to maintain an action for wrongful death did not exist under the common law, and exists in Nebraska, as in other states, solely by statute and is a matter for legislative enactment.

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

Richard D. Sievers of Marti, Dalton, Bruckner, O'Gara & Keating, P.C., for appellant.

Jewell, Gatz & Collins, for appellee.

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

PER CURIAM.

The plaintiff, Barbara Smith, personal representative of the estate of Baby Boy Smith, deceased, appeals the dismissal of the plaintiff's amended petition against Columbus Community Hospital, Inc. The hospital demurred to Smith's petition. When the hospital's demurrer was sustained and the plaintiff elected not to replead by further amended petition, plaintiff's action was dismissed by order of the district court for Platte County. From such dismissal plaintiff appeals. "On reviewing the sustaining of a demurrer, this court must treat as undisputed the facts as alleged in the petition." *Blanchard v. White*, 217 Neb. 877, 880, 351 N.W.2d 707, 709-10 (1984).

In February 1982 Barbara Smith was diagnosed as pregnant, with an expected date of delivery of October 8, 1982. Being in active labor on October 17, Barbara Smith was admitted to the

defendant hospital at 5:45 a.m. on that date. At 7:10 a.m. on October 17, Barbara Smith delivered a stillborn male infant at the defendant hospital. Plaintiff's petition alleges that the hospital, through its employees, was guilty of negligence which was the proximate cause of the death of Baby Boy Smith. The plaintiff claimed that the labor room nurse was negligent in failing to properly monitor fetal heart tones, failing to promptly and properly notify plaintiff's physician of her admission, and failing to assemble the hospital's emergency surgical team at a time when the life of Baby Boy Smith could have been saved by performing an emergency cesarean section. Plaintiff, as personal representative, sought special damages for the funeral expenses and general damages for loss of comfort, companionship, and society regarding Baby Boy Smith. The hospital demurred and alleged that the amended petition did not state facts sufficient to constitute a cause of action. Neb. Rev. Stat. § 25-806 (Reissue 1979). As previously indicated, after the court sustained the hospital's demurrer and allowed time for further amendment, the plaintiff elected to stand on her amended petition to which the demurrer had been sustained, and the plaintiff's action was dismissed.

The sole question raised in this appeal is whether or not the personal representative of the estate of an unborn child, as a viable fetus which dies prior to birth as the result of another's negligence, has a cause of action for damages recoverable under the Nebraska wrongful death statute.

Neb. Rev. Stat. § 30-809 (Reissue 1979) provides:

> Whenever the death of a person shall be caused by the wrongful act, neglect or default, of any person, company or corporation, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

The question raised in the present appeal was raised for the

first time in *Drabbels v. Skelly Oil Co.*, 155 Neb. 17, 50 N.W.2d 229 (1951), where the trial court sustained a demurrer to the petition of the administrator of the estate of Coleen Ann Drabbels, an unborn child born dead as the result of an explosion allegedly caused by negligence on the part of the defendant oil company. In *Drabbels, supra*, plaintiff's petition alleged that at the time of the explosion Audrey Drabbels was 8 months pregnant and that the unborn child was viable and capable of separate and independent existence. In affirming the judgment of the trial court in sustaining the defendant's demurrer and dismissing the plaintiff's petition, we stated at 19, 21-24, 50 N.W.2d at 230-32:

> The wrongful death statute is plain in stating that the right of action created by it exists only in cases wherein the injured person could himself have maintained an action for damages had he lived. . . .
>
> . . . .
>
> In our opinion a child born dead cannot maintain an action at common law for injuries received by it while in its mother's womb, and consequently the personal representative cannot maintain it under a wrongful death statute limiting such actions to those which would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof.
>
> . . . .
>
> We adhere to the rule that an unborn child is a part of the mother until birth and, as such, has no juridical existence. . . . [W]e can find no convincing authority that a child born dead ever became a person insofar as the law of torts is concerned.
>
> . . . .
>
> Since no cause of action accrued to the child born dead, for injuries received before birth, none survived to the personal representative under the wrongful death statute. It would appear, therefore, that an action of this character may not be maintained unless and until the right to bring it is afforded by legislative enactment.

Some 26 years later, the same question raised and answered in

Drabbels v. Skelly Oil Co., supra, was again brought before this court in *Egbert v. Wenzl*, 199 Neb. 573, 260 N.W.2d 480 (1977), where the trial court sustained a demurrer to the petition of the administratrix of the estate of Baby Girl Egbert, a viable fetus born dead as the result of alleged negligence of the defendant in operation of a motor vehicle. In affirming the trial court's dismissal of the petition, we held:

> The issue in this case, not one of first impression in Nebraska, is whether an action for the wrongful death of a stillborn fetus may be maintained under section 30-809, R.R.S. 1943. We conclude that it may not, and adhere to the rule set forth in Drabbels v. Skelly Oil Co., 155 Neb. 17, 50 N.W.2d 229 (1951).
>
> . . . .
>
> . . . The right to maintain an action for wrongful death did not exist under the common law, and exists in Nebraka [sic], as in other states, solely by statute. [Citations omitted.]
>
> . . . .
>
> . . . In view of the common law rule that an unborn fetus was not a person insofar as the law of torts is concerned, we think that if there had been an intention to create an action for the wrongful death of a viable fetus it would have been specifically so stated by the Legislature when the wrongful death statute was enacted. In Drabbels, this court noted that such an action "may not be maintained unless and until the right to bring it is afforded by legislative enactment." In the 26 years since Drabbels was decided, the Nebraska Legislature has not acted to include a viable fetus within the definition of person under section 30-809, R.R.S. 1943. Plaintiffs have not directed our attention to any evidence of legislative intent to include recovery for the death of a viable fetus under section 30-809, R.R.S. 1943, and we have found none.
>
> We express no opinion with respect to the existence of the fetus as a person in either the philosophical or scientific sense. We hold only that the Legislature did not exhibit the intention to include a viable fetus within the scope of our wrongful death statute.

Egbert v. Wenzl, supra at 573-74, 576, 260 N.W.2d at 481-82. As previously expressed twice prior to the present appeal, if a viable fetus is to be included within the scope of the Nebraska wrongful death statute, § 30-809, the right to recover under the wrongful death statute is still a matter for legislative enactment so expressing and not a matter for this court to include in the wrongful death statute a cause of action of a child born dead.

The district court was correct in sustaining the demurrer and dismissing plaintiff's amended petition based on an action for wrongful death.

AFFIRMED.

SHANAHAN, J., dissenting.

By uncritically perpetuating the incorrect result reached in *Drabbels v. Skelly Oil Co.*, 155 Neb. 17, 50 N.W.2d 229 (1951), and *Egbert v. Wenzl*, 199 Neb. 573, 260 N.W.2d 480 (1977), this court has given new meaning to Khayyam's words:

> The Moving Finger writes; and, having writ,
> Moves on; nor all your Piety nor Wit
> Shall lure it back to cancel half a Line.

> [T]he antiquity of a rule is no measure of its soundness. "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." Address by O.W. Holmes, 10 Harv. L. Rev. 457, 469 (Jan. 8, 1897).

Commonwealth v. Cass, 392 Mass. 799, 805-06, 467 N.E.2d 1324, 1328 (1984).

As pointed out by Sheldon R. Shapiro, annotator for the work appearing at 84 A.L.R.3d 411 (1978), the question involves a cause of action "where an unborn child was viable (that is, capable of independent existence apart from its mother) at the time of sustaining injuries resulting in prenatal death." *Id.* at 415.

When the majority shores up its opinion by reiterating there is "no convincing authority" for recognizing the cause of action today denied by this court, there is disregard of an ever-growing body of law throughout the United States.

According to the Supreme Court of Pennsylvania in *Amadio v. Levin,* 509 Pa. 199, 501 A.2d 1085 (1985), decided on December 4, 1985, from 1949 to the present, 29 states and the District of Columbia have recognized that "survival and wrongful death actions lie by the estates of stillborn children for fatal injuries they received while viable children en ventre sa mere." 501 A.2d at 1086-87. The Supreme Court of Pennsylvania concluded that, based on "the body of medical knowledge" existing today, "the reasons formerly relied on to deny [a cause of action for prenatal injury causing stillbirth of a viable fetus] no longer are persuasive." 501 A.2d at 1087.

While the majority of this court clings to a rule having its inception in a lack of information, advances in medical science have now supplied evidence of causal connections between alleged prenatal negligence and damage. See, W. Keeton, Prosser and Keeton on the Law of Torts, *Limited Duty* § 55 (5th ed. 1984). If courts disregard developments in science relative to causes of action, motor vehicle negligence law will have to be reconsidered, because courts will have to ignore existence of the wheel.

In his scholarly opinion unanimously adopted by the Supreme Court of Arizona in *Summerfield v. Superior Court, Maricopa Cty.*, 144 Ariz. 467, 698 P.2d 712 (1985), decided April 24, 1985, Justice Feldman traces the rule, today reaffirmed by this court's majority construing Nebraska's wrongful death statute, directly to the nascent 19th-century case of *Baker v. Bolton*, 1 Camp. 493, 170 Eng. Rep. 1033 (1808), which probably emerged from the enlightenment of the 18th century. In *Summerfield* the Arizona Supreme Court, recognizing that *person* encompasses a stillborn, viable fetus for the purpose of Arizona's wrongful death statute, held at 477, 479, 698 P.2d at 722, 724:

> The majority rule, which now recognizes that a death action will lie under the circumstances present here, acknowledges that the common law has evolved to the point that the word "person" does usually include a fetus capable of extrauterine life. . . . The majority finds no logic in the premise that if the viable infant dies

> immediately before birth it is not a "person" but that if it dies immediately after birth it is a "person."
>
> . . . We believe that the common law now recognizes that it is the ability of the fetus to sustain life independently of the mother's body that should determine when tort law should recognize it as a "person" whose loss is compensable to the survivors. . . .
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> . . . .
>
> . . . By upholding the right of recovery, we join the majority and better reasoned view.

Nebraska should have become the 31st jurisdiction recognizing the cause of action again rejected by this court.

From our orbit in a jurisprudential galaxy, today we have rocketed backward into a black hole and a fate uncertain.

ROSE MARIE REIFSCHNEIDER, APPELLANT, V. NEBRASKA METHODIST HOSPITAL, A CORPORATION, ET AL., APPELLEES.

387 N.W.2d 486

Filed May 23, 1986. No. 85-149.

1. **Summary Judgment.** Summary judgment is appropriate when there is no genuine issue as to any material fact.
2. _____. The moving party must first show that if the evidence were uncontroverted at trial he would be entitled to judgment as a matter of law. Such a prima facie showing shifts the burden of producing evidence as to a factual issue to the party opposing the motion. The court then views the evidence in a light most favorable to the party against whom the motion is directed and decides only if there is a genuine issue as to any material fact, but not how that issue is to be decided.
3. **Medical Malpractice: Physicians and Surgeons: Negligence: Expert Witnesses: Evidence: Proof.** Whether a specific manner of treatment or exercise of skill by a physician or surgeon or other professional demonstrates a lack of skill or knowledge or failure to exercise reasonable care is a matter that, usually, must be proved by expert testimony.
4. **Medical Malpractice: Physicians and Surgeons: Negligence: Liability.** Generally, an attending staff physician is not liable for failure of a hospital to execute reasonable instructions that he has given for the treatment of his patients.

Appeal from the District Court for Douglas County: THEODORE L. CARLSON, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Cynthia G. Irmer of Matthews & Cannon, P.C., for appellant.

Robert M. Slovek and Joseph S. Daly of Sodoro, Daly & Sodoro, for appellees.

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

BOSLAUGH, J.

The plaintiff, Rose Marie Reifschneider, commenced this action to recover damages for the injuries she sustained when she fell from a hospital cart on April 4, 1977. The defendants are Nebraska Methodist Hospital, Emergency Medical Services Group, and Dr. Robert Stryker.

After an evidentiary hearing, the trial court sustained the defendants' motion for summary judgment. The trial court found there was no competent evidence giving rise to a genuine issue of material fact. The finding was based in part on the stipulation of the parties that no expert witness would be called on the issues of the standard of care or liability of the defendants. The plaintiff has appealed.

Most of the facts are not in dispute. On April 4, 1977, the plaintiff was taken to the emergency room of Nebraska Methodist Hospital by her father, Jacob Reifschneider. The plaintiff appeared to be unstable and semiconscious. The emergency room personnel placed the plaintiff on a hospital cart in an examining room. The side rails on the cart were raised, but the plaintiff was not strapped down or otherwise restrained.

The defendant Stryker, the physician on duty in the emergency room, was called to examine the plaintiff. His examination, as shown by the emergency room chart, revealed that the plaintiff was moderately drowsy and had slurred speech. Her pupils were equal and reacted to light, but she had some nystagmus, which is a rhythmic jerking motion of the eyes which may be due to a number of different reasons. The doctor

found some questionable weakness of the right hand and some tenderness in the plaintiff's lower abdomen. A neurological examination was conducted, but the results were negative, other than that the plaintiff appeared lethargic and questionably sedated. The doctor ordered that the patient be catheterized. The doctor testified by deposition that he asked someone to remain in the room with the plaintiff at all times, but he did not remember to whom he gave that order.

After the doctor's examination but while the plaintiff was still on the hospital cart in the examining room, the nurse who was attending her was called from the room by the charge nurse. The charge nurse, after requesting that the attending nurse give assistance elsewhere, saw that the plaintiff's father was in the room and asked him to remain with the plaintiff. Despite the charge nurse's request, the plaintiff's father left the plaintiff unattended. The plaintiff then attempted to get off the end of the hospital cart and fell, suffering a severe blow to the face and temporomandibular joint. This suit was filed to recover damages for the injuries she sustained in the fall.

The plaintiff's second amended petition made two specific allegations of negligence. The plaintiff alleged that the defendants were negligent (1) in failing to restrain the plaintiff and (2) in failing to provide attendants or adequate supervision. The trial court granted summary judgment in favor of all the defendants on both allegations, due to the absence of expert testimony as to the duty of care.

Summary judgment is appropriate when there is no genuine issue as to any material fact. Neb. Rev. Stat. § 25-1332 (Reissue 1979). The moving party must first show that if the evidence were uncontroverted at trial he would be entitled to judgment as a matter of law. *Hanzlik v. Paustian*, 211 Neb. 322, 318 N.W.2d 712 (1982). Such a prima facie showing shifts the burden of producing evidence as to a factual issue to the party opposing the motion. *Hanzlik, supra*. The court then views the evidence in a light most favorable to the party against whom the motion is directed and decides only if there is a genuine issue as to any material fact, but not how that issue is to be decided. *Hanzlik, supra*; *Scheideler v. Elias*, 209 Neb. 601, 309 N.W.2d 67 (1981). " 'Summary judgment is an extreme remedy and should be

awarded only when the issue is clear beyond all doubt.' " *Hanzlik, supra* at 327, 318 N.W.2d at 715 (citing *Scheideler v. Elias, supra*).

It is clear from the record the plaintiff failed to meet her burden of producing some competent evidence of negligence on the issue of failure to restrain. Dr. Stryker's affidavit, which was received in evidence, was sufficient as a prima facie showing on the absence of negligence. See *Hanzlik v. Paustian*, 216 Neb. 575, 344 N.W.2d 649 (1984). The burden of producing evidence to show a genuine factual issue then shifted to the plaintiff. The plaintiff offered no evidence as to the defendants' alleged duty of care to restrain the plaintiff.

In Nebraska, whether a specific manner of treatment or exercise of skill by a physician or surgeon or other professional demonstrates a lack of skill or knowledge or failure to exercise reasonable care is a matter that, usually, must be proved by expert testimony. *Northrup v. Archbishop Bergan Mercy Hosp.*, 575 F.2d 605 (8th Cir. 1978); *Hanzlik v. Paustian*, 211 Neb. 322, 318 N.W.2d 712 (1982); *Halligan v. Cotton*, 193 Neb. 331, 227 N.W.2d 10 (1975). See, also, Annot., 40 A.L.R.3d 515 (1971). One of the exceptions is that "expert testimony is not legally necessary when the conclusion to be drawn from the facts does not require specific, technical, or scientific knowledge and the circumstances surrounding the injury are within the common experience, knowledge, and observation of laymen." *Northrup, supra* at 607.

The plaintiff argues that the question of restraint is custodial or nonmedical and within the grasp of knowledge of ordinary laymen, and, therefore, no expert testimony as to the defendants' duty to restrain is necessary. This argument assumes that the ordinary trier of fact, judge or jury, is capable of assessing the status of an emergency room patient and determining whether or not restraints are needed. This court has indicated a hesitancy in placing such a burden on the trier of fact. *Halligan v. Cotton, supra*. We believe expert testimony is required to establish a duty of the defendants to restrain a patient such as the plaintiff, and, absent such evidence, the motion was properly sustained as to that issue.

On the issue of adequate supervision or provision of

attendants, it is necessary to consider separately the evidence offered against each defendant. Although this court cannot assume that a duty to provide attendants exists, and will not find that such knowledge is within the realm of ordinary experience, there is some evidence in the form of Dr. Stryker's testimony that Nebraska Methodist Hospital owed such a duty to the plaintiff.

The depositions of Dr. Stryker and nurses Jass and Metcalfe, staff nurses on duty at the time of plaintiff's injury, were received in evidence without objection. The deposition of Dr. Stryker addresses the duty of due care owed by the hospital to the plaintiff. The relevant portion of the deposition is as follows:

Q. Okay. But you didn't ask anybody to remain in the room with her at all times?
A. Yes, I did.
Q. Oh, you did ask someone to do that?
A. Yes.
Q. Who did you ask to remain in the room?
A. I don't recall.
Q. Would it have been a nurse or a person—are there other people besides nurses and doctors in the emergency room?
A. Yes.
Q. What kind of employees are those?
A. There's secretaries, there are technicians, there's licensed L.P.N.'s, licensed practical nurses.
Q. All right.
A. That's essentially, I think, it.
Q. Would you have chosen somebody from any one of those particular groups to stay in the room at all times?
A. Yes, I would have given that order to a nurse or L.P.N.

Thus, the record does contain some expert testimony that the hospital had a duty to provide a constant attendant to the plaintiff. The record further discloses that at the time the plaintiff was injured there were no hospital personnel present or in attendance in the room with the plaintiff. The record contains a prima facie showing of negligence by the hospital

sufficient to defeat the motion for summary judgment and establish a question of fact which must be resolved by trial. The trial court should not have sustained the motion for summary judgment in favor of the hospital.

The record does not contain a prima facie showing of negligence against Dr. Stryker on the issue of providing attendants. Generally, an attending staff physician is not liable for failure of a hospital to execute reasonable instructions that he has given for the treatment of his patients. See 1 D. Louisell & H. Williams, Medical Malpractice ¶ 16.07[2] (1985). There is no evidence to suggest that the physician should be liable for the hospital's alleged error under the circumstances in this case. Further, without any additional expert testimony on the duty of care owed by Dr. Stryker to the plaintiff, the doctor's affidavit that "he followed the generally accepted and recognized standard of care of skill of the community" supports the finding by the trial court. The judgment in favor of Dr. Stryker and Emergency Medical Services Group is affirmed. The judgment as to Nebraska Methodist Hospital is reversed and the cause remanded for further proceedings.

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

STATE OF NEBRASKA, APPELLEE, V. DEREK W. DIXON, APPELLANT.

387 N.W.2d 682

Filed May 23, 1986. No. 85-486.

1. **Confessions: Evidence.** Voluntariness is the ultimate test to use an accused's statement, admission, or confession as evidence in a criminal prosecution.
2. _____: _____. To be admissible an accused's statement, admission, or confession must have been freely and voluntarily made, and must not have been the product of or extracted by any direct or implied promise or inducement, no matter how slight.
3. **Police Officers and Sheriffs: Confessions: Appeal and Error.** Whether an officer has made a promise for a defendant's statement is a question of fact to be determined by a trial court—a decision which will not be set aside unless clearly wrong.
4. **Motions to Suppress: Appeal and Error.** In determining whether a trial court's

findings on a motion to suppress are clearly erroneous, the Supreme Court recognizes the trial court as the trier of fact and takes into consideration that the trial court has observed witnesses testifying regarding such motion to suppress.

5. **Proximate Cause.** Conduct is a cause of an event if the event in question would not have occurred but for that conduct; conversely, conduct is not a cause of an event if that event would have occurred without such conduct.
6. **Criminal Law: Death: Proximate Cause: Intent.** An act or omission to act is the proximate cause of death when it substantially and materially contributes, in a natural and continuous sequence, unbroken by an efficient, intervening cause, to the resulting death. It is unnecessary for proximate cause purposes that the particular kind of harm that results from the defendant's act be intended by him.
7. **Criminal Law: Homicide: Proximate Cause.** A victim's fatal heart attack, proximately caused by a defendant's felonious conduct toward that victim, establishes the causal connection between felonious conduct and homicide necessary to permit a conviction for felony murder in violation of Neb. Rev. Stat. § 28-303(2) (Reissue 1979).
8. **Evidence: Verdicts: Appeal and Error.** A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support the verdict.

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

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

Robert M. Spire, Attorney General, and Lynne R. Fritz, for appellee.

KRIVOSHA, C.J., BOSLAUGH, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

SHANAHAN, J.

Derek W. Dixon appeals his first degree murder conviction by a jury in the district court for Douglas County. The information charged that Dixon "during the perpetration of, or attempt to perpetrate a burglary [did] kill Susan K. Jourdan." Neb. Rev. Stat. § 28-303 (Reissue 1979) provides: "A person commits murder in the first degree if he kills another person . . . (2) in the perpetration of or attempt to perpetrate any sexual assault in the first degree, arson, robbery, kidnapping, hijacking of any public or private means of transportation, or burglary . . . ."

Susan Jourdan, age 76, lived alone in her South Omaha

home. As recently as 1979, Jourdan had two surgical procedures pertaining to cancer, but, with occasional assistance from her family, did light housework. Around 10 a.m. on December 31, 1984, Jourdan's sister, Agnes Hamann, visited by telephone with Jourdan, who said she was going to fix some eggs for breakfast as soon as the sisters finished talking on the phone. Near 9 p.m. on December 31, Ms. Hamann telephoned her daughter, Virginia Hansen, and expressed concern that she had made numerous unanswered telephone calls to Jourdan. The next morning Ms. Hamann recontacted her daughter and again expressed concern that no one answered the telephone at the Jourdan house. Virginia Hansen and her husband went to the Jourdan residence around 10 a.m. on January 1, 1985, found the front door locked, but, looking through a window, saw the interior in "disarray." After unlocking the front door, Hansens entered and saw the telephone, with the receiver out of its cradle, lying in the doorway between the living room and kitchen. On further investigation Hansens found Jourdan, clad in a bathrobe and nightgown, face down on the kitchen floor. From a neighbor's house Hansens called paramedics and police. On arrival and finding Jourdan quite obviously dead, the paramedics made no attempt at resuscitation.

A police officer from a cruiser unit also arrived and found the kitchen door, as an entry at the rear of Jourdan's house, had been "kicked open," the house "ransacked," and the interior of the house was "very cold," noting the presence of ice in some pans in the kitchen sink. The cruiser officer summoned the homicide unit of the Omaha Police Department.

As part of their investigation on that morning of January 1, officers of the homicide unit examined the hollow-core, wooden kitchen door which allowed entry from the outside by way of an enclosed porch. A window in the kitchen door was shattered, and window glass was scattered immediately inside the doorway. The door itself was damaged. Below the area of the lock and doorknob, the hollow-core, wooden door was broken; that is, the lower part of the door was separated from the upper portion and was lying inside the kitchen. In the separated door panel was a jagged hole at the bottom left side.

Further investigation by the officers disclosed other

pertinent facts. The cord from the living room telephone jack had been torn from the plug-attachment to the phone. The thermostat for the house's oil furnace was set at 78 °F, but the furnace was not operating. Officers restarted the furnace by using the reset button. Outside temperature was -11 °F. One officer found ice, approximately 3/8-inch thick, formed in kitchen utensils in the sink. Coin wrappers were found in the living room, coin banks had been rifled, and a wrapped roll of pennies was discovered near the kitchen exit. Drawers of various furniture items were open, and contents, such as papers and clothing, were strewn on the floor. A "space heater" was located, but not then in use, in the living room. A scorched pan containing three eggs was found on the kitchen stove with the burner on a low setting. Through "dust" for fingerprints, a latent palm print was "lifted" from the area at the kitchen door. Also, from the site of the hole in the broken kitchen door, police obtained a print from a shoe with a tread sole. The shoe print was later identified as the type from a Puma brand tennis shoe.

On the morning of January 5 the police crime laboratory identified the palm print as that of Derek Dixon, age 20, who had been arrested for robbery five times and use of a firearm in the commission of a felony once. A warrant was issued for Dixon's arrest on a charge of burglary. Later, on January 5 Omaha police were notified that Dixon was in custody at Liberty, Missouri, in the Clay County jail.

Police detectives Paul Wade and Richard W. Circo, equipped with the warrant for Dixon's arrest on burglary, went to Liberty, Missouri, on January 6. At the Clay County jail, after informing Dixon of his *Miranda* rights, Wade and Circo commenced interrogating Dixon. During interrogation, Dixon asked the nature of the charge against him, and one of the officers produced the arrest warrant, which Dixon read. Dixon asked, "What evidence do you have?" One officer responded, "[T]he Judge has the evidence," and for the first time Dixon was told that his palm print had been found at the Jourdan residence. When Dixon asked to see the "evidence," the officers handed Dixon a copy of the "Criminalistic Report" made by the Omaha Police Department's crime laboratory. That report indicated Dixon's palm print matched the print

obtained at the Jourdan residence. When Dixon became silent, Detective Circo told him "he would feel better if he . . . told the truth" and asked, "Are you sorry for going in there?" Dixon made no answer. When again asked if he was "sorry for going in there," Dixon nodded his head affirmatively and then stated, "If I talk, I'll go to jail. If I don't talk, I'll go to jail." Dixon asked to see Detective Wade's "calling card," which designated Wade as an officer of the "homicide unit" of the Omaha Police Department. Dixon responded: "How come you're here from the Homicide Unit? The warrant says 'burglary.' " Wade answered, "We are here to investigate the entire case." Dixon denied taking anything from Jourdan's house and then volunteered,

> We were just driving around. I went up to the door and knocked. I wanted to use the phone. I went in. She was laying on the floor, trying to use the phone. I told her I wanted to use the phone, and she stared at me, and I went over and pulled the cord out of the phone.

Dixon next admitted that he had taken $50 from the Jourdan house and asked, "Is she dead?" to which Detective Circo replied, "Yes." Dixon remarked, "I never touched her . . . the autopsy will show that." Dixon became distraught, and the officers terminated interrogation.

After the detectives returned to Omaha with Dixon on January 7, Dixon was booked on a charge of burglarizing Jourdan's house. Officers obtained a search warrant for Dixon's personal effects brought from Missouri and found a pair of high-top Puma tennis shoes. The Pumas and the broken door from Jourdan's house were sent to the FBI crime laboratory for tests. On January 8 an additional complaint charged Dixon with Jourdan's murder during perpetration or attempted perpetration of a burglary. Later, the original complaint charging Dixon with burglary was dismissed by the county attorney.

Dixon filed a motion to suppress his statements made to the detectives at the Clay County jail in Missouri. Dixon testified at the suppression hearing and acknowledged that, during interrogation by Detectives Circo and Wade, he was not "drunk or under the influence of drugs or anything." Dixon also

acknowledged the detectives' admonition of Dixon's *Miranda* rights. In describing his interrogation Dixon testified:

> [S]omeone had asked me a question, and I told them that if I answered the questions or I don't answer the questions, I was going to jail still.
>
> So then he had asked me, what do I think would be best, and then he gave me the parable of two children caught stealing in a store, or something of that nature. And he said — he asked me, if I had kids, which one would I punish if they had both got caught stealing and this one here comes home and tells his mother that he didn't get — that he wasn't stealing, and this one said he was, which one would she get on the most, you know.

When asked the meaning of the "parable of the two children," Dixon explained: "It had meant like, you know, if I told him whatever I know, it would be better than not to say nothing, you know," believing that he would be punished more severely if he did not discuss the matter with the detectives.

Detective Circo testified at the suppression hearing. According to Circo, there had been the suggestion to Dixon that he should be honest in discussing matters with the detectives. Circo denied mentioning any "parable" about two children and their mother.

The district court overruled Dixon's motion to suppress and, later, a jury trial commenced.

Detectives Circo and Wade testified about their conversations with Dixon and his statements to the detectives. Wade testified that he recalled Circo's telling Dixon about the parable of the two children while the detectives were driving Dixon back to Omaha. Wade explained that such conversation was an effort to quiet Dixon during his emotional outburst en route to Omaha. Circo again denied mentioning any parable to Dixon.

An FBI agent-technician described the method for comparing and identifying footprints, concluding that the shoe print on the Jourdan kitchen door was made by Dixon's shoe.

Dr. Blaine Y. Roffman, a pathologist, testified about the Jourdan autopsy. Before performing the autopsy, Dr. Roffman conferred with officers of the homicide unit concerning police

investigation after discovery of Jourdan's body. Dr. Roffman observed stasis dermatitis on Jourdan's legs, an indication that an individual is suffering from poor circulation of blood in the lower extremities. On gross examination of Jourdan's heart, Dr. Roffman noted "myocardial fibrosis" or "fibrous connected tissue in areas of the heart," indicating poor circulation of blood. According to Dr. Roffman, Jourdan suffered from a moderate degree of damage to her coronary vessels, "50 percent narrowing by atherosclerosis of the right coronary artery and about 25 percent narrowing by atherosclerosis of the anterior descending branch of the left coronary artery." Atherosclerosis is a "buildup of fatty material within the lumen or opening of the coronary arteries through which blood flows; and so the caliber or the diameter of that opening is reduced by the buildup of plaque inside that vessel . . . ." In Dr. Roffman's opinion the cause of Jourdan's death was cardiac arrhythmia; that is, "the probable sequence of events was she had a cardiac arrhythmia, which is an abnormal rhythm, due to the underlying coronary artery disease which I described in association with being exposed to severe cold weather." As explained by Dr. Roffman, the most common cause of arrhythmia includes any type of "shock influence to the heart," such as "any type of mental shock" due to "emotional shock" or "any extreme environmental change: very hot, very cold; anything that would increase the pressure on the heart to do more than it basically is capable of doing under ordinary circumstances." In further explanation regarding his opinion for the cause of Jourdan's death, Dr. Roffman emphasized that Jourdan's two previous major surgical procedures for cancer and her postoperative activity indicated that "her cardiac status was quite good on a normal day-in-and-day-out basis" and "she was able to handle the activities which she was engaged in without problems." Dr. Roffman reiterated that the "shock value and the emotional trauma inflicted upon this lady at the time of the break-in caused the arrhythmia, which caused her death in association with, later on, exposure to cold." In further explaining his opinion concerning Jourdan's death, Dr. Roffman testified that the "precipitating event" for Jourdan's cardiac arrhythmia was the "emotional trauma of having her

door kicked in and stimulating her heart to beat abnormally, causing her collapse and ultimate death," that is, the

> emotional shock value which causes her heart with her diseased process underlying it to abnormally beat, causing her to collapse. How long she lived during that period of time, I don't know. If she lived long enough for the room to be exposed to cold, then the exposure to the cold was certainly an added factor.

Dixon did not testify and did not call any witness.

The court instructed the jury by NJI 14.08 regarding reasonable doubt, namely:

> "Reasonable doubt" is such doubt as would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause and hesitate before taking the represented facts as true and relying and acting thereon. It is such a doubt as will not permit you, after full, fair, and impartial consideration of all the evidence, to have an abiding conviction, to a moral certainty, of the guilt of the accused. At the same time, absolute or mathematical certainty is not required. *You may be convinced of the truth of a fact beyond a reasonable doubt and yet be fully aware that possibly you may be mistaken. You may find an accused guilty upon the strong probabilities of the case, provided such probabilities are strong enough to exclude any doubt of his guilt that is reasonable.* A reasonable doubt is an actual and substantial doubt reasonably arising from the evidence, from the facts or circumstances shown by the evidence, or from the lack of evidence on the part of the State, as distinguished from a doubt arising from mere possibility, bare imagination, or from fanciful conjecture.

(Emphasis supplied.)

Dixon had objected to the emphasized part of the instruction and requested that the court delete that material from the instruction on reasonable doubt.

The jury found Dixon guilty as charged, and the court later sentenced Dixon to life imprisonment.

As errors assigned, Dixon contends: (1) His statements to detectives at the Missouri jail should have been suppressed; (2)

Evidence is insufficient to sustain a finding that Dixon's conduct caused Jourdan's death; and (3) The instruction regarding reasonable doubt is incorrect.

Dixon's claim that the district court should have suppressed his statement made to detectives is based on an allegation of improper influence by the officers; namely, Dixon would receive less punishment if he made truthful statements about the Jourdan homicide.

Voluntariness is the ultimate test to use an accused's statement, admission, or confession as evidence in a criminal prosecution. *State v. Bodtke*, 219 Neb. 504, 363 N.W.2d 917 (1985). To be admissible an accused's statement, admission, or confession must have been freely and voluntarily made, and must not have been the product of or extracted by any direct or implied promise or inducement, no matter how slight. *State v. Robertson*, 219 Neb. 782, 366 N.W.2d 429 (1985). Whether an officer has made a promise for a defendant's statement is a question of fact to be determined by a trial court—a decision which will not be set aside unless clearly wrong. Cf. *State v. Walmsley*, 216 Neb. 336, 344 N.W.2d 450 (1984) (whether a search is consensual is a question of fact for a trial court). See *State v. Beard*, 221 Neb. 891, 381 N.W.2d 170 (1986) (the Supreme Court "will not overturn the trial court's findings of fact when determining the correctness of the [trial court's] rulings on motions to suppress unless those findings are clearly wrong," *id.* at 895-96, 381 N.W.2d at 173). In determining whether a trial court's findings on a motion to suppress are clearly erroneous, the Supreme Court recognizes the trial court as the "trier of fact" and takes into consideration that the trial court has observed witnesses testifying regarding such motion to suppress. *State v. Walmsley, supra.* The district court weighed the conflicting evidence concerning the alleged parable Dixon attributed to Detective Circo. Any conflict was resolved in favor of the State. Nothing compels our conclusion that the decision of the district court was clearly wrong in overruling Dixon's motion to suppress. Cf. *State v. LaChappell, ante* p. 112, 381 N.W.2d 343 (1986), where this court held that a district court was clearly wrong in its finding that a defendant was unreasonably seized in reference to a question whether evidence

should be suppressed. Dixon's assignment of error concerning suppression of his statements is without merit.

Next, Dixon contends evidence is insufficient to permit a conviction under Nebraska's felony murder rule reflected by § 28-303(2). Dixon does not argue evidence will not support a finding that he burglarized Jourdan's house in violation of Neb. Rev. Stat. § 28-507 (Reissue 1979) (crime of burglary; elements). Rather, Dixon contends there is no evidence that his presence or conduct in the burglarized house caused Jourdan's death.

In *State v. Perkins*, 219 Neb. 491, 498-99, 364 N.W.2d 20, 26 (1985), this court reviewed a conviction for a homicide occurring during a robbery and stated:

> [T]here need not be an intent to kill in felony murder, only an intent to commit the underlying felony. " 'The turpitude involved in the robbery takes the place of intent to kill. . . .' " [Citing and quoting from *State v. Bradley*, 210 Neb. 882, 317 N.W.2d 99 (1982).]
>
> Felony murder is not on the same footing with other forms of first degree murder. Willfulness, deliberation, and premeditation are irrelevant considerations. " 'In [felony murder] it is the particular *actus reus*, the . . . means of the murder, which we have singled out for our gravest criminal sanction and not a particular *mens rea*. . . .' " [Citing and quoting from *State v. Bradley, supra*.]

Conduct is a cause of an event if the event in question would not have occurred but for that conduct; conversely, conduct is not a cause of an event if that event would have occurred without such conduct. See *Saporta v. State*, 220 Neb. 142, 368 N.W.2d 783 (1985).

The Supreme Court of Connecticut, in *State v. Spates*, 176 Conn. 227, 405 A.2d 656 (1978), considered "proximate cause" in relation to a criminal homicide which occurred during a robbery. The defendant bound his victim, who suffered a fatal heart attack. Medical testimony established the cause of the victim's death as a heart attack "brought on by the emotional stress resulting from the action of the defendant." *Id.* at 230, 405 A.2d at 658. The defendant contended that direct infliction of physical injury to a victim is indispensable to establish

criminal conduct as the cause of a victim's death. The Supreme Court of Connecticut concluded:

> "Every person is held to be responsible for the natural consequences of his acts, and if he commits a felonious act and death follows, it does not alter its nature or diminish its criminality to prove that other causes cooperated to produce that result." [Citations omitted.] If Murdock's death came about as a result of the conjunction of his heart disease and the violence, shock or excitement caused by the defendant's acts, it was still brought about by the criminal "conduct" of the defendant, for the consequences of which he is answerable. [Citations omitted.]
>
> . . . "Proximate cause" in the criminal law does not necessarily mean the last act of cause, or the act in point of time nearest to death. The concept of proximate cause incorporates the notion that an accused may be charged with a criminal offense even though his acts were not the immediate cause of death. An act or omission to act is the proximate cause of death when it substantially and materially contributes, in a natural and continuous sequence, unbroken by an efficient, intervening cause, to the resulting death. It is the cause without which the death would not have occurred and the predominating cause, the substantial factor, from which death follows as a natural, direct and immediate consequence. [Citations omitted.] It is unnecessary for "proximate cause" purposes that the particular kind of harm that results from the defendant's act be intended by him. In many situations giving rise to criminal liability, the harm that results is unintended, yet is directly or indirectly caused by an act of the defendant. In such cases, where the death or injury caused by the defendant's conduct is a foreseeable and natural result of that conduct, the law considers the chain of legal causation unbroken and holds the defendant criminally responsible.

Id. at 233-35, 405 A.2d at 660.

Durden v. State, 250 Ga. 325, 297 S.E.2d 237 (1982), involved the Georgia felony murder rule applied to a death in

conjunction with a burglary. The victim, responding to a burglar alarm in his store, notified police about the burglary in progress, went to his store, and exchanged shots with the burglar. Although the victim was not wounded, he died within a few minutes after the police arrived. Medical testimony established the cause of the victim's death was "cardiac arrest caused by the victim's small coronary arteries and the stress of events before the victim's death." *Id.* at 325, 297 S.E.2d at 239. The Supreme Court of Georgia held:

> Where one commits a felony upon another, such felony is to be accounted as the efficient, proximate cause of the death whenever it shall be made to appear either that the felony directly and materially contributed to the happening of a subsequent accruing immediate cause of the death, or that the injury materially accelerated the death, although proximately occasioned by a pre-existing cause.

Id. at 329, 297 S.E.2d at 241-42.

Several other jurisdictions have also held a victim's fatal heart attack, attributable to a defendant's criminal conduct directed toward that victim, supplies the causal connection between the victim's death and the defendant's criminal conduct; for example, *People v. Stamp*, 2 Cal. App. 3d 203, 82 Cal. Rptr. 598 (1969) (60-year-old victim with an advanced case of atherosclerosis; pathologist's opinion: fright induced by a robbery was "too much of a shock" to the victim's system and caused death); *Booker; Bridges v. State*, 270 Ind. 498, 386 N.E.2d 1198 (1979) (74-year-old robbery victim suffered from arrhythmia, which was brought on by emotional stress from the robbery and led to cardiac arrest); *State v. Atkinson*, 298 N.C. 673, 259 S.E.2d 858 (1979) (victim, suffering from high blood pressure and hardening of the arteries, had a previous heart attack before armed robbery by the defendant; pathologist's opinion: severe stress caused the victim's "heart to stop").

We, therefore, hold that a victim's fatal heart attack, proximately caused by a defendant's felonious conduct toward that victim, establishes the causal connection between felonious conduct and homicide necessary to permit a conviction for felony murder in violation of § 28-303(2).

The evidence at Dixon's trial provided the jury with an appropriate basis to find that Dixon had burglarized the Jourdan house. In his statement given to the detectives, Dixon admitted his presence at and entry into the Jourdan home. Dixon's palm print and his shoe print corroborate such statement. The shoe print, the hole in the door, the broken and scattered window glass inside the kitchen doorway, the bottom part of the fractured door within the kitchen, and possession of money taken from the Jourdan house competently show Dixon's willful, malicious, and forcible breaking and entering Jourdan's home, burglary in violation of § 28-507.

Dr. Roffman's testimony provided the jury with opinion evidence on the fact of causation, whether Dixon's felonious entry into the house caused Jourdan's death. Dixon admitted to Detectives Circo and Wade that Jourdan was alive when he entered the house. The implosion of window glass and part of the wooden kitchen door would startle the most imperturbable individual. Seeing Dixon coming through the doorway into the kitchen probably would stir one to "stare" at him, visual fixation founded in fear intensified by Dixon's ripping the "cord out of the phone." All that unfolded before Susan Jourdan, 76 years old and living alone. What total terror likely seized and constricted Susan Jourdan's heart may be beyond another's comprehension. What the jury did understand was Dr. Roffman's explanation of the cause of Susan Jourdan's death, "emotional trauma of having her door kicked in and stimulating her heart to beat abnormally, causing her collapse and ultimate death."

As we expressed in *State v. Schott, ante* p. 456, 462, 384 N.W.2d 620, 625 (1986): "A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support the verdict." Such quantum of evidence exists in the present case.

Finally, Dixon challenges the propriety of the trial court's giving NJI 14.08 regarding characterization of "reasonable doubt." Within the past few weeks we have considered and rejected challenges to the correctness and adequacy of NJI 14.08 which were identical to the question raised by Dixon. *State v. Beard*, 221 Neb. 891, 381 N.W.2d 170 (1986), and *State*

v. Bostwick, ante p. 631, 385 N.W.2d 906 (1986), have already disposed of Dixon's challenge to the court's instruction on reasonable doubt.

AFFIRMED.

WHITE, J., participating on briefs.

GARRON SCHMECKPEPER, APPELLANT, V. ARNOLD KOERTJE, APPELLEE.

388 N.W.2d 51

Filed May 30, 1986. No. 84-920.

1. **Equity: Unjust Enrichment: Appeal and Error.** A suit to prevent unjust enrichment is tried in equity, and our review of equitable actions is by trial de novo.
2. **Appeal and Error.** In a trial de novo this court is to retry issues of fact and reach an independent conclusion as to what finding or findings are required under the pleadings and all the evidence, without reference to the conclusion reached in the district court, subject to the rule that where credible evidence on material issues is in conflict, this court will consider that the trial court observed the witnesses and accepted one version of the facts over another.
3. **Landlord and Tenant: Leases: Improvements: Property.** It is the general rule that improvements made while a party is in possession of premises under a lease which does not grant the right of reimbursement are not reimbursable to that tenant.
4. _____: _____: _____: _____. Improvements which become a part of the real estate may not be removed and do not become the property of the lessee unless such removal or ownership is provided for by agreement or statute.
5. **Landlord and Tenant: Improvements: Decedents' Estates.** Any possible right of a tenant, who as a prospective heir failed to inherit, to be compensated for improvements made to the land is limited to those situations in which the tenant's improvements were made under a bona fide, but mistaken, claim of ownership, where the landlord-testator acquiesced in the improvement or engaged in inequitable or misleading conduct.

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

David A. Domina of Domina & Gerrard, P.C., for appellant.

Patrick J. Birmingham, for appellee.

KRIVOSHA, C.J., BOSLAUGH, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

HASTINGS, J.

The plaintiff, Garron Schmeckpeper, appeals the judgment in his action in equity for restitution of the value of improvements placed upon the land of the defendant, Arnold Koertje. The plaintiff's assignor and son, Richard Schmeckpeper, claimed to have improved the land he farmed as tenant of Arnold Koertje, relying on Koertje's assurances that Richard Schmeckpeper would inherit some portion of the farm property on Koertje's death.

The trial court found that Koertje made no such assurances and that Koertje was not unjustly enriched when he exercised his possessory rights to the leasehold and new improvements by evicting Richard Schmeckpeper for nonpayment of rent. However, since Koertje admitted that he had agreed with Richard Schmeckpeper to regard a Behlen steel grain bin as personal property of the tenant, the judgment allowed the appellant to take possession of that grain bin. We affirm.

Richard Schmeckpeper married Georgia Gail Koertje, daughter of Arnold Koertje, on October 11, 1975. Shortly thereafter, the newlyweds moved onto the Koertje farm under the terms of a written 1-year lease. Arnold and Viola Koertje had recently vacated the farm after Arnold injured his back and was unable to perform heavy farmwork.

Richard Schmeckpeper had many ideas for farm improvements during his tenancy, some of which came to fruition. In 1976, his first year as tenant farmer, Richard asked his father-in-law to install an irrigation system. Koertje refused to put in a pivot due to the expense and unsuitable terrain. The next year Richard asked Koertje to sell him a couple of acres of the farm property to enable him to erect a hog confinement system. Again, Koertje refused. Instead, Schmeckpeper improved the two existing hog houses, refurbishing the walls of one and placing a concrete feed floor in the other.

A month or two after Richard Schmeckpeper moved onto the farm he decided he needed more grain storage. When he proposed construction of a 7,623-bushel Behlen steel grain bin,

his father-in-law tried to dissuade him from incurring such a debt in his first year of farming. There were already six wooden grain bins and a 2,100-bushel steel bin on the farm. Koertje informed Schmeckpeper that if he chose to install the grain bin it would be Schmeckpeper's personal property; Koertje would not pay any part of the purchase price or the property taxes. The steel grain bin was erected in 1977. The following year, when Schmeckpeper farmed additional rental property, he installed another steel grain bin under similar circumstances. The second bin had a capacity of 9,600 bushels.

Schmeckpeper also installed three hog waterers in the early part of his tenancy. There were two in place when he originally took possession of the leasehold. As the livestock population grew, demand for water also increased. Schmeckpeper was dissatisfied with the amount of water his well could pump. He wanted to be able to use six hog waterers at one time. Once again, Koertje told his son-in-law that if he wanted to make the improvement he would have to pay for it himself.

Schmeckpeper installed a new well system with a submersible pump, using some piping from the old well system. Unfortunately, the new well yielded water with a high nitrate and bacteria count, which led to a high mortality rate among the livestock. When the hogs developed an intestinal disease, Schmeckpeper decided that the only way to cure it was to "get out of business for at least . . . one year." It was at that point that Schmeckpeper proposed dairy farming as an alternative. In June 1980 Schmeckpeper informed his father-in-law of his intention. Koertje advised against the new undertaking, warning Schmeckpeper that he was not going to help him.

Sometime later, at a Sunday family dinner, Schmeckpeper told his father-in-law that he planned to convert the existing barn into a milking parlor. Koertje opposed the idea, stating that he would not "foot the bill." The inside of the old barn was gutted and rebuilt for dairy production. About a year later, Schmeckpeper decided his dairy cattle needed additional shelter, so he began construction of a freestall barn. Schmeckpeper had two or three conversations with Koertje concerning this final project. Koertje did not approve of the improvement and finally, after the construction was well

underway, agreed to pay only the property taxes on the new freestall barn.

Garron Schmeckpeper, on the other hand, was very supportive of the new improvements. He provided labor for construction of the freestall barn and guaranteed his son's debt incurred to finance the construction of the barn. Since Richard Schmeckpeper has been unable to make payment on that debt, the plaintiff has been making installments on his son's behalf.

The primary factual dispute in this case concerns alleged conversations between Richard Schmeckpeper and Arnold Koertje. Richard Schmeckpeper claims that throughout the period he was improving his landlord's farm he had discussions with Koertje regarding his insecure status as a year-to-year lessee who had invested substantial sums of money in the leasehold.

Schmeckpeper asked for a written agreement that Koertje would assume the debt on the improvements if Schmeckpeper lost his right of possession. Koertje allegedly responded that there was no reason to worry, since "the kids" would eventually inherit the farm anyway. Schmeckpeper interpreted Koertje's statement as including himself and Koertje's three daughters as heirs. Koertje denied that any such conversation took place. He was never asked for an agreement to assume his son-in-law's debts, and he never indicated that either Richard Schmeckpeper or his daughter Georgia Gail Schmeckpeper would inherit the farm.

A suit to prevent unjust enrichment is tried in equity, and our review of equitable actions is by trial de novo. Neb. Rev. Stat. § 25-1925 (Reissue 1985). In a trial de novo this court is to retry issues of fact and reach an independent conclusion as to what finding or findings are required under the pleadings and all the evidence, without reference to the conclusion reached in the district court, subject to the rule that where credible evidence on material issues is in conflict, this court will consider that the trial court observed the witnesses and accepted one version of the facts over another. § 25-1925; *Burgess v. Omahawks Radio Control Org.*, 219 Neb. 100, 362 N.W.2d 27 (1985). Having done so, we affirm.

It is the general rule that improvements made while a party is

in possession of premises under a lease which does not grant the right of reimbursement are not reimbursable to him. *Lienemann v. Lienemann*, 201 Neb. 458, 268 N.W.2d 108 (1978); *Blomquist v. Board of Educational Lands & Funds*, 170 Neb. 741, 104 N.W.2d 264 (1960); *Smith v. Kober*, 108 Neb. 768, 189 N.W. 377 (1922). Further, improvements which become a part of the real estate may not be removed and do not become the property of the lessee unless such removal or ownership is provided for by agreement or statute. *Lienemann, supra*; *State v. Bardsley*, 185 Neb. 629, 177 N.W.2d 599 (1970).

We agree with the trial court that Koertje agreed that the two steel grain bins were to be the personal property of Richard Schmeckpeper. Thus, it was proper that they were offered for sale at an auction of Richard Schmeckpeper's personal property. Since the larger of the two grain bins was not sold at auction, the trial court properly ruled that it remained the personal property of Schmeckpeper and that he was entitled to possession of that grain bin. Finding no evidence of other agreements or statutes providing that other improvements made by Schmeckpeper were to remain the property of the tenant at the termination of the lease, we must consider the appellant's contention that the appellee must compensate Garron Schmeckpeper for the improvements, in order to prevent unjust enrichment.

In seeking compensation for the remaining improvements, the appellant relies primarily on dictum appearing in *Lienemann v. Lienemann, supra* at 463, 268 N.W.2d at 112:

> We acknowledge that in a particular case equitable principles might require us to make allowances for improvements made by a tenant during the term of his lease in contemplation of his status as a prospective heir when he does not inherit the property and is not compensated in a partition action, viz., the other heirs.

A brief summary of the facts in *Lienemann* is necessary to place that dictum in proper context. George and Frank Lienemann were tenant farmers of their father's land from March 1950 to March 2, 1963. George Lienemann lived on the farm from March 1950 to April 1976. On March 2, 1963, their father conveyed the property to Frank Lienemann as trustee for

the use and benefit of himself and his four brothers and a sister. George and Frank were to continue farming the land and were to receive three-fifths of the profits, with the remaining two-fifths going to their father while he lived, apparently, and to the trust after his death. George had placed $25,000 worth of improvements on the property while he and Frank were colessors from their father.

When one brother desired to sell his portion of the property, the remaining children filed a partition action. In the same action, George Lienemann sought compensation for his improvements. This court noted that the only evidence adduced that supported any right to compensation was George's testimony that his father consented to the improvements, stating: "Go ahead if you want to. It will all be yours, anyway, someday." *Lienemann, supra* at 462, 268 N.W.2d at 111.

In *Lienemann* we found that George Lienemann was not entitled to compensation for improvements, noting that the improvements were made primarily for the benefit of the occupant himself. "They were not made under any claim of compensation." *Id.* at 463, 268 N.W.2d at 112. Similarly, in the present case, it is undisputed that Koertje never agreed to compensate Richard Schmeckpeper for the improvements he made to the leasehold.

The *Lienemann* dictum implying that we might recognize a right to compensation for improvements where a prospective heir failed to inherit and was not compensated in a partition action has limited applicability. A prospective heir's improvement of property under a bona fide, but mistaken, claim of ownership could be grounds for compensation if the testator acquiesced in the improvement or engaged in inequitable or misleading conduct. Annot., 57 A.L.R.2d 263 (1958).

Richard Schmeckpeper had no bona fide claim of ownership. He had no agreement to purchase the farm, and, although his expectation that he would inherit the farm as one of Koertje's "kids" was conceivable as long as he was married to Koertje's daughter, it was merely optimistic in light of his recent divorce. In any event, Schmeckpeper testified that he requested an agreement that Koertje would assume liability on any

improvements Schmeckpeper would make. He clearly realized that he placed himself at financial risk by making the improvements without such an agreement, but he proceeded nevertheless. Schmeckpeper did not improve the leasehold under any mistaken claim of ownership.

In addition, Koertje did not mislead his son-in-law to believe that Koertje would pay for any portion of the improvements. Koertje tried to dissuade Schmeckpeper from incurring the debts and erecting the improvements. He only acquiesced in the construction of the milking parlor and freestall barn after construction was well underway. Koertje was not unjustly enriched when his son-in-law's tenancy was terminated.

The judgment of the district court is affirmed.

AFFIRMED.

WHITE, J., participating on briefs.

MARY ANN NEKUDA, PERSONAL REPRESENTATIVE OF THE ESTATE OF RAPHAEL NEKUDA, DECEASED, APPELLEE, V. WASPI TRUCKING, INC., A FOREIGN CORPORATION, JEFFREY DE ANGELO, APPELLEES, AND THE STATE OF NEBRASKA, APPELLANT.

388 N.W.2d 438

Filed May 30, 1986. No. 84-952.

1. **Appeal and Error.** Regarding questions of law, this court has an obligation to reach its conclusion independent from the conclusion reached by a trial court.
2. **Judgments: Appeal and Error.** Findings of fact by the trial court have the force and effect of a jury verdict and will not be set aside unless clearly wrong.
3. **Workmen's Compensation: Subrogation.** Under Neb. Rev. Stat. § 48-118 (Reissue 1984), the subrogated interest of the employer, for computation and allocation of fees and expenses, is not restricted to the workmen's compensation benefits actually paid, but is measured by the workmen's compensation liability relieved or discharged by the recovery against the third party.
4. _____: _____. Under Neb. Rev. Stat. § 48-118 (Reissue 1984), the trial court has discretion to prorate and apportion the reasonable expenses and fees between the employer and employee as their interests appear at the time of recovery in a suit against a third party.
5. _____: _____. Where an employer refuses to lump-sum periodic lifetime workmen's compensation benefits due an employee or dependents, and where a

recovery is made against a third party, the obligation of the employer to continue to make lifetime payments is not extinguished but merely suspended for the period of time the employer's share of the recovery satisfies the continuing obligation due the employee.

6. _____: _____. In calculating the fees and expenses of both an employee and an employer, in connection with the recovery of damages from a third party under Neb. Rev. Stat. § 48-118 (Reissue 1984), where a lump-sum agreement is not reached, the fees and expenses are to be deducted immediately from the recovery, and the employer's share of such fees and expenses is to be repaid weekly by the employer to the employee over the period of time benefit payments are due to the employee.

Appeal from the District Court for Douglas County: THEODORE L. CARLSON, Judge. Affirmed in part, and in part reversed and remanded with directions.

Robert M. Spire, Attorney General, and William J. Orester, for appellant.

Ronald F. Krause of Cassem, Tierney, Adams, Gotch & Douglas, for appellee Nekuda.

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

GRANT, J.

This case involves the allocation of attorney fees between an employer and the personal representative of the estate of a deceased employee under the provisions of Neb. Rev. Stat. § 48-118 (Reissue 1984). Section 48-118 applies to suits brought against third parties for injuries caused by the third party to an employee entitled to workmen's compensation benefits from his employer for the same injuries. The State of Nebraska, Department of Roads (State), as the employer of the deceased workman, appeals from an order of the district court for Douglas County, Nebraska, allocating attorney fees following a successful recovery by Mary Ann Nekuda, personal representative of the estate of Raphael Nekuda, from a third party. For the following reasons we modify the judgment of the trial court and remand the cause for further proceedings.

The record before us shows the following. The original proceeding out of which this appeal developed was an action in tort brought by Mary Ann Nekuda to recover damages against

the defendant tort-feasors, Waspi Trucking, Inc., and Jeffrey De Angelo, for the wrongful death of her husband, Raphael Nekuda. The State was made a party defendant for the purpose of preserving its statutory right of subrogation under § 48-118 of the Nebraska workmen's compensation law.

Raphael Nekuda was killed in a motor vehicle accident on October 4, 1983. On that date Mr. Nekuda was an employee of the State, acting within the scope of his employment, and was operating a State truck while traveling east on Interstate 80 in Sarpy County, Nebraska. The truck was struck from the rear by a tractor-trailer owned by Waspi Trucking and operated by Jeffrey De Angelo. The force of impact caused the truck Mr. Nekuda was operating to leave the traveled portion of Interstate 80, travel down an embankment, and ultimately overturn, causing injuries leading to Mr. Nekuda's death.

The third-party tort-feasors, Waspi Trucking and Jeffrey De Angelo, failed to make any offer of settlement. Mrs. Nekuda filed a petition on August 15, 1984, against Waspi Trucking and Jeffrey De Angelo, claiming damages for the wrongful death of her husband. The State filed its answer on September 17, 1984, and set forth its anticipated potential exposure and subrogation claim for $241,208.33 under the Nebraska workmen's compensation law and joined with Mrs. Nekuda in praying for judgment against the defendants.

Prior to trial, counsel for Mrs. Nekuda secured a settlement in the amount of $200,000 from the defendants, as full satisfaction of all claims pending against them.

On October 1, 1984, Mrs. Nekuda filed a motion for an order approving the settlement and apportioning the proceeds of the recovery, including expenses and attorney fees, between her and the State. An evidentiary hearing was conducted regarding this motion on October 29, 1984. At that hearing Mrs. Nekuda and the State stipulated that the settlement amount for $200,000 was fair and reasonable to both Mrs. Nekuda and the State; that the total payment made by the State to Mrs. Nekuda under workmen's compensation law from October 5, 1983, to October 26, 1984, was $11,093.07; that the "future benefit which the State receives by the temporary cessation of benefits to Mrs. Nekuda" under the workmen's

compensation law (or, as phrased by the State's counsel, "the State's entire liability computed to its present value") was $128,449.44; and that the State's total interest in the recovery was $139,542.51 ($11,093.07 + $128,449.44). The parties further agreed that the expenses, other than attorney fees, were minimal, and therefore all concerned treated the attorney fees as the total expense of recovery.

Mrs. Nekuda then adduced testimony that she and her counsel had entered into a "standard contingency arrangement" which provided for a fee of one-third of a recovery where her claim was settled after the filing of a suit against the tort-feasors. The testimony further showed that Mrs. Nekuda's attorney was not approached with offers of settlement and that, after giving the State and the potential defendants 30 days' notice of the filing of a suit, Mrs. Nekuda's attorney did file suit. Testimony also showed that the State had not agreed to a proposed lump-sum settlement of Mrs. Nekuda's workmen's compensation claim and had not agreed to the amount of attorney fees to be paid by the State for services rendered by Mrs. Nekuda's attorney in pursuing the claim against the tort-feasors. The State adduced no evidence at this hearing.

On November 19, 1984, the trial court entered its order after the hearing on this motion and found that the settlement of $200,000 was fair and reasonable to all parties and that the recovery had been secured through the sole efforts of Mrs. Nekuda's attorney. The court ordered that the sum of $11,093.07 be paid over to the State as reimbursement for compensation benefits previously paid; that the remaining proceeds of $188,906.93 be paid to Mrs. Nekuda; and that the State pay a fee of one-third of $139,542.51 (representing the total interest of the State in the recovery: $11,093.07, previously paid, plus $128,449.44, the commuted value of the State's future liability), or $46,467.66 [sic], to plaintiff's attorney for services rendered on behalf of the State. The State timely appealed to this court.

The State assigns three errors: (1) That the court erred in ruling that under the provisions of § 48-118 the proceeds of a recovery by an injured employee against a third-party

tort-feasor should be paid to the plaintiff without first deducting the attorney fees taxable to the State, the employer of the injured employee; (2) That the court erred in interpreting the law by ruling that the State was liable for the payment of an attorney fee equal to one-third of the recovery made on behalf of the State; and (3) That the court erred in ruling that the share of attorney fees taxable to the State should be paid independently of the proceeds received from the third-party tort-feasors.

The interpretation of a statute is a question of law. Regarding questions of law, this court has an obligation to reach its conclusion independent from the conclusion reached by a trial court. *Boisen v. Petersen Flying Serv., ante* p. 239, 383 N.W.2d 29 (1986). Findings of fact by the trial court have the force and effect of a jury verdict and will not be set aside unless clearly wrong. *Rudolf v. Tombstone Pizza Corp.*, 214 Neb. 276, 333 N.W.2d 673 (1983).

Section 48-118 provides that where a third party is held liable for the injuries or death of an employee, while that employee was in the course and scope of his employment, then the employer is subrogated, to the extent of his liability under the Nebraska Workmen's Compensation Act, for any amounts recovered from that third party. Section 48-118 also provides a procedure for allocating attorney fees between parties. The only issues on appeal in this case concern the amount of the attorney fees due from the State and when and how those fees should be paid.

In its second assignment of error, the State contends the trial court erred by ruling that the State is liable for the payment of an attorney fee equal to one-third of the recovery made on its behalf. The evidence before us shows that counsel for Mrs. Nekuda and Mrs. Nekuda entered into a contingent fee arrangement whereby counsel would receive a fee corresponding to one-third of the total amount recovered against Waspi Trucking and Jeffrey De Angelo if the claim was resolved after the actual filing of suit. The trial court found that this contingent fee arrangement was "customary, standard, fair and reasonable in this jurisdiction." No evidence was adduced by the State to the contrary. The evidence supports the court's

factfindings as to the amount of the fee. The trial court ordered the State to pay one-third of its recovery amount to Mrs. Nekuda's attorney in satisfaction of attorney fees rendered to it. The State's second assignment of error is without merit.

The other assignments of error raised by the State are consolidated for discussion purposes because both errors raise the issue as to when and in what manner attorney fees are to be paid by an employer following a successful recovery by the employee from a third party. In determining this issue we are governed by § 48-118. That section first states that an employee has the right to recover from a third party causing injury or death to an employee. The statute further states that, in such situation, the employer "shall be subrogated to the right of the employee . . . against such third person . . . ."

In particular, § 48-118 provides in part:

> Any recovery by the employer against such third person, in excess of the compensation paid by the employer after deducting the expenses of making such recovery, shall be paid forthwith to the employee or to the dependents, and shall be treated as an advance payment by the employer, on account of any future installments of compensation; *Provided*, that nothing in this section or act shall be construed to deny the right of an injured employee or of his personal representative to bring suit against such third person in his own name or in the name of the personal representative based upon such liability, but in such event an employer having paid or paying compensation to such employee or his dependents shall be made a party to the suit for the purpose of reimbursement . . . .

In the case at bar, Mrs. Nekuda, after proper notice to the employer, the State, filed her petition against the tort-feasors, joining the State as a defendant when the State did not join in that petition. This procedure is authorized by § 48-118.

The controlling parts of § 48-118 are that the recovery is to be treated as "an advance payment"; that the "reasonable expenses of making such recovery" shall be deducted from the recovery; and that such expenses "shall be prorated" between the employer and employee, "which expenses . . . shall be apportioned by the court between the parties as their interests

appear at the time of such recovery."

Applying the language of § 48-118 to this case, we first see that, of the $200,000 recovery, $11,093.07 must be "reimbursed" to the State as moneys already advanced by the State at the time of the settlement. Of that sum which has been recovered for the State, the State must pay Mrs. Nekuda's counsel, who was determined by the trial court to have effectuated the recovery, a sum equal to one-third as "reasonable expenses."

It is with regard to the remaining $188,906.93 of the recovery that difficulties arise. It was stipulated by the parties that "the State's entire liability computed to its present value" was $128,449.44. Therefore, of the $188,906.93, the State was entitled to the benefit of $128,449.44 and Mrs. Nekuda to $60,457.49. Those figures represent the interests of the parties as "their interests appear at the time of such recovery." Under § 48-118 the subrogated interest of the employer, for computation and allocation of fees and expenses, is not restricted to the workmen's compensation benefits actually paid, but is measured by the workmen's compensation liability relieved or discharged by the recovery against the third party.

The "reasonable expenses" of the recovery were determined by the trial court as an amount equal to one-third of the recovery. One-third of the $188,906.93 recovery (as to this phase of the recovery) is $62,968.97. Of those expenses the State's share is $42,818.90. The State's share of expenses (attorney fees) was arrived at in the following manner:

$$\frac{\text{STATE'S INTEREST IN NET RECOVERY } \$128{,}449.44}{\text{TOTAL NET RECOVERY } \$188{,}906.93} = \text{STATE'S PERCENTAGE SHARE OF NET RECOVERY } 68\%$$

TOTAL ATTORNEY FEES FOR NET RECOVERY ($188,906.93 x 1/3)		$62,968.97
STATE'S PERCENTAGE SHARE OF NET RECOVERY	x	68%
STATE'S SHARE OF ATTORNEY FEES		$42,818.90

Section 48-118 provides that "attorney's fees shall be apportioned by the court between the parties as their interests appear at the time of such recovery." In this case the State interest in the total net recovery "at the time of such recovery"

was 68 percent of the total net recovery ($188,906.93). Thus, the State should bear 68 percent, or $42,818.90, of the attorney fees.

Having decided this, we now turn to the issues as to when the fee should be paid and how it should be paid. The trial court found that the entire fee due Mrs. Nekuda's attorney should be paid immediately. We agree with the trial court on that point because § 48-118 contemplates the immediate "deducting [of] expenses of making such recovery" and the payment of the balance of the recovery to the employee or dependents. The State concedes this point in its brief.

We disagree, however, with the trial court as to the timing of the payment and the manner in which the fees owed by the State should be paid. The trial court ordered the State to pay its share of attorney fees separate and apart from the recovery amount. In other words, the State, as the employer, would have to draw its check to Mrs. Nekuda's attorney for the employer's share of attorney fees rather than having the attorney fees taken out of the settlement proceeds. At this point Mrs. Nekuda would have taken out of the proceeds her share of the total attorney fees of $20,150.07 ($62,968.97 - $42,818.90). This approach would result in Mrs. Nekuda's paying attorney fees of $20,150.07 and retaining in her immediate possession the sum of $168,756.86 ($188,906.93 - $20,150.07). She would have the use of such money over the entire period that weekly payments would have been due her. Such a result would operate to give Mrs. Nekuda an unfair, immediate advantage over the employer by requiring, in effect, that the employer lump-sum the benefits due Mrs. Nekuda. Such settlements are not mandatory, but by agreement of the parties. Neb. Rev. Stat. §§ 48-140 et seq. (Reissue 1984). In this case the State has specifically stated it does not want a lump-sum settlement.

We recognize, on the other hand, that the employer is receiving a benefit from the recovery during each week that it does not have to pay the weekly benefits to the dependent of the deceased workman. We determine that the employer's proportionate amount of the attorney fees should be paid each week (or any other agreed-upon period) to the dependent of the deceased workman as a reimbursement of the expenses incurred

in obtaining periodic benefits received by the employer, the State in this case. We hold, therefore, that the trial court should have ordered that the State's projected share of attorney fees be paid out of the settlement proceeds and that the State should reimburse Mrs. Nekuda each week as the State obtains the weekly benefit of not being required to pay Mrs. Nekuda.

Two problems remain, however: Mrs. Nekuda's right to future compensation payments and the payment of the State's share of the attorney fees. The State has indicated to Mrs. Nekuda that it did not desire to commute its liability to present value. We hold, in that situation, where an employer refuses to lump-sum periodic lifetime workmen's compensation benefits due an employee or dependents, and where a recovery is made against a third party, the obligation of the employer to continue to make lifetime payments is not extinguished but merely suspended for the period of time the employer's share of the recovery satisfies the continuing obligation due the employee. It is the State's position that the commuted value of $128,449.44 is used only to calculate expenses "at the time of such recovery." However, under § 48-118, the State is entitled to credit for "advance payment" of the total of $128,449.44, and not that sum less expenses. In other words, the amount recovered from the third-party tort-feasors suspends the State's obligation to pay workmen's compensation benefits to Mrs. Nekuda until such time as the advance payments credit is exhausted. Based upon Mr. Nekuda's salary at the time of his death and the Nebraska Workmen's Compensation Act, specifically Neb. Rev. Stat. § 48-122.01 (Reissue 1984), the State is required to pay Mrs. Nekuda $164.05 per week in workmen's compensation benefits until her death or the termination of her "widowhood."

The time for which payment is suspended is computed as follows:

$$\frac{\text{STATE'S INTEREST IN RECOVERY } \$128{,}449.44}{\text{MRS. NEKUDA'S WEEKLY BENEFIT } \$164.05} = \begin{array}{c}\text{TIME PERIOD BENEFITS}\\ \text{ARE SUSPENDED}\\ \text{782.99 WEEKS}\\ \text{OR 15.06 YEARS}\end{array}$$

When these "advance payments" of $128,449.44 have been used up, the State shall resume its required payments of $164.05 per week, provided that the statutory contingencies have not occurred.

With regard to the State's paying its share of the expenses, we hold that the State must reimburse Mrs. Nekuda for its share of such attorney fees over the time period for which weekly benefits are suspended. The amount Mrs. Nekuda should be reimbursed each week is computed as follows:

$$\frac{\text{STATE'S SHARE OF ATTORNEY FEES } \$42{,}818.90}{\text{TIME PERIOD BENEFITS ARE SUSPENDED } 782.99 \text{ WEEKS}} = \text{WEEKLY REIMBURSEMENT } \$54.69$$

This means that the employer's burden of the attorney fee expenses will be paid each week in the amount of one-third of the weekly benefits of $164.05.

The reason for this weekly reimbursement of the recovery costs is twofold. First, under the Nebraska Workmen's Compensation Act, employers must bear an appropriate share of the expense. Requiring Mrs. Nekuda to pay the State's share of attorney fees, without reimbursement, would violate this rule and possibly result in the employer's never paying any share of the expenses of recovery. Second, because of the third-party recovery, the employer is relieved of paying its weekly workmen's compensation benefit to Mrs. Nekuda for 15 years. The fact that the employer is relieved of paying these benefits amounts to a weekly extinguishment of a liability by the employer to the employee. This constitutes a benefit to the employer. It follows that the obligation to share legal expenses attributable to that recovery should be satisfied each week by the employer, as that liability is relieved because of the third-party recovery. Thus, the State is required to reimburse Mrs. Nekuda $54.69 for each week up to 782.99 weeks, as long as she remains alive and unmarried. After that she is entitled to her full benefits under the Nebraska Workmen's Compensation Act.

In so ordering, we recognize we may have departed to some degree from our holding in *Gillotte v. Omaha Public Power Dist.*, 189 Neb. 444, 203 N.W.2d 163 (1973). In that case, Gillotte, an employee of the Larson Cement Stone Company, was seriously injured while in the course of his employment, due to the negligence of the defendant Omaha Public Power District (OPPD). A trial resulted in a judgment for Gillotte and against OPPD in the sum of $79,263. The attorneys for Gillotte's employer, Larson Cement Stone Company, offered to take part in the trial but were requested not to do so by Gillotte's attorney.

Thereafter, Gillotte filed an application for determination of the amount of the employer's subrogated interest and future liability, and for allocation of fees and costs. The workmen's compensation benefits paid to Gillotte up to that point had totaled $11,673.24. The present value of future disability payments due Gillotte under the Nebraska Workmen's Compensation Act was $18,167.75. The State's total interest in the award was, therefore, $29,840.99.

In affirming the trial court we said at 452-53, 203 N.W.2d at 168:

> Under section 48-118, R.R.S. 1943, the subrogated interest of the employer, for computation and allocation of fees and expenses, is not restricted to the workmen's compensation benefits actually paid, but is measured by the workmen's compensation liability relieved or discharged by the recovery against the third party.
>
> Under section 48-118, R.R.S. 1943, the trial court has discretion to prorate and apportion the reasonable expenses and fees between the employer and employee as their interests appear at the time of recovery in a suit against a third party. The trial court specifically found that the defendant employer and its insurer, by reason of plaintiff's successful recovery from Omaha Public Power District, recovered not only the $11,673.24 already paid to or for the plaintiff, but were also relieved of the obligation to pay the plaintiff disability benefits of a present value of $18,167.75. The court determined that the total advantage to the defendant employer and its insurer that resulted

from plaintiff's successful recovery against the third party defendant amounted to $29,840.99. The court also determined that the reasonable value of the services of plaintiff's attorney to the defendant employer and its insurer was $10,000. Those determinations were neither arbitrary nor unreasonable. Under the terms of section 48-118, R.R.S. 1943, they should be specifically approved.

By affirming the trial court's order in *Gillotte, supra*, we also affirmed the manner in which the attorney fees were to be paid. In this case we approve all of the holdings in *Gillotte* except insofar as *Gillotte* indicates that the employer must pay its share of the attorney fees of the recovery immediately at the time of the recovery.

In *Gillotte, supra*, the trial court determined that the employer's share of the reasonable expenses and fees incurred by the plaintiff in preparing for trial was $10,428.53. Since the employer had already paid workmen's compensation benefits to the employee amounting to $11,673.24, the trial court offset the total expenses of trial incurred by the employer against the amount previously paid and directed the payment of $1,244.71 to the employer as full satisfaction of the subrogation claims. By doing so the entire attorney fees attributable to both past and future benefits were to be paid at the time of the court's order by an immediate offset of the employer's total expenses in connection with the employer's share of the recovery. The *Gillotte* approach was followed by the trial court in this case. That case is overruled only insofar as it required the immediate payment of the fees and expenses.

We recognize that other states have followed the *Gillotte* procedure. See, *Owens v. C & R Waste Material*, 76 N.J. 584, 388 A.2d 977 (1978); *Prettyman v. Utah State Department of Finance*, 27 Utah 2d 333, 496 P.2d 89 (1972). We decline to continue to follow that approach to this problem.

The antithesis to the approach just set out is that adopted in cases such as *Jones v. Melroe Div., Clark Equipment Co.*, 102 Ill. App. 3d 1103, 430 N.E.2d 1385 (1981), and *Ruediger v. Kallmeyer Brothers Service*, 501 S.W.2d 56 (Mo. 1973). In those cases the employer makes no payment out of pocket at all in

connection with the reimbursement of the expenses of a recovery from a third party. Instead, the benefit to the employer is reduced by the employer's share of expenses of the recovery, and the employer is given credit for advance payments of the lesser amount, thus reducing the time during which payments are suspended. The employer then must resume payments at an earlier date. This approach is used to reimburse the employee for the employer's share of the expenses of recovery. We decline to adopt that approach.

The approach which we have adopted is a variation of the general approach in *Franges v General Motors*, 404 Mich. 590, 274 N.W.2d 392 (1979). We believe the approach adopted by this court in this case reaches the result required by our statutes.

The order of the district court is hereby affirmed as to the amount of attorney fees but is reversed as to the manner of payment for the fees. This cause is hereby remanded to the district court for further proceedings consistent with this opinion.

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

BOSLAUGH, J., dissenting.

It seems to me that this is a very simple case. There are only two issues to be decided: how the net recovery should be distributed and the credit the employer should receive. The statute is clear and determines the answer to both questions.

Neb. Rev. Stat. § 48-118 (Reissue 1984) provides that the amount of the recovery against a third person, in excess of the compensation paid by the employer, and after deducting the expenses of making the recovery, shall be paid forthwith to the employee or the dependents.

The recovery in this case was $200,000. The expense of making the recovery was the attorney fee of one-third of the recovery, or $66,666.67. The net recovery was $133,333.33 ($200,000 - $66,666.67). The employer had paid compensation in the amount of $11,093.07. This amount, less the employer's proportionate share of the expenses, must be paid to the employer ($11,093.07 - $3,697.69 = $7,395.38). Since there are no other dependents, the balance of the net recovery, $125,937.95 ($133,333.33 - $7,395.38), must be paid forthwith

to the plaintiff.

The statute further provides that the amount paid to the employee or to the dependents shall be treated as an advance payment of any future installments of compensation. The amount paid to the plaintiff, $125,937.95, divided by the weekly rate of compensation, $164.05, results in the employer's receiving credit for 767.68 weeks. At the end of that time, if the plaintiff is alive and her "widowhood" has not ended, the employer must resume payment of the weekly benefit.

Since the employer is unwilling to enter into a lump-sum settlement, the present value of its potential liability must be disregarded. To the extent *Gillotte v. Omaha Public Power Dist.*, 189 Neb. 444, 203 N.W.2d 163 (1973), is in conflict, it should be disapproved.

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

JOHN D. HASSETT, APPELLANT, V. SWIFT & COMPANY, A DELAWARE CORPORATION, APPELLEE.

388 N.W.2d 55

Filed May 30, 1986. No. 85-200.

1. **Summary Judgment.** A summary judgment may be rendered if the pleadings, depositions, admissions, and affidavits together reveal that there is no genuine issue as to any material fact, that the ultimate inferences to be drawn from those facts are clear, and that the moving party is entitled to judgment as a matter of law.
2. _____. In deciding if any real issue of fact exists, the court is required to take the view of the evidence most favorable to the party against whom the motion is directed and give that party the benefit of all favorable inferences which may reasonably be drawn from the evidence.
3. **Principal and Agent.** Apparent authority or agency for which a principal may be liable must be traceable to him and cannot be established by the acts, declaration, or conduct of an agent.
4. **Principal and Agent: Corporations: Contracts.** An officer of a corporation has no apparent authority to bind the corporation to an unusual, extraordinary, or unreasonable contract.

5. **Summary Judgment.** The movant on a motion for summary judgment may discharge his burden of proof by a showing that if the case proceeded to trial his opponent could produce no competent evidence to support a contrary position.
6. _____. A prima facie showing by the movant for summary judgment, i.e., the production of enough evidence to demonstrate such party's entitlement to a judgment if evidence were uncontroverted at trial, shifts the burden of producing evidence to the party opposing the motion.
7. _____. A prima facie showing for summary judgment having been made, it should be granted to the movant unless the opposing party offers competent evidence that there is a genuine issue as to a material fact.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Affirmed.

Cynthia G. Irmer of Matthews & Cannon, P.C., for appellant.

Robert L. Berry of Kennedy, Holland, DeLacy & Svoboda, for appellee.

BOSLAUGH, HASTINGS, CAPORALE, and GRANT, JJ., and BRODKEY, J., Retired.

BRODKEY, J., Retired.

Plaintiff below, John D. Hassett, appeals to this court from an order entered by the district court for Douglas County, Nebraska, sustaining a motion filed by the defendant for summary judgment in a breach of contract action brought by the plaintiff. We affirm.

The object of this litigation is the construction of an alleged oral agreement between the parties whereby the plaintiff, who was an employee of the defendant, having first entered its employment in September 1947, had terminated that employment and had gone to work for another company in August 1964. He returned to work for defendant on February 8, 1965, at the request of his former supervisor, and under an alleged promise by that supervisor that the 5-month period would be "bridged" for the purposes of computing his pension with defendant, Swift & Company.

In his amended petition filed in the district court, plaintiff alleged that the oral agreement between the parties was valid and binding and that under its terms the defendant had no right to disallow plaintiff's service with defendant from 1948 to 1964

in computing his pension, and prayed that the court determine the amount of money due the plaintiff from the defendant.

Although the defendant in its answer sets forth various and sundry defenses, the main thrust of its answer is that any cause of action alleged by the plaintiff in his amended petition would be barred by applicable statutes of limitations and, also, as alleged in its answer, that the petition failed to state a cause of action upon which relief could be granted. Defendant also asserts that plaintiff was aware not later than September 5, 1967, that the gap in his service would not be bridged and that his retirement could and would only be computed on the basis of his service commencing on the date of his rehiring, to wit, February 8, 1965.

At this point the defendant filed a motion for summary judgment, at the hearing of which the trial court found that it was possible but unlikely that a contract to bridge Hassett's services existed. The trial court further stated that even if a contract existed, a breach occurred no later than September 5, 1967; hence, it was clear that any action was barred by the statute of limitations. The trial court reasoned that as no issue existed regarding the statute of limitations, the defendant was entitled to judgment as a matter of law, and thereupon sustained defendant's motion for summary judgment.

The plaintiff then filed his motion for a new trial, which was overruled by the court. He then perfected his appeal to this court.

In his brief on appeal the appellant assigns as errors that the district court erred in holding that the statute of limitations began to run against his claim against the appellee in 1967, in granting summary judgment although many issues of material fact yet existed, and in dismissing appellant's action.

By way of factual background to the present litigation, the record reveals that Hassett began working for Swift & Company on September 8, 1947, and that on August 29, 1964, he voluntarily resigned his position as assistant sales manager with that company and went to work for another company at an increase in pay. A short time later, a discussion occurred between Hassett and C.J. Kleeman, who was the city sales manager for Swift & Company in Omaha at that time. Hassett

testified that Kleeman discussed the possibility of Hassett's returning to work for Swift & Company and stated that Kleeman promised him that if he returned to Swift, "nothing will have changed. It would be just like you had not ever left the company. . . . [Y]our years would be bridged . . . ." Hassett testified that he believed that Kleeman had the necessary authority to verbally finalize the bridging issue and that Kleeman's statements superseded those printed in the company's pension plan booklet. Hassett received no written promise from Kleeman or any other employee of Swift & Company.

The Swift & Company pension trust as amended to April 1, 1961, was the pension plan which was in effect when Hassett left Swift. The plan specifically provided that "[t]he service to be taken into account in computing the amount of an employe's pension shall be *the last continuous period of service* of the employe . . . ." (Emphasis supplied.) The administration of the pension trust was vested in the pension board. There was no provision for "bridging" the service of a former employee of Swift & Company. Hassett had received the booklet describing Swift's pension plan.

Before a former employee such as Hassett could be rehired, it was necessary to obtain the approval of the local plant manager and the general sales department in Chicago. A memorandum dated December 18, 1964, written by H.B. Bartleson, of Swift's general sales department, to K.M. Coughenour, the Omaha plant manager, stated the conditions under which Hassett could be rehired. The conditions were that Hassett would begin strictly as a new employee and that there would be no possibility whatsoever of bridging Hassett's service. The memorandum also stated that Hassett "should be given no encouragement that [bridging] will be considered at a later date."

On February 8, 1965, Hassett was rehired by Swift. The pension plan then in effect was the Swift & Company pension trust as amended to February 1, 1965. This document specified that an employee who quit would lose all accumulated credited service except for the purpose of determination of any pension, immediate or deferred, to which the employee might then be entitled. The document further provided specifically that if an

employee were "subsequently re-employed, no credit [would] be given for prior service."

After Hassett's reemployment he persisted until the early 1970s in pursuing the bridging issue with Kleeman as well as with several other Swift managers. Hassett received only negative responses. One response was a memorandum dated September 5, 1967, which was dictated in Hassett's presence, from B.A. Balgus, the plant manager, to R.E. Rogers, of the general sales department in Chicago. This memorandum, a copy of which was received by Hassett, stated that Balgus had informed Hassett that day that Hassett's service would not be bridged.

In August 1981 Hassett was informed that his position with Swift would be terminated effective December 1, 1981, because Swift was changing to distribution through food brokers and the sales department was being eliminated.

On September 25, 1981, Thomas Fogarty, the regional sales manager from Chicago, and J.A. Hansen, Swift's district manager, met with Hassett and again informed him that his service would not be bridged. On November 14, 1981, Hassett wrote to Hansen requesting his consideration of the bridging issue. R.B. Greene, Swift's vice president of personnel, replied on November 23, 1981, again stating that Hassett's service would not be bridged, and referred to the Balgus memorandum of September 5, 1967.

The law regarding summary judgments in Nebraska is well settled. A summary judgment may be rendered if the pleadings, depositions, admissions, and affidavits together reveal that there is no genuine issue as to any material fact, that the ultimate inferences to be drawn from those facts are clear, and that the moving party is entitled to judgment as a matter of law. Neb. Rev. Stat. § 25-1332 (Reissue 1985); *Yankton Prod. Credit Assn. v. Larsen*, 219 Neb. 610, 365 N.W.2d 430 (1985).

Summary judgment is an extreme remedy and its purpose is to "pierce sham pleadings and to dispose of cases in which there is no genuine claim or defense." *Hanzlik v. Paustian*, 211 Neb. 322, 326, 318 N.W.2d 712, 715 (1982), *aff'd on remand* 216 Neb. 575, 344 N.W.2d 649 (1984), *cert. denied* 469 U.S. 854, 105 S. Ct. 179, 83 L. Ed. 2d 113 (1984). We, as well as the lower

court, in deciding if any real issue of fact exists, are required "to take the view of the evidence most favorable to the party against whom the motion is directed and give that party the benefit of all favorable inferences which may reasonably be drawn from the evidence." *Yankton, supra* at 614, 365 N.W.2d at 433.

Applying this test and viewing the evidence most favorably to the plaintiff, we find there is no genuine issue of material fact.

Hassett argues that the district court disregarded certain factual issues, most importantly whether a contract existed. It is quite apparent from the evidence which has been discussed that Kleeman, the city sales manager in Omaha, had no authority, actual or express, to bind Swift & Company by a promise to Hassett that if he returned to work, his service would be bridged. Kleeman, in fact, had no authority to rehire Hassett without obtaining approval from the local plant manager and the general sales department in Chicago.

In an effort to avoid that problem, Hassett argues that Kleeman had apparent authority to bind Swift & Company to such a contract. Apparent authority or agency for which a principal may be liable must be traceable to him and cannot be established by the acts, declaration, or conduct of an agent. *Wolfson Car Leasing Co., Inc. v. Weberg*, 200 Neb. 420, 264 N.W.2d 178 (1978).

There is nothing in the record to support a finding that a genuine issue of material fact exists as to the apparent authority of a city sales manager to promise to vary or waive a provision in the corporation's employee pension plan. Kleeman was not an officer of the corporation. Even the president of a corporation has no apparent authority to bind the corporation to an unusual, extraordinary, or unreasonable contract. *Kline v. Little Rapids Pulp Co.*, 206 Wis. 464, 240 N.W. 128 (1932).

The booklets containing the terms of the Swift & Company pension trust are in evidence. Hassett was furnished with copies of the booklets describing the pension plan and admitted he had read them. The authority to administer the pension plan is vested in the pension board. The plan specifically provides that only the "last continuous period of service" shall be taken into account in computing an employee's pension. An employee

who quits loses all credited service. If he is later reemployed, no credit is given for prior service. There is no evidence that these provisions of the pension plan have ever been varied or waived for any employee. The witnesses who testified as to that matter stated that service was never bridged.

The movant on a motion for summary judgment may discharge his burden of proof by a showing that if the case proceeded to trial his opponent could produce no competent evidence to support a contrary position. A prima facie showing by the movant for summary judgment, i.e., the production of enough evidence to demonstrate such party's entitlement to a judgment if evidence were uncontroverted at trial, shifts the burden of producing evidence to the party opposing the motion. A prima facie showing for summary judgment having been made, it should be granted to the movant unless the opposing party offers competent evidence that there is a genuine issue as to a material fact. *Hanzlik v. Paustian, supra.*

In view of the evidence produced by Swift & Company, the burden was on Hassett to produce some evidence to support a finding that a material question of fact existed as to the apparent authority of Kleeman to bind Swift & Company to such a contract. No such evidence was produced. Upon this state of the record, the defendant was entitled to summary judgment.

In conclusion, from our review of the record we have determined that there is no genuine issue of material fact as to whether an oral contract to bridge the plaintiff's services existed. Therefore, it is unnecessary to discuss the questions relating to the statute of limitations, and the judgment of the lower court granting defendant's motion for summary judgment should be and hereby is affirmed.

AFFIRMED.

PATRICK J. BOLAN ET AL., APPELLANTS, V. MICHAEL BOYLE ET AL., APPELLEES.

387 N.W.2d 690

Filed May 30, 1986. No. 85-201.

1. **Jurisdiction.** Parties cannot confer subject matter jurisdiction upon a judicial tribunal by either acquiescence or consent.
2. **Jurisdiction: Claims: Municipal Corporations.** Generally, before a court may acquire jurisdiction over a claim against a city of the metropolitan class, the procedures set out in Neb. Rev. Stat. § 14-804 (Reissue 1983) must be followed.

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

Robert E. O'Connor, Jr., of Robert E. O'Connor & Associates, for appellants.

Herbert M. Fitle, Omaha City Attorney, and Timothy K. Kelso, for appellees.

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

GRANT, J.

Plaintiffs, Patrick J. Bolan and Marcellus Deats, appeal the dismissal of their suit against Michael Boyle; the City of Omaha (City), a municipal corporation; and others. In an earlier case involving these same parties, *Bolan v. Boyle*, 218 Neb. 85, 352 N.W.2d 586 (1984) (*Bolan I*), the defendants were described as officials of the City and the City and were referred to collectively as the City. We use the same nomenclature herein. In *Bolan I* this court held that plaintiffs were entitled to be compensated for the entire time they were at work for the City, and reversed and remanded for further proceedings. After remand, defendant City filed a motion for summary judgment alleging there was no material question of fact and that the City was entitled to judgment as a matter of law. After hearing, the district court granted the motion for summary judgment based upon the lack of jurisdiction and dismissed plaintiffs' petition. The district court found that plaintiffs had failed to either allege in the petition or submit any evidence to show that they had first filed their claim with the city comptroller, as required by Neb. Rev. Stat. § 14-804 (Reissue 1983), as a prerequisite to seeking

judicial relief.

Plaintiffs assign four errors, which may be considered as two: (1) That it was error for the district court to entertain a jurisdictional challenge on remand; and (2) That it was error to dismiss the action for lack of jurisdiction based upon § 14-804, rather than finding that the Nebraska Wage Payment and Collection Act (Wage Act), Neb. Rev. Stat. §§ 48-1228 et seq. (Reissue 1984), applied and granted jurisdiction. For the following reasons we affirm.

The facts of this case have been adequately set out in *Bolan I* and will not be reiterated here. As stated above, in *Bolan I* we ruled that since the employer City retained a hold on the employees during their lunch period so that the employees were not actually at liberty, that therefore the lunch period constituted compensable time. The judgment was reversed and the cause remanded for further proceedings. It was on remand to the district court that the City first raised the jurisdictional issue under § 14-804. No evidence appears in the record on this appeal to show that plaintiffs followed the procedure set out in § 14-804.

We find plaintiffs' assertion that jurisdiction could not be raised on remand to be without merit. While we note that *Bolan I* has turned out to be an exercise in futility, since the City failed to raise the dispositive jurisdictional issue until remand, this court cannot act to impose or grant subject matter jurisdiction on a court which otherwise does not have it. As we have reaffirmed recently, "parties cannot confer subject matter jurisdiction upon a judicial tribunal by either acquiescence or consent." *Riedy v. Riedy, ante* p. 310, 312, 383 N.W.2d 742, 744 (1986). Subject matter jurisdiction may not be waived.

Plaintiffs' argument that it was error for the district court to apply § 14-804 and dismiss the petition is also without merit. While plaintiffs assert that it was error for the district court to hold that the Wage Act did not apply, it is unnecessary for this court to reach that issue. For the following reasons we determine that there was no jurisdiction in the district court, and we affirm the district court's dismissal of the petition based upon plaintiffs' failure to comply with § 14-804.

Generally, before a court may acquire jurisdiction over a

claim against a city of the metropolitan class, the procedures set out in § 14-804 must be followed. See *Schmitt v. City of Omaha*, 191 Neb. 608, 217 N.W.2d 86 (1974). Section 14-804 provides:

> Before any claim against the city, except officers' salaries earned within twelve months or interest on the public debt is allowed, the claimant or his agent or attorney shall verify the same by his affidavit, stating that the several items therein mentioned are just and true and the services charged therein or articles furnished, as the case may be, were rendered or furnished as therein charged, and that the amount therein charged and claimed is due and unpaid, allowing all just credits. . . . All claims against the city must be filed with the city comptroller. When the claim of any person against the city is disallowed, in whole or in part, by the city council, such person may appeal from the decision of said city council to the district court of the same county, as provided in section 14-813.

The City is one of the metropolitan class governed by Neb. Rev. Stat. ch. 14 (Reissue 1983). Section 14-804 provides procedural prerequisites which must be followed before a claim against the City may be allowed or the disallowance of such a claim may be appealed to a district court. Section 14-804 governs all such claims, and we hold that it governs the claim involved herein. No evidence showing that plaintiffs followed the procedures set out in § 14-804 was presented to the district court. Jurisdiction did not attach in the district court, and, therefore, this court has no jurisdiction to consider the matter further. See, *Glup v. City of Omaha, ante* p. 355, 383 N.W.2d 773 (1986); *Moell v. Mennonite Deaconess Home & Hosp.*, 221 Neb. 168, 375 N.W.2d 618 (1985).

The district court was correct in finding that it lacked jurisdiction, and its dismissal of the petition is affirmed.

AFFIRMED.

CAPORALE, J., not participating.

SANDRA M. JEFFERS, APPELLANT, V. BISHOP CLARKSON MEMORIAL HOSPITAL, A NEBRASKA CORPORATION, APPELLEE.

387 N.W.2d 692

Filed May 30, 1986. No. 85-205.

1. **Employment Contracts: Termination of Employment.** When employment is not for a definite term, and there are no contractual or statutory restrictions upon the right of discharge, an employer may lawfully discharge an employee whenever and for whatever cause it chooses without incurring liability.
2. **Employment Contracts.** Simply because the employee does not have an employment contract for a specific term does not deprive her of the benefit of grievance procedures as set forth in an employee handbook.
3. **Employment Contracts: Termination of Employment.** Except in cases where an employee is deprived of constitutional or statutory rights or where contractual agreements guarantee that employees may not be fired without just cause, the law in this state continues to deny any implied covenant of good faith or fair dealing in employment termination.

Appeal from the District Court for Douglas County: THEODORE L. CARLSON, Judge. Reversed and remanded for further proceedings.

John B. Ashford of Ashford & Bowie, P.C., for appellant.

Andrew E. Grimm and Dale E. Bock of Nelson & Harding, for appellee.

KRIVOSHA, C.J., BOSLAUGH, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

This appeal arises from an order of the Douglas County District Court sustaining the appellee's demurrer and dismissing the appellant's petition. We reverse and remand.

In her petition appellant alleged that from September 1971 to July 1984 she was employed at Bishop Clarkson Memorial Hospital in Omaha, Nebraska, as a licensed practical nurse (LPN). At the time of hire Jeffers was supplied with an employee handbook outlining the terms and conditions of employment and the benefits afforded Clarkson employees. The handbook also included procedures to be followed by both employee and employer in processing grievances. At the time it hired Jeffers, Clarkson also made oral representations to her

with respect to her compensation.

On July 21, 1984, Clarkson nursing personnel officials discharged Jeffers after discovering that she had allegedly misrepresented to them that she had renewed her LPN license for 1984. Clarkson became aware of the status of Jeffers' LPN license after the state Board of Nursing informed the hospital that the license had not been renewed for 1984. The hospital asked Jeffers to produce her 1984 LPN license. Instead, she produced a canceled check as proof that she had renewed her LPN license for 1984. The hospital discovered that the canceled check was actually the payment for her 1983 LPN license renewal. The hospital subsequently fired Jeffers because of her alleged dishonesty in the matter.

Immediately after she was fired, Jeffers initiated a grievance action according to the procedures in the employee handbook. In a letter attached to the petition, dated August 8, 1984, Clarkson's area manager responded to the grievance by informing Jeffers that her dishonesty was the reason she was fired and denying her request for reinstatement. The letter stated that "[n]o further action will be taken in your implied grievance action unless you can validate, without question, that your LPN license was renewed and was current as of January 1, 1984."

In her petition Jeffers alleged that she was wrongfully discharged because the employee handbook and the oral representations constituted an employment contract between her and the hospital, the terms of which were not adhered to by the hospital when it fired Jeffers. Pursuant to Neb. Rev. Stat. § 25-806(6) (Reissue 1985), the hospital generally demurred to Jeffers' petition. Clarkson argues that Jeffers' petition failed to state a cause of action because it did not allege that the employment contract prohibited the hospital from discharging her without cause, nor did it allege that Jeffers' termination was done in bad faith, with a retaliatory motive, or in violation of state law or public policy. The district court sustained the hospital's demurrer, plaintiff failed to amend her petition, and the court dismissed the petition. Jeffers appeals, assigning as her sole error the trial court's sustaining of the hospital's general demurrer and dismissing of her petition.

In reviewing the sustaining of a demurrer, this court must treat the facts alleged in the petition as undisputed. *Morris v. Lutheran Medical Center*, 215 Neb. 677, 340 N.W.2d 388 (1983). We consider only the facts set forth in the petition, and we do not consider extrinsic matters in determining whether a pleading states a cause of action. *Heinzman v. County of Hall*, 213 Neb. 268, 328 N.W.2d 764 (1983). Further, a general demurrer admits only such facts as are well pleaded and does not admit mere conclusions of the pleader. *Hall v. Cox Cable of Omaha, Inc.*, 212 Neb. 887, 327 N.W.2d 595 (1982).

In her petition Jeffers alleges that an employment contract existed between her and the hospital, consisting of the terms and conditions specified in the employee handbook as well as hospital officials' oral representations. Paragraph X of Jeffers' petition states:

> That Plaintiff's termiantion [sic] by the Defendant was contrary to the terms and conditions of the Employee Handbook in the following particulars:
>
> (a) The Plaintiff was not guilty of dishonesty as alleged by the Defendant as the reason for terminaiton [sic].
>
> (b) Defendant was terminated without cause.
>
> (c) Defendant failed to throughly [sic] investigate the Plaintiff's grievance as required by the grievance procedure.

Incorporated by reference in Jeffers' petition are selected portions of the employee handbook, including the section captioned "Grievance Procedure," which reads as follows:

> It is the responsibility of Clarkson Hospital to hear and consider complaints from employees which may arise out of conditions of employment, with the objective of speedy resolution of the grievance to the mutual satisfaction of all parties. All Managers are responsible to hear and try to settle informally all grievances or complaints which employees bring to their attention.
>
> If you do have a grievance, first bring it to the attention of your immediate Supervisor. This may be done in an informal manner. Your Supervisor will investigate your problem and attempt to resolve your grievance within three (3) working days.

> If you are still not satisfied with the results, you may present your problem to your Department Manager, who will also investigate and return a decision within three working days. If the solution still fails to resolve the matter, you may refer your complaint, in writing, to the Associate Administrator/Director of your Division. He/She will then conduct a thorough investigation of the problem, including a discussion with the Manager of Employee Relations to offer a quick solution. In turn, you will receive a written decision within one week. A copy of the decision will be forwarded to your Manager and the Personnel Department for inclusion in your personnel file.

Nothing in this provision indicates that discharge actions are exempt from grievance procedures; therefore, we assume that Jeffers' discharge was subject to the grievance procedures as described in the handbook.

Also incorporated by reference in Jeffers' petition is a section of the handbook entitled "Discipline," which states in part: "Any violation of these policies, rules, or misconduct could lead to disciplinary action including your immediate dismissal." Jeffers' petition essentially asserts (1) that an employment contract existed between her and Clarkson, (2) that under the terms of the contract she could be discharged only for violating a hospital rule or regulation, (3) that she did not violate a hospital rule or regulation when she told hospital officials that she had renewed her LPN license, and (4) that even if she had violated a hospital rule, the hospital failed to satisfy the terms of the contract when it refused to carry out the grievance procedures.

Jeffers concedes that she was not hired for a specific length of time under her employment contract. In *Morris v. Lutheran Medical Center*, 215 Neb. 677, 340 N.W.2d 388 (1983), we held that when employment is not for a definite term, and *there are no contractual or statutory restrictions upon the right of discharge*, an employer may lawfully discharge an employee whenever and for whatever cause it chooses without incurring liability. However, we also held in *Morris* that simply because the employee does not have an employment contract for a

specific term does not deprive her of the benefit of grievance procedures as set forth in an employee handbook. But see *Mau v. Omaha Nat. Bank*, 207 Neb. 308, 299 N.W.2d 147 (1980) (company handbook does not create employment for a definite period).

Except in cases where an employee is deprived of constitutional or statutory rights or where contractual agreements guarantee that employees may not be fired without just cause, the law in this state continues to deny any implied covenant of good faith or fair dealing in employment termination. See, e.g., *Alford v. Life Savers, Inc.*, 210 Neb. 441, 315 N.W.2d 260 (1982); *Feola v. Valmont Industries, Inc.*, 208 Neb. 527, 304 N.W.2d 377 (1981).

The plaintiff's petition sufficiently states a cause of action. She has alleged the existence of an employment contract which, while not guaranteeing her continued, indefinite employment, establishes provisions for discharge and defines procedures to which she and her employer are bound in assessing the validity of her discharge.

The district court's order is reversed, and the cause is remanded for proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WHITE, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. PAUL L. DOUGLAS, APPELLANT.

388 N.W.2d 801

Filed May 30, 1986. No. 85-245.

1. **Criminal Law.** There are no common-law crimes in the State of Nebraska.
2. **Criminal Law: Legislature: Statutes.** No act is criminal unless the Legislature has in express terms declared it to be so, and no person can be punished for any act or omission which is not made penal by the plain import of written law.
3. **Criminal Law: Statutes.** It is a fundamental principle of statutory construction that a penal statute is to be strictly construed.

4. **Criminal Law: Oaths and Affirmations: Perjury: Statutes.** To sustain a conviction for perjury outside a judicial proceeding, there must exist a valid statute which requires the making of a statement under oath.
5. _____: _____: _____: _____. For an oath to be "required by law" as a foundation for the crime of perjury in violation of Neb. Rev. Stat. § 28-915(1) (Reissue 1985), a specific statute must explicitly require that an oath be administered.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Reversed and remanded with direction to dismiss.

William E. Morrow, Jr., Thomas J. Culhane, and Tamra L. Wilson of Erickson & Sederstrom, P.C., for appellant.

Kirk E. Naylor, Jr., and Vincent Valentino, Special Prosecutors, for appellee.

BOSLAUGH, HASTINGS, SHANAHAN, and GRANT, JJ., and MORAN and HOWARD, D. JJ., and COLWELL, D.J., Retired.

PER CURIAM.

On February 9, 1984, the Special Commonwealth Committee of the Nebraska Legislature authorized the chairperson of the committee to set a date, time, and place for a committee meeting to consider the actions of Paul Douglas in relation to Commonwealth Savings Company. The committee also described the procedures to be followed at the meeting pursuant to rules of the Nebraska Unicameral. Each witness appearing before the committee was required to take an oath or affirmation to tell the truth. On February 13 Richard Kopf, special counsel for the committee, sent a letter requesting that Douglas appear and testify before the committee. On February 25 Douglas appeared before the committee, took an oath, and testified regarding his past association with Marvin E. Copple, a real estate developer.

On June 14, 1984, the grand jury returned a true bill on the indictment that charged Douglas with two counts of criminal conduct resulting from the Commonwealth investigation. Count I charged Douglas with perjury in violation of Neb. Rev. Stat. § 28-915(1) (Reissue 1985) by alleging that

> [Douglas] did, after having given his oath or affirmation in a matter where said oath or affirmation was required by

law, and before an authority having full power to administer the same, said being the Special Commonwealth Committee of the Legislature of Nebraska, depose, affirm or declare the following matters to be fact, to-wit:

> That he paid income tax on all of the payments he received from Marvin E. Copple for services he performed for Marvin E. Copple.
>
> That the payments he received from Marvin E. Copple, for the services he performed for said Marvin E. Copple, totalled Thirty-two Thousand Five Hundred Dollars ($32,500).
>
> That his actions as Attorney General of Nebraska had not been influenced by his business or personal relationships with Marvin E. Copple.

Further, that at the time he, Paul L. Douglas, deposed, affirmed or declared said matters to be fact he knew the same to be false.

Count II charged Douglas with obstruction of justice under Neb. Rev. Stat. § 28-901(1) (Reissue 1985).

Pursuant to Neb. Rev. Stat. § 29-1808 (Reissue 1985), Douglas moved to quash the indictment, contending in part that the testimony given under oath before the Special Commonwealth Committee was not subject to prosecution under § 28-915. The district court overruled the motion and also rejected similar contentions made in both a plea in abatement and demurrer subsequently filed by Douglas.

Douglas' trial commenced on December 3, 1984. The jury eventually found Douglas guilty of perjury and not guilty of obstruction of justice. On March 8, 1985, the district court sentenced Douglas to probation for a period of 3 years and ordered him to meet certain conditions of the probation.

At the outset we choose to offer some preliminary observations. In the first place we point out that in this case it is not within the province of our review to judge the propriety of Douglas' activities as Attorney General. We make no judgment as to whether, as a lawyer, he had a moral obligation to tell the

truth apart from any statutorily prescribed standard relating to false swearing. We undertake no assessment of the responsibility for the demise of Commonwealth Savings Company. None of these issues properly belongs within the ambit of this appeal.

Rather, we are required to examine this record for error. In so doing we may not consider that at the time Douglas was the Attorney General of the state or that he was then authorized to practice law. He is entitled to due process of law as provided by our Constitution to the same extent as any other citizen of this state. Nothing more, nothing less.

Douglas asserts nine assignments of error, including the following: "The court erred in failing to quash or dismiss Count I of the indictment because it failed as a matter of law to allege facts which would constitute perjury since the statements were made in a setting where no oaths were required by law." Because we believe this contention is dispositive of the appeal, we need not and do not consider issues raised in the remaining assignments of error.

Section 28-915 provides in pertinent part as follows:

> (1) A person commits perjury if, having given his oath or affirmation in any judicial proceeding or to any affidavit on undertakings, bonds, or recognizances or in any other matter where an oath or affirmation is required by law, he deposes, affirms or declares any matter to be fact, knowing the same to be false, or denies any matter to be fact, knowing the same to be true.

The parties agree that the language "in any other matter where an oath or affirmation is required by law" in § 28-915 provides the sole basis for convicting Douglas of perjury for testimony before the Special Commonwealth Committee. Douglas maintains that for an individual to be convicted of perjury under § 28-915, the individual must knowingly make a false statement under oath where a specific statute requires an oath to be administered. Although Neb. Rev. Stat. § 50-103 (Reissue 1984) provides that any member of the Legislature "*may* administer oaths in the Legislature, and while acting on a committee *may* administer oaths on the business of such committee" (emphasis supplied), no Nebraska statute requires

that an oath be administered to individuals testifying before a legislative committee. Douglas argues that, although the allegedly false statements were made under oath, such an oath was not "required by law" and Douglas cannot be convicted of perjury. The State argues that the phrase "required by law" means only that the oath must be administered by an individual or entity possessing the authority to require the oath. It is the State's position that, since § 50-103 authorizes a legislative committee to administer and, hence, require an oath, Douglas' statements made under oath before an official body possessing the authority to administer an oath fall within the scope of § 28-915. According to the State,

> the majority rule is that if a governmental body, authority or agency is vested with the statutory authority to require that testimony be adduced in its proceedings under oath, even though the exercise of that authority is not mandatory, such testimony adduced under oath may properly be the subject of a perjury prosecution.

Brief for Appellee at 13.

Neb. Rev. Stat. § 29-106 (Reissue 1985) provides:

> This code and every other law upon the subject of crime which may be enacted shall be construed according to the plain import of the language in which it is written, without regard to the distinction usually made between the construction of penal laws and laws upon other subjects, and no person shall be punished for an offense which is not made penal by the plain import of the words, upon pretense that he has offended against its spirit.

In *Kinnan v. State*, 86 Neb. 234, 236-37, 125 N.W. 594, 595 (1910), this court enunciated: "[I]t is now settled beyond question, that there are no common law crimes in this state . . . ."

In construing § 28-915 we are guided by the general rule found in *State v. Ewert*, 194 Neb. 203, 204, 230 N.W.2d 609, 610 (1975): "No act is criminal unless the Legislature has in express terms declared it to be so, and no person can be punished for any act or omission which is not made penal by the plain import of written law." Also, as this court held in *State v. Beyer*, 218 Neb. 33, 37, 352 N.W.2d 168, 171 (1984): " 'It is a

fundamental principle of statutory construction that a penal statute is to be strictly construed.' " In *United States v. Speidel*, 562 F.2d 1129, 1131-32 n.4 (8th Cir. 1977), the Court of Appeals for the Eighth Circuit stated: "Strict construction of criminal statutes is based on need to provide fair warning of what conduct is criminal and to insure that the legislature rather than the courts define criminal behavior." As expressed by this court in *State v. Hamilton*, 215 Neb. 694, 699, 340 N.W.2d 397, 400 (1983): "It is not for courts to supply missing words and even sentences in order to make definite that which is indefinite."

In *Saunders v. State*, 170 Tex. Crim. 358, 341 S.W.2d 173 (1960), the Texas Court of Criminal Appeals addressed the question of whether false testimony given before an investigatory committee of the Texas Legislature constituted perjury under a statute which defined perjury as a false statement made under oath or affirmation in "circumstances in which [such] oath or affirmation is required by law . . . ." 341 S.W.2d at 176 (Davidson, J., concurring). Tex. Stat. Ann. art. 5429a (Vernon 1958) authorized members of the Legislature to administer oaths, and Saunders, appearing before the legislative committee, made the allegedly false statements while under oath. In holding that Saunders' prosecution for perjury should have been dismissed, the Texas court stated:

> Nowhere in our statutes may the requirement be found which demands that witnesses who testify before the Legislature or any of its committees shall be sworn. Article 5429a, Vernon's Ann.Civ.St., merely *empowers* members of the Legislature to administer oaths to witnesses who appear before either House or a committee thereof and does no more than add members of the Legislature to those enumerated in Article 26, V.A.C.S., as those who are authorized to administer oaths.
>
> Can it be said that an oath administered by any of those persons . . . enumerated in Articles 26 or 5429a, supra, is, per se, one which is required by law? We think not.

(Emphasis in original.) 341 S.W.2d at 174. In a concurring opinion one judge of the court also noted:

> The cases which have been before this court wherein a conviction for perjury was authorized upon a false

> affidavit or statement outside of and unconnected with a judicial proceeding are based upon the proposition that there must exist a valid statute, a valid law, which requires the making of the affidavit or statement under oath.

341 S.W.2d at 177 (Davidson, J., concurring). The general proposition established in *Saunders v. State, supra*, therefore, is that for an oath to be one which is "required by law," a specific statute must explicitly require that an oath be administered. That an individual or entity possesses the authority to administer an oath is not sufficient to implicate the more restrictive language "required by law."

The State declares that *Saunders v. State, supra*, is unpersuasive and refers us to *Commonwealth v. Giles*, 350 Mass. 102, 213 N.E.2d 476 (1966). In *Giles* the defendant was indicted on two counts of perjury for allegedly false statements made before the Massachusetts Crime Commission. The relevant section of the Massachusetts perjury statute provided that a false statement must be made by one "being required by law to take an oath." *Id.* at 105 n.3, 213 N.E.2d at 479 n.3. See, also, Mass. Gen. Laws Ann. ch. 268, § 1 (West 1970). The crime commission was statutorily authorized to administer an oath, but no Massachusetts statute required that an oath be administered to individuals testifying before the commission. The majority of the Supreme Judicial Court of Massachusetts, relying extensively upon a close examination of the legislative history of the Massachusetts perjury statute, concluded that the Legislature intended that "all wilfully false (and relevant) statements under oath . . . were to constitute perjury, where the oath reasonably should be regarded as 'required by law,' " that is, "where there [is] statutory or other legal justification for requiring an oath in particular circumstances." *Id.* at 107-08, 213 N.E.2d at 480-81. Thus, although no statute specifically required that an oath be administered to individuals testifying before the commission, the fact that the commission was authorized to require an oath was sufficient to satisfy the language "required by law."

However, we find the dissent in *Commonwealth v. Giles, supra*, to be more persuasive:

> No standard is set by the words "other legal justification

> for requiring an oath in particular circumstances" or by the words "where the oath reasonably should be regarded as 'required by law.' " These words, engrafted on the statute by the majority, not only leave their meaning and applicability to the judiciary, but they implicitly require the court, as each case arises, to supply an essential element of the crime, namely, the particular oath, whether required by statute or not, to which the penalty for false swearing attaches. Penal statutes should not be left in such a peripatetic state. From the founding of the Commonwealth public policy has been against such enactments. "The public policy of the Commonwealth in the creation of crimes is not for this court to determine, but for the Legislature. Our function is merely that of discovering the meaning of the words that the Legislature has used, bearing in mind that under the American system of law a citizen is not to be punished criminally unless his deed falls plainly within the words of the statutory prohibition, construed naturally. His deed is not to be declared a crime upon ambiguous words or by a strained construction." [Citation omitted.]

Commonwealth v. Giles, supra at 120-21, 213 N.E.2d at 488-89 (Kirk, J., dissenting).

The view adopted by the court in *Saunders v. State*, 170 Tex. Crim. 358, 341 S.W.2d 173 (1960), and suggested by the dissenting opinion in *Commonwealth v. Giles, supra*, is equally applicable to the case before us in the construction of § 28-915.

At common law, perjury was limited to materially false testimony given as part of a *judicial proceeding*. See 4 Wharton's Criminal Law § 601 (C. Torcia 14th ed. 1981). Thus, to the extent that false testimony given in a nonjudicial proceeding constitutes the criminal offense of perjury, it is a statutory deviation from the accepted common-law definition of perjury. Section 28-915 was enacted in 1977 as part of the overall revision of the Nebraska Criminal Code and is substantially similar to previous Neb. Rev. Stat. § 28-701 (Reissue 1975), "or in any other matter where, by law, an oath or affirmation is required," which, in turn, was based upon Gen. Stat. ch. 58, § 155 (1873).

It is of significance to us that the Model Penal Code, at the time of the enactment of § 28-915 in 1977, defined perjury as follows:

> A person is guilty of perjury, a felony of the third degree, if in any official proceeding he makes a false statement under oath or equivalent affirmation, or swears or affirms the truth of a statement previously made, when the statement is material and he does not believe it to be true.

Model Penal Code § 241.1(1) at 175 (1985).

> "[O]fficial proceeding" means a proceeding heard or which may be heard before any legislative, judicial, administrative or other governmental agency or official authorized to take evidence under oath, including any referee, hearing examiner, commissioner, notary or other person taking testimony or deposition in connection with any such proceeding.

Model Penal Code § 240.0(4) at 167 (1985). Section 241.1(1) specifically includes within its definition of perjury sworn testimony before a legislative committee.

The proposal to effect a general revision of the Nebraska penal code originated in L.R. 39, 80th Leg., 1969 Legis. J. 1589 (Apr. 22, 1969). Pursuant to the resolution, a commission was appointed and a study made of the entire penal code. The commission's report, which was sent to the Speaker of the Legislature on October 2, 1972, recommended adoption of the Model Penal Code provisions concerning perjury. See Advisory Committee Final Draft, Proposed Revision of the Nebraska Criminal Code §§ 9-601, 9-602.

L.B. 8, the bill which was introduced in the 83d Leg., 1st Sess., on January 3, 1973, to adopt the Nebraska Criminal Code, contained the provisions of the Model Penal Code relating to perjury. See L.B. 8, §§ 192, 193 at 149-51. On March 19, 1974, L.B. 8 as amended by the Judiciary Committee was placed on General File. These amendments struck the language of the Model Penal Code concerning perjury and inserted the language concerning perjury which was eventually contained in L.B. 38 at the time it was introduced and later passed on June 1, 1977. See Judiciary Committee amendments to L.B. 8, 83d

Leg., 2d Sess. § 160 at 127.

Although several states have either adopted the Model Penal Code's conception of perjury, see, e.g., Ala. Code § 13A-10-101 (repl. 1982); N.D. Cent. Code § 12.1-11-01 (repl. 1985); 18 Pa. Cons. Stat. Ann. § 4902 (Purdon 1983), or selected the phrase "required or *authorized* by law" (emphasis supplied) in defining perjury, see, e.g., Iowa Code Ann. § 720.2 (West 1979); Minn. Stat. Ann. § 609.48 (West 1964), we find it persuasive that the Nebraska Legislature, in enacting § 28-915, chose not to adopt the Model Penal Code provision but, instead, expressly rejected the broad language of the Model Penal Code and elected to adhere to the general notion originally expressed in § 28-701, that criminal perjury is limited to situations where an oath is "required by law."

It may be argued that public policy should include within the definition of perjury false testimony made under oath before a legislative committee. It is not, however, the function of this court to determine what form a penal statute best serves the public interest, but to strictly construe and apply the penal statute chosen by the Legislature. *State v. Hamilton*, 215 Neb. 694, 340 N.W.2d 397 (1983). In a strict sense the word "require" is an imperative. To require means "[t]o direct, order, demand, instruct, command, claim, compel, request, need, exact." Black's Law Dictionary 1172 (5th ed. 1979). The word "law" means "statute." See *Matter of Sorensen*, 195 Misc. 742, 91 N.Y.S.2d 220 (1949). That other jurisdictions, following the lead of the Model Penal Code, have adopted more expansive deviations from the common-law definition of perjury only accentuates the degree to which we must carefully construe the more restrictive language chosen by the Nebraska Legislature. We simply cannot accept the State's invitation to create, in the guise of judicial construction, a new perjury statute.

Accordingly, we conclude that for an individual to be convicted of perjury under § 28-915 on the basis of the language "in any other matter where an oath or affirmation is required by law," such individual, "having given his oath or affirmation," must depose, affirm, or declare "any matter to be fact, knowing the same to be false," or deny "any matter to be fact, knowing the same to be true," in a circumstance where

a specific statute explicitly requires an oath to be administered. Since there is no Nebraska statute explicitly requiring an oath to be administered to individuals testifying before a legislative committee, Douglas' sworn testimony before the Special Commonwealth Committee could not have provided the basis for prosecution under § 28-915. The State, in an attempt to bring Douglas' testimony before the Special Commonwealth Committee within the ambit of § 28-915, cites to Neb. Rev. Stat. § 50-105 (Reissue 1984), which authorizes the Legislature to punish as contempt "refusing to attend or to be sworn or to be examined as a witness before the Legislature or a committee . . . ." Although such section does authorize the Legislature to hold in contempt an individual refusing to be sworn, when required by a committee of the Legislature pursuant to a rule of the Nebraska Unicameral, the statute does not explicitly require that an oath be administered to individuals testifying before a committee, as do other statutes governing testimony before various administrative boards and quasi-judicial entities. See, e.g., Neb. Rev. Stat. § 23-1807 (Reissue 1983), coroner's inquest: "[a]n oath shall be administered to the witnesses"; Neb. Rev. Stat. § 81-885.18(5) (Reissue 1981), real estate license application hearings: "all witnesses shall be duly sworn by the chairman of the commission."

The indictment did not and could not state an offense under § 28-915. Douglas' motion to quash should have been granted and the prosecution dismissed.

Therefore, we reverse the judgment and remand this matter to the district court with direction to quash the indictment and dismiss the proceedings.

REVERSED AND REMANDED WITH DIRECTION TO DISMISS.

JOSEPH E. HALBLEIB ET AL., APPELLANTS, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLEE.
TOM ALLEN ET AL., APPELLANTS, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLEE.
LINDA DEBOLT ET AL., APPELLANTS, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLEE.

388 N.W.2d 60

Filed May 30, 1986. Nos. 85-285, 85-355, 85-357.

1. **Jurisdiction: Claims: Municipal Corporations.** Generally, before a court may acquire jurisdiction over a claim against a city of the metropolitan class, the provisions of Neb. Rev. Stat. § 14-804 (Reissue 1983) must be followed.
2. **Jurisdiction.** Parties cannot confer subject matter jurisdiction upon a judicial tribunal by either acquiescence or consent.

Appeals from the District Court for Douglas County: PAUL J. HICKMAN and KEITH HOWARD, Judges. Affirmed.

Thomas F. Dowd of Dowd, Fahey & Dinsmore, for appellants.

Herbert M. Fitle, Omaha City Attorney, and Timothy K. Kelso, for appellee.

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

WHITE, J.

Three actions filed against the City of Omaha under the Nebraska Wage Payment and Collection Act, Neb. Rev. Stat. §§ 48-1228 et seq. (Reissue 1984), have been consolidated for appeal. In each case appellants, city employees, claim they were not adequately compensated for work performed. The city, in each case, filed a special demurrer or a summary judgment on the ground that appellants did not comply with the claims statute, Neb. Rev. Stat. § 14-804 (Reissue 1983). In each case a district judge found for the city and dismissed appellants' action after finding that the wage act does not apply to the City of Omaha and that § 14-804 does establish, as a condition precedent to the maintenance of such an action, that claimants file a claim with the city comptroller, to be acted upon by the city council, prior to seeking relief in district court.

Appellants assign the following as error. First, the district court erred as a matter of law in finding that compliance with the claims statute is a condition precedent to subject matter jurisdiction in the district court. Second, the district court erred as a matter of law in not assuming subject matter jurisdiction on the basis of the wage act. Third, the district court erred in sustaining the demurrer and motions for summary judgment.

The facts and issues of these cases are similar to those in our recent case of *Bolan v. Boyle, ante* p. 826, 387 N.W.2d 690 (1986). As in *Bolan,* we find these assignments of error to be without merit, and we affirm the judgment of the district court in each of the cases.

Plaintiffs-appellants filed actions in equity for an accounting under the Nebraska Wage Payment and Collection Act, § 48-1231, for compensation, alleging that they are not required to exhaust the administrative remedy provided for in § 14-804, the claims statute. Section 14-804 provides:

> Before any claim against the city, except officers' salaries earned within twelve months or interest on the public debt is allowed, the claimant or his agent or attorney shall verify the same by his affidavit, stating that the several items therein mentioned are just and true and the services charged therein or articles furnished, as the case may be, were rendered or furnished as therein charged, and that the amount therein charged and claimed is due and unpaid, allowing all just credits. The city comptroller and his deputy shall have authority to administer oaths and affirmations in all matters required by this section. All claims against the city must be filed with the city comptroller. When the claim of any person against the city is disallowed, in whole or in part, by the city council, such person may appeal from the decision of said city council to the district court of the same county, as provided in section 14-813.

Generally, before a court may acquire jurisdiction over a claim against a city of the metropolitan class, these procedures must be followed. See *Schmitt v. City of Omaha*, 191 Neb. 608, 217 N.W.2d 86 (1974).

In the first of the three cases consolidated for appeal,

appellants, mechanical maintenance workers in Omaha's sewage treatment plants, alleged that they were entitled to back wages for the preceding 5 years because they actually worked in a higher-paying classification than the one to which they were assigned. The city filed a special demurrer on the ground that the appellants had not alleged compliance with the claims statute. The district court sustained the demurrer.

Employees of the public works department central garage filed an action alleging that they were due back wages for 5 years for mandatory preshift work for which they were never compensated. The city moved for a summary judgment, which was sustained because there was no evidence that appellants had complied with the provisions of the claims statute.

In the third action, employees, designated as clerk-typists in the criminal investigation bureau of the police division, alleged that they were due back wages for the preceding 5 years because they performed the duties of secretaries, a higher-paying classification. Again, the city moved for a summary judgment on the ground of noncompliance with the claims statute, and the motion was sustained and the petition dismissed.

There is no evidence in the records of the cases to show compliance with the provisions of the claims statute, a condition precedent to seeking relief through the courts. Parties cannot confer subject matter jurisdiction upon a judicial tribunal by either acquiescence or consent. *Riedy v. Riedy, ante* p. 310, 383 N.W.2d 742 (1986).

As in *Bolan*, plaintiffs assert that it was error for the district court to find that the wage act did not apply. Once again, it is unnecessary for this court to reach that issue.

For the foregoing reasons the decisions of the district court are affirmed.

AFFIRMED.

CAPORALE, J., not participating.

ZELLER SAND & GRAVEL, A PARTNERSHIP, APPELLANT, V. BUTLER COUNTY, NEBRASKA, APPELLEE.

388 N.W.2d 62

Filed May 30, 1986. No. 85-303.

1. **Counties: Claims: Contracts.** Neb. Rev. Stat. § 23-135 (Reissue 1983) applies to all claims arising from or out of a contract.
2. **Counties: Claims: Warrants.** Neb. Rev. Stat. § 23-135 (Reissue 1983) applies where a claim is not a mere formal prerequisite to the issuance of a warrant in payment but, rather, requires quasi-judicial action in the sense that an exercise of discretion is required in ascertaining or fixing the amount to be allowed, or resolution of the claim otherwise involves a determination of factual questions based upon evidence.
3. **Counties: Claims: Courts: Jurisdiction.** Where Neb. Rev. Stat. § 23-135 (Reissue 1983) applies, the district court has appellate jurisdiction for the purpose of conducting a trial de novo, as though the action had been originally instituted in such court.
4. **Counties: Pleadings: Claims: Demurrer: Time.** A petition for the allowance of a claim against a county which is subject to the provisions of Neb. Rev. Stat. § 23-135 (Reissue 1983) is demurrable unless it shows on its face that the claim was filed with the county clerk within the statutory time.

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

James C. Stecker and, on brief, David A. Beck of Baker & Beck, P.C., for appellant.

James L. Birkel, Butler County Attorney, for appellee.

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

CAPORALE, J.

Plaintiff-appellant, Zeller Sand & Gravel, a partnership, alleges defendant-appellee, Butler County, breached its contract to purchase at a stated price all the pit gravel it should require for road purposes during a specified period, as the result of which the former was damaged. The county demurred on the ground Zeller's operative petition fails to state a cause of action, as, among other things, it does not allege that Zeller had first filed its claim with the county clerk as required by Neb. Rev. Stat. § 23-135 (Reissue 1983). The district court sustained the demurrer and, after Zeller's election to stand on its

operative petition, dismissed the action. The single issue presented by Zeller's two assignments of error is whether the district court erred in ruling its petition fails to state a cause of action. We affirm.

Section 23-135 provides in pertinent part: "All claims against a county must be filed with the county clerk within ninety days from and after a time when any materials or labor, which form the basis of the claims, shall have been furnished or performed . . . ." This requirement provides the county with full information of the rights asserted against it, and enables it to make proper investigation concerning the merits of claims against it and to settle those of merit without the expense of litigation. See 17 E. McQuillin, The Law of Municipal Corporations § 48.02 (rev. 3d ed. 1982).

The first question is whether the foregoing statute applies to the situation presented by this case. Zeller claims not, because the county's breach prevented materials or labor from being furnished.

We have long held, however, that the statute applies to all claims arising from or out of a contract. *Coverdale & Colpitts v. Dakota County*, 144 Neb. 166, 12 N.W.2d 764 (1944). See, also, *McCollough v. County of Douglas*, 150 Neb. 389, 34 N.W.2d 654 (1948); *Hollingsworth v. Saunders County*, 36 Neb. 141, 54 N.W. 79 (1893). Further, we have stated that § 23-135 applies where a claim is not a mere formal prerequisite to the issuance of a warrant in payment but, rather, requires quasi-judicial action in the sense that an exercise of discretion is required in ascertaining or fixing the amount to be allowed, or resolution of the claim otherwise involves a determination of factual questions based upon evidence. *Heinzman v. County of Hall*, 213 Neb. 268, 328 N.W.2d 764 (1983); *McCollough v. County of Douglas, supra*.

While we have neither been directed to nor found a case decided by this court involving the claimed breach of a requirements contract by a purchaser county, there is no gainsaying the fact that the subject claim not only arises out of a contract but that its resolution, had the matter been presented to the county, would have necessitated the exercise of quasi-judicial action. The county would have been required to

decide factual questions based on evidence both as to whether the contract had in fact been breached and, if so, as to the amount of damages proximately caused thereby. In such a situation the district court has appellate jurisdiction to conduct a trial de novo, as though the action had been originally instituted in such court. *Roy v. Bladen School Dist. No. R-31*, 165 Neb. 170, 84 N.W.2d 119 (1957); *Strawn v. County of Sarpy*, 154 Neb. 844, 49 N.W.2d 677 (1951).

Zeller argues, however, that neither of the foregoing rules applies to a claim which is unliquidated and that the subject claim is such. In support of this position Zeller cites *Wherry v. Pawnee County*, 88 Neb. 503, 129 N.W. 1013 (1911). *Wherry* does indeed state that an action "sounding in tort or for unliquidated damages *must* be commenced in court, and that it *cannot* be instituted by filing a claim with the county board." (Emphasis in original.) *Id.* at 510, 129 N.W. at 1016. The distinction between *Wherry* and the present case is that *Wherry* was a tort action predicated upon the county's negligent failure to maintain a bridge. Its language must be read in that context; so read, *Wherry* holds only that a tort claim, under the law as it then stood, need not first be presented to the county. A like result had been reached 18 years earlier in *Hollingsworth v. Saunders County, supra*. The phrase "or for unliquidated damages" in *Wherry* does no more than further describe an action for a negligent tort.

Having determined that § 23-135 applies to the situation at hand, the only question remaining to be answered is whether the petition fails to state a cause of action because it does not recite that the claim was first presented to the county. The answer is in the affirmative.

We observed in *Coverdale & Colpitts v. Dakota County, supra*, that under Comp. Stat. § 26-119 (Supp. 1941), the precursor of present § 23-135, a petition for the allowance of a claim against a county which shows on its face that the claim was not filed with the county clerk within the stated time limit is demurrable.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GEORGE RAYMOND DANIELS, APPELLANT.

388 N.W.2d 446

Filed May 30, 1986. Nos. 85-463, 85-464, 85-465, 85-466.

1. **Search and Seizure.** A warrantless search of a house may be justified when the police have obtained the consent to search from a party who possessed common authority over, or other sufficient relationship to, the premises sought to be inspected.
2. **Sexual Assault: Witnesses.** In a prosecution for sexual assault, the prosecutrix may testify in chief on direct examination, if within a reasonable time under all the circumstances after the act was committed she made complaint to another, to the fact and nature of the complaint, but not as to its details.
3. **Sexual Assault: Witnesses: Corroboration.** One to whom the complaining witness has complained may testify to the fact and nature of the complaint if the complaint was made voluntarily and without unreasonable delay.
4. _____: _____: _____. The rule which permits testimony of a witness that a sexual assault victim complained to such witness of the assault is for the purpose of confirming the fact of complaint, and does not permit consideration of the complaint as substantive proof of the facts of the assault. A jury should be given a limiting instruction to this effect.
5. **Witnesses: Evidence: Corroboration: Appeal and Error.** Where a statement of a witness is used erroneously as substantive evidence but is merely cumulative of other competent evidence of the same facts which are sufficient to support the conviction, the trial court's failure to control such error generally will not constitute reversible error.
6. **Directed Verdict.** The trial court is justified in directing a verdict of not guilty only when there is a total failure of competent proof to support a material allegation in the information, or when testimony adduced is of so weak or doubtful a character that conviction based thereon could not be sustained.

Appeal from the District Court for Dakota County: ROBERT E. OTTE, Judge. Affirmed.

Kurt A. Hohenstein, for appellant.

Robert M. Spire, Attorney General, and Lynne R. Fritz, for appellee.

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

HASTINGS, J.

George R. Daniels appealed his conviction by jury on two counts of first degree sexual assault and two counts of first degree false imprisonment. Daniels was originally charged with

two counts of first degree sexual assault and two counts of kidnaping. At trial appellant's motions for directed verdicts after each of the State's and the appellant's cases were overruled.

In reaching its verdict the jury found that the appellant was not guilty of kidnaping but was guilty of two counts of first degree false imprisonment as a lesser-included offense. Appellant's motions for new trial on each of the unconsolidated cases were overruled. Daniels was sentenced to 10 to 20 years' imprisonment for each of the sexual assault convictions and 1 to 3 years for each of the false imprisonment convictions, all sentences to run consecutively.

The incident from which these convictions arose took place in a house rented by the Wilke family in South Sioux City. The family consists of a husband and wife and five children. Daniels paid the Wilkes $116-per-month rent for living space in their home. He slept in the basement but had free access to the entire house. The Wilkes also had access to the basement, where they did laundry and stored goods, though Mr. Wilke instructed the children to respect the appellant's privacy.

On July 6, 1984, while the Wilkes were on vacation, two neighborhood girls, ages 9 and 12, came to the door, asking for Kathleen Wilke's daughters. The appellant invited them to watch T.V., locked the doors, threatened them with a machete, and sexually assaulted them. Daniels also threatened the girls with physical harm if they reported the incident to anyone.

The day after the assault, one of the victims, Allison, met her friend Johnna Eidenschink at the park and sketchily related the incident. Johnna told her mother, Kathleen Wilke, about the conversation, and Duane Wilke ordered the appellant to leave the house permanently on September 9. Daniels left the Wilke house, taking nothing but his cigarettes with him. On September 21 the Wilkes consented to a search of the basement, which yielded the machete Daniels used in assaulting the girls.

The appellant assigns as errors that the trial court erred (1) in overruling the motion to suppress the machete, finding that the Wilkes had authority to consent to a search of the basement, (2) in overruling hearsay objections to the testimony of Allison and Johnna regarding their conversation about the assault, and (3)

in overruling appellant's motions for directed verdicts on the kidnaping charges.

Regarding the first assignment of error, the motion to suppress the machete was properly overruled. We have stated that a warrantless search of a house may be justified when the police have obtained the consent to search from a party who possessed common authority over, or other sufficient relationship to, the premises sought to be inspected. *State v. Van Ackeren*, 200 Neb. 812, 265 N.W.2d 675 (1978). The Wilkes had sufficient authority over the basement to consent voluntarily to its search.

The parties devote a substantial portion of their briefs to arguments concerning whether the appellant had been evicted and whether the appellant's possessions had been abandoned. We need not reach those questions. Even if Daniels had not vacated the house, the Wilkes, as cohabitants of the house, had authority to consent to a search of the basement. The basement was not designated for exclusive use of the appellant, and, in fact, it was not used exclusively by the appellant. See, also, *State v. Billups*, 209 Neb. 737, 311 N.W.2d 512 (1981); *State v. Schrader*, 196 Neb. 632, 244 N.W.2d 498 (1976); *United States v. Finch*, 557 F.2d 1234 (8th Cir. 1977).

The appellant's second assignment of error concerns the admission of testimony of one of the victims, Allison, and her friend Johnna Eidenschink, Kathleen Wilke's daughter. Allison testified that she had a conversation with Johnna in the park on the day after the assault took place. The court overruled the defendant's hearsay objection. "Q. What did you tell Johnna? A. I told her that—I told her what happened. I didn't tell her all the things he made us do. I just told her what he did to us."

Johnna, age 12, testified that about "half a week" after her return to South Sioux City, she talked with Allison in a park. Again over objection, the witness testified:

> Q. I'm going to ask you the question again. Then you tell me either yes or no. When you were talking to Allison after you had gotten back from vacation, did she say anything to you that concerned you? Answer that yes or no.
>
> A. Well, yes.

Q. What was it that she told you that concerned you?

A. She said that George Daniels was chasing them around with a knife.

Q. Did she say if it involved anyone else besides herself or not?

A. She said her and Kelly . . . .

Q. Did she say anything else that you can remember?

A. No.

In support of the admission of this testimony, the State relies on an evidentiary rule developed in Nebraska case law.

> "The rule is well established in this state that in a prosecution for sexual assault, *the prosecutrix may testify* in chief on direct examination, if within a reasonable time under all the circumstances after the act was committed she made complaint to another, *to the fact and nature of the complaint, but not as to its details;* and that *others may likewise testify in chief to such fact and nature of the complaint, but not as to its details. . . .*"

(Emphasis in original.) *State v. Evans*, 212 Neb. 476, 481, 323 N.W.2d 106, 109 (1982); *State v. Watkins*, 207 Neb. 859, 301 N.W.2d 338 (1981); *State v. Chaney*, 184 Neb. 734, 171 N.W.2d 787 (1969); *Perry v. State*, 163 Neb. 628, 80 N.W.2d 699 (1957); *Sherrick v. State*, 157 Neb. 623, 61 N.W.2d 358 (1953).

This court has also stated that one to whom the complaining witness has complained may testify to the fact and nature of the complaint if the complaint was made voluntarily and without unreasonable or inconsistent delay. *State v. Watkins, supra*; *State v. Deardurff*, 186 Neb. 92, 180 N.W.2d 890 (1970); *Texter v. State*, 170 Neb. 426, 102 N.W.2d 655 (1960).

The "complaint of rape" rule is a longstanding doctrine which is applicable under three different theories with varying results. The rationale underlying the above-quoted Nebraska rule is explained as the first theory in 4 J. Wigmore, Evidence in Trials at Common Law § 1135 at 298-99 (J. Chadbourn rev. 1972):

> Now, when a woman charges a man with a rape, and testifies to the details, and the accused denies the act itself, its very commission thus coming into issue, the circumstance that at the time of the alleged rape the

> woman said nothing about it to anybody constitutes in effect a self-contradiction . . . .
>
> . . . .
>
> (b) So, where nothing appears on the trial as to the making of such a complaint, the jury might naturally assume that none was made, and counsel for the accused might be entitled to argue upon that assumption. As a peculiarity, therefore, of this kind of evidence, it is only just that the prosecution should be allowed to forestall this natural assumption by showing that the woman was *not silent*, i.e., *that a complaint was in fact made.*

(Emphasis in original.) As a consequence of applying this theory, the witness may not testify to details of the complaint, and the prosecutrix must testify at trial. *Id.* § 1136.

Since the appellant denied the charges against him, and Allison testified at trial, the Nebraska "complaint of rape" rule is applicable in this case.

The appellant argues, however, that despite the "complaint of rape" rule, Allison's and Johnna's testimony was nevertheless hearsay and does not fall within any of the statutory exceptions. It is true that under the first theory of the "complaint of rape" rule, there is no exception to the hearsay rule. Contrast theory three for res gestae and excited utterances. *Id.* § 1139.

In practical application it is very difficult to lay proper foundation for and elicit testimony of the complaint without appearing to violate the hearsay rule. While foundation is laid in part by describing the context of the complaint—time, place, and conversants—the conversation is not clearly relevant until the complainant explains the topic of the conversation. Nor is the evidentiary rule referred to above invoked without some mention of the fact that the conversation concerned a complaint of sexual assault. The most natural form of describing such a conversation appears to be textbook hearsay: She told me he sexually assaulted her.

As defined in Neb. Rev. Stat. § 27-801(3) (Reissue 1979), hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

If the victim of a sexual assault or the person to whom he or she complains testifies to the topic of their conversation, the general statement of the complaint is not necessarily offered for the truth of the matter asserted. It is offered to demonstrate the relevancy of the conversation. When offered for this limited purpose, the statement is not hearsay within the statutory definition. By the same token it is not admissible for substance. Accordingly, the jury should be given a limiting instruction when such testimony is received. *Fitzgerald v. United States*, 443 A.2d 1295 (D.C. 1982).

Fitzgerald is a notable case not only for similarity of the facts involved but for the fact that the District of Columbia, along with Nebraska, is one of the few jurisdictions that requires corroboration of sexual assaults on minors. Annot., 31 A.L.R.4th 120 (1984). In that case a 12-year-old girl was sexually assaulted but did not immediately report the crime due to a threat on her life. The following day, however, at a picnic, she complained to her young friend, describing some but not all of the details. The court held that evidence of the conversation and complaint was admissible as corroboration under the "complaint of rape" doctrine, "not for the truth of the matter asserted, but merely for the fact that the statement was made." 443 A.2d at 1304. The court remanded with instructions to carefully limit testimony regarding the complaint to the mere fact that a complaint was made. At the first trial the court had admitted a substantive, detailed description of the occurrence as related by the complainant to the witnesses.

Allison's testimony in the present case does not relate details of the crime, and thus complies with the restrictions on the "complaint of rape" doctrine. It was not error for the trial court to admit her statement that she complained of a sexual assault.

Defendant argues that Johnna's testimony that Allison told her that "George Daniels was chasing them around with a knife" related more details than were absolutely necessary to identify the conversation as a complaint of sexual assault. However, if a witness can testify that the victim told the witness that "she was raped," or "she was sexually assaulted," or "she was forced to have intercourse," as pertaining to "the fact and nature of the complaint," we see nothing wrong with her

saying, in effect, "she submitted to intercourse because of the threat of a knife."

This underlines our determination that Johnna's testimony was relevant, not for the truth of the matter asserted but to confirm Allison's testimony that she made a complaint to Johnna. It was not admissible as substantive proof that Daniels chased the victim with a knife. In that regard the situation is much the same as the admissibility of a prior inconsistent statement which is received only as an aid to the jury in estimating the credibility of the witness, and not as substantive proof of the facts declared. The trial court correctly limited the jury's consideration of such statements by its instruction No. 14. Although we have never previously addressed this situation, we believe that the trial court should have given a limiting instruction as to the "complaint of rape" statement.

However, the trial court's failure to give such an instruction was not prejudicial error under the circumstances. The fact that the appellant chased the victim with a knife is not an essential element of the crimes charged. And, although that testimony might have served to prove the appellant's intent to terrorize as an element of the kidnaping charge, or terrorizing as an element of first degree false imprisonment, both victims testified to the appellant's threatening use of or reference to the knife.

Thus, Johnna's statement, used erroneously as substantive proof, was merely cumulative. There is other competent evidence to support the convictions. The trial court's failure to give a limiting instruction was not reversible error in this instance. *State v. Smith*, 221 Neb. 406, 377 N.W.2d 527 (1985); *State v. Thierstein*, 220 Neb. 766, 371 N.W.2d 746 (1985); *State v. Ruzicka*, 218 Neb. 594, 357 N.W.2d 457 (1984).

The appellant's third assignment of error, that the trial court should have granted his motion for directed verdict of not guilty, is also without merit. Daniels argues that the State did not present sufficient evidence to support the kidnaping charge. The crime of kidnaping is defined at Neb. Rev. Stat. § 28-313 (Reissue 1979):

> (1) A person commits kidnapping if he abducts another or, having abducted another, continues to restrain him with intent to do the following:

(a) Hold him for ransom or reward; or
(b) Use him as a shield or hostage; or
(c) Terrorize him or a third person; or
(d) Commit a felony; or
(e) Interfere with the performance of any government or political function.

Defining the more pertinent terms from § 28-313, Neb. Rev. Stat. § 28-312 (Reissue 1979) provides:

(1) Restrain shall mean to restrict a person's movement in such a manner as to interfere substantially with his liberty:
(a) By means of force, threat, or deception; or
. . . .
(2) Abduct shall mean to restrain a person with intent to prevent his liberation by:
(a) Secreting or holding him in a place where he is not likely to be found; or
(b) Endangering or threatening to endanger the safety of any human being.

We believe that the evidence that Daniels locked the doors of the Wilke house, made references to and wielded the machete, and, finally, restrained the victims physically and sexually assaulted them against their struggles to resist is sufficient evidence of abducting, restraining, terrorizing, and committing a felony to submit the charge of kidnaping to a jury.

The trial court is justified in directing a verdict of not guilty only when there is a total failure of competent proof to support a material allegation in the information, or when testimony adduced is of so weak or doubtful a character that conviction based thereon could not be sustained. *State v. Smith*, 219 Neb. 176, 361 N.W.2d 532 (1985). Such was not the case here, and the district court did not err in refusing to do so.

The judgment is affirmed.

AFFIRMED.

SHANAHAN, J., concurring.

Because there is ample appropriate evidence and no prejudicial error, I concur with the majority, namely, Daniels' convictions must be affirmed. However, in affirming Daniels' convictions for first degree sexual assault, this court continues

to adhere to a suspect evidentiary requirement, an anachronistic remnant of an era which lacked the procedural protection and safeguards now available to an accused in the adversarial process of our criminal justice system.

In reaching its decision the majority has again recognized the "complaint of rape" rule, which is nothing more than a form of required corroboration of a victim's testimony before a conviction for first degree sexual assault may be sustained.

Required corroboration of a victim's testimony was unknown at common law in prosecution of a charge for the crime now known as sexual assault. See 7 J. Wigmore, Evidence in Trials at Common Law § 2061 (J. Chadbourn rev. 1978).

Much of the problem resulting from the requirement of corroboration in a sexual assault case is laid at the feet of Sir Matthew Hale, Lord Chief Justice of the Court of King's Bench from 1671 to 1676, whose writings were posthumously published in 1736. According to Hale, in a rape case there should be "concurrent evidence to make out the fact," because sexual assault "is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent." See *People v. Rincon-Pineda*, 14 Cal. 3d 864, 874, 538 P.2d 247, 254, 123 Cal. Rptr. 119, 126 (1975). This court in *Mathews v. State*, 19 Neb. 330, 27 N.W. 234 (1886), adopted Hale's rule, casting suspicion over testimony from any victim in a sexual assault trial, and acknowledged that Hale, 200 years earlier, had laid "down rules for testing the credibility of the principal witnesses, which are as applicable to-day in trials [for sexual assault] as when announced." *Id.* at 335, 27 N.W. at 236.

In historical perspective, Hale's rule was formulated when

> "[t]he fundamental precepts of due process, that an accused is presumed innocent and is to be acquitted unless proven guilty beyond a reasonable doubt . . . were recognized as desiderata in Hale's era but had yet to crystallize into rights. . . . The rights of an accused to present witnesses in his defense and to compel their attendance, subsequently enshrined in the Sixth Amendment, were barely nascent in the 17th century. . . . Most importantly of all, in the context of a rape case, one

> accused of a felony in Hale's day had no right whatsoever to the assistance of counsel . . . ."

People v. Rincon-Pineda, supra at 878, 538 P.2d at 256-57, 123 Cal. Rptr. at 128-29. In Hale's era, therefore, trial on a sexual assault would force "an accused, on trial for his life, to stand alone before a jury inflamed by passion and to attempt to answer a carefully contrived story without benefit of counsel, witnesses, or even a presumption of innocence." *Id.* at 878, 538 P.2d at 257, 123 Cal. Rptr. at 129.

"The arguments most often heard in support of the rule of corroboration involve many factors, such as the jury's outrage at testimony of sex offenses, the difficulty in defending against such charges, the dangers of falsification, and the severe penalties involved." *State v. Cabral*, 122 R.I. 623, 626, 410 A.2d 438, 440 (1980).

Notwithstanding Hale's skepticism concerning testimony from a victim in a sexual assault case, jurisdiction after jurisdiction has renounced any court-made rule requiring corroboration of a victim's testimony in a sexual assault trial before a conviction for that crime may be sustained. For instance, in *State v. Byers*, 102 Idaho 159, 627 P.2d 788 (1981), the Supreme Court of Idaho, noting that only two states, Idaho and Nebraska, categorically required corroboration in "sex crime cases," abolished Idaho's court-made rule of corroboration for a victim's testimony, thereby leaving Nebraska the somewhat dubious distinction of being the only jurisdiction still holding that "corroboration of the victim's testimony is necessary in order to support a conviction" in every case of sexual assault. Annot., 31 A.L.R.4th 120, 136 (1984). As mentioned in the majority's opinion, *Fitzgerald v. United States*, 443 A.2d 1295 (D.C. 1982), restricted the requirement of corroboration to a case involving a sexual assault on a child versus a case involving a mature victim, but even that suggested distinction has inherent incongruities.

> The requirement for independent corroboration in sex-offense cases has been the subject of ever increasing criticism. Contemporary empirical studies suggest that the factors employed to support the corroboration requirement do not justify the rule. There is a great

> reluctance to report a rape. [Citations omitted.] Juries generally tend to view rape charges with skepticism and suspicion, especially when there is a suggestion of willingness or agreement on the part of the victim [citations omitted], and convictions, in the absence of aggravating circumstances, are the exception rather than the rule.

State v. Cabral, supra at 627, 410 A.2d at 441.

After observing that testimony from a sexual assault victim would have been sufficient without corroboration to support a conviction for the crime of simple battery, the Idaho Supreme Court, in *State v. Byers, supra* at 164, 627 P.2d at 793, commented:

> [W]e agree that an absolute rule in all sex crime cases requiring corroboration both as to the fact of the crime and the perpetrator thereof is no longer justified. . . . It is difficult to see a sound basis for continuing the philosophy that rape is distinctive from other crimes to the extent that corroboration is a necessary requirement.

The trier of fact in a sexual assault case will consider several relevant factors or circumstances in determining credibility of any witness, including the victim; for example, the demeanor of a witness, the apparent fairness exhibited by a witness, and the reasonableness or unreasonableness of statements of a witness. See NJI 1.41. By instruction in a jury trial and argument of counsel, the trier of fact may also consider existence or absence of any prompt report of a sexual assault as an additional factor affecting credibility of a victim or weight to be accorded a victim's testimony. Further, the trier of fact may consider whether the victim had a motive to falsify the particular charge against a defendant and whether there is any inconsistency within the victim's testimony or resulting from the testimony of another witness.

Abolishing the corroboration requirement would not jeopardize the rights of an accused. Frequently, the State produces evidence in addition to a victim's testimony. However, in a case where the only evidence about a sexual assault is the victim's testimony, a court must still determine whether the victim's testimony is discredited as a matter of law, that is,

decide whether a victim's testimony is so inherently self-contradictory to the point of untrustworthiness or otherwise unbelievable that a sexual assault case cannot be submitted to a jury for disposition. See *State v. Beck,* 286 S.E.2d 234, 242 (W. Va. 1981) (uncorroborated testimony of a sexual assault victim is sufficient, unless such testimony is "inherently incredible").

The rule of required corroboration of a victim's testimony in a sexual assault case entered Nebraska's criminal justice system before adoption of the Nebraska Evidence Rules in 1975. Under Neb. Evid. R. 104 (Neb. Rev. Stat. § 27-104 (Reissue 1985)), whether a person is qualified to be a witness is a preliminary question to be determined by the trial court. Further, as provided in Neb. Evid. R. 601 (Neb. Rev. Stat. § 27-601 (Reissue 1985)), "Every person is competent to be a witness except as otherwise provided in these rules." None of the Nebraska Evidence Rules refers specifically to competency or credibility of a sexual assault victim. In *State v. Joy,* 220 Neb. 535, 371 N.W.2d 113 (1985), we recognized that a defendant's conviction for first degree murder "may be supported by the uncorroborated testimony of an accomplice." *Id.* at 537, 371 N.W.2d at 115. Yet, the corroboration requirement in sexual assault cases is judicial predetermination concerning credibility of a class of witnesses, that is, a victim of a sexual assault is not entitled to the same credibility accorded a victim testifying about a crime other than a sexual assault. If, as some surmise, corroboration is required for a defendant's protection in a trial on a sexual assault charge, logically one must ponder and inevitably conclude that corroboration of a victim's testimony is indispensable to sustain a conviction on any criminal charge.

Finally, present law in Nebraska prohibits a trial judge from commenting on the evidence submitted to a jury. See NJI 1.01. Thus, a trial court cannot comment or express its view on the credibility of a witness or weight to be given to any particular evidence. Nevertheless, implicit in the requirement of corroboration is judicial depreciation of the testimony from a victim of a sexual assault.

I believe the outdated and discriminatory rule of required

corroboration of a victim's testimony regarding a sexual assault should be eliminated from the Nebraska criminal justice system.

KRIVOSHA, C.J., and WHITE, J., join in this concurrence.

STATE OF NEBRASKA, APPELLEE, V. HOWARD K. FRASER, APPELLANT.

387 N.W.2d 695

Filed May 30, 1986. No. 85-642.

1. **Prior Convictions: Right to Counsel: Waiver.** A defendant may object to the validity of a prior conviction for enhancement purposes where there is no showing that at the time of the previous conviction he was represented by counsel or knowingly and voluntarily waived the right to counsel.
2. **Prior Convictions.** A defendant may not relitigate a former conviction in an enhancement proceeding.
3. _____. At an enhancement hearing the trial court is required to advise the defendant that he has a right to review the record of a prior conviction, bring mitigating facts to the attention of the court prior to sentencing, and object to the validity of a prior conviction as provided in Neb. Rev. Stat. § 39-669.07 (Reissue 1984).

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

George A. Sutera of Sutera & Sutera Law Offices, P.C., for appellant.

Robert M. Spire, Attorney General, and Janie Castaneda, for appellee.

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

BOSLAUGH, J.

The appellant, Howard K. Fraser, appeals from his conviction and sentence for second offense driving while intoxicated.

The complaint charged Fraser in count I with driving while intoxicated, second offense, and in count II with operating a motor vehicle without lights on December 21, 1984. The complaint further alleged that Fraser had been convicted of driving while intoxicated in May of 1980.

On January 16, 1985, Fraser, appearing without counsel, entered pleas of guilty to both counts. After determining that the pleas had been entered voluntarily and intelligently, the court found the defendant guilty as charged and ordered an enhancement hearing on count I.

On March 22, 1985, Fraser appeared for the enhancement hearing and noted his previous waiver of the right to counsel. The court accepted the State's offer of exhibit 1, a certified transcript which included the ticket, complaint, journal entry, and bench sheet from Fraser's May 16, 1980, DWI conviction. Fraser objected to exhibit 1 on grounds that, contrary to indications in the transcript, he had not pleaded guilty to that charge. Upon further inquiry by the court, Fraser explained that he had asked to wait to plead until he knew the results of a blood alcohol test. At that point Fraser maintains the county attorney stated that the results had been lost. The judge then asked for the arresting officer's statement and, after reviewing it, advised Fraser of the possible penalties and of his choices. Fraser admits that he knowingly waived his right to counsel at the May 16, 1980, proceeding.

The county court determined that exhibit 1 was valid for enhancement purposes and that the penalty should be enhanced to driving while intoxicated, second offense. Fraser was sentenced on count I to 18 months' probation, a $500 fine plus all costs and expenses, 6 months' suspended license, 12 months' restricted license, 48 hours of incarceration in the county jail, and 28 days in jail unless sooner waived by the court.

On the appeal to the district court, the defendant argued that if he had been represented by counsel at the March 22, 1985, enhancement hearing, he would have known of his right to bring in mitigating circumstances to show that he had not pleaded guilty in 1980. The district court affirmed both Fraser's conviction and sentence, and his motion for new trial was overruled.

On appeal to this court Fraser claims (1) that the county and district courts improperly enhanced his conviction to a second offense and (2) since the conviction was improperly enhanced, the sentence imposed was improper.

The basis of Fraser's first contention is the conviction was improperly enhanced because the trial court at the March 22, 1985, hearing failed to advise him of his right to review the record of the prior conviction and to bring mitigating facts to the attention of the court prior to sentencing as provided in Neb. Rev. Stat. § 39-669.07 (Reissue 1984).

Under § 39-669.07 a defendant may object to the validity of a prior conviction for enhancement purposes where there is no showing that at the time of the previous conviction he was represented by counsel or knowingly and voluntarily waived the right to counsel. *State v. Soe*, 219 Neb. 797, 366 N.W.2d 439 (1985); *State v. Ziemba*, 216 Neb. 612, 346 N.W.2d 208 (1984); *State v. Smith*, 213 Neb. 446, 329 N.W.2d 564 (1983).

In *State v. Smith, supra* at 449, 329 N.W.2d at 566, we held that a defendant may not relitigate a former conviction in an enhancement proceeding, and to that extent the conviction cannot be collaterally attacked. However,

> the burden remains with the State to prove the prior convictions. This cannot be done by proving a judgment which would have been invalid to support a sentence of imprisonment in the first instance. *Baldasar v. Illinois, supra*. . . . A defendant's objection to the introduction of a transcript of conviction which fails to show on its face that counsel was afforded or the right waived does not constitute a collateral attack on the former judgment.

At the hearing on March 22, 1985, Fraser objected to the use of exhibit 1 to prove the prior conviction because it indicated that he had pleaded guilty. His objection did not go to the fact of the prior conviction nor to the fact that he had waived the right to counsel.

Our recent cases have made it clear that "[f]or enhancement purposes the burden on the State to prove valid prior convictions is only to show that the defendant had, or waived, counsel at the time of such prior convictions." *State v. Soe, supra* at 799, 366 N.W.2d at 440-41. Other objections to the

validity of prior convictions constitute collateral attacks and must be raised either by direct appeal or in separate proceedings commenced expressly for the purpose of setting aside the alleged invalid judgment. *State v. Jones*, 219 Neb. 184, 362 N.W.2d 58 (1985); *State v. Baxter*, 218 Neb. 414, 355 N.W.2d 514 (1984).

In *State v. Ziemba, supra* at 620, 346 N.W.2d at 214, we stated that regardless of whether a prior conviction is proved by transcript or by the defendant's admission, "the trial court is required to advise the defendant that he has a right to review the record of the prior conviction, bring mitigating facts to the attention of the court prior to sentencing, and object to the validity of the prior conviction as provided in § 39-669.07."

In *State v. Tonge*, 217 Neb. 747, 350 N.W.2d 571 (1984), we held that the trial court did not err in failing to advise the defendant of his right to challenge the constitutional validity of his prior convictions, because the amendment to § 39-669.07 mandating such an advisement came into effect after the incident leading to the enhanced conviction. We noted, however, that even if Tonge had been entitled to the advisement, a contest of the prior convictions would have been without merit because the record of those convictions showed either that he was represented by counsel or that he waived that right.

In the present case, like *Tonge, supra*, it is clear from the record that the defendant knowingly waived the right to counsel in the proceedings leading to his May 16, 1980, DWI conviction.

The record shows that at the enhancement hearing on March 22, 1985, Fraser was specifically advised of his right to challenge or contest the validity of any prior conviction offered for purposes of enhancing his punishment. Fraser did in fact object to the record of his prior conviction. The record also shows that the trial court thoroughly reviewed the transcript of the prior conviction with Fraser. Prior to imposing sentence, the court asked Fraser if he had anything he wished to say. Fraser responded that he was a good family man who held a responsible job and that he had never had an accident. He asked the court to consider those facts in determining his sentence.

Because Fraser could not successfully challenge the May 16,

1980, conviction for enhancement purposes and because he was in fact given the opportunity to raise mitigating circumstances and to review the record of his prior conviction, we find no merit in the first assignment of error.

Since the conviction was properly enhanced in this case, there was no abuse of discretion in the trial court's imposition of sentence. The sentence imposed was authorized by the provisions of § 39-669.07(2). See *State v. Soe,* 219 Neb. 797, 366 N.W.2d 439 (1985). There being no prejudicial error, the judgment and sentence of the trial court are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DUDLEY HALLIGAN, APPELLANT.

387 N.W.2d 698

Filed May 30, 1986. No. 85-686.

1. **Arrests: Probable Cause.** The test of probable cause for a warrantless arrest is whether at the moment the facts and circumstances within the officers' knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense.
2. **Appeal and Error.** Generally, this court will not address errors assigned but not discussed.
3. **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. 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 Brown County: EDWARD E. HANNON, Judge. Affirmed.

John P. Heitz of Cronin, Symonds & Heitz, for appellant.

Robert M. Spire, Attorney General, and Janie Castaneda, for appellee.

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

GRANT, J.

Defendant, Dudley Halligan, was charged by complaint filed July 10, 1984, in the county court for Brown County, Nebraska, with three offenses: (1) driving under the influence of intoxicating liquor in violation of Neb. Rev. Stat. § 39-669.07 (Reissue 1984); (2) reckless driving in violation of Neb. Rev. Stat. § 39-669.01 (Reissue 1984); and (3) refusal to submit to a chemical test for alcohol content in the body in violation of Neb. Rev. Stat. § 39-669.08(3) (Reissue 1984). Defendant pled not guilty to each charge. The case was tried to the county court sitting without a jury, and the charges were heard separately. The county court found Halligan "guilty of Reckless Driving" and "guilty of Driving While Under the Influence," and dismissed the charge of refusal to submit to a chemical test.

The court sentenced the defendant to serve 7 days in the Brown County jail, to pay a fine of $200, and revoked the defendant's driver's license for 6 months on the charge of driving while intoxicated and sentenced the defendant to serve 5 days in the Brown County jail on the charge of reckless driving.

Notice of appeal to district court was timely filed. The district court reversed the reckless driving conviction but affirmed the conviction for driving while intoxicated. Defendant timely appealed to this court from his conviction of driving while under the influence of intoxicating liquors.

In this court defendant assigns four errors: (1) It was error for the trial court to allow the arresting officer to testify; (2) It was error for the trial court to allow a witness with an admitted bias to testify; (3) It was error for the trial court to fail to find the evidence insufficient to establish guilt beyond a reasonable doubt; and (4) It was error for the district court to affirm the conviction for driving while intoxicated. For the reasons stated below we affirm.

With regard to defendant's first assignment of error—that the arrest was unlawful as a warrantless arrest and the ensuing testimony of the arresting officer inadmissible—we disagree.

Neb. Rev. Stat. § 29-404.02 (Reissue 1985) provides the

guidelines for a warrantless arrest and, in relevant part, sets out:

> A peace officer may arrest a person without a warrant if the officer has reasonable cause to believe that such person has committed:
>
> . . . .
>
> (2) A misdemeanor, and the officer has reasonable cause to believe that such person either (a) will not be apprehended unless immediately arrested; (b) may cause injury to himself or others or damage to property unless immediately arrested; (c) may destroy or conceal evidence of the commission of such misdemeanor; or (d) has committed a misdemeanor in the presence of the officer.

We have recently reaffirmed what constitutes reasonable or probable cause. In *State v. Klingelhoefer, ante* p. 219, 222-23, 382 N.W.2d 366, 369 (1986), we stated:

> " '[T]he test of probable cause for a warrantless arrest is whether at the moment the facts and circumstances within their (the officers') knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense.' "

We find that the sheriff had probable cause to believe that a misdemeanor had been committed based upon the following facts: defendant's breath smelled of alcohol, his eyes were bloodshot, and his speech was slurred. We further find that the sheriff had probable cause to believe that a warrantless arrest was justified under § 29-404.02(2)(c) because evidence would be destroyed without immediate action. The body would metabolize the alcohol and the evidence would be lost. The arrest of defendant without a warrant was valid under § 29-404.02(2)(c). See *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966).

In connection with defendant's second assignment of error, the assignment is not discussed, nor is any proposition of law set out or case cited in defendant's brief in support of the assignment. Generally, this court will not address errors assigned but not discussed. Neb. Ct. R. of Prac. 9D(1)d (rev. 1983); *Bauer v. Peterson*, 212 Neb. 174, 322 N.W.2d 389 (1982).

Defendant's second assignment will not be addressed.

Defendant's third and fourth assignments are directed to the question of the sufficiency of the evidence to support defendant's conviction.

We have held:

> 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. The verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.

State v. Schenck, ante p. 523, 529-30, 384 N.W.2d 642, 647-48 (1986).

The facts of the case are as follows. On June 24, 1984, defendant was involved in a one-vehicle accident near Long Pine, Nebraska. Defendant was alone in a pickup truck. The pickup struck a tree when it left the road after defendant lost control. The vehicle was in a sliding skid, with the vehicle traveling sideways. The pickup became airborne, rolled over several times, and, as one witness testified, "settled down" after it struck the tree. Defendant was transported to Brown County Hospital by ambulance.

At the scene Deputy Sheriff Jerry Benne noticed that defendant's breath smelled of alcohol. Three full cans of beer were in the vehicle. The testimony of the two nurses who attended defendant at the hospital was in agreement regarding defendant's appearance. Defendant's eyes were bloodshot, his breath smelled of alcohol, and his speech was slow and slurred. Defendant responded to questions addressed to him.

Defendant's assignment of error questioning the sufficiency of the evidence to sustain his conviction is without merit. While the evidence shows that defendant was in pain while at the hospital, may well have been suffering from a concussion, and was not observed by any witness while he was standing, the undisputed evidence showed that defendant's eyes were bloodshot, his breath smelled strongly of alcohol, and his speech was slurred. One nurse testified that defendant touched

and grabbed her in such personal ways that the nurse wore the protective lead apron, designed to protect the wearer against x-ray effects, as protection against defendant's actions. The same nurse testified that defendant told her that he had "one too many beers."

In addition, both nurses testified that in their opinion defendant was under the influence of alcoholic liquors when admitted to the hospital. Defendant made no objection to such opinion testified to by one nurse. Defendant's only objection to the opinion of the second nurse was that she was "biased." This objection apparently was the subject of defendant's second assignment of error, which, as stated above, was not discussed in defendant's brief. The opinions of both nurses were properly considered by the trial court. When the opinion testimony is before the court without valid objections to such testimony, a different factual picture is presented to the trier of fact than that presented in *State v. Johnson*, 215 Neb. 391, 338 N.W.2d 769 (1983).

We determine there was sufficient evidence before the trial court to sustain defendant's conviction, and his sentence is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GENE R. MARTENS, APPELLANT.

387 N.W.2d 701

Filed May 30, 1986. No. 85-737.

1. **Pleas.** In order to make an intelligent and voluntary plea where there has been a group arraignment, the defendant must have been present when the court advised those charged of their constitutional rights. The record must disclose that defendant was present at that time.

2. **Criminal Law: Pleas: Constitutional Law.** The proper procedure for a group arraignment is to call each person being arraigned before the bench, identify him, and advise him that the remarks of the court apply to each person individually.
3. **Courts: Records.** The record of the trial court imports absolute verity in all appellate proceedings, and if such record is incomplete or incorrect, the remedy is by appropriate proceedings to secure a correction thereof in the trial court.
4. **Sentences: Appeal and Error.** Absent evidence showing an abuse of discretion, a sentence imposed within statutory limits will not be disturbed on appeal.

Appeal from the District Court for Platte County: JOHN M. BROWER, Judge. Affirmed.

Gerald M. Stilmock of Tessendorf, Milbourn & Fehringer, P.C., for appellant.

Robert M. Spire, Attorney General, and Terry R. Schaaf, for appellee.

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

KRIVOSHA, C.J.

Gene R. Martens appeals from a judgment which was initially entered by the county court for Platte County, Nebraska, and subsequently affirmed by the district court for Platte County, ordering Martens to serve 90 days in jail and to pay $21 in court costs for issuing a bad check in violation of Neb. Rev. Stat. § 28-611 (Cum. Supp. 1984). Martens, through court-appointed counsel, alleges that the county court committed plain error in finding that Martens' guilty plea was made knowingly, voluntarily, and intelligently and that, under the circumstances, the sentence imposed was excessive. We have reviewed both assignments and find that they must be overruled. The judgment and sentence are, therefore, affirmed.

There is no issue in this case that Martens issued the check in violation of § 28-611. Martens entered a plea of guilty to the charge. See *State v. Price*, 198 Neb. 229, 252 N.W.2d 165 (1977). The only question is whether on the record it appears that Martens entered his plea freely, voluntarily, and intelligently as required by law. Martens maintains that the record is silent as to whether he was present at the time the

county court advised a group of individuals, including Martens, of their constitutional rights; Martens, therefore, claims that it cannot be said that his plea was properly and constitutionally made. In support of his position he cites to us *State v. Ziemba*, 216 Neb. 612, 621, 346 N.W.2d 208, 214 (1984), in which we said: "In order to make an intelligent and voluntary plea where there has been a group arraignment, the defendant must have been present when the court advised those charged of their constitutional rights. The record must disclose that defendant was present at that time." Martens further directs our attention to *State v. Predmore*, 220 Neb. 336, 340, 370 N.W.2d 99, 101 (1985), wherein we said: "The proper procedure for a group arraignment is to call each person being arraigned before the bench, identify him, and advise him that the remarks of the court apply to each person individually." Martens does not maintain nor offer any evidence that he was not present, but merely argues that the record is silent as to his presence and that therefore he should be entitled to have his sentence and conviction set aside and be given the opportunity to enter a new plea after being properly informed of his constitutional rights.

While we generally agree with the rules of law cited to us by appellant, we do not agree that the record is silent. Quite to the contrary, we believe that the record, such as it is, establishes that Martens was present when the group was advised of their constitutional rights and that, absent evidence to the contrary, there is no basis for his present claim.

Both a bill of exceptions and a supplemental bill of exceptions of the proceedings which took place in the county court for Platte County, Nebraska, on April 23, 1985, were filed with this court. The supplemental bill recites at the top:

> (At 9:25 a.m. on April 23, 1985, in the county court of Platte County, Columbus, Nebraska, before the HONORABLE LYLE WINKLE, one of the judges of said court with Mr. William Kurtenbach appearing as counsel for the plaintiff [the State of Nebraska] and the defendant [Gene R. Martens] appearing in person, the following proceedings were had:)
>
> THE COURT: Now the rest of you that are present are

> here for the purpose of being arraigned on various charges here this morning. So first, I'm going to call off the list of names of those who are present. . . .

Thereafter, several cases were called, including case No. CR85-151, *State v. Gene R. Martens*. The record then reflects that Martens, in person, responded "Yes" when asked if he was present.

The original bill of exceptions containing the proceedings in the county court for Platte County, Nebraska, also provides:

> (At 9:25 a.m. on April 23, 1985, in the county court of Platte County, Columbus, Nebraska, before the HONORABLE LYLE WINKLE, one of the judges of said court, with Mr. William Kurtenbach appearing as counsel for the plaintiff and the defendant being present in person, the following proceedings were had:)

Thereafter, there appears in the record a detailed and precise recitation of what transpired, including the following:

> Now in order to save time, I'm going to advise each of you as a group as to what is your various statutory and constitutional rights, as well as the pleas and the consequences of those pleas. Then I'll have you come up before the court one at a time to be sure you know and understand what you've been charged with and what are the possible penalties as it applies to each of you individually.

The court then proceeded to carefully, fully, and properly advise each of the individuals present of his constitutional rights. At the conclusion the record recites:

> (Whereupon several other arraignments were had prior to Mr. Martens:)
>
> THE COURT: Next being case number CR85-151, the State of Nebraska vs. Gene R. Martens. You're Gene R. Martens?
>
> MR. MARTENS: Yes.

The record reflects that, at that point, the court once again proceeded to explain the charges as well as the corresponding penalties to Martens.

Setting aside, briefly, the question of whether Martens was present when the court advised the entire group of their

constitutional rights, the record makes it clear that Martens entered his plea freely, knowingly, and voluntarily. He argues, however, that because the bill of exceptions and supplemental bill of exceptions do not indicate whether the rollcall occurred before the court advised all of the parties of their constitutional rights or after, the record is silent as to whether Martens was present when the court advised the various defendants of their constitutional rights. We believe that Martens' argument cannot be sustained.

To begin with, a simple reading of both the bill of exceptions and the supplemental bill of exceptions makes it clear that the rollcall could not have occurred after the court advised the individuals of their constitutional rights, but must, of necessity, have occurred before. Furthermore, both the bill of exceptions and supplemental bill of exceptions recite on their face that Martens *was* present when both events occurred, regardless of the order in which that may have taken place. This is not the same as a silent record. We have repeatedly held that the record of the trial court imports absolute verity in all appellate proceedings, and if such record is incomplete or incorrect, the remedy is by appropriate proceedings to secure a correction thereof in the trial court. See *Campbell v. City of Ogallala*, 183 Neb. 238, 159 N.W.2d 574 (1968). See, also, *Wonderling v. Conley*, 182 Neb. 446, 155 N.W.2d 349 (1967).

If Martens wishes to maintain that the records which recited that he was present were incorrect, it is incumbent upon him to secure a correction of the record or else be bound by it. Consequently, we believe that Martens' contention that the record is silent as to whether he was advised of his constitutional rights and, therefore, whether he entered his plea freely, knowingly, and voluntarily is without merit and must be overruled.

That leaves us with the question of whether the sentence was excessive. While at first blush it may appear that the sentence was excessive, in view of the fact that the check was in the amount of $11.28, a further reading of the presentence investigation makes it quite clear that that is not the case. The offense was a Class II misdemeanor, punishable by a maximum of 6 months' imprisonment or a fine of $1,000, or both

imprisonment and fine. See Neb. Rev. Stat. § 28-106(1) (Cum. Supp. 1984). We have repeatedly held that, absent evidence showing an abuse of discretion, a sentence imposed within statutory limits will not be disturbed on appeal. See, *State v. Davis*, 200 Neb. 557, 264 N.W.2d 198 (1978); *State v. Komor*, 213 Neb. 376, 329 N.W.2d 120 (1983).

Martens' presentence investigation discloses that between 1973 and April of 1985 he was convicted on no less than 14 occasions for issuing insufficient fund checks. On most occasions he was fined. The fines appeared to do little to discourage Martens. On one occasion he was sentenced to 30 days in jail, and on another occasion sentenced to 1 to 3 years in the state penal complex. Additionally, he has been convicted of first degree arson, and on two occasions has escaped from prison, once in Nebraska and once in Rawlins, Wyoming. Under the evidence in this case and the record which he brings to this court, we cannot say that the district court abused its discretion in imposing the sentence it did. Absent evidence of an abuse of discretion, we have no alternative but to affirm the sentence.

The conviction and sentence are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL W. RYAN, APPELLANT.

387 N.W.2d 705

Filed May 30, 1986. No. 85-794.

1. **Sentences: Appeal and Error.** Error without prejudice is harmless and will not afford a basis for vacating a proper sentence.
2. _____: _____. A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.

Appeal from the District Court for Richardson County: ROBERT T. FINN, Judge. Affirmed.

Richard L. Goos, Special Court-Appointed Attorney, for appellant.

Robert M. Spire, Attorney General, and Dale A. Comer, for appellee.

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

CAPORALE, J.

Defendant, Michael W. Ryan, pled guilty to possessing a machine gun in violation of Neb. Rev. Stat. § 28-1203 (Reissue 1985). He was thereafter sentenced to imprisonment for a period of 5 years. The issues presented by defendant's assignments of error are (1) whether the sentencing court violated defendant's due process rights by relying on information not contained in the presentence report or elsewhere in the record and to which defendant therefore had no opportunity to reply, and (2) whether the sentence is excessive. We affirm.

The presentence report, which was reviewed by defendant and his trial attorney and not objected to, reflects, among other things, that in connection with a stolen property investigation, law enforcement officers were directed to a Richardson County farm. The farm was occupied by about 20 people, including the defendant. In executing a search warrant on June 25, 1985, the officers encountered the defendant, who admitted owning the machine gun in question but claimed he did not know it would fire as a fully automatic weapon, thinking he had discarded the parts which enabled it to do so. Approximately $125,000 worth of stolen merchandise was found at the farm, along with not less than 35 weapons, several of which were automatic, together with 97,000 rounds of ammunition. The presentence report also reveals that the defendant had been arrested for speeding in Kansas in September of 1982. He failed to appear for trial on that charge, as the consequence of which his operator's license was suspended and later reinstated. In February of 1985 defendant was again arrested, this time for giving a worthless check. He pled guilty and was ordered to make restitution.

In imposing sentence the judge stated he had not only considered the facts in the presentence report but "other public comments that the defendant has made from the time of his plea up to the present date."

Notwithstanding the fact that defendant's trial counsel did not move for a specification of the comments to which the judge referred, defendant now contends that the judge's consideration of the undisclosed comments violated defendant's constitutional right to due process of law because, not knowing what was in the judge's mind, he could not "rebut that information."

As the discussion which follows demonstrates, however, the portions of the presentence report summarized above in and of themselves demonstrate that there was no abuse of discretion in the sentence imposed. That being so, it matters not whether the sentencing judge erred in considering the undisclosed comments, a question we do not decide, for error without prejudice is harmless and will not afford a basis for vacating a proper sentence. See, *State v. Gregory*, 220 Neb. 778, 371 N.W.2d 754 (1985); *State v. Hunt*, 220 Neb. 707, 371 N.W.2d 708 (1985).

The possession of a machine gun is a Class IV felony. Neb. Rev. Stat. § 28-1203 (Reissue 1985). As such, no minimum punishment is required; the maximum period of imprisonment is limited to 5 years. Neb. Rev. Stat. § 28-105 (Reissue 1985). Thus, it is true that defendant was potentially sentenced to the maximum period of imprisonment allowable. He was not, however, sentenced to the longest minimum period of imprisonment allowable, one-third of 5 years, or 20 months. Neb. Rev. Stat. § 83-1,105 (Reissue 1981). As a consequence of the sentencing judge's election not to specify a minimum period of imprisonment, defendant's actual sentence is an indeterminate one of from 0 to 5 years, less certain good time computations. Neb. Rev. Stat. §§ 83-1,107, 83-1,107.01, 83-1,108 (Reissue 1981). In point of fact, the Department of Correctional Services is free to discharge defendant from his prison obligation at any time from and after the moment of defendant's arrival at the prison gates.

While it is true, as defendant points out, that he had a relatively clean criminal record prior to this occurrence, we agree with the Attorney General that the number of weapons and amount of ammunition found indicate that defendant's possession of the weapon which is the subject of this case was

not an isolated matter.

It is axiomatic that a sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Perdue, ante* p. 679, 386 N.W.2d 14 (1986). No such abuse existing, the sentence of the district court is affirmed.

AFFIRMED.

MICUAL D. CARSON, APPELLANT, V. RONALD E. SORENSEN, COMMISSIONER OF LABOR, STATE OF NEBRASKA, APPELLEE.

388 N.W.2d 454

Filed May 30, 1986. No. 85-914.

1. **Employment Security Law: Appeal and Error.** The standard of a review from the district court's order terminating unemployment benefits is de novo on the record.
2. **Employment Security Law: Words and Phrases.** The Department of Labor's definition of a systematic and sustained job search constitutes reasonable compliance with federal directives and is not outside the authority granted by the Legislature.

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

Micual D. Carson, pro se.

Jerry D. Slominski, for appellee.

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

WHITE, J.

This is an appeal by Micual D. Carson from an order of the Keith County District Court affirming the Nebraska Appeal Tribunal's decision to disqualify Carson from receiving federal supplemental unemployment compensation. We affirm.

Carson was discharged on September 30, 1983, from his employment at PAKS Developmental Services in Ogallala, Nebraska, for "insubordination and failure to carry out directives." He had worked at PAKS for about a year as an assistant residential manager at $3.79 per hour.

Carson applied for unemployment benefits with the Nebraska Department of Labor on November 16, 1983. He was initially disqualified from receiving benefits for 9 weeks due to alleged misconduct, but he successfully appealed this decision and began receiving state benefits. By May 1984 Carson had exhausted his state benefits. See Neb. Rev. Stat. § 48-626 (Reissue 1984). However, under the provisions of Neb. Rev. Stat. §§ 48-628.02 through 48-628.04 (Reissue 1984), he became eligible to receive extended benefits through the federal supplemental compensation (FSC) program.

To receive benefits under the FSC program, the Nebraska Department of Labor requires an applicant to seek employment in a "systematic and sustained" manner, including at least five new job contacts per week which must be made on three different days of the week for the week claimed. Of the five or more contacts, three must be in person. The applicant cannot include contacts made in previous weeks, in person or otherwise, toward the current week's contacts. At the time he applied for FSC benefits, Carson signed a form acknowledging these requirements.

For the week ending May 26, 1984, Carson listed on his report of work seeking activities three job contacts, two on May 24, 1984, and one on May 25, 1984. All three were personal contacts, the latter being a followup interview to a job contact made 2 weeks earlier. The Department of Labor disqualified Carson from receiving FSC benefits because of inadequate job contacts for the week ending May 26, 1984. Carson appealed the department's action. Following a hearing, the hearing officer affirmed the disqualification. The hearing officer determined that Carson was aware of the requirements for FSC benefits, that Carson had not fulfilled the requirements, and that he had not offered any new evidence of additional job contacts for the week in question.

Carson appealed the decision to the Keith County District

Court. At the trial Carson was allowed to introduce evidence of his work search efforts during the entire time he had been unemployed. Exhibit 2 is a compilation of every job contact he made in 1984. Exhibit 4 reveals that Carson's job search has been directed almost entirely toward positions with the State of Nebraska and has been aimed at positions with salaries significantly higher than $3.79 an hour. Neither of these exhibits contains the minimum number or type of contacts required for FSC benefits for the week ending May 26, 1984.

The district court affirmed the appeal tribunal's decision. Carson now appeals to this court. The issue on appeal is limited to whether the FSC eligibility requirements are reasonable for a person employed in the social services field. Our standard of review of the district court's decision is de novo on the record. Neb. Rev. Stat. § 48-640 (Supp. 1985). Accordingly, we retry the issues of fact and reach an independent conclusion. *Montclair Nursing Center v. Wills*, 220 Neb. 547, 371 N.W.2d 121 (1985).

Neb. Rev. Stat. § 48-628.03 (Reissue 1984) provides:

> (1) An individual shall be ineligible for payment of extended benefits for any week of unemployment in his or her eligibility period if the commissioner finds that during such period (a) he or she failed to accept any offer of suitable work or failed to apply for any suitable work to which he or she was referred by the commissioner, or (b) he or she failed to actively engage in seeking work as prescribed under subsection (5) of this section.
>
> . . . .
>
> (5) For the purposes of subsection (1) of this section, an individual shall be treated as actively engaged in seeking work during any week if the individual has engaged in a systematic and sustained effort to obtain work during such week, and the individual furnishes tangible evidence that he or she has engaged in such effort during such week.

The Nebraska Department of Labor has further defined a "systematic and sustained" job search in its regulations:

> The job search requirements for the Federal Supplemental Compensation systematic and sustained job search are:
>
> 1. Five or six <u>NEW</u> job contacts <u>each</u> week.

2. A majority of these job contacts must be made in person.
3. The job contacts must be made on three different days of the week claimed.
4. No duplications can be made from previous weeks claimed.
5. I must report in person after I have returned three job contact work sheets.

Inclusion of the "systematic and sustained" work search requirements resulted from an amendment to the Federal-State Extended Unemployment Compensation Act of 1970, I.R.C. § 3304 (1982), passed by Congress. The act requires states to withhold payment of FSC benefits unless the applicant has engaged in a "systematic and sustained effort to obtain work during such week." § 3304(a)(3)(E)(i). Under the Federal Supplemental Compensation Act of 1982, I.R.C. § 3304 (1982, Supp. I 1983, & Supp. II 1984), the terms and conditions of state law which apply to claims for extended compensation also apply to claims for FSC benefits. Consequently, the FSC program is operated by the states under state extended benefits statutes.

Although state law controls FSC benefits requirements, the federal government has promulgated guidelines which states must follow to receive FSC funding. These guidelines are contained in Unemployment Insurance Program Letters and in General Administration Letters (GAL). GAL No. 21-81, dated May 12, 1981, includes the following instructions to state employment agencies operating an extended benefit program:

> An EB claimant is expected to make a more diligent and active search for work than would normally be required of an individual receiving regular benefits. To meet EB eligibility requirements, the claimant's search for work must be "systematic and sustained." A "sustained" effort to obtain work is a continual effort maintained at length throughout each week. Under the requirement to actively seek work, passive availability for work is not sufficient. A "systematic" effort to obtain work is a work search conducted with thoroughness and with a plan or methods to produce results. Registration with a referral union will

> be considered as partially meeting the active search for work requirements, but individual work search efforts will be required in every case to demonstrate an active search for work.
>
> . . . .
>
> If there are no or few openings in an individual's customary occupation, he/she must broaden the types of work sought to meet the "active" search for work requirement even if the claimant's job prospects are classified as "good." The broadening of types of work sought to include work other than the claimant's highest skill or customary work must be accompanied by a willingness by the claimant to lower his/her wage exceptations [sic]. Claimants who restrict their job search to their customary occupation as a mere preference, not based upon physical or mental capability or conditions of the labor market, and by this limitation fail to maintain an active search for work will be ineligible for extended benefits for failing to actively seek work.

As the federal guidelines indicate, an applicant for FSC benefits is "expected to make a more diligent and active search for work" than would normally be required of one applying for regular benefits. Further, FSC applicants are expected to broaden their job search efforts "to include work other than the claimant's highest skill or customary work." The applicant must be willing "to lower his/her wage expectations" in order to meet the "active" job search requirement.

Because failure to comply with federal directives could jeopardize funding, the Nebraska Legislature undoubtedly intended that the Department of Labor operate its extended benefits program consistent with these guidelines. The department's definition of a systematic and sustained job search constitutes reasonable compliance with federal directives and is not outside the authority granted by the Legislature.

We find in our de novo review of the record that Carson did not make the necessary job contacts for the week ending May 26, 1984. He argues that the job market in his field, social services, is limited, so that it is impossible to make the required

number of weekly contacts. However, the record reflects no effort on Carson's part to venture outside the social services field for employment. The Department of Labor's regulations being reasonable, Carson was required to follow them in order to maintain FSC benefits. This he failed to do. The judgment of the district court is affirmed.

AFFIRMED.

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5. There are no mathematical formulas by which property adjustments or awards of support can be precisely determined; ultimately, the test is whether the property adjustment and support award are reasonable under the facts of each case.
Anderson v. Anderson 212
6. It is proper to consider retirement benefits in determining whether support should be awarded to a spouse.
Anderson v. Anderson 212
7. Money obligations accrued under a foreign alimony decree registered in this state pursuant to the provisions of the Uniform Enforcement of Foreign Judgments Act, Neb. Rev. Stat. §§ 25-1587 through 25-15,104 (Reissue 1979), may be enforced by the courts of this state.
Riedy v. Riedy 310
8. The Uniform Enforcement of Foreign Judgments Act, Neb. Rev. Stat. §§ 25-1587 through 25-15,104 (Reissue 1979), does not permit the courts of this state to enforce or modify foreign alimony decrees with respect to unaccrued money obligations.
Riedy v. Riedy 310

9. Pension benefits are properly to be considered by the court in exercising its discretion in property division or award of alimony.
Ray v. Ray 324
10. The award of alimony to a nonmilitary spouse for her lifetime, as a method of dealing with her interest in her husband's military pension, falls within the method of dealing with that pension approved in *Kullbom v. Kullbom*, 209 Neb. 145, 306 N.W.2d 844 (1981).
Ray v. Ray 324
11. While the criteria for reaching a reasonable division of property and a reasonable award of alimony may overlap, the two serve different purposes and are to be considered separately. The purpose of a property division is to distribute the marital assets equitably between the parties. The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances and the other criteria enumerated in this section make it appropriate. Neb. Rev. Stat. § 42-365 (Reissue 1984).
Taylor v. Taylor 721
12. The division of property and the awarding of alimony in marriage dissolution cases are matters initially entrusted to the sound discretion of the trial judge, which matters, on appeal, will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion. In a de novo review by the Supreme Court, where the evidence is in conflict, the Supreme Court will give weight to the fact that the trial judge observed and heard the witnesses and accepted one version of the facts rather than another.
Taylor v. Taylor 721
13. The ultimate test for determining correctness in the amount of alimony is reasonableness.
Taylor v. Taylor 721
14. While earning capacity or expectations of income may properly be considered in an allowance of alimony, they are not proper considerations in determining the appropriate division of property.
Taylor v. Taylor 721

Appeal and Error

1. A proper judgment will not be reversed even if the trial court did not give the right reasons.
State Farm Mut. Auto. Ins. Co. v. Royal Ins. Co. 13
2. The findings of the trial court in an appeal from an order revoking a motor vehicle operator's license under the implied consent law are reviewed de novo as in equity.
Jensen v. Jensen 23
3. On appeal to the district court, it is the licensee's burden to

establish grounds for reversal by a preponderance of the evidence.
Jensen v. Jensen 23
4. In reviewing a decision of the Nebraska Workmen's Compensation Court, findings of fact made by the Workmen's Compensation Court on rehearing have the same effect as a jury verdict in a civil case, and an order disposing of a case may not be set aside where the findings are supported by the evidence. The facts are not reweighed on appeal.
Oham v. Aaron Corp. 28
Laffin v. Nelson Enterprize 226
Breckenridge v. Midlands Roofing Co. 452
Badgett v. St. Joseph Hosp. 467
Snyder v. IBP, Inc. 534
Evans v. American Community Stores 538
Smith v. Hastings Irr. Pipe Co. 663
5. In testing the sufficiency of the evidence to support the 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. Every controverted fact must be resolved in favor of the successful party, who should have the benefit of every inference that can reasonably be drawn therefrom.
Oham v. Aaron Corp. 28
Badgett v. St. Joseph Hosp. 467
Beavers v. IBP, Inc. 647
Smith v. Hastings Irr. Pipe Co. 663
6. The findings of the Nebraska Workmen's Compensation Court will not be overturned on appeal unless they are clearly wrong.
Oham v. Aaron Corp. 28
Beavers v. IBP, Inc. 647
7. Custody matters are initially entrusted to the sound discretion of the trial judge, which matters, on appeal, will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion.
Delaney v. Delaney 33
State ex rel. Ross v. Jacobs 380
8. Where the evidence is in conflict, this court will, on its de novo review of the record, give weight to the fact that the trial judge observed and heard the witnesses and accepted one version of the facts rather than another.
Delaney v. Delaney 33
9. It is not error to refuse instruction on any issue which is not supported by evidence.
State v. Menser 36
10. An appeal from an order terminating parental rights is reviewed in this court de novo on the record.
In re Interest of P.F. 44

11. In an action at law where a jury has been waived, the findings of the trial court have the effect of a jury verdict on appeal. In considering the sufficiency of the evidence to sustain the judgment, the evidence will be considered in the light most favorable to the successful party, any controverted fact will be resolved in that party's favor, and the successful party will have the benefit of every inference reasonably deducible from the evidence.
Middagh v. Stanal Sound Ltd. 54
Maple v. City of Omaha 293
Professional Recruiters v. Wilkinson Mfg. Co. 351
Nekuda v. Waspi Trucking, Inc. 806
12. In the review of applications to modify child support orders, matters are initially entrusted to the sound discretion of the trial court, and the trial court's order will be affirmed on appeal in the absence of an abuse of the trial court's discretion.
Lenz v. Lenz 85
Meyers v. Meyers 370
13. A trial court's ruling in receiving or excluding expert testimony will be reversed only when there has been an abuse of discretion.
Aetna Cas. & Surety Co. v. Nielsen 92
14. After a jury has considered all of the evidence and returned a verdict of guilty, that verdict may not, as a matter of law, be set aside on appeal for insufficiency of evidence if the evidence sustained some rational theory of guilt.
State v. Wilkening 107
State v. Schott 456
State v. Schenck 523
15. The verdict of the trier of fact must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
State v. Wilkening 107
State v. Rich 394
State v. Dixon 787
16. This court will not overturn the trial court's factual findings when determining the correctness of the latter's rulings on the suppression of evidence unless those findings are clearly wrong.
State v. LaChappell 112
17. With respect to questions about a statute, our role is limited to interpretation and application of statutes, irrespective of our personal agreement or disagreement with a particular legislative enactment, so long as a questioned statute does not violate a constitutional requirement. Whether a court considers particular legislation as wise or unwise is irrelevant to the judicial task of construing or applying a statute.
State v. Roth 119
18. In the absence of an abuse of discretion, a sentence imposed

within statutory limits will not be disturbed on appeal.
State v. Dillon 131
State v. Jackson 384
State v. Tate 586
State v. Perdue 679
State v. Martens 870
State v. Ryan 875
19. Awards of alimony and the division of marital property are matters which are initially entrusted to the discretion of the trial court and will not be disturbed on appeal unless the record establishes that the trial court has abused its discretion.
Bryan v. Bryan 180
Ray v. Ray 324
Taylor v. Taylor 721
20. While a divorce case is to be tried de novo on the record, this court will give weight to the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of facts rather than the opposite.
Bryan v. Bryan 180
Taylor v. Taylor 721
21. Our review of appeals in equity actions requires us to reach an independent conclusion as to disputed facts. However, where there is an irreconcilable conflict on material factual issues, this court will consider the fact that the trial court observed the witnesses and their manner of testifying.
Werner v. Schardt 186
22. On appeal from a decree of the trial court dismissing an action at the close of plaintiff's evidence, this court must determine whether the cause of action was proved, and must accept as true plaintiff's evidence and any reasonable conclusions deducible therefrom.
Hahn & Hupf Constr. v. Highland Heights Nsg. Home 189
23. The review of a decision of the Commission of Industrial Relations is restricted to considering whether the decision is supported by substantial evidence, whether the commission acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable.
City of Omaha v. Omaha Police Union Local 101 197
IBEW Local 244 v. Lincoln Elec. Sys. 550
24. Findings of fact made by the trial court in an action brought under the State Tort Claims Act have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong.
Bean v. State 202
25. In actions for legal separation the adjustment of property and the award of support are matters initially entrusted to the sound discretion of the trial judge, which matters, on appeal, will be reviewed de novo on the record and modified only in the event of

an abuse of that discretion.
Anderson v. Anderson 212
26. In the de novo review of the adjustment of property or award of support in an action for legal separation, the Nebraska Supreme Court, where the evidence is in conflict, will give weight to the fact that the trial judge observed and heard the witnesses and accepted one version of the facts rather than another.
Anderson v. Anderson 212
27. There are no mathematical formulas by which property adjustments or awards of support can be precisely determined; ultimately, the test is whether the property adjustment and support award are reasonable under the facts of each case.
Anderson v. Anderson 212
28. If properly admitted evidence exists to establish that which improperly admitted evidence also establishes, the error in receiving the inadmissible evidence is not grounds for reversal.
State v. Klingelhoefer 219
White v. Lovgren 771
29. An error in the admission of evidence may, under appropriate circumstances, be cured by an instruction from the court.
State v. Klingelhoefer 219
30. Where there is a question before a district court, acting as an appellate court, concerning its appellate jurisdiction, the district court is procedurally correct in disposing of the case on the basis of a motion to dismiss.
VisionQuest, Inc. v. State 228
31. A claimant must comply with the requirements of Neb. Rev. Stat. § 77-2407 (Reissue 1981) in order to present a valid appeal to the district court from the denial of a contract claim against the state.
VisionQuest, Inc. v. State 228
32. Regarding a question of law, the Supreme Court has an obligation to reach its conclusion independent from the conclusion reached by a trial court.
Boisen v. Petersen Flying Serv. 239
Nekuda v. Waspi Trucking, Inc. 806
33. Failure to comply with the rules of the Supreme Court regarding presentation of a question concerning constitutionality of a statute—written notice of a constitutional question filed with the Clerk of the Supreme Court when the brief of the one contesting constitutionality is filed with the court, and service of the contestant's brief on the Attorney General within the prescribed time—precludes the Supreme Court's considering a question about constitutionality of a statute.
Voyles v. DeBrown Leasing, Inc. 250
34. A partial summary judgment that a claimant is a guest passenger within the purview of Nebraska's former guest statute, Neb. Rev. Stat. § 39-6,191 (Reissue 1978), while the issue of the host driver's

negligence is unresolved, is not a final judgment or order reviewable by the Supreme Court.
Voyles v. DeBrown Leasing, Inc. 250
35. The findings of a trial court in a law action tried without a jury have the effect of a jury verdict and will not be set aside on appeal unless they are clearly wrong.
Maple v. City of Omaha 293
Mary Young Men's Christian Assn. v. Hall 738
36. To acquire jurisdiction over the subject matter of the action, the requirements of the statute granting right of appeal are mandatory and must be fully complied with in order for the district court to have jurisdiction, and the district court may not enter any order other than an order of dismissal.
Nebraska Dept. of Correctional Servs. v. Carroll 307
37. A motion for continuance is addressed to the sound discretion of the court, and in the absence of a showing of an abuse of discretion, a ruling on a motion for a continuance will not be disturbed on appeal.
First Nat. Bank v. Schroeder 330
State ex rel. Douglas v. Schroeder 473
38. It is not within the province of this court to resolve evidentiary conflicts or to weigh evidence. Rather, it is our obligation to review the judgment entered in light of the evidence and to consider the evidence in the light most favorable to the successful party, resolving all conflicts in his favor and granting him the benefit of every inference which is reasonably deducible therefrom.
Professional Recruiters v. Wilkinson Mfg. Co. 351
39. As required by Neb. Rev. Stat. §§ 25-1905 and 25-1931 (Reissue 1979), within 1 calendar month after rendition of the final judgment or order sought to be reversed, vacated, or modified, a petitioner in error must file a petition and an appropriate transcript containing the final judgment or order to be judicially reviewed.
Glup v. City of Omaha 355
40. Unless a petitioner in an error proceeding demonstrates that lack of a timely filed transcript is the result of failure in performance of a public duty owed by the official charged with preparation or furnishing the transcript, absence of a mandatory transcript prevents or defeats jurisdiction of a court asked to review a final judgment or order.
Glup v. City of Omaha 355
41. Whether a question is raised by the parties concerning jurisdiction of the lower court or tribunal, it is not only within the power but the duty of an appellate court to determine whether such appellate court has jurisdiction over the subject matter.
Glup v. City of Omaha 355

42. Where lack of subject matter jurisdiction in the original tribunal is apparent on the face of the record, yet the parties fail to raise that issue, it is the duty of the reviewing court to raise and determine the issue of jurisdiction sua sponte.
Glup v. City of Omaha 355

43. If a district court is without jurisdiction over the subject matter of litigation, the Supreme Court does not acquire jurisdiction as a result of an appeal from a final order of the district court.
Glup v. City of Omaha 355
Wood v. Tesch 654

44. Factual determinations by the Workmen's Compensation Court will not be set aside on appeal unless such determinations are clearly wrong. Regarding facts determined and findings made upon rehearing in the Workmen's Compensation Court, Neb. Rev. Stat. § 48-185 (Reissue 1984) precludes the Supreme Court's substitution of its view of facts for that of the Workmen's Compensation Court if the record contains evidence to substantiate the factual conclusions reached by the Workmen's Compensation Court.
Vredeveld v. Gelco Express 363

45. Where the record presents nothing more than conflicting medical testimony, the Supreme Court will not substitute its judgment for that of the Workmen's Compensation Court.
Vredeveld v. Gelco Express 363

46. The awarding of attorney fees in a hearing on modification of a dissolution decree is a matter within the trial court's initial discretion and, while reviewed de novo in this court, will be affirmed in the absence of an abuse of that discretion.
Meyers v. Meyers 370

47. In determining the sufficiency of the evidence to sustain a conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence.
State v. Jackson 384
State v. Huffman 512

48. In any judicial proceeding under Neb. Rev. Stat. §§ 48-638 to 48-640 (Reissue 1984), the court shall consider the matter de novo upon the record.
Barada v. Sorensen 391

49. In determining the sufficiency of the evidence to sustain a criminal conviction, this court does not resolve conflicts in the evidence, pass upon the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence, and a verdict rendered thereon must be sustained if, taking the view of such evidence

most favorable to the State, there is sufficient evidence to support it.
State v. Blattner 396
State v. Schenck 523
State v. Havlat 554
State v. Halligan 866

50. In its appellate review of a question whether property is exempt from taxation pursuant to Neb. Rev. Stat. § 77-202(1)(c) (Reissue 1981), the Supreme Court determines tax exemption in an equitable trial of factual questions de novo on the record, subject to the rule that where credible evidence is in conflict on material issues of fact, the Supreme Court will consider the fact that the trial court observed the witnesses and accepted one version of the facts over another.
Immanuel, Inc. v. Board of Equal. 405

51. The responsibility for filing a bill of exceptions on appeal in the Supreme Court rests upon the appellant.
Taylor v. Wallesen 411

52. When, on appeal, this court is asked to review errors which require a consideration of the evidence, we cannot give them consideration in the absence of a bill of exceptions.
Taylor v. Wallesen 411

53. The time within which an appeal must be taken is mandatory and must be met in order for an appellate tribunal to acquire jurisdiction of the subject matter.
Federal Land Bank v. McElhose 448

54. In determining whether evidence is sufficient to sustain a conviction in a jury trial, the Supreme Court does not resolve conflicts of evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented to a jury—all of which is within a jury's province for disposition. A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict.
State v. Schott 456
State v. Dondlinger 741

55. Appeals in criminal cases tried in a county court are governed by Neb. Rev. Stat. § 29-613 (Reissue 1979), and are restrictively disposed on the basis of the record made in the county court.
State v. Schott 456

56. A district court's review of criminal cases tried in a county court is limited to an examination of the record for error or an abuse of discretion which occurred in the county court.
State v. Schott 456

57. A district court may modify a sentence imposed by a county court only where the county court has so abused its discretion as to

render its sentence an error upon the record presented.
State v. Schott 456

58. A party cannot be heard to complain of an error which he himself has been instrumental in bringing about.
State v. Bonaparte 469

59. The Nebraska Supreme Court will not consider a constitutional question in the absence of a specification of the constitutional provision which is claimed to be violated.
State ex rel. Douglas v. Schroeder 473

60. An abuse of discretion takes place where the trial court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result.
State ex rel. Douglas v. Schroeder 473

61. The awarding and amount of an attorney fee under the Nebraska Consumer Protection Act, Neb. Rev. Stat. §§ 59-1601 et seq. (Reissue 1984), rest in the sound discretion of the trial court; the Nebraska Supreme Court will only interfere where the allowance is clearly excessive or insufficient.
State ex rel. Douglas v. Schroeder 473

62. Restoration of the purchase price under the Nebraska Consumer Protection Act, Neb. Rev. Stat. §§ 59-1601 et seq. (Reissue 1984), rests within the discretion of the trial court; its ruling thereon will not be disturbed on appeal in the absence of an abuse of that discretion.
State ex rel. Douglas v. Schroeder 473

63. An action for rescission of a contract is equitable in nature and, as such, is reviewable by this court de novo on the record. However, when the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and adopted one version of the facts rather than the opposite.
Equitable Life Assurance Soc'y v. Joiner 504

64. The function of assignments of error is that they set out the issues presented on appeal. They serve to advise the appellee of the question submitted for determination in order that the appellee may know what contentions must be met. They also advise this court of the issues which are submitted for decision.
State v. Huffman 512

65. It is not reversible error for a trial court to fail to give a specific instruction on credibility of the testimony of an accomplice where such an instruction is not requested.
State v. Huffman 512

66. When the punishment of an offense created by statute is left to the discretion of the trial court, to be exercised within certain

prescribed limits, a sentence imposed within those limits will not be disturbed on appeal unless the record reveals an abuse of discretion.
State v. Schenck 523

67. The weight and credibility of expert witnesses in workmen's compensation cases is for the trier of fact.
Snyder v. IBP, Inc. 534

68. It is not for the Supreme Court to resolve conflicts in the evidence. Credibility of witnesses and the weight to be given their testimony are for the administrative agency as a trier of fact.
IBEW Local 244 v. Lincoln Elec. Sys. 550

69. Information as to an alleged discriminatory sentencing not appearing in the record may not be considered by this court on appeal.
State v. Tate 586

70. The Nebraska Supreme Court is not required to disturb on appeal an otherwise entirely appropriate sentence solely because someone else was treated more leniently.
State v. Tate 586

71. Where the bill of exceptions in a case is not filed with this court as required by Neb. Ct. R. 5C(5) (rev. 1983), the judgment appealed from will be affirmed if the pleadings in the case support the judgment.
Pabst v. First American Distrib., Inc. 591

72. Appeals to this court under the provisions of the Nebraska Employment Security Law, Neb. Rev. Stat. §§ 48-601 to 48-669 (Reissue 1984), are reviewed de novo on the record.
Smith v. Sorensen 599

73. A judicial abuse of discretion does not denote or imply improper motive, bad faith, or intentional wrong by a judge, but requires the reasons or ruling of a trial judge to be clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition through a judicial system.
Newton v. Brown 605

74. Permission to amend pleadings is addressed to the sound discretion of the trial court, and absent an abuse of discretion, its decision will be affirmed.
Christian Servs., Inc. v. Northfield Villa, Inc. 628

75. A motion for a mistrial is addressed to the sound discretion of the trial court, and its ruling will not be disturbed in the absence of a showing of an abuse of discretion.
State v. Bostwick 631

76. Where the record in a workers' compensation case presents nothing more than conflicting medical testimony, the Nebraska

Supreme Court will not substitute its judgment for that of the compensation court.
Beavers v. IBP, Inc. 647
77. The granting of a motion for additional evaluation as to whether a defendant is a mentally disordered sex offender is addressed to the sound discretion of the trial court, and absent an abuse of that discretion, there is no error in refusing such request.
State v. Perdue 679
78. The standard of review on an appeal to the Nebraska Supreme Court from an order of the Public Service Commission granting a certificate of public convenience and necessity is limited to determining whether the commission acted within the scope of its authority and whether the order in question was reasonable and not arbitrarily made.
In re Application of Regency Limo 684
79. In reviewing a probate case on appeal from the county and district courts, our review, like that of the district court, must be confined to an examination for errors appearing on the record.
In re Estate of Wagner 699
80. Where there is a genuine or real question of fact regarding a victim's lack of consent regarding an alleged first degree sexual assault, it is not within the province of the Supreme Court to reconsider the factual matters resolved by the jury in reaching a verdict that a defendant overcame the victim by force, threat of force, express or implied, coercion, or deception.
State v. Dondlinger 741
81. Prejudicial error regarding jury instructions may not be predicated solely upon a particular sentence or phrase in an isolated instruction, but must appear from consideration of the entire instruction of which the questioned sentence or phrase is a part, as well as consideration of other relevant instructions given to the jury.
State v. Dondlinger 741
82. Jury instructions must be read together, and if the instructions taken as a whole correctly state the law, are not misleading, and adequately cover the issues, there is no prejudicial error.
State v. Dondlinger 741
83. A motion to disqualify a trial judge on account of prejudice is addressed to the sound discretion of the trial court. Generally, the ruling on a motion to disqualify a trial judge on the ground of bias and prejudice will be affirmed on appeal unless the record establishes bias and prejudice as a matter of law.
State v. Dondlinger 741
84. The allowance, amount, and allocation of a guardian ad litem fee is a matter within the initial discretion of a trial court, involves consideration of the equities and circumstances of each particular case, and will not be set aside on appeal in the absence of an abuse

of discretion by the trial court.
Smith v. Smith 752
85. An appeal from an order terminating parental rights is reviewed by this court de novo on the record, giving weight to the fact that the trial court observed the parties and witnesses and judged their credibility.
In re Interest of M.B., R.P., and J.P. 757
86. In appeals regarding Neb. Rev. Stat. § 48-628 (Reissue 1984), the Supreme Court reviews the record de novo, retries the issues of fact involved in the findings challenged, and reaches an independent conclusion regarding such issues of fact.
Stackley v. State 767
Carson v. Sorensen 878
87. Once a jury verdict has been rendered, the verdict should be upheld as against the challenge of an error in the proceedings unless the error was somehow prejudicial.
White v. Lovgren 771
88. Whether an officer has made a promise for a defendant's statement is a question of fact to be determined by a trial court—a decision which will not be set aside unless clearly wrong.
State v. Dixon 787
89. In determining whether a trial court's findings on a motion to suppress are clearly erroneous, the Supreme Court recognizes the trial court as the trier of fact and takes into consideration that the trial court has observed witnesses testifying regarding such motion to suppress.
State v. Dixon 787
90. A suit to prevent unjust enrichment is tried in equity, and our review of equitable actions is by trial de novo.
Schmeckpeper v. Koertje 800
91. In a trial de novo this court is to retry issues of fact and reach an independent conclusion as to what finding or findings are required under the pleadings and all the evidence, without reference to the conclusion reached in the district court, subject to the rule that where credible evidence on material issues is in conflict, this court will consider that the trial court observed the witnesses and accepted one version of the facts over another.
Schmeckpeper v. Koertje 800
92. Where a statement of a witness is used erroneously as substantive evidence but is merely cumulative of other competent evidence of the same facts which are sufficient to support the conviction, the trial court's failure to control such error generally will not constitute reversible error.
State v. Daniels 850
93. Generally, this court will not address errors assigned but not discussed.
State v. Halligan 866

94. Error without prejudice is harmless and will not afford a basis for vacating a proper sentence.
State v. Ryan 875

Appeal Bonds

1. The execution, approval, and filing of the bond required by Neb. Rev. Stat. § 60-420 (Reissue 1984) are necessary steps to the acquisition of subject matter jurisdiction of an implied consent proceeding by the district court.
Bammer v. Jensen 400
2. Filing in the district court does not satisfy the requirement of Neb. Rev. Stat. § 60-420 (Reissue 1984) that the bond be filed in the office of the director of the Department of Motor Vehicles within 20 days of the order concerning which complaint is made.
Bammer v. Jensen 400

Arrests

1. The test of probable cause for a warrantless arrest is whether at the moment the facts and circumstances within the officers' knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense.
State v. Klingelhoefer 219
State v. Halligan 866
2. Where no issue as to the propriety of an arrest is raised and the evidence of the preliminary breath test is relevant only for the limited purpose of establishing probable cause to require the driver to submit to a test of his or her blood, urine, or breath under Neb. Rev. Stat. § 39-669.08 (Reissue 1984) and thereby make the results of the second test admissible in evidence for the purpose of seeking to convict a driver for operating a motor vehicle while under the influence of alcohol, the admissibility of the preliminary breath test is a question of law and should therefore be admitted into evidence out of the presence of the jury.
State v. Klingelhoefer 219

Assignments

A purchaser who receives possession of an automobile without also obtaining from the owner an assignment of the certificate of title properly notarized and duly executed in accordance with the statutes then in effect acquires no right, title, claim, or interest in or to a motor vehicle and does not thereby become the owner of the vehicle in question.
State Farm Mut. Auto. Ins. Co. v. Royal Ins. Co. 13

Attorney and Client

1. The decision to object or not to object is part of trial strategy, and this court gives due deference to defense counsel's discretion in

formulating trial tactics.
State v. Lieberman 95
2. There is no such position known as "attorney of an estate." When an attorney is employed to render services in securing the probate of a will or settling of an estate, he or she acts as attorney for the personal representative and not for the estate.
In re Estate of Wagner 699

Attorney Fees

1. It is the practice in this state to allow the recovery of attorney fees only in such cases as are provided for by law, or where the uniform course of procedure has been to allow such recovery. As a general rule of practice in this state, attorney fees are allowed to the successful party in litigation only where such allowance is provided by statute.
State Farm Mut. Auto. Ins. Co. v. Royal Ins. Co. 13
2. A district court may award attorney fees for securing dismissal of an untimely appeal from an order of the Nebraska Equal Opportunity Commission.
Nebraska Dept. of Correctional Servs. v. Carroll 307
3. The awarding of attorney fees in a hearing on modification of a dissolution decree is a matter within the trial court's initial discretion and, while reviewed de novo in this court, will be affirmed in the absence of an abuse of that discretion.
Meyers v. Meyers 370
4. Among the factors to be evaluated in the awarding of an attorney fee is the result obtained.
Meyers v. Meyers 370
5. An attorney fee will ordinarily be denied where no reasonable justification appears for the position taken by the party claiming entitlement to such a fee.
Meyers v. Meyers 370
6. The awarding and amount of an attorney fee under the Nebraska Consumer Protection Act, Neb. Rev. Stat. §§ 59-1601 et seq. (Reissue 1984), rest in the sound discretion of the trial court; the Nebraska Supreme Court will only interfere where the allowance is clearly excessive or insufficient.
State ex rel. Douglas v. Schroeder 473
7. An employee is not entitled to an attorney fee or to interest where the employer applies for rehearing and succeeds in reducing the award an employee obtained upon original hearing.
Snyder v. IBP, Inc. 534
8. Neb. Rev. Stat. § 48-125 (Reissue 1984) does not authorize the award of an attorney fee where there exists a reasonable controversy between the parties as to the entitlement of compensation.
Beavers v. IBP, Inc. 647

9. When the employer files an application for rehearing before a panel of the compensation court, it is the employer's failure to reduce the award on original hearing which triggers the taxing of a reasonable attorney fee as costs.
Beavers v. IBP, Inc. 647

Banks and Banking

1. As a general rule, it is not necessary that a donee or beneficiary have knowledge about creation of a joint account, sign a signature card, or either deposit or withdraw funds from the account in order to establish a valid joint tenancy in a bank account.
In re Estate of Lienemann 169
2. The statutory rule that a payor bank is accountable for a demand item presented to it and not settled for, paid, returned, or a notice of dishonor sent before the midnight deadline may be varied or waived by agreement. Neb. U.C.C. §§ 4-302, 4-103 (Reissue 1980).
Stauffer Seeds, Inc. v. Nebraska Sec. Bank 594
3. A bank may set off the funds of a depositor to pay a debt due the bank from the depositor.
Stauffer Seeds, Inc. v. Nebraska Sec. Bank 594

Blood, Breath, and Urine Tests

1. A refusal to submit to a chemical test for purposes of the implied consent law occurs where the conduct of the arrested motorist is such that a reasonable person in the officer's position would be justified in believing that such motorist was capable of refusal and manifested an unwillingness to submit to the test.
Jensen v. Jensen 23
Pollard v. Jensen 521
2. A person is not exempted from the provisions of a refusal statute merely because he was too intoxicated to appreciate the consequences of his refusal.
Jensen v. Jensen 23
3. Where no issue as to the propriety of an arrest is raised and the evidence of the preliminary breath test is relevant only for the limited purpose of establishing probable cause to require the driver to submit to a test of his or her blood, urine, or breath under Neb. Rev. Stat. § 39-669.08 (Reissue 1984) and thereby make the results of the second test admissible in evidence for the purpose of seeking to convict a driver for operating a motor vehicle while under the influence of alcohol, the admissibility of the preliminary breath test is a question of law and should therefore be admitted into evidence out of the presence of the jury.
State v. Klingelhoefer 219
4. There is no requirement that *Miranda* warnings be given prior to a request to submit to a chemical analysis of blood, breath, or urine

under the Nebraska implied consent law.
State v. Klingelhoefer 219
5. Under the implied consent law a driver is not entitled to consult with an attorney before submitting to a chemical test, nor is a delay in the test required due to a driver's request to consult with an attorney.
State v. Klingelhoefer 219
6. Neb. Rev. Stat. § 39-669.09 (Reissue 1984) does not require the officer to inform the person to be tested of his privilege to request an independent test.
State v. Klingelhoefer 219
7. The only understanding required by the licensee is that he has been asked to take a test. It is not a defense that he does not understand the consequences of refusal or is not able to make a reasoned judgment as to what course of action to take.
Pollard v. Jensen 521
8. If the suspect knew that he was being asked a question and manifested a refusal, for the purpose of the statute he refused to take the test.
Pollard v. Jensen 521

Causes of Action

In order for there to exist a cause of action for tortious interference with a business relationship, it is necessary to prove: (1) The existence of a valid business relationship or expectancy; (2) Knowledge by the interferer of the relationship or expectancy; (3) An intentional act of interference on the part of the interferer; (4) Proof that the interference caused the harm sustained; and (5) Damage to the party whose relationship or expectancy was disrupted.
Mike Pratt & Sons, Inc. v. Metalcraft, Inc. 333

Certificate of Title

A purchaser who receives possession of an automobile without also obtaining from the owner an assignment of the certificate of title properly notarized and duly executed in accordance with the statutes then in effect acquires no right, title, claim, or interest in or to a motor vehicle and does not thereby become the owner of the vehicle in question.
State Farm Mut. Auto. Ins. Co. v. Royal Ins. Co. 13

Child Custody

1. Custody matters are initially entrusted to the sound discretion of the trial judge, which matters, on appeal, will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion.
Delaney v. Delaney 33
State ex rel. Ross v. Jacobs 380

2. The primary consideration in determining custody and visitation is the best interests of the child.
State ex rel. Ross v. Jacobs 380
3. Custody cannot be taken from an unwed mother absent evidence of unfitness and that the removal is in the best interests of the child.
Shoecraft v. Catholic Social Servs. Bureau 574
4. The unwed father has no automatic right to custody.
Shoecraft v. Catholic Social Servs. Bureau 574
5. Although Neb. Rev. Stat. § 42-364(1)(b) (Reissue 1984) provides that a court, in determining custody and visitation, shall consider the desires and wishes of a child affected by a dissolution decree if such child is of an age of comprehension, such statute does not require that a court derive a minor child's wishes only from the child's testimony, as opposed to evidence from some source other than the child's testimony which adequately establishes the child's desire and wishes regarding custody and visitation.
Smith v. Smith 752

Child Support

1. In the review of applications to modify child support orders, matters are initially entrusted to the sound discretion of the trial court, and the trial court's order will be affirmed on appeal in the absence of an abuse of the trial court's discretion.
Lenz v. Lenz 85
Meyers v. Meyers 370
2. Child support payments are not subject to modification unless there has occurred since the entry of the prior order a material change of circumstances not in the contemplation of the parties and of such a nature as to require modification in the best interests of the child.
Meyers v. Meyers 370
3. A material change in circumstances results from an alteration and passage from one condition to another.
Meyers v. Meyers 370
4. Determination of whether there has been a material change in circumstances involves a consideration of whether there has been a change in the financial resources of the parents, the needs of the child for whom support is paid, and whether the change in circumstances is temporary or permanent.
Meyers v. Meyers 370
5. The dissolution statutes do not empower courts to order a parent to contribute to the support of an adult handicapped child.
Meyers v. Meyers 370

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. Wilkening 107
State v. Schott 456
State v. Tate 586

Claims

1. Generally, before a court may acquire jurisdiction over a claim against a city of the metropolitan class, the procedures set out in Neb. Rev. Stat. § 14-804 (Reissue 1983) must be followed.
Bolan v. Boyle 826
Halbleib v. City of Omaha 844
2. Neb. Rev. Stat. § 23-135 (Reissue 1983) applies to all claims arising from or out of a contract.
Zeller Sand & Gravel v. Butler Co. 847
3. Neb. Rev. Stat. § 23-135 (Reissue 1983) applies where a claim is not a mere formal prerequisite to the issuance of a warrant in payment but, rather, requires quasi-judicial action in the sense that an exercise of discretion is required in ascertaining or fixing the amount to be allowed, or resolution of the claim otherwise involves a determination of factual questions based upon evidence.
Zeller Sand & Gravel v. Butler Co. 847
4. Where Neb. Rev. Stat. § 23-135 (Reissue 1983) applies, the district court has appellate jurisdiction for the purpose of conducting a trial de novo, as though the action had been originally instituted in such court.
Zeller Sand & Gravel v. Butler Co. 847
5. A petition for the allowance of a claim against a county which is subject to the provisions of Neb. Rev. Stat. § 23-135 (Reissue 1983) is demurrable unless it shows on its face that the claim was filed with the county clerk within the statutory time.
Zeller Sand & Gravel v. Butler Co. 847

Collateral Attack

The claim that property is assessed too high for taxation purposes cannot be made in the first instance by direct application to any other body or by a collateral attack in law or equity in the event of failure to bring the matter before the county board of equalization and to appeal therefrom in case of an adverse determination. A collateral attack may be made upon an assessment of property for tax purposes only if the assessment, or some part thereof, is wholly void.
Beshore v. Sidwell 441

Commission of Industrial Relations

1. The review of a decision of the Commission of Industrial

Relations is restricted to considering whether the decision is supported by substantial evidence, whether the commission acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable.
City of Omaha v. Omaha Police Union Local 101 197
IBEW Local 244 v. Lincoln Elec. Sys. 550

2. The Commission of Industrial Relations is an administrative agency empowered to perform a legislative function and, as such, has no power or authority other than that specifically conferred on it by statute or by a construction thereof necessary to accomplish the purposes of the act establishing the commission.
Wood v. Tesch 654

3. The Commission of Industrial Relations has no authority to vindicate constitutional rights, nor to hear cases for breach of contract, nor to declare rights, duties, and obligations of the parties.
Wood v. Tesch 654

4. Not every controversy concerning the terms, tenure, or conditions of employment is an industrial dispute which lodges jurisdiction in the Commission of Industrial Relations.
Wood v. Tesch 654

5. A uniquely personal termination of employment does not constitute an industrial dispute notwithstanding the fact it may involve a controversy concerning terms, tenure, or conditions of employment.
Wood v. Tesch 654

Confessions

1. Once an individual in custody indicates in any manner, at any time prior to or during questioning, that he or she wishes to remain silent, interrogation must cease, for at this point the individual being interrogated has shown that he or she intends to exercise his or her fifth amendment right to remain silent.
State v. LaChappell 112

2. Once the right to remain silent has been invoked, there is a strong presumption against its subsequent waiver.
State v. LaChappell 112

3. The police are not required to accept as conclusive any statement or act, no matter how ambiguous, as a sign that a suspect desires to cut off questioning.
State v. LaChappell 112

4. Voluntariness is the ultimate test to use an accused's statement, admission, or confession as evidence in a criminal prosecution.
State v. Dixon 787

5. To be admissible an accused's statement, admission, or confession must have been freely and voluntarily made, and must not have been the product of or extracted by any direct or implied promise

or inducement, no matter how slight.
State v. Dixon 787
6. Whether an officer has made a promise for a defendant's statement is a question of fact to be determined by a trial court—a decision which will not be set aside unless clearly wrong.
State v. Dixon 787

Conspiracy

1. The principal element of a conspiracy is an agreement or understanding between two or more persons to inflict a wrong against or injury upon another.
Hahn & Hupf Constr. v. Highland Heights Nsg. Home 189
2. Where two or more persons combine to unlawfully injure another's business, the action is properly one for conspiracy.
Mike Pratt & Sons, Inc. v. Metalcraft, Inc. 333
3. The principal element of conspiracy is an agreement or understanding between two or more persons to inflict a wrong against or injury upon another. It involves some mutual mental action coupled with an intent to commit the act which results in injury. Without the scienter, persons cannot conspire.
Mike Pratt & Sons, Inc. v. Metalcraft, Inc. 333
4. To constitute a conspiracy there must be a combination of two or more persons; a preconceived plan and unity of design and purpose, for the common design is of the essence of the conspiracy.
Mike Pratt & Sons, Inc. v. Metalcraft, Inc. 333

Constitutional Law

1. Failure to comply with the rules of the Supreme Court regarding presentation of a question concerning constitutionality of a statute—written notice of a constitutional question filed with the Clerk of the Supreme Court when the brief of the one contesting constitutionality is filed with the court, and service of the contestant's brief on the Attorney General within the prescribed time—precludes the Supreme Court's considering a question about constitutionality of a statute.
Voyles v. DeBrown Leasing, Inc. 250
2. The word "impair," as used in the U.S. Constitution, requires no construction and may be given its ordinary meaning, which, according to the most basic dictionary definition, is "to make worse."
Caruso v. City of Omaha 257
3. Not every change constitutes an impairment under the federal Constitution. The change must take something away and not work to the parties' benefit.
Caruso v. City of Omaha 257
4. A motorist has a reasonable expectation of privacy which is not

subject to arbitrary invasions solely at the unfettered discretion of police officers in the field.
State v. Crom 273
5. The Nebraska Supreme Court will not consider a constitutional question in the absence of a specification of the constitutional provision which is claimed to be violated.
State ex rel. Douglas v. Schroeder 473
6. The right to a jury trial under the seventh amendment to the U.S. Constitution does not apply in state courts.
State ex rel. Douglas v. Schroeder 473
7. The purpose of article I, § 6, of the Nebraska Constitution is to preserve the right to a jury trial as it existed at common law and under the statutes in force when the Constitution was adopted.
State ex rel. Douglas v. Schroeder 473
8. Nebraska's rape shield law, Neb. Rev. Stat. § 28-321 (Cum. Supp. 1984), which generally excludes evidence in the form of details of the victim's prior sexual conduct, does not prevent defendants from presenting *relevant* evidence in their own defense. It merely denies a defendant the opportunity to harass and humiliate the complainant at trial and divert the attention of the jury to issues not relevant to the controversy. A defendant has no constitutional right to inquire into irrelevant matters.
State v. Schenck 523
9. A person's capacity to claim the protection of article I, § 7, of the Nebraska Constitution as to unreasonable searches and seizures, like its counterpart, the fourth amendment to the U.S. Constitution, depends upon whether the person who claims such protection has a legitimate expectation of privacy in the invaded place.
State v. Havlat 554
10. The open fields doctrine of *Hester v. United States*, 265 U.S. 57, 44 S. Ct. 445, 68 L. Ed. 898 (1924), is applicable under our Constitution.
State v. Havlat 554
11. Although a state may not impose greater restrictions on police activity as a matter of federal constitutional law, a state may impose higher standards governing police practices on the basis of state law.
State v. Havlat 554
12. Concerning the open fields doctrine, our state Constitution does not afford more protection than does the fourth amendment to the federal Constitution as interpreted in *Oliver v. United States*, 466 U.S. 170, 104 S. Ct. 1735, 80 L. Ed. 2d 214 (1984), and we decline to judicially impose higher standards governing law enforcement officers under the provisions of the state Constitution.
State v. Havlat 554

13. The relationship between parent and child is constitutionally protected.
Shoecraft v. Catholic Social Servs. Bureau 574
14. The constitutional prohibition against double jeopardy does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment.
State v. Bostwick 631
15. In a given case the double jeopardy clause bars a criminal prosecution only where (1) jeopardy has attached in a prior criminal proceeding, (2) the defendant is being tried for the same offense prosecuted in that prior proceeding, and (3) the prior proceeding has terminated jeopardy.
State v. Bostwick 631
16. Where the governmental conduct in question is intended to goad the defendant into moving for a mistrial, a defendant may raise the bar of double jeopardy to a second trial after having succeeded in aborting the first trial on the defendant's own motion.
State v. Bostwick 631
17. Generally, a motion by a defendant for a mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error.
State v. Bostwick 631
18. So long as a trial court has not abused its discretion in determining that a jury is deadlocked, a declaration of mistrial resulting from a jury's inability to reach a verdict does not bar reprosecution under the double jeopardy clause of state and federal Constitutions.
State v. Bostwick 631
19. Freedom of speech and the right of assembly provided by the first amendment to the U.S. Constitution are among the fundamental liberties protected from state impairment by the due process clause of the fourteenth amendment to the U.S. Constitution.
Wood v. Tesch 654
20. While one who is a governmental at-will employee may be discharged for no reason at all, he or she may not be discharged on a basis that infringes upon constitutionally protected interests.
Wood v. Tesch 654
21. A governmental employee may not constitutionally be compelled to relinquish his or her first amendment right to comment on matters relating to his or her employment which are of public concern.
Wood v. Tesch 654
22. In discharging a governmental at-will employee who has exercised his or her right of free speech on matters of public concern, the interest of the governmental employee in commenting as a citizen upon such matters and the interest of the governmental employer

in promoting the efficiency of the public services it performs through its employees must be balanced.
Wood v. Tesch 654
23. The closeness of working relationships is a factor to be considered in balancing the governmental employee's constitutional right to free speech and the governmental employer's interest in efficiency.
Wood v. Tesch 654
24. When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment in discharging an employee is appropriate; it is not necessary for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships are manifest before taking action.
Wood v. Tesch 654
25. The more substantially involved in matters of public concern is the employee's speech, the stronger must be the employer's showing as to the disruptive effect upon close working relationships and efficiency.
Wood v. Tesch 654
26. The right to inform people about unions is protected by both the right to free speech and the right of assembly.
Wood v. Tesch 654
27. In construing provisions of a constitution, courts may examine debates and proceedings of a constitutional convention to determine the framers' intended meaning of words, phrases, or clauses of a constitution.
Jaksha v. State 690
28. The Constitution as amended must be construed as a whole. Every clause in a constitution has been inserted for a useful purpose and should receive even broader and more liberal construction than statutes.
Jaksha v. State 690
29. The purpose of the Governor's proclamation, calling a special session of the Legislature pursuant to Neb. Const. art. IV, § 8, is notice to the public regarding subjects to be considered at such legislative session and specification of the boundaries for the area of legislation which may be enacted during that special session of the Legislature.
Jaksha v. State 690
30. Neb. Const. art. IV, § 8, as part of the power of the executive branch of government, permits the Governor to determine when an extraordinary occasion exists, necessitating convention of a special session of the Nebraska Legislature.
Jaksha v. State 690
31. The subject matter restriction envisioned in Neb. Const. art. IV, § 8, empowers the Governor to set the boundaries of legislative

action permissible at a special session of the Nebraska Legislature.
Jaksha v. State 690
32. Under Neb. Const. art. IV, § 8, the Governor may, during the Legislature's special session convened pursuant to a gubernatorial proclamation, submit by an appropriate amended proclamation any additional subjects for valid legislation to be enacted at such special session of the Legislature.
Jaksha v. State 690
33. The proper procedure for a group arraignment is to call each person being arraigned before the bench, identify him, and advise him that the remarks of the court apply to each person individually.
State v. Martens 870

Consumer Protection

1. The Nebraska Consumer Protection Act, Neb. Rev. Stat. §§ 59-1601 et seq. (Reissue 1984), is equitable in nature; as such, trials thereunder are to the court.
State ex rel. Douglas v. Schroeder 473
2. The awarding and amount of an attorney fee under the Nebraska Consumer Protection Act, Neb. Rev. Stat. §§ 59-1601 et seq. (Reissue 1984), rest in the sound discretion of the trial court; the Nebraska Supreme Court will only interfere where the allowance is clearly excessive or insufficient.
State ex rel. Douglas v. Schroeder 473
3. Restoration of the purchase price under the Nebraska Consumer Protection Act, Neb. Rev. Stat. §§ 59-1601 et seq. (Reissue 1984), rests within the discretion of the trial court; its ruling thereon will not be disturbed on appeal in the absence of an abuse of that discretion.
State ex rel. Douglas v. Schroeder 473

Contracts

1. An insurance contract should be considered as any other contract and should be given effect according to the ordinary sense of the terms used.
State Farm Mut. Auto. Ins. Co. v. Royal Ins. Co. 13
2. When provisions of an insurance contract are ambiguous or are susceptible of two constructions, the policy must be liberally construed in favor of the insured.
State Farm Mut. Auto. Ins. Co. v. Royal Ins. Co. 13
3. Generally, in negotiating a contract the parties may impose any condition precedent, a performance of which is essential before the parties become bound by the agreement.
K & K Pharmacy v. Barta 215

4. Where a contract is executed but its effectiveness is dependent upon the fulfillment of an agreed condition before it can become a binding contract, such contract cannot be enforced unless the condition is performed.
K & K Pharmacy v. Barta 215
5. The party seeking to enforce a contract containing a condition precedent bears the burden of proof as to the occurrence of the condition.
K & K Pharmacy v. Barta 215
6. If the agreement leaves no doubt that honest satisfaction and no more is meant, the condition does not occur if the obligor is honestly, even though unreasonably, dissatisfied.
K & K Pharmacy v. Barta 215
7. When neither the terms of a contract nor facts and circumstances demonstrating the intent of the parties are disputed, construction of a contract is a question of law.
Boisen v. Petersen Flying Serv. 239
8. In order for there to exist a cause of action for tortious interference with a business relationship, it is necessary to prove: (1) The existence of a valid business relationship or expectancy; (2) Knowledge by the interferer of the relationship or expectancy; (3) An intentional act of interference on the part of the interferer; (4) Proof that the interference caused the harm sustained; and (5) Damage to the party whose relationship or expectancy was disrupted.
Mike Pratt & Sons, Inc. v. Metalcraft, Inc. 333
9. A justifiable termination does not operate to create a liability, either under a contract theory or under the state antitrust statutes, against one who terminates a contract.
Mike Pratt & Sons, Inc. v. Metalcraft, Inc. 333
10. Where a contract is clear and unambiguous, it is not subject to a construction different from that which flows from the language used.
Omaha City Emp. Local 251 v. City of Omaha 412
11. When contractual language is ambiguous, a court will construe such language against the party preparing the contract, especially where the language is embodied in a preprinted form.
American Sec. Servs. v. Vodra 480
12. A written contract expressed in unambiguous language is not subject to interpretation or construction, and the intention of the parties must be determined from its contents alone. A trial court is not free to rewrite a contract for the parties or speculate as to the terms of a contract which the parties have not seen fit to set out or are contrary to the express terms of the contract.
Rees v. Huffman 493
13. In construing a contract, words must be given their plain and ordinary meaning as ordinary, average, or reasonable persons

would understand them, and the contract must be viewed as a whole.
Rees v. Huffman 493
14. Mere assignees who are strangers to contracts are not in privity with assignors for the purpose of asserting the assignors' usury defense or claims under the Nebraska Installment Loan Act, Neb. Rev. Stat. §§ 45-114 et seq. (Reissue 1984).
General Electric Credit Corp. v. Best Refr'd Express 499
15. An action for rescission of a contract is equitable in nature and, as such, is reviewable by this court de novo on the record. However, when the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and adopted one version of the facts rather than the opposite.
Equitable Life Assurance Soc'y v. Joiner 504
16. When an applicant makes an untrue statement with respect to a material fact peculiarly within his knowledge, the finder of fact may, from the mere occurrence of the false statement, conclude it was made knowingly with intent to deceive.
Equitable Life Assurance Soc'y v. Joiner 504
17. In the absence of fraud, one who signs an instrument without reading it, when he can read and has an opportunity, cannot avoid the effect of his signature merely because he was not informed of the contents of the instrument.
Equitable Life Assurance Soc'y v. Joiner 504
18. Only a taxpayer of a sanitary and improvement district organized pursuant to the sanitary and improvement districts act, Neb. Rev. Stat. §§ 31-727 et seq. (Reissue 1984), has standing to contest validity of contractual obligations for expenditure of such district's funds.
Rexroad, Inc. v. S.I.D. No. 66 618
19. Under an authorized hypothecation agreement a debtor may confer a right on a creditor in property belonging to another sufficient to create a security interest in such property which may be perfected under the Uniform Commercial Code.
Mid City Bank v. Omaha Butcher Supply 671
20. Where the contract contains no express condition precedent, a party who claims that the contract is subject to a condition has the burden to prove that the contract is conditional.
Mary Young Men's Christian Assn. v. Hall 738
21. An officer of a corporation has no apparent authority to bind the corporation to an unusual, extraordinary, or unreasonable contract.
Hassett v. Swift & Company 819
22. Neb. Rev. Stat. § 23-135 (Reissue 1983) applies to all claims

arising from or out of a contract.
Zeller Sand & Gravel v. Butler Co. 847

Conveyances

The court, in examining the matter of whether a deed was procured by undue influence, is not concerned with the rightness of the conveyance but only with determining whether it was the voluntary act of the grantor.
Bishop v. Hotovy 623

Convictions

1. 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. Wilkening 107
2. To sustain a conviction for a crime, the corpus delecti must be proved beyond a reasonable doubt.
State v. Rich 394
3. In determining whether evidence is sufficient to sustain a conviction in a jury trial, the Supreme Court does not resolve conflicts of evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented to a jury—all of which is within a jury's province for disposition. A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict.
State v. Schott 456
State v. Huffman 512
State v. Schenck 523
State v. Dondlinger 741
State v. Halligan 866
4. A conviction may rest on the uncorroborated testimony of an accomplice.
State v. Huffman 512

Corporations

1. A corporate director must act in the best interests of shareholders and is obligated to the duties of fidelity, good faith, and prudence with respect to the interests of security holders, as well as the duty to exercise independent judgment with respect to matters committed to the discretion of the board of directors and lying at the heart of the management of the corporation. These duties are applicable to a director's acts in recommending a proposed merger.
ConAgra, Inc. v. Cargill, Inc. 136
2. In the context of a proposed merger, a director has a duty under

Del. Code Ann. tit. 8, § 251(b) (rev. 1974), to act in an informed and deliberate manner.
ConAgra, Inc. v. Cargill, Inc. 136
3. A director's duty to inform himself or herself in preparation for a decision derives from the fiduciary capacity in which he or she serves the corporation and its shareholders.
ConAgra, Inc. v. Cargill, Inc. 136
4. Since a director is vested with the responsibility for the management of the affairs of the corporation, he or she must execute that duty with the recognition that he or she acts on behalf of others. Such obligation does not tolerate faithlessness or self-dealing.
ConAgra, Inc. v. Cargill, Inc. 136
5. Even if the board of directors enters into a contract containing a lockup provision, the agreement must not infringe on the voting rights of shareholders or chill the bidding process.
ConAgra, Inc. v. Cargill, Inc. 136
6. A trial court is free to assess expert opinion and determine the fair market value of a closely held corporation in light of the expert testimony regarding the type of business done, the fixed and liquid assets of the business at actual or book value, the business' net worth, the market for the shares, the past earnings, future losses, and earning potential of the business.
Bryan v. Bryan 180
7. The trial court is not required to accept any one method of stock valuation as more accurate than another accounting procedure.
Bryan v. Bryan 180
8. A trial court's valuation of a closely held corporation is reasonable if it has an acceptable basis in fact and principle.
Bryan v. Bryan 180
9. An individual director cannot escape liability for fraudulent corporate action taken under authorization affirmatively approved by him merely by asserting his ignorance of facts he had a duty to know and should have known. Where fraud is committed by a corporation, it is time to disregard the corporate fiction and hold the persons responsible therefor in their individual capacities.
Hahn & Hupf Constr. v. Highland Heights Nsg. Home 189
10. Where the duty of knowing facts exists, ignorance due to neglect of duty on the part of a director creates the same liability as actual knowledge and a failure to act thereon. This must involve a breach of a fiduciary relationship.
Hahn & Hupf Constr. v. Highland Heights Nsg. Home 189
11. Directors of a corporation occupy a fiduciary relation to the corporation and its stockholders. However, as a general rule, such relation does not extend to general creditors of the corporation.
Hahn & Hupf Constr. v. Highland Heights Nsg. Home 189

12. A director who misrepresents a material fact to another to induce the latter to enter into a financial relation with a corporation, to that person's detriment, may be liable to such other person for fraud and misrepresentation. Where that same director makes a representation which at the time is believed to be true, but later on he or she finds that it is false, and that other person continues to rely on the original representation to that person's detriment, that director may be personally liable, depending on the circumstances of the case.
Hahn & Hupf Constr. v. Highland Heights Nsg. Home 189
13. Under the provisions of Neb. Rev. Stat. § 21-20,121 (Reissue 1983), objection to a nonauthorized corporation's maintaining a lawsuit may be raised at any time during the pendency of such litigation, and the court may, in its discretion, limit the time that the plaintiff can have for procuring the necessary certificate of authority.
Christian Servs., Inc. v. Northfield Villa, Inc. 628
14. An officer of a corporation has no apparent authority to bind the corporation to an unusual, extraordinary, or unreasonable contract.
Hassett v. Swift & Company 819

Corroboration

1. In a prosecution for sexual assault the victim need not be independently corroborated on the particular acts constituting sexual assault, but must be corroborated on the material facts and circumstances tending to support the victim's testimony about the principal fact in issue.
State v. Jackson 384
2. One to whom the complaining witness has complained may testify to the fact and nature of the complaint if the complaint was made voluntarily and without unreasonable delay.
State v. Daniels 850
3. The rule which permits testimony of a witness that a sexual assault victim complained to such witness of the assault is for the purpose of confirming the fact of complaint, and does not permit consideration of the complaint as substantive proof of the facts of the assault. A jury should be given a limiting instruction to this effect.
State v. Daniels 850
4. Where a statement of a witness is used erroneously as substantive evidence but is merely cumulative of other competent evidence of the same facts which are sufficient to support the conviction, the trial court's failure to control such error generally will not constitute reversible error.
State v. Daniels 850

Counties

1. Statements of individual county commissioners acting separately do not constitute the statements of the county.
Wood v. Tesch 654
2. Neb. Rev. Stat. § 23-135 (Reissue 1983) applies to all claims arising from or out of a contract.
Zeller Sand & Gravel v. Butler Co. 847
3. Neb. Rev. Stat. § 23-135 (Reissue 1983) applies where a claim is not a mere formal prerequisite to the issuance of a warrant in payment but, rather, requires quasi-judicial action in the sense that an exercise of discretion is required in ascertaining or fixing the amount to be allowed, or resolution of the claim otherwise involves a determination of factual questions based upon evidence.
Zeller Sand & Gravel v. Butler Co. 847
4. Where Neb. Rev. Stat. § 23-135 (Reissue 1983) applies, the district court has appellate jurisdiction for the purpose of conducting a trial de novo, as though the action had been originally instituted in such court.
Zeller Sand & Gravel v. Butler Co. 847
5. A petition for the allowance of a claim against a county which is subject to the provisions of Neb. Rev. Stat. § 23-135 (Reissue 1983) is demurrable unless it shows on its face that the claim was filed with the county clerk within the statutory time.
Zeller Sand & Gravel v. Butler Co. 847

Courts

1. Where there is a question before a district court, acting as an appellate court, concerning its appellate jurisdiction, the district court is procedurally correct in disposing of the case on the basis of a motion to dismiss.
VisionQuest, Inc. v. State 228
2. The district court may, on motion and satisfactory proof that a judgment had been fully paid or satisfied by the act of the parties thereto, order it discharged and canceled of record.
Cotton v. Cotton 306
3. To acquire jurisdiction over the subject matter of the action, the requirements of the statute granting right of appeal are mandatory and must be fully complied with in order for the district court to have jurisdiction, and the district court may not enter any order other than an order of dismissal.
Nebraska Dept. of Correctional Servs. v. Carroll 307
4. In matters relating to the dissolution of marriages, courts have only such power as is conferred upon them by statute.
Meyers v. Meyers 370
5. The only statutory authority conferred on district courts to deal

with children in dissolution actions is that contained in Neb. Rev. Stat. § 42-364 (Reissue 1984).
Meyers v. Meyers 370
6. The adoption of ordinances under the police power is a legislative act, and the courts cannot interfere with such matters by attempting to mandate their adoption or amendment.
Omaha City Emp. Local 251 v. City of Omaha 412
7. A trial court should limit itself to entering but one final determination of the rights of the parties in a case.
Federal Land Bank v. McElhose 448
8. Appeals in criminal cases tried in a county court are governed by Neb. Rev. Stat. § 29-613 (Reissue 1979), and are restrictively disposed on the basis of the record made in the county court.
State v. Schott 456
9. A district court's review of criminal cases tried in a county court is limited to an examination of the record for error or an abuse of discretion which occurred in the county court.
State v. Schott 456
10. A district court may modify a sentence imposed by a county court only where the county court has so abused its discretion as to render its sentence an error upon the record presented.
State v. Schott 456
11. Where the facts adduced on an issue are such that reasonable minds can draw but one conclusion, the court must decide the question as a matter of law rather than submit it to the jury for determination.
Remelius v. Ritter 734
12. Where Neb. Rev. Stat. § 23-135 (Reissue 1983) applies, the district court has appellate jurisdiction for the purpose of conducting a trial de novo, as though the action had been originally instituted in such court.
Zeller Sand & Gravel v. Butler Co. 847
13. The record of the trial court imports absolute verity in all appellate proceedings, and if such record is incomplete or incorrect, the remedy is by appropriate proceedings to secure a correction thereof in the trial court.
State v. Martens 870

Criminal Law

1. The exception to the duty to retreat before employing deadly force is inapplicable if the defendant has in fact retreated voluntarily from his dwelling.
State v. Menser 36
2. A defendant in a criminal action is not only entitled to counsel but to the effective assistance of counsel.
State v. Grotzky 39
3. The standard for determining the effectiveness of counsel in a

criminal case is whether the attorney, in representing the accused, performed at least as well as a lawyer with ordinary training and skill in the criminal law in the area.
State v. Grotzky 39
4. Neb. Rev. Stat. §§ 39-669.07 and 39-669.08 (Reissue 1984) do not require intent as an element necessary to be proved by the State to show a violation of such statutes.
State v. Grotzky 39
5. The decision to object or not to object is part of trial strategy, and this court gives due deference to defense counsel's discretion in formulating trial tactics.
State v. Lieberman 95
6. To maintain a claim of ineffective assistance of counsel, the record must affirmatively support the defendant's position.
State v. Lieberman 95
7. 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. Wilkening 107
8. After a jury has considered all of the evidence and returned a verdict of guilty, that verdict may not, as a matter of law, be set aside on appeal for insufficiency of evidence if the evidence sustained some rational theory of guilt.
State v. Wilkening 107
State v. Schenck 523
9. Manslaughter can be committed when someone causes the death of another unintentionally while operating a motor vehicle in violation of the law.
State v. Roth 119
10. One purpose of the false reporting statute, Neb. Rev. Stat. § 28-907(1)(a) (Cum. Supp. 1984), is to prevent a waste of time and effort by law enforcement personnel.
In re Interest of McManaman 263
11. In determining the sufficiency of the evidence to sustain a conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence.
State v. Jackson 384
12. To sustain a conviction for a crime, the corpus delecti must be proved beyond a reasonable doubt.
State v. Rich 394
13. A verdict by a trier of fact in a criminal proceeding will be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
State v. Rich 394

14. In determining the sufficiency of the evidence to sustain a criminal conviction, this court does not resolve conflicts in the evidence, pass upon the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence, and a verdict rendered thereon must be sustained if, taking the view of such evidence most favorable to the State, there is sufficient evidence to support it.
State v. Blattner 396
State v. Havlat 554
15. Appeals in criminal cases tried in a county court are governed by Neb. Rev. Stat. § 29-613 (Reissue 1979), and are restrictively disposed on the basis of the record made in the county court.
State v. Schott 456
16. A district court's review of criminal cases tried in a county court is limited to an examination of the record for error or an abuse of discretion which occurred in the county court.
State v. Schott 456
17. A district court may modify a sentence imposed by a county court only where the county court has so abused its discretion as to render its sentence an error upon the record presented.
State v. Schott 456
18. Although prior contradictory statements made by the prosecutrix may cause the jury to doubt the account of facts testified to by her at trial, generally such prior statements do not negate, erase, or eradicate the evidence that a certain fact exists.
State v. Schenck 523
19. The elements of the crime of uttering a forged instrument are (1) the offering of a forged instrument with the representation by words or acts that it is true and genuine, (2) the knowledge that the same is false, forged, or counterfeited, and (3) the intent to defraud.
State v. Tate 586
20. While prosecutorial need alone does not mean probative value outweighs prejudice, the more essential the evidence, the greater its probative value, and the less likely that a trial court should order the evidence excluded.
State v. Bostwick 631
21. For use of a firearm, in violation of Neb. Rev. Stat. § 28-1205(1) (Reissue 1979), to subject a victim to sexual penetration by force or threat of force, Neb. Rev. Stat. § 28-319(1)(a) (Reissue 1979), it is only necessary that the victim be aware of the firearm's presence; that the assailant, in proximity to the firearm and knowing the firearm's location, has realistic accessibility to that firearm; and that the victim reasonably believes that the assailant will discharge the firearm to harm the victim unless the victim submits to the act of the assailant.
State v. Dondlinger 741

22. An act or omission to act is the proximate cause of death when it substantially and materially contributes, in a natural and continuous sequence, unbroken by an efficient, intervening cause, to the resulting death. It is unnecessary for proximate cause purposes that the particular kind of harm that results from the defendant's act be intended by him.
State v. Dixon 787
23. A victim's fatal heart attack, proximately caused by a defendant's felonious conduct toward that victim, establishes the causal connection between felonious conduct and homicide necessary to permit a conviction for felony murder in violation of Neb. Rev. Stat. § 28-303(2) (Reissue 1979).
State v. Dixon 787
24. There are no common-law crimes in the State of Nebraska.
State v. Douglas 833
25. No act is criminal unless the Legislature has in express terms declared it to be so, and no person can be punished for any act or omission which is not made penal by the plain import of written law.
State v. Douglas 833
26. It is a fundamental principle of statutory construction that a penal statute is to be strictly construed.
State v. Douglas 833
27. To sustain a conviction for perjury outside a judicial proceeding, there must exist a valid statute which requires the making of a statement under oath.
State v. Douglas 833
28. For an oath to be "required by law" as a foundation for the crime of perjury in violation of Neb. Rev. Stat. § 28-915(1)(Reissue 1985), a specific statute must explicitly require that an oath be administered.
State v. Douglas 833
29. The proper procedure for a group arraignment is to call each person being arraigned before the bench, identify him, and advise him that the remarks of the court apply to each person individually.
State v. Martens 870

Crops

Purchase price, under Neb. Rev. Stat. § 52-903 (Reissue 1984), means more than money and may include credits applied to a debt.
Galyen Petroleum Co. v. Svoboda 268

Damages

1. In calculating the damages due a lessee for failure of the lessor to install items required by the lease, lessee's damages are limited to the difference between the reasonable rental value of the property

as it was as compared to what it was contracted to be.
Middagh v. Stanal Sound Ltd. 54
2. The purchaser of a product pursuant to contract cannot recover economic losses from the seller manufacturer on claims in tort based on negligent manufacture or strict liability in the absence of physical harm to persons or property caused by the defective product.
Hilt Truck Line v. Pullman, Inc. 65
3. To establish a prima facie case in negligence, a plaintiff need only establish some evidence of duty, breach, causation, and damages.
Hilt Truck Line v. Pullman, Inc. 65
4. Testimony concerning an insurer's estimated cost of repairing damage is, when offered to prove the amount of damage, hearsay evidence and inadmissible.
State v. Larkin 398
5. A child born dead cannot maintain an action at common law for injuries received by it while in its mother's womb, and consequently the personal representative cannot maintain it under a wrongful death statute limiting such actions to those which would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof.
Smith v. Columbus Community Hosp. 776

Death

1. Where a violent death is shown under circumstances indicating that death occurred within the time and place limits of the employment without evidence as to the cause of death, there is no presumption that the death arose out of and in the course of the employment by virtue of Neb. Rev. Stat. § 48-151 (Reissue 1984).
Breckenridge v. Midlands Roofing Co. 452
2. There exists in Nebraska a presumption against death by suicide, but that presumption is rebuttable and is overcome and disappears when either direct or circumstantial evidence is introduced showing that the death was caused by suicide. The burden is then upon the party asserting such to adduce evidence that the death was accidental and not from suicide.
Breckenridge v. Midlands Roofing Co. 452
3. An act or omission to act is the proximate cause of death when it substantially and materially contributes, in a natural and continuous sequence, unbroken by an efficient, intervening cause, to the resulting death. It is unnecessary for proximate cause purposes that the particular kind of harm that results from the defendant's act be intended by him.
State v. Dixon 787

Debtors and Creditors

1. Directors of a corporation occupy a fiduciary relation to the

corporation and its stockholders. However, as a general rule, such relation does not extend to general creditors of the corporation.
Hahn & Hupf Constr. v. Highland Heights Nsg. Home 189

2. Purchase price, under Neb. Rev. Stat. § 52-903 (Reissue 1984), means more than money and may include credits applied to a debt.
Galyen Petroleum Co. v. Svoboda 268

3. Where a certain sum of money is tendered by a debtor to a creditor on condition that the creditor accept it in full satisfaction of the demand, the sum being in dispute, the creditor must either refuse the tender or accept it as made subject to the condition. If the creditor accepts it, he or she accepts the condition also, notwithstanding any protest made to the contrary.
Rees v. Huffman 493

4. A bank may set off the funds of a depositor to pay a debt due the bank from the depositor.
Stauffer Seeds, Inc. v. Nebraska Sec. Bank 594

5. Under an authorized hypothecation agreement a debtor may confer a right on a creditor in property belonging to another sufficient to create a security interest in such property which may be perfected under the Uniform Commercial Code.
Mid City Bank v. Omaha Butcher Supply 671

6. Under the Uniform Commercial Code a financing statement is sufficient in describing the collateral stated in the financing statement if it sets out an address of the secured party from which information concerning the security interest may be obtained, gives a mailing address of the debtor, and contains a statement indicating the types, or describing the items, of collateral, and reasonably defines the collateral.
Mid City Bank v. Omaha Butcher Supply 671

Decedents' Estates

1. Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intention at the time the account is created. Neb. Rev. Stat. § 30-2704(a) (Reissue 1979).
In re Estate of Lienemann 169

2. In determining the effect of a joint account agreement regarding Neb. Rev. Stat. § 30-2704(a) (Reissue 1979), the significant consideration is the intent of the depositor.
In re Estate of Lienemann 169

3. Where an individual creates and funds a bank account, naming that individual and another or others as parties to such account, only the intent of the individual creating and funding the account is relevant under Neb. Rev. Stat. § 30-2704 (Reissue 1979) in determining the nature of the account, that is, whether there is

right of survivorship pertaining to an account.
In re Estate of Lienemann 169
4. In reviewing a probate case on appeal from the county and district courts, our review, like that of the district court, must be confined to an examination for errors appearing on the record.
In re Estate of Wagner 699
5. There is no such position known as "attorney of an estate." When an attorney is employed to render services in securing the probate of a will or settling of an estate, he or she acts as attorney for the personal representative and not for the estate.
In re Estate of Wagner 699
6. A child born dead cannot maintain an action at common law for injuries received by it while in its mother's womb, and consequently the personal representative cannot maintain it under a wrongful death statute limiting such actions to those which would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof.
Smith v. Columbus Community Hosp. 776
7. The right to maintain an action for wrongful death did not exist under the common law, and exists in Nebraska, as in other states, solely by statute and is a matter for legislative enactment.
Smith v. Columbus Community Hosp. 776
8. Any possible right of a tenant, who as a prospective heir failed to inherit, to be compensated for improvements made to the land is limited to those situations in which the tenant's improvements were made under a bona fide, but mistaken, claim of ownership, where the landlord-testator acquiesced in the improvement or engaged in inequitable or misleading conduct.
Schmeckpeper v. Koertje 800

Declaratory Judgments

1. A court may refuse to enter a declaratory judgment where it would not terminate the uncertainty or controversy giving rise to the proceedings.
VisionQuest, Inc. v. State 228
2. The granting of declaratory relief rests in the discretion of the trial court.
VisionQuest, Inc. v. State 228

Deeds

1. One asserting that an absolute conveyance of real estate is in fact an equitable mortgage has the burden of proving such fact by clear and convincing evidence.
Stava v. Stava 343
2. When it is contended that a conveyance of real estate is in actuality a mortgage, the test is whether the relation of the parties to each other as debtor and creditor continued. If it does, the transaction

will be treated as a mortgage, otherwise not.
Stava v. Stava 343
3. Whether a deed absolute in form is a mortgage depends upon the intention of both grantor and grantee of the deed. Their intention may be evidenced not only by the documents in question but also by their declarations and conduct.
Stava v. Stava 343
4. Upon the execution, delivery, and acceptance of an unambiguous deed, such being the final acts of the parties expressing the terms of their agreement with reference to the subject matter, all prior negotiations and agreements are deemed merged therein. The doctrine of merger does not apply where there has been fraud or mistake.
Newton v. Brown 605
5. The court, in examining the matter of whether a deed was procured by undue influence, is not concerned with the rightness of the conveyance but only with determining whether it was the voluntary act of the grantor.
Bishop v. Hotovy 623
6. The burden is on the party alleging the execution of a deed was the result of undue influence to prove such undue influence by clear and convincing evidence.
Bishop v. Hotovy 623

Demurrer

A petition for the allowance of a claim against a county which is subject to the provisions of Neb. Rev. Stat. § 23-135 (Reissue 1983) is demurrable unless it shows on its face that the claim was filed with the county clerk within the statutory time.
Zeller Sand & Gravel v. Butler Co. 847

Directed Verdict

1. On appeal from a decree of the trial court dismissing an action at the close of plaintiff's evidence, this court must determine whether the cause of action was proved, and must accept as true plaintiff's evidence and any reasonable conclusions deducible therefrom.
Hahn & Hupf Constr. v. Highland Heights Nsg. Home 189
2. The standard governing a trial judge in assessing a motion for a directed verdict is well established. The judge must resolve every controverted fact in favor of the party against whom the verdict is sought, and must also give that party the benefit of every reasonable inference that can be drawn from the facts in evidence.
Sierks v. Delk 360
3. The court should direct a verdict only when facts are conceded, undisputed, or such that reasonable minds could draw but one

conclusion from them.
Sierks v. Delk 360
4. A trial court is justified in directing a verdict of not guilty only where there is a total failure of competent proof to support a material allegation in the information, or when the testimony adduced is of so weak or doubtful a character that a conviction based thereon could not be sustained.
State v. Tate 586
State v. Daniels 850

Divorce

1. While a divorce case is to be tried de novo on the record, this court will give weight to the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of facts rather than the opposite.
Bryan v. Bryan 180
2. In matters relating to the dissolution of marriages, courts have only such power as is conferred upon them by statute.
Meyers v. Meyers 370
3. The only statutory authority conferred on district courts to deal with children in dissolution actions is that contained in Neb. Rev. Stat. § 42-364 (Reissue 1984).
Meyers v. Meyers 370
4. The dissolution statutes do not empower courts to order a parent to contribute to the support of an adult handicapped child.
Meyers v. Meyers 370

Double Jeopardy

1. The constitutional prohibition against double jeopardy does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment.
State v. Bostwick 631
2. In a given case the double jeopardy clause bars a criminal prosecution only where (1) jeopardy has attached in a prior criminal proceeding, (2) the defendant is being tried for the same offense prosecuted in that prior proceeding, and (3) the prior proceeding has terminated jeopardy.
State v. Bostwick 631
3. Where the governmental conduct in question is intended to goad the defendant into moving for a mistrial, a defendant may raise the bar of double jeopardy to a second trial after having succeeded in aborting the first trial on the defendant's own motion.
State v. Bostwick 631
4. Generally, a motion by a defendant for a mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the

defendant's motion is necessitated by prosecutorial or judicial error.
State v. Bostwick 631
5. So long as a trial court has not abused its discretion in determining that a jury is deadlocked, a declaration of mistrial resulting from a jury's inability to reach a verdict does not bar reprosecution under the double jeopardy clause of state and federal Constitutions.
State v. Bostwick 631

Drunk Driving

Neb. Rev. Stat. §§ 39-669.07 and 39-669.08 (Reissue 1984) do not require intent as an element necessary to be proved by the State to show a violation of such statutes.
State v. Grotzky 39

Due Process

Freedom of speech and the right of assembly provided by the first amendment to the U.S. Constitution are among the fundamental liberties protected from state impairment by the due process clause of the fourteenth amendment to the U.S. Constitution.
Wood v. Tesch 654

Easements

1. In order to obtain rights in the real property of another by prescriptive easement, a claimant must show that his use was exclusive, adverse, under a claim of right, continuous and uninterrupted, and open and notorious for the full 10-year prescriptive period.
Werner v. Schardt 186
2. A use is adverse and under a claim of right if the claimant proves uninterrupted and open use for the necessary period. Once the claimant has established this presumption, it will prevail unless the owner of the land proves by a preponderance of the evidence that the use was by license, agreement, or permission.
Werner v. Schardt 186
3. 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.
Werner v. Schardt 186
4. The nature and extent or scope of the easement claimed by prescription must be clearly established.
Werner v. Schardt 186

Effectiveness of Counsel

1. A defendant in a criminal action is not only entitled to counsel but to the effective assistance of counsel.
State v. Grotzky 39
2. The standard for determining the effectiveness of counsel in a criminal case is whether the attorney, in representing the accused,

performed at least as well as a lawyer with ordinary training and skill in the criminal law in the area.
State v. Grotzky 39
3. The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.
State v. Lieberman 95
4. To maintain a claim of ineffective assistance of counsel, the record must affirmatively support the defendant's position.
State v. Lieberman 95
5. It is a well-established rule in this state that a decision to call or not to call a witness, made by counsel as a matter of trial strategy, even if the choice may prove to be incorrect, does not, without more, sustain a finding of ineffectiveness of counsel.
State v. Lieberman 95
6. One alleging ineffective assistance of counsel has the burden of establishing incompetency of counsel and, further, demonstrating in what manner inadequacy of counsel was prejudicial.
State v. Dillon 131

Emergency Vehicles
1. A police officer must be allowed to rely on the emergency status of the dispatch for his or her own protection and that of the public. As long as such officer acts in good faith in operating emergency equipment, he or she enjoys the privileges provided in Neb. Rev. Stat. §§ 39-608 and 39-640 (Reissue 1984).
Maple v. City of Omaha 293
2. Whether an authorized emergency vehicle is operating "proper audible or visual signals" under Neb. Rev. Stat. § 39-640 (Reissue 1984) is a factual question.
Maple v. City of Omaha 293
3. The statute granting emergency privileges to police vehicles clearly imposes a duty of due regard or due care upon the drivers of emergency vehicles, and in a negligence action their conduct will be measured against that of a reasonable person exercising due care under the same emergency circumstances.
Maple v. City of Omaha 293
4. The statutory law granting the right-of-way to emergency vehicles generally does not condition that right-of-way on other drivers' perception of emergency equipment.
Maple v. City of Omaha 293

Employer and Employee
1. There are three general requirements relating to partial restraints of trade: First, is the restriction reasonable in the sense that it is not injurious to the public; second, is the restriction reasonable in

the sense that it is no greater than is reasonably necessary to protect the employer in some legitimate interest; and, third, is the restriction reasonable in the sense that it is not unduly harsh and oppressive on the employee.
Boisen v. Petersen Flying Serv. 239
American Sec. Servs. v. Vodra 480
2. Not every employer-employee relationship infuses validity and enforceability into a postemployment restraint on competition by a former employee.
Boisen v. Petersen Flying Serv. 239
3. Regarding a postemployment covenant not to compete, an employer has a legitimate business interest in protection against competition by improper and unfair methods, but an employer is not entitled to enforcement of a restrictive covenant which merely protects the employer from ordinary competition.
Boisen v. Petersen Flying Serv. 239
American Sec. Servs. v. Vodra 480
4. Where an employee has substantial personal contact with the employer's customers, develops goodwill with such customers, and siphons away the goodwill under circumstances where the goodwill properly belongs to the employer, the employee's resultant competition is unfair, and the employer has a legitimate need for protection against the employee's competition.
Boisen v. Petersen Flying Serv. 239
5. An employer has a legitimate need to curb or prevent competitive endeavors by a former employee who has acquired confidential information or trade secrets pertaining to the employer's business operations.
Boisen v. Petersen Flying Serv. 239
6. Ordinarily, an employer has no legitimate business interest in postemployment prevention of an employee's use of some general skill or training acquired while working for the employer, although such on-the-job acquisition of general knowledge, skill, or facility may make the employee an effective competitor for the former employer.
Boisen v. Petersen Flying Serv. 239
7. A covenant not to compete, as a partial restraint of trade, is available to prevent unfair competition by a former employee but is not available to shield an employer against ordinary competition.
Boisen v. Petersen Flying Serv. 239
8. 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.
Professional Recruiters v. Wilkinson Mfg. Co. 351
9. There is no single test by which the determination of whether or not a workman is an employee, as distinguished from an independent contractor, may be made. This must be determined from all the facts in the case.
Professional Recruiters v. Wilkinson Mfg. Co. 351
10. In reference to an employer-customer relationship, good will is that value which results from the probability that old customers will continue to trade or deal with the members of an established concern.
American Sec. Servs. v. Vodra 480
11. Reasonableness of a specific restrictive covenant must be assessed upon the facts of a particular case and must be determined on all the circumstances.
American Sec. Servs. v. Vodra 480
12. The restriction imposed by a covenant not to compete must be no wider in scope than is necessary to protect the business of the employer.
American Sec. Servs. v. Vodra 480
13. A balancing test is applied in determining whether the restraint of a postemployment covenant not to compete is unduly harsh or oppressive and, therefore, unenforceable.
American Sec. Servs. v. Vodra 480
14. Supervisory personnel cannot be represented in the same bargaining unit with rank and file employees.
IBEW Local 244 v. Lincoln Elec. Sys. 550
15. Supervisory or managerial personnel may not retain the same bargaining agent as the employees' union because that would be tantamount to permitting them to enter the same bargaining unit.
IBEW Local 244 v. Lincoln Elec. Sys. 550
16. The mere fact that each local union can be traced back to a common international union will not be enough to show that the locals are affiliated with each other. There must be a positive showing that the national has authority and power to exercise control over both locals and that it is actually exercising that control.
IBEW Local 244 v. Lincoln Elec. Sys. 550
17. It is unlawful to act adversely toward an employee because of his or her union membership or activity.
Wood v. Tesch 654

Employment Contracts

1. When employment is not for a definite term, and there are no contractual or statutory restrictions upon the right of discharge,

an employer may lawfully discharge an employee whenever and for whatever cause it chooses without incurring liability.
Jeffers v. Bishop Clarkson Memorial Hosp. 829
2. Simply because the employee does not have an employment contract for a specific term does not deprive her of the benefit of grievance procedures as set forth in an employee handbook.
Jeffers v. Bishop Clarkson Memorial Hosp. 829
3. Except in cases where an employee is deprived of constitutional or statutory rights or where contractual agreements guarantee that employees may not be fired without just cause, the law in this state continues to deny any implied covenant of good faith or fair dealing in employment termination.
Jeffers v. Bishop Clarkson Memorial Hosp. 829

Employment Security Law

1. In any judicial proceeding under Neb. Rev. Stat. §§ 48-638 to 48-640 (Reissue 1984), the court shall consider the matter de novo upon the record.
Barada v. Sorensen 391
2. "Misconduct" within the meaning of Neb. Rev. Stat. § 48-628(b) (Reissue 1984) is a deliberate, willful, or wanton disregard of an employer's interest or of the standards of behavior which the employer has a right to expect of his employees, or carelessness or negligence of such a degree or recurrence as to manifest culpability, wrongful intent, or evil design.
Barada v. Sorensen 391
3. Appeals to this court under the provisions of the Nebraska Employment Security Law, Neb. Rev. Stat. §§ 48-601 to 48-669 (Reissue 1984), are reviewed de novo on the record.
Smith v. Sorensen 599
Carson v. Sorensen 878
4. "Misconduct" under Neb. Rev. Stat. § 48-628(b) (Cum. Supp. 1982) is defined as " 'behavior which evidences (1) wanton and willful disregard of the employer's interests, (2) deliberate violation of rules, (3) disregard of standards of behavior which the employer can rightfully expect from the employee, or (4) negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard of the employer's interests or of the employee's duties and obligations.' " *McCorison v. City of Lincoln*, 215 Neb. 474, 476, 339 N.W.2d 294, 295-96 (1983).
Smith v. Sorensen 599
5. The falsifying of entries by an employee on his employer's work records constitutes "misconduct" under Neb. Rev. Stat. § 48-628(b) (Cum. Supp. 1982).
Smith v. Sorensen 599
6. In order for a violation of an employer's work rule to constitute

"misconduct," it is necessary that the rule be a reasonable one.
Smith v. Sorensen 599
7. As a general rule, a labor contract is irrelevant to the determination of what constitutes "misconduct" under the Nebraska Employment Security Law, Neb. Rev. Stat. §§ 48-601 to 48-669 (Reissue 1984).
Smith v. Sorensen 599
8. To avoid disqualification from unemployment benefits under Neb. Rev. Stat. § 48-628 (Reissue 1984), an employee, who has voluntarily left employment, has the burden of proving there was good cause for the employee's terminating an employment relationship.
Stackley v. State 767
9. In appeals regarding Neb. Rev. Stat. § 48-628 (Reissue 1984), the Supreme Court reviews the record de novo, retries the issues of fact involved in the findings challenged, and reaches an independent conclusion regarding such issues of fact.
Stackley v. State 767
10. The Department of Labor's definition of a systematic and sustained job search constitutes reasonable compliance with federal directives and is not outside the authority granted by the Legislature.
Carson v. Sorensen 878

Equity

1. Our review of appeals in equity actions requires us to reach an independent conclusion as to disputed facts. However, where there is an irreconcilable conflict on material factual issues, this court will consider the fact that the trial court observed the witnesses and their manner of testifying.
Werner v. Schardt 186
2. Where a court of equity has properly acquired jurisdiction in a suit for equitable relief, it will make a complete adjudication of all matters properly presented and involved in the case.
Sandy Creek P.S. v. St. Paul Surplus Lines Ins. Co. 424
3. A constructive trust is a relationship, with respect to property, subjecting the person by whom the title to the property is held to an equitable duty to convey it to another on the ground that his acquisition or retention of the property is wrongful and that he would be unjustly enriched if he were permitted to retain the property.
Ruppert v. Breault 432
4. The judgment of a court of equity is called a decree.
Federal Land Bank v. McElhose 448
5. The Nebraska Consumer Protection Act, Neb. Rev. Stat. §§ 59-1601 et seq. (Reissue 1984), is equitable in nature; as such, trials thereunder are to the court.
State ex rel. Douglas v. Schroeder 473

6. Generally, in order to be entitled to the equitable remedy of accounting, it is necessary to show a fiduciary or trust relationship between the parties, or a complicated series of accounts, making the remedy at law inadequate.
American Sec. Servs. v. Vodra 480
7. An action for rescission of a contract is equitable in nature and, as such, is reviewable by this court de novo on the record. However, when the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and adopted one version of the facts rather than the opposite.
Equitable Life Assurance Soc'y v. Joiner 504
8. Equitable relief by reformation depends on whether an instrument to be reformed expresses the intent of the parties. The remedy of reformation is designed to correct an erroneous instrument and, by such correction, reflect the real intent of the parties regarding that instrument.
Newton v. Brown 605
9. Interest is sometimes allowed by courts of equity, in the exercise of a sound discretion, when interest would not be recoverable at law. A court of equity, in its discretion, may allow interest when, under all the circumstances of a case, assessment of interest is equitable and just. As compensation to the one who has been deprived of the use of money, interest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness.
Newton v. Brown 605
10. A suit to prevent unjust enrichment is tried in equity, and our review of equitable actions is by trial de novo.
Schmeckpeper v. Koertje 800

Evidence

1. In testing the sufficiency of the evidence to support the 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. Every controverted fact must be resolved in favor of the successful party, who should have the benefit of every inference that can reasonably be drawn therefrom.
Oham v. Aaron Corp. 28
Smith v. Hastings Irr. Pipe Co. 663
2. Neb. Rev. Stat. § 25-1220 (Reissue 1979) permits comparisons between known genuine writing and the disputed writing to be made by a jury either with or without the aid of experts.
Aetna Cas. & Surety Co. v. Nielsen 92
3. The overruling of a motion in limine does not eliminate the need to

object to the introduction of evidence in order to preserve the error.
State v. Lieberman 95
4. Where no issue as to the propriety of an arrest is raised and the evidence of the preliminary breath test is relevant only for the limited purpose of establishing probable cause to require the driver to submit to a test of his or her blood, urine, or breath under Neb. Rev. Stat. § 39-669.08 (Reissue 1984) and thereby make the results of the second test admissible in evidence for the purpose of seeking to convict a driver for operating a motor vehicle while under the influence of alcohol, the admissibility of the preliminary breath test is a question of law and should therefore be admitted into evidence out of the presence of the jury.
State v. Klingelhoefer 219
5. If properly admitted evidence exists to establish that which improperly admitted evidence also establishes, the error in receiving the inadmissible evidence is not grounds for reversal.
State v. Klingelhoefer 219
6. An error in the admission of evidence may, under appropriate circumstances, be cured by an instruction from the court.
State v. Klingelhoefer 219
7. Where evidence is in conflict and such that reasonable minds may draw different conclusions therefrom, the questions of negligence and comparative and contributory negligence are factual determinations.
Maple v. City of Omaha 293
8. To warrant a continuance because of the absence of a witness or evidence, the expected evidence must be credible and such as probably to affect the result. The absence of evidence that plainly cannot alter the result of the action is clearly no ground for a motion to continue a cause.
First Nat. Bank v. Schroeder 330
9. Testimony concerning an insurer's estimated cost of repairing damage is, when offered to prove the amount of damage, hearsay evidence and inadmissible.
State v. Larkin 398
10. When, on appeal, this court is asked to review errors which require a consideration of the evidence, we cannot give them consideration in the absence of a bill of exceptions.
Taylor v. Wallesen 411
11. There exists in Nebraska a presumption against death by suicide, but that presumption is rebuttable and is overcome and disappears when either direct or circumstantial evidence is introduced showing that the death was caused by suicide. The burden is then upon the party asserting such to adduce evidence that the death was accidental and not from suicide.
Breckenridge v. Midlands Roofing Co. 452

12. The Supreme Court will not interfere with a guilty verdict based on evidence, unless that evidence, so lacking probative force, is insufficient to support a verdict beyond a reasonable doubt.
State v. Schott 456
State v. Dixon 787
13. Nebraska's rape shield law, Neb. Rev. Stat. § 28-321 (Cum. Supp. 1984), which generally excludes evidence in the form of details of the victim's prior sexual conduct, does not prevent defendants from presenting *relevant* evidence in their own defense. It merely denies a defendant the opportunity to harass and humiliate the complainant at trial and divert the attention of the jury to issues not relevant to the controversy. A defendant has no constitutional right to inquire into irrelevant matters.
State v. Schenck 523
14. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.
State v. Schenck 523
15. 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. Schenck 523
16. The determination of the admissibility of evidence generally rests within the sound discretion of the trial court.
State v. Schenck 523
17. It is not for the Supreme Court to resolve conflicts in the evidence. Credibility of witnesses and the weight to be given their testimony are for the administrative agency as a trier of fact.
IBEW Local 244 v. Lincoln Elec. Sys. 550
18. Because of the wide variety of facts that may have circumstantial probative value, courts are liberal in admitting such evidence of facts which appear to have some degree of relevance to the matters in issue.
State v. Havlat 554
19. When a case is tried to the court without a jury, it is presumed that the trial court considered only competent and relevant evidence in reaching its decision.
State v. Havlat 554
20. Before reformation of an instrument will be allowed, the party seeking such reformation on a claim of mutual mistake must, by clear and convincing evidence, prove existence of such mistake in reference to the instrument to be reformed.
Newton v. Brown 605
21. Clear and convincing evidence means and is that amount which

produces in the trier of fact a firm belief or conviction about the existence of the fact to be proved.
Newton v. Brown 605
22. 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. Neb. Evid. R. 401 (Neb. Rev. Stat. § 27-401 (Reissue 1979)). Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Neb. Evid. R. 403 (Neb. Rev. Stat. § 27-403 (Reissue 1979)).
State v. Bostwick 631
23. While prosecutorial need alone does not mean probative value outweighs prejudice, the more essential the evidence, the greater its probative value, and the less likely that a trial court should order the evidence excluded.
State v. Bostwick 631
24. Where evidence is objected to which is substantially identical with evidence admitted and not objected to, prejudicial error will not lie because of its admission.
White v. Lovgren 771
25. Whether a specific manner of treatment or exercise of skill by a physician or surgeon or other professional demonstrates a lack of skill or knowledge or failure to exercise reasonable care is a matter that, usually, must be proved by expert testimony.
Reifschneider v. Nebraska Methodist Hosp. 782
26. Voluntariness is the ultimate test to use an accused's statement, admission, or confession as evidence in a criminal prosecution.
State v. Dixon 787
27. To be admissible an accused's statement, admission, or confession must have been freely and voluntarily made, and must not have been the product of or extracted by any direct or implied promise or inducement, no matter how slight.
State v. Dixon 787
28. Where a statement of a witness is used erroneously as substantive evidence but is merely cumulative of other competent evidence of the same facts which are sufficient to support the conviction, the trial court's failure to control such error generally will not constitute reversible error.
State v. Daniels 850

Expert Witnesses

1. A trial court's ruling in receiving or excluding expert testimony will be reversed only when there has been an abuse of discretion.
Aetna Cas. & Surety Co. v. Nielsen 92

2. It is not possible to establish an exact standard for determining the qualifications of expert or skilled witnesses.
Aetna Cas. & Surety Co. v. Nielsen 92
3. The weight to be given expert testimony is for the trier of fact.
Aetna Cas. & Surety Co. v. Nielsen 92
4. A trial court is free to assess expert opinion and determine the fair market value of a closely held corporation in light of the expert testimony regarding the type of business done, the fixed and liquid assets of the business at actual or book value, the business' net worth, the market for the shares, the past earnings, future losses, and earning potential of the business.
Bryan v. Bryan 180
5. Where the record presents nothing more than conflicting medical testimony, the Supreme Court will not substitute its judgment for that of the Workmen's Compensation Court.
Vredeveld v. Gelco Express 363
Beavers v. IBP, Inc. 647
6. A conflict or contradiction regarding an expert's opinion need not result from opinions expressed by different experts. A conflict or contradiction of opinions may arise in the course of testimony given by the same expert witness. A good faith conflict due to self-contradiction of an expert's opinions presents a question to be resolved by the trier of fact.
Vredeveld v. Gelco Express 363
Beavers v. IBP, Inc. 647
7. The nature and number of examinations by a physician are factors affecting credibility of a medical witness and weight to be attached to testimony from such witness.
Vredeveld v. Gelco Express 363
8. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.
State v. Schenck 523
9. It is for the trial court to make the initial decision on whether the testimony of an expert will assist the trier of fact. The soundness of its determination depends upon the qualification of the witness, the nature of the issue on which the opinion is sought, the foundation laid, and the particular facts of the case.
State v. Schenck 523
10. The weight and credibility of expert witnesses in workmen's compensation cases is for the trier of fact.
Snyder v. IBP, Inc. 534
11. The meaning of words used by medical experts may be ascertained by the sense in which they are used.
Snyder v. IBP, Inc. 534

12. Whether a specific manner of treatment or exercise of skill by a physician or surgeon or other professional demonstrates a lack of skill or knowledge or failure to exercise reasonable care is a matter that, usually, must be proved by expert testimony.
Reifschneider v. Nebraska Methodist Hosp. 782

False Reporting

One purpose of the false reporting statute, Neb. Rev. Stat. § 28-907(1)(a) (Cum. Supp. 1984), is to prevent a waste of time and effort by law enforcement personnel.
In re Interest of McManaman 263

Fees

The allowance, amount, and allocation of a guardian ad litem fee is a matter within the initial discretion of a trial court, involves consideration of the equities and circumstances of each particular case, and will not be set aside on appeal in the absence of an abuse of discretion by the trial court.
Smith v. Smith 752

Final Orders

1. The power of an administrative agency to reconsider its decision exists only until the aggrieved party institutes judicial review or the statutory time for such review has passed, and any such agency reconsideration does not operate to extend the statutory time for judicial review.
B. T. Energy Corp. v. Marcus 207
2. A partial summary judgment that a claimant is a guest passenger within the purview of Nebraska's former guest statute, Neb. Rev. Stat. § 39-6,191 (Reissue 1978), while the issue of the host driver's negligence is unresolved, is not a final judgment or order reviewable by the Supreme Court.
Voyles v. DeBrown Leasing, Inc. 250

Foreign Judgments

1. Money obligations accrued under a foreign alimony decree registered in this state pursuant to the provisions of the Uniform Enforcement of Foreign Judgments Act, Neb. Rev. Stat. §§ 25-1587 through 25-15,104 (Reissue 1979), may be enforced by the courts of this state.
Riedy v. Riedy 310
2. The Uniform Enforcement of Foreign Judgments Act, Neb. Rev. Stat. §§ 25-1587 through 25-15,104 (Reissue 1979), does not permit the courts of this state to enforce or modify foreign alimony decrees with respect to unaccrued money obligations.
Riedy v. Riedy 310

Forgery

The elements of the crime of uttering a forged instrument are (1) the offering of a forged instrument with the representation by words

or acts that it is true and genuine, (2) the knowledge that the same is false, forged, or counterfeited, and (3) the intent to defraud.
State v. Tate 586

Fraud

1. Generally, a court, sitting in equity, will not impose a constructive trust and constitute an individual as a trustee of the legal title for property, unless it be shown, by clear and convincing evidence, that the individual, as a potential constructive trustee, had obtained title to property by fraud, misrepresentation, or an abuse of an influential or confidential relationship and that, under the circumstances, such individual should not, according to the rules of equity and good conscience, hold and enjoy the property so obtained.
In re Estate of Lienemann 169
2. An individual director cannot escape liability for fraudulent corporate action taken under authorization affirmatively approved by him merely by asserting his ignorance of facts he had a duty to know and should have known. Where fraud is committed by a corporation, it is time to disregard the corporate fiction and hold the persons responsible therefor in their individual capacities.
Hahn & Hupf Constr. v. Highland Heights Nsg. Home 189
3. In order to sustain an action for fraud and false representation, the plaintiff must, in substance, prove (1) that a representation was made as a statement of fact; (2) that it was false; (3) that the party making the representation knew it was false, or else made it without knowledge as a positive statement of known fact, i.e., recklessly made; (4) that it was made with intent to deceive and for the purpose of inducing the other party to act upon it; (5) that the party hearing the false statement had a reasonable basis to rely on the statement and did in fact rely on it and was damaged thereby; and (6) the amount of the damage.
Hahn & Hupf Constr. v. Highland Heights Nsg. Home 189
4. A director who misrepresents a material fact to another to induce the latter to enter into a financial relation with a corporation, to that person's detriment, may be liable to such other person for fraud and misrepresentation. Where that same director makes a representation which at the time is believed to be true, but later on he or she finds that it is false, and that other person continues to rely on the original representation to that person's detriment, that director may be personally liable, depending on the circumstances of the case.
Hahn & Hupf Constr. v. Highland Heights Nsg. Home 189
5. Constructive trusts arise from actual or constructive fraud or imposition, committed by one party on another. Thus, if one

person procures the legal title to property from another by fraud or misrepresentation, or by an abuse of some influential or confidential relation which he holds toward the owner of the legal title, obtains such title from him upon more advantageous terms than he could otherwise have obtained it, the law constructs a trust in favor of the party upon whom the fraud or imposition has been practiced.
Ruppert v. Breault 432

6. When an applicant makes an untrue statement with respect to a material fact peculiarly within his knowledge, the finder of fact may, from the mere occurrence of the false statement, conclude it was made knowingly with intent to deceive.
Equitable Life Assurance Soc'y v. Joiner 504

7. In the absence of fraud, one who signs an instrument without reading it, when he can read and has an opportunity, cannot avoid the effect of his signature merely because he was not informed of the contents of the instrument.
Equitable Life Assurance Soc'y v. Joiner 504

8. Upon the execution, delivery, and acceptance of an unambiguous deed, such being the final acts of the parties expressing the terms of their agreement with reference to the subject matter, all prior negotiations and agreements are deemed merged therein. The doctrine of merger does not apply where there has been fraud or mistake.
Newton v. Brown 605

Good Cause

To avoid disqualification from unemployment benefits under Neb. Rev. Stat. § 48-628 (Reissue 1984), an employee, who has voluntarily left employment, has the burden of proving there was good cause for the employee's terminating an employment relationship.
Stackley v. State 767

Goodwill

1. Goodwill is the advantage or benefit which is acquired by an establishment beyond the mere value of the capital, stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices.
Taylor v. Taylor 721

2. Whether goodwill exists and whether goodwill has any value are questions of fact.
Taylor v. Taylor 721

Guardians Ad Litem

The allowance, amount, and allocation of a guardian ad litem fee is a matter within the initial discretion of a trial court, involves consideration of the equities and circumstances of each particular case, and will not be set aside on appeal in the absence of an abuse of discretion by the trial court.
Smith v. Smith 752

Habitual Criminals

The records of prior convictions of a defendant relied on to establish a finding that defendant is a habitual criminal must show that at the time of the prior convictions defendant was represented by counsel or knowingly, intelligently, and voluntarily waived counsel.
State v. Huffman 512

Hearsay

Testimony concerning an insurer's estimated cost of repairing damage is, when offered to prove the amount of damage, hearsay evidence and inadmissible.
State v. Larkin 398

Highways

The State's conduct in maintaining its highways falls squarely within the purview of the State Tort Claims Act, Neb. Rev. Stat. §§ 81-8,209 et seq. (Reissue 1981).
Bean v. State 202

Homicide

1. Manslaughter can be committed when someone causes the death of another unintentionally while operating a motor vehicle in violation of the law.
State v. Roth 119
2. The maximum penalty of confinement that may be imposed upon a person convicted of manslaughter resulting from his operation of a motor vehicle is 6 months' imprisonment in the county jail.
State v. Roth 119
3. A victim's fatal heart attack, proximately caused by a defendant's felonious conduct toward that victim, establishes the causal connection between felonious conduct and homicide necessary to permit a conviction for felony murder in violation of Neb. Rev. Stat. § 28-303(2) (Reissue 1979).
State v. Dixon 787

Immunity

Although we do not engage in a special duty-general duty analysis of sovereign immunity, it is still necessary for the claimant, in order to recover from the municipality, to prove that a duty was owed to

him or her, that this duty was breached, and that an injury was proximately caused by that breach.
Maple v. City of Omaha 293

Implied Consent

1. The findings of the trial court in an appeal from an order revoking a motor vehicle operator's license under the implied consent law are reviewed de novo as in equity.
Jensen v. Jensen 23
2. On appeal to the district court, it is the licensee's burden to establish grounds for reversal by a preponderance of the evidence.
Jensen v. Jensen 23
3. A refusal to submit to a chemical test for purposes of the implied consent law occurs where the conduct of the arrested motorist is such that a reasonable person in the officer's position would be justified in believing that such motorist was capable of refusal and manifested an unwillingness to submit to the test.
Jensen v. Jensen 23
Pollard v. Jensen 521
4. A person is not exempted from the provisions of a refusal statute merely because he was too intoxicated to appreciate the consequences of his refusal.
Jensen v. Jensen 23
5. There is no requirement that *Miranda* warnings be given prior to a request to submit to a chemical analysis of blood, breath, or urine under the Nebraska implied consent law.
State v. Klingelhoefer 219
6. Under the implied consent law a driver is not entitled to consult with an attorney before submitting to a chemical test, nor is a delay in the test required due to a driver's request to consult with an attorney.
State v. Klingelhoefer 219
7. Neb. Rev. Stat. § 39-669.09 (Reissue 1984) does not require the officer to inform the person to be tested of his privilege to request an independent test.
State v. Klingelhoefer 219
8. The execution, approval, and filing of the bond required by Neb. Rev. Stat. § 60-420 (Reissue 1984) are necessary steps to the acquisition of subject matter jurisdiction of an implied consent proceeding by the district court.
Bammer v. Jensen 400
9. Filing in the district court does not satisfy the requirement of Neb. Rev. Stat. § 60-420 (Reissue 1984) that the bond be filed in the office of the director of the Department of Motor Vehicles within 20 days of the order concerning which complaint is made.
Bammer v. Jensen 400
10. The only understanding required by the licensee is that he has been asked to take a test. It is not a defense that he does not understand

the consequences of refusal or is not able to make a reasoned judgment as to what course of action to take.
Pollard v. Jensen 521
11. If the suspect knew that he was being asked a question and manifested a refusal, for the purpose of the statute he refused to take the test.
Pollard v. Jensen 521

Improvements

1. It is the general rule that improvements made while a party is in possession of premises under a lease which does not grant the right of reimbursement are not reimbursable to that tenant.
Schmeckpeper v. Koertje 800
2. Improvements which become a part of the real estate may not be removed and do not become the property of the lessee unless such removal or ownership is provided for by agreement or statute.
Schmeckpeper v. Koertje 800
3. Any possible right of a tenant, who as a prospective heir failed to inherit, to be compensated for improvements made to the land is limited to those situations in which the tenant's improvements were made under a bona fide, but mistaken, claim of ownership, where the landlord-testator acquiesced in the improvement or engaged in inequitable or misleading conduct.
Schmeckpeper v. Koertje 800

Insurance

1. An insurance contract should be considered as any other contract and should be given effect according to the ordinary sense of the terms used.
State Farm Mut. Auto. Ins. Co. v. Royal Ins. Co. 13
2. When provisions of an insurance contract are ambiguous or are susceptible of two constructions, the policy must be liberally construed in favor of the insured.
State Farm Mut. Auto. Ins. Co. v. Royal Ins. Co. 13
3. Testimony concerning an insurer's estimated cost of repairing damage is, when offered to prove the amount of damage, hearsay evidence and inadmissible.
State v. Larkin 398
4. An insurer is required to undertake the defense of claims asserted against its insured which fall within the coverage of its policy.
Sandy Creek P.S. v. St. Paul Surplus Lines Ins. Co. 424
5. As used in an exclusionary definition in an insurance policy, "money damages" means money sued for by a plaintiff which plaintiff prays should be paid by the insured directly to, or for the direct or indirect benefit of, the plaintiff allegedly damaged by actions of the insured.
Sandy Creek P.S. v. St. Paul Surplus Lines Ins. Co. 424

6. When an applicant makes an untrue statement with respect to a material fact peculiarly within his knowledge, the finder of fact may, from the mere occurrence of the false statement, conclude it was made knowingly with intent to deceive.
Equitable Life Assurance Soc'y v. Joiner 504
7. In the absence of fraud, one who signs an instrument without reading it, when he can read and has an opportunity, cannot avoid the effect of his signature merely because he was not informed of the contents of the instrument.
Equitable Life Assurance Soc'y v. Joiner 504

Intent

1. Neb. Rev. Stat. §§ 39-669.07 and 39-669.08 (Reissue 1984) do not require intent as an element necessary to be proved by the State to show a violation of such statutes.
State v. Grotzky 39
2. Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intention at the time the account is created. Neb. Rev. Stat. § 30-2704(a) (Reissue 1979).
In re Estate of Lienemann 169
3. In determining the effect of a joint account agreement regarding Neb. Rev. Stat. § 30-2704(a) (Reissue 1979), the significant consideration is the intent of the depositor.
In re Estate of Lienemann 169
4. Where an individual creates and funds a bank account, naming that individual and another or others as parties to such account, only the intent of the individual creating and funding the account is relevant under Neb. Rev. Stat. § 30-2704 (Reissue 1979) in determining the nature of the account, that is, whether there is right of survivorship pertaining to an account.
In re Estate of Lienemann 169
5. Whether a deed absolute in form is a mortgage depends upon the intention of both grantor and grantee of the deed. Their intention may be evidenced not only by the documents in question but also by their declarations and conduct.
Stava v. Stava 343
6. It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language; neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute.
Meyers v. Meyers 370
7. Intentionally means willfully or purposely, and not accidentally or involuntarily.
State v. Schott 456
8. Recklessly shall mean acting with respect to a material element of

an offense when any person disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation. Neb. Rev. Stat. § 28-109(19) (Reissue 1979).
State v. Schott 456

9. The intent with which an act is committed is a mental process and may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident.
State v. Schott 456

10. Equitable relief by reformation depends on whether an instrument to be reformed expresses the intent of the parties. The remedy of reformation is designed to correct an erroneous instrument and, by such correction, reflect the real intent of the parties regarding that instrument.
Newton v. Brown 605

11. If incorrect language or wording is inserted by mistake, including a scrivener's mistake, into an instrument intended to reflect the agreement of the parties, such mistake is mutual and contrary to the real intention and agreement of the parties.
Newton v. Brown 605

12. An erroneous omission or deletion, even by a scrivener, from an instrument intended to reflect the agreement of the parties is a mutual mistake and is contrary to the real intention and agreement of the parties.
Newton v. Brown 605

13. An act or omission to act is the proximate cause of death when it substantially and materially contributes, in a natural and continuous sequence, unbroken by an efficient, intervening cause, to the resulting death. It is unnecessary for proximate cause purposes that the particular kind of harm that results from the defendant's act be intended by him.
State v. Dixon 787

Interest

Interest is sometimes allowed by courts of equity, in the exercise of a sound discretion, when interest would not be recoverable at law. A court of equity, in its discretion, may allow interest when, under all the circumstances of a case, assessment of interest is equitable and just. As compensation to the one who has been deprived of the use of money, interest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness.
Newton v. Brown 605

Joint Accounts

1. Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intention at the time the account is created. Neb. Rev. Stat. § 30-2704(a) (Reissue 1979).
   In re Estate of Lienemann 169
2. As a general rule, it is not necessary that a donee or beneficiary have knowledge about creation of a joint account, sign a signature card, or either deposit or withdraw funds from the account in order to establish a valid joint tenancy in a bank account.
   In re Estate of Lienemann 169
3. In determining the effect of a joint account agreement regarding Neb. Rev. Stat. § 30-2704(a) (Reissue 1979), the significant consideration is the intent of the depositor.
   In re Estate of Lienemann 169
4. Where an individual creates and funds a bank account, naming that individual and another or others as parties to such account, only the intent of the individual creating and funding the account is relevant under Neb. Rev. Stat. § 30-2704 (Reissue 1979) in determining the nature of the account, that is, whether there is right of survivorship pertaining to an account.
   In re Estate of Lienemann 169

Judges

1. A party seeking to disqualify a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality.
   State v. Dondlinger 741
2. A motion to disqualify a trial judge on account of prejudice is addressed to the sound discretion of the trial court. Generally, the ruling on a motion to disqualify a trial judge on the ground of bias and prejudice will be affirmed on appeal unless the record establishes bias and prejudice as a matter of law.
   State v. Dondlinger 741

Judgments

1. A proper judgment will not be reversed even if the trial court did not give the right reasons.
   State Farm Mut. Auto. Ins. Co. v. Royal Ins. Co. 13
2. In an action at law where a jury has been waived, the findings of the trial court have the effect of a jury verdict on appeal. In considering the sufficiency of the evidence to sustain the judgment, the evidence will be considered in the light most favorable to the successful party, any controverted fact will be resolved in that party's favor, and the successful party will have

the benefit of every inference reasonably deducible from the evidence.
Middagh v. Stanal Sound Ltd. 54
Maple v. City of Omaha 293
Professional Recruiters v. Wilkinson Mfg. Co. 351
Mary Young Men's Christian Assn. v. Hall 738
Nekuda v. Waspi Trucking, Inc. 806

3. A judgment must be sufficiently certain in its terms to be able to be enforced in a manner provided by law.
Lenz v. Lenz 85

4. On appeal from a decree of the trial court dismissing an action at the close of plaintiff's evidence, this court must determine whether the cause of action was proved, and must accept as true plaintiff's evidence and any reasonable conclusions deducible therefrom.
Hahn & Hupf Constr. v. Highland Heights Nsg. Home 189

5. In our review of a bench trial of an action at law, this court must consider the evidence in the light most favorable to the successful party, resolving all conflicts in his favor. That party is entitled to the benefit of every inference that can reasonably be deduced from the evidence.
Maple v. City of Omaha 293

6. The district court may, on motion and satisfactory proof that a judgment had been fully paid or satisfied by the act of the parties thereto, order it discharged and canceled of record.
Cotton v. Cotton 306

7. As required by Neb. Rev. Stat. §§ 25-1905 and 25-1931 (Reissue 1979), within 1 calendar month after rendition of the final judgment or order sought to be reversed, vacated, or modified, a petitioner in error must file a petition and an appropriate transcript containing the final judgment or order to be judicially reviewed.
Glup v. City of Omaha 355

8. Timely filing of both the petition in error and the certified transcript is mandatory to confer jurisdiction on a court asked to review a final judgment or order, as provided by Neb. Rev. Stat. § 25-1905 (Reissue 1979).
Glup v. City of Omaha 355

9. Where a proceeding in error pursuant to Neb. Rev. Stat. § 25-1905 (Reissue 1979) is utilized to seek reversal, vacation, or modification of a final judgment or order, jurisdiction of a court does not attach until a petition and transcript, containing the final judgment or order, are filed in the court requested to review such judgment or order.
Glup v. City of Omaha 355

10. Unless a petitioner in an error proceeding demonstrates that lack of a timely filed transcript is the result of failure in performance of

a public duty owed by the official charged with preparation or furnishing the transcript, absence of a mandatory transcript prevents or defeats jurisdiction of a court asked to review a final judgment or order.
Glup v. City of Omaha 355
11. If a district court is without jurisdiction over the subject matter of litigation, the Supreme Court does not acquire jurisdiction as a result of an appeal from a final order of the district court.
Glup v. City of Omaha 355
12. The judgment of a court of equity is called a decree.
Federal Land Bank v. McElhose 448
13. A judgment is the final determination of the rights of the parties.
Federal Land Bank v. McElhose 448
14. The rendition of a judgment is the act of the court, or a judge thereof, in pronouncing judgment, accompanied by the making of a notation on the trial docket.
Federal Land Bank v. McElhose 448
15. Failing a notation on the trial docket, a judgment is rendered when some written notation is made and filed in the records of the court.
Federal Land Bank v. McElhose 448
16. Where a second judgment in part contradicts an earlier judgment, the time for appeal from that portion of the second judgment which contradicts the earlier judgment, and that portion only, runs from the rendition of the second judgment.
Federal Land Bank v. McElhose 448
17. A trial court should limit itself to entering but one final determination of the rights of the parties in a case.
Federal Land Bank v. McElhose 448
18. Where the facts adduced on an issue are such that reasonable minds can draw but one conclusion, the court must decide the question as a matter of law rather than submit it to the jury for determination.
Remelius v. Ritter 734
19. Where there is no evidence that a master has been negligent other than through the imputation of the negligent conduct of his servant, based upon the doctrine of respondeat superior, as between the same parties, a judgment in favor of the servant on the merits renders invalid any judgment against the master.
White v. Lovgren 771

Juries

1. The right to a jury trial under the seventh amendment to the U.S. Constitution does not apply in state courts.
State ex rel. Douglas v. Schroeder 473
2. The purpose of article I, § 6, of the Nebraska Constitution is to

preserve the right to a jury trial as it existed at common law and under the statutes in force when the Constitution was adopted.
State ex rel. Douglas v. Schroeder 473

Jurisdiction

1. A claimant must comply with the requirements of Neb. Rev. Stat. § 77-2407 (Reissue 1981) in order to present a valid appeal to the district court from the denial of a contract claim against the state.
VisionQuest, Inc. v. State 228
2. To acquire jurisdiction over the subject matter of the action, the requirements of the statute granting right of appeal are mandatory and must be fully complied with in order for the district court to have jurisdiction, and the district court may not enter any order other than an order of dismissal.
Nebraska Dept. of Correctional Servs. v. Carroll 307
3. Money obligations accrued under a foreign alimony decree registered in this state pursuant to the provisions of the Uniform Enforcement of Foreign Judgments Act, Neb. Rev. Stat. §§ 25-1587 through 25-15,104 (Reissue 1979), may be enforced by the courts of this state.
Riedy v. Riedy 310
4. The Uniform Enforcement of Foreign Judgments Act, Neb. Rev. Stat. §§ 25-1587 through 25-15,104 (Reissue 1979), does not permit the courts of this state to enforce or modify foreign alimony decrees with respect to unaccrued money obligations.
Riedy v. Riedy 310
5. Parties cannot confer subject matter jurisdiction upon a judicial tribunal by either acquiescence or consent.
Riedy v. Riedy 310
Bolan v. Boyle 826
Halbleib v. City of Omaha 844
6. Timely filing of both the petition in error and the certified transcript is mandatory to confer jurisdiction on a court asked to review a final judgment or order, as provided by Neb. Rev. Stat. § 25-1905 (Reissue 1979).
Glup v. City of Omaha 355
7. Where a proceeding in error pursuant to Neb. Rev. Stat. § 25-1905 (Reissue 1979) is utilized to seek reversal, vacation, or modification of a final judgment or order, jurisdiction of a court does not attach until a petition and transcript, containing the final judgment or order, are filed in the court requested to review such judgment or order.
Glup v. City of Omaha 355
8. Unless a petitioner in an error proceeding demonstrates that lack of a timely filed transcript is the result of failure in performance of a public duty owed by the official charged with preparation or furnishing the transcript, absence of a mandatory transcript

prevents or defeats jurisdiction of a court asked to review a final judgment or order.
Glup v. City of Omaha 355
9. Whether a question is raised by the parties concerning jurisdiction of the lower court or tribunal, it is not only within the power but the duty of an appellate court to determine whether such appellate court has jurisdiction over the subject matter.
Glup v. City of Omaha 355
10. Where lack of subject matter jurisdiction in the original tribunal is apparent on the face of the record, yet the parties fail to raise that issue, it is the duty of the reviewing court to raise and determine the issue of jurisdiction sua sponte.
Glup v. City of Omaha 355
11. If a district court is without jurisdiction over the subject matter of litigation, the Supreme Court does not acquire jurisdiction as a result of an appeal from a final order of the district court.
Glup v. City of Omaha 355
12. In matters relating to the dissolution of marriages, courts have only such power as is conferred upon them by statute.
Meyers v. Meyers 370
13. The only statutory authority conferred on district courts to deal with children in dissolution actions is that contained in Neb. Rev. Stat. § 42-364 (Reissue 1984).
Meyers v. Meyers 370
14. The execution, approval, and filing of the bond required by Neb. Rev. Stat. § 60-420 (Reissue 1984) are necessary steps to the acquisition of subject matter jurisdiction of an implied consent proceeding by the district court.
Bammer v. Jensen 400
15. Filing in the district court does not satisfy the requirement of Neb. Rev. Stat. § 60-420 (Reissue 1984) that the bond be filed in the office of the director of the Department of Motor Vehicles within 20 days of the order concerning which complaint is made.
Bammer v. Jensen 400
16. Where a court of equity has properly acquired jurisdiction in a suit for equitable relief, it will make a complete adjudication of all matters properly presented and involved in the case.
Sandy Creek P.S. v. St. Paul Surplus Lines Ins. Co. 424
17. The time within which an appeal must be taken is mandatory and must be met in order for an appellate tribunal to acquire jurisdiction of the subject matter.
Federal Land Bank v. McElhose 448
18. The Nebraska Supreme Court acquires no jurisdiction of a cause appealed from a tribunal which lacked subject matter jurisdiction.
Wood v. Tesch 654
19. The Commission of Industrial Relations is an administrative

agency empowered to perform a legislative function and, as such, has no power or authority other than that specifically conferred on it by statute or by a construction thereof necessary to accomplish the purposes of the act establishing the commission.
Wood v. Tesch 654

20. The Commission of Industrial Relations has no authority to vindicate constitutional rights, nor to hear cases for breach of contract, nor to declare rights, duties, and obligations of the parties.
Wood v. Tesch 654

21. Not every controversy concerning the terms, tenure, or conditions of employment is an industrial dispute which lodges jurisdiction in the Commission of Industrial Relations.
Wood v. Tesch 654

22. A uniquely personal termination of employment does not constitute an industrial dispute notwithstanding the fact it may involve a controversy concerning terms, tenure, or conditions of employment.
Wood v. Tesch 654

23. Generally, before a court may acquire jurisdiction over a claim against a city of the metropolitan class, the procedures set out in Neb. Rev. Stat. § 14-804 (Reissue 1983) must be followed.
Bolan v. Boyle 826
Halbleib v. City of Omaha 844

24. Where Neb. Rev. Stat. § 23-135 (Reissue 1983) applies, the district court has appellate jurisdiction for the purpose of conducting a trial de novo, as though the action had been originally instituted in such court.
Zeller Sand & Gravel v. Butler Co. 847

Jury Instructions

1. It is the duty of the trial court to instruct the jury upon the accused's theory of the case if there is sufficient evidence to support it.
State v. Menser 36

2. It is not error to refuse instruction on any issue which is not supported by evidence.
State v. Menser 36

3. An error in the admission of evidence may, under appropriate circumstances, be cured by an instruction from the court.
State v. Klingelhoefer 219

4. It is not reversible error for a trial court to fail to give a specific instruction on credibility of the testimony of an accomplice where such an instruction is not requested.
State v. Huffman 512

5. Prejudicial error regarding jury instructions may not be predicated solely upon a particular sentence or phrase in an

isolated instruction, but must appear from consideration of the entire instruction of which the questioned sentence or phrase is a part, as well as consideration of other relevant instructions given to the jury.
State v. Dondlinger 741
6. Jury instructions must be read together, and if the instructions taken as a whole correctly state the law, are not misleading, and adequately cover the issues, there is no prejudicial error.
State v. Dondlinger 741

Jury Misconduct

1. Where the defendant initiates and causes jury misconduct, the defendant is estopped from maintaining that such misconduct entitles the defendant to a new trial.
State v. Bonaparte 469
2. In order for alleged jury misconduct to be a basis for a new trial, the conduct must have been prejudicial to the defendant.
State v. Bonaparte 469
3. Where a defendant causes jury misconduct, he cannot thereafter be heard to maintain that such misconduct was prejudicial.
State v. Bonaparte 469

Labor and Labor Relations

1. Supervisory personnel cannot be represented in the same bargaining unit with rank and file employees.
IBEW Local 244 v. Lincoln Elec. Sys. 550
2. Supervisory or managerial personnel may not retain the same bargaining agent as the employees' union because that would be tantamount to permitting them to enter the same bargaining unit.
IBEW Local 244 v. Lincoln Elec. Sys. 550
3. The mere fact that each local union can be traced back to a common international union will not be enough to show that the locals are affiliated with each other. There must be a positive showing that the national has authority and power to exercise control over both locals and that it is actually exercising that control.
IBEW Local 244 v. Lincoln Elec. Sys. 550
4. As a general rule, a labor contract is irrelevant to the determination of what constitutes "misconduct" under the Nebraska Employment Security Law, Neb. Rev. Stat. §§ 48-601 to 48-669 (Reissue 1984).
Smith v. Sorensen 599
5. The right to inform people about unions is protected by both the right to free speech and the right of assembly.
Wood v. Tesch 654
6. It is unlawful to act adversely toward an employee because of his or her union membership or activity.
Wood v. Tesch 654

Landlord and Tenant

1. To constitute a constructive eviction it must be shown that the premises were rendered unfit for occupancy for the purposes for which they were leased or were rendered unfit so as to deprive lessee of the beneficial use of the premises.
   Middagh v. Stanal Sound Ltd. 54
2. In calculating the damages due a lessee for failure of the lessor to install items required by the lease, lessee's damages are limited to the difference between the reasonable rental value of the property as it was as compared to what it was contracted to be.
   Middagh v. Stanal Sound Ltd. 54
3. It is the general rule that improvements made while a party is in possession of premises under a lease which does not grant the right of reimbursement are not reimbursable to that tenant.
   Schmeckpeper v. Koertje 800
4. Improvements which become a part of the real estate may not be removed and do not become the property of the lessee unless such removal or ownership is provided for by agreement or statute.
   Schmeckpeper v. Koertje 800
5. Any possible right of a tenant, who as a prospective heir failed to inherit, to be compensated for improvements made to the land is limited to those situations in which the tenant's improvements were made under a bona fide, but mistaken, claim of ownership, where the landlord-testator acquiesced in the improvement or engaged in inequitable or misleading conduct.
   Schmeckpeper v. Koertje 800

Leases

1. It is the general rule that improvements made while a party is in possession of premises under a lease which does not grant the right of reimbursement are not reimbursable to that tenant.
   Schmeckpeper v. Koertje 800
2. Improvements which become a part of the real estate may not be removed and do not become the property of the lessee unless such removal or ownership is provided for by agreement or statute.
   Schmeckpeper v. Koertje 800

Legislature

1. The state may lay its sovereignty aside and consent to be sued on such terms and conditions as the Legislature may provide.
   VisionQuest, Inc. v. State 228
2. It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language; neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute.
   Meyers v. Meyers 370
3. A sanitary and improvement district, existing pursuant to the

sanitary and improvement districts act, Neb. Rev. Stat. §§ 31-727 et seq. (Reissue 1984), is a legislative creature, a political subdivision of the State of Nebraska.
Rexroad, Inc. v. S.I.D. No. 66 618

4. No act is criminal unless the Legislature has in express terms declared it to be so, and no person can be punished for any act or omission which is not made penal by the plain import of written law.
State v. Douglas 833

Liability

1. The herd laws pertain to damage to property and do not alter the common-law liability for personal injuries caused by trespassing bulls.
Foland v. Malander 1

2. An individual director cannot escape liability for fraudulent corporate action taken under authorization affirmatively approved by him merely by asserting his ignorance of facts he had a duty to know and should have known. Where fraud is committed by a corporation, it is time to disregard the corporate fiction and hold the persons responsible therefor in their individual capacities.
Hahn & Hupf Constr. v. Highland Heights Nsg. Home 189

3. Where the duty of knowing facts exists, ignorance due to neglect of duty on the part of a director creates the same liability as actual knowledge and a failure to act thereon. This must involve a breach of a fiduciary relationship.
Hahn & Hupf Constr. v. Highland Heights Nsg. Home 189

4. A director who misrepresents a material fact to another to induce the latter to enter into a financial relation with a corporation, to that person's detriment, may be liable to such other person for fraud and misrepresentation. Where that same director makes a representation which at the time is believed to be true, but later on he or she finds that it is false, and that other person continues to rely on the original representation to that person's detriment, that director may be personally liable, depending on the circumstances of the case.
Hahn & Hupf Constr. v. Highland Heights Nsg. Home 189

5. Under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1983), it was the intent of the Legislature, with certain exceptions noted, to hold a municipality liable to an injured party for negligence of its employees, in the same manner that a private person would be liable to such claimant. There is no requirement that the negligent act complained of be performed by such municipal employee in furtherance of a private duty owed to the claimant as opposed to a duty owed the claimant and public generally.
Maple v. City of Omaha 293

6. A justifiable termination does not operate to create a liability, either under a contract theory or under the state antitrust statutes, against one who terminates a contract.
Mike Pratt & Sons, Inc. v. Metalcraft, Inc. 333
7. The object of an action of replevin is to recover specific personal property, and liability for the value of the property accrues only if a return of the property cannot be had.
Arcadia State Bank v. Nelson 704
8. Where there is no evidence that a master has been negligent other than through the imputation of the negligent conduct of his servant, based upon the doctrine of respondeat superior, as between the same parties, a judgment in favor of the servant on the merits renders invalid any judgment against the master.
White v. Lovgren 771
9. Generally, an attending staff physician is not liable for failure of a hospital to execute reasonable instructions that he has given for the treatment of his patients.
Reifschneider v. Nebraska Methodist Hosp. 782

Liens

1. Purchase price, under Neb. Rev. Stat. § 52-903 (Reissue 1984), means more than money and may include credits applied to a debt.
Galyen Petroleum Co. v. Svoboda 268
2. A person claiming the existence of a lien has the burden of proving the existence of the lien.
Bishop v. Hotovy 623

Limitations of Actions

1. The power of an administrative agency to reconsider its decision exists only until the aggrieved party institutes judicial review or the statutory time for such review has passed, and any such agency reconsideration does not operate to extend the statutory time for judicial review.
B. T. Energy Corp. v. Marcus 207
2. The statute of limitations for reformation of an instrument, as prescribed by Neb. Rev. Stat. § 25-207 (Reissue 1979), contains a discovery rule.
Newton v. Brown 605

Livestock

1. The herd laws pertain to damage to property and do not alter the common-law liability for personal injuries caused by trespassing bulls.
Foland v. Malander 1
2. An action for the infliction of personal injury by a trespassing bull upon an occupier of land may be brought on a theory of

negligence, but not on a strict liability theory.
Foland v. Malander 1

Master and Servant

Where there is no evidence that a master has been negligent other than through the imputation of the negligent conduct of his servant, based upon the doctrine of respondeat superior, as between the same parties, a judgment in favor of the servant on the merits renders invalid any judgment against the master.
White v. Lovgren 771

Medical Malpractice

1. Whether a specific manner of treatment or exercise of skill by a physician or surgeon or other professional demonstrates a lack of skill or knowledge or failure to exercise reasonable care is a matter that, usually, must be proved by expert testimony.
Reifschneider v. Nebraska Methodist Hosp. 782
2. Generally, an attending staff physician is not liable for failure of a hospital to execute reasonable instructions that he has given for the treatment of his patients.
Reifschneider v. Nebraska Methodist Hosp. 782

Mentally Disordered Sex Offender

The granting of a motion for additional evaluation as to whether a defendant is a mentally disordered sex offender is addressed to the sound discretion of the trial court, and absent an abuse of that discretion, there is no error in refusing such request.
State v. Perdue 679

Merger

Upon the execution, delivery, and acceptance of an unambiguous deed, such being the final acts of the parties expressing the terms of their agreement with reference to the subject matter, all prior negotiations and agreements are deemed merged therein. The doctrine of merger does not apply where there has been fraud or mistake.
Newton v. Brown 605

Minors

1. The only statutory authority conferred on district courts to deal with children in dissolution actions is that contained in Neb. Rev. Stat. § 42-364 (Reissue 1984).
Meyers v. Meyers 370
2. The relationship between parent and child is constitutionally protected.
Shoecraft v. Catholic Social Servs. Bureau 574
3. Disparate treatment of an unwed father and of an unwed mother in child adoption proceedings is a suspect classification.
Shoecraft v. Catholic Social Servs. Bureau 574

4. The state has a compelling interest in the well-being of all children, whether born in or out of wedlock.
Shoecraft v. Catholic Social Servs. Bureau 574
5. The transfer of children by relinquishment from unwed mothers and the adoption of those children are compelling state interests.
Shoecraft v. Catholic Social Servs. Bureau 574
6. A child born dead cannot maintain an action at common law for injuries received by it while in its mother's womb, and consequently the personal representative cannot maintain it under a wrongful death statute limiting such actions to those which would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof.
Smith v. Columbus Community Hosp. 776

Miranda Rights

1. Once an individual in custody indicates in any manner, at any time prior to or during questioning, that he or she wishes to remain silent, interrogation must cease, for at this point the individual being interrogated has shown that he or she intends to exercise his or her fifth amendment right to remain silent.
State v. LaChappell 112
2. Once the right to remain silent has been invoked, there is a strong presumption against its subsequent waiver.
State v. LaChappell 112
3. The police are not required to accept as conclusive any statement or act, no matter how ambiguous, as a sign that a suspect desires to cut off questioning.
State v. LaChappell 112
4. There is no requirement that *Miranda* warnings be given prior to a request to submit to a chemical analysis of blood, breath, or urine under the Nebraska implied consent law.
State v. Klingelhoefer 219

Modification of Decree

1. In the review of applications to modify child support orders, matters are initially entrusted to the sound discretion of the trial court, and the trial court's order will be affirmed on appeal in the absence of an abuse of the trial court's discretion.
Lenz v. Lenz 85
Meyers v. Meyers 370
2. Child support payments are not subject to modification unless there has occurred since the entry of the prior order a material change of circumstances not in the contemplation of the parties and of such a nature as to require modification in the best interests of the child.
Meyers v. Meyers 370
3. A material change in circumstances results from an alteration and

passage from one condition to another.
Meyers v. Meyers 370
4. Determination of whether there has been a material change in circumstances involves a consideration of whether there has been a change in the financial resources of the parents, the needs of the child for whom support is paid, and whether the change in circumstances is temporary or permanent.
Meyers v. Meyers 370
5. The awarding of attorney fees in a hearing on modification of a dissolution decree is a matter within the trial court's initial discretion and, while reviewed de novo in this court, will be affirmed in the absence of an abuse of that discretion.
Meyers v. Meyers 370

Mortgages
1. One asserting that an absolute conveyance of real estate is in fact an equitable mortgage has the burden of proving such fact by clear and convincing evidence.
Stava v. Stava 343
2. When it is contended that a conveyance of real estate is in actuality a mortgage, the test is whether the relation of the parties to each other as debtor and creditor continued. If it does, the transaction will be treated as a mortgage, otherwise not.
Stava v. Stava 343
3. Whether a deed absolute in form is a mortgage depends upon the intention of both grantor and grantee of the deed. Their intention may be evidenced not only by the documents in question but also by their declarations and conduct.
Stava v. Stava 343

Motions for Continuance
1. A motion for continuance is addressed to the sound discretion of the court, and in the absence of a showing of an abuse of discretion, a ruling on a motion for a continuance will not be disturbed on appeal.
First Nat. Bank v. Schroeder 330
State ex rel. Douglas v. Schroeder 473
2. To warrant a continuance because of the absence of a witness or evidence, the expected evidence must be credible and such as probably to affect the result. The absence of evidence that plainly cannot alter the result of the action is clearly no ground for a motion to continue a cause.
First Nat. Bank v. Schroeder 330

Motions for Mistrial
1. A mistrial results in nullification of a pending jury trial. In order to prevent defeat of justice or to further justice during a jury trial, a mistrial is generally granted at the occurrence of a fundamental

failure preventing a fair trial in the adversarial process.
State v. Bostwick 631
2. A motion for a mistrial is addressed to the sound discretion of the trial court, and its ruling will not be disturbed in the absence of a showing of an abuse of discretion.
State v. Bostwick 631
3. Where the governmental conduct in question is intended to goad the defendant into moving for a mistrial, a defendant may raise the bar of double jeopardy to a second trial after having succeeded in aborting the first trial on the defendant's own motion.
State v. Bostwick 631
4. Generally, a motion by a defendant for a mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error.
State v. Bostwick 631
5. So long as a trial court has not abused its discretion in determining that a jury is deadlocked, a declaration of mistrial resulting from a jury's inability to reach a verdict does not bar reprosecution under the double jeopardy clause of state and federal Constitutions.
State v. Bostwick 631

Motions for New Trial

New evidence offered in support of a motion for new trial must be so potent that, by strengthening evidence already offered, a new trial would probably result in a new verdict.
State v. Lieberman 95

Motions to Dismiss

1. Where there is a question before a district court, acting as an appellate court, concerning its appellate jurisdiction, the district court is procedurally correct in disposing of the case on the basis of a motion to dismiss.
VisionQuest, Inc. v. State 228
2. A pretrial motion to dismiss is not permissible as a pretrial pleading but may sometimes be recognized as a demurrer on stipulation of the parties or by rule of court.
Voyles v. DeBrown Leasing, Inc. 250
3. An evidentiary hearing on a motion to dismiss does not convert an irregular pleading, such as a pretrial motion to dismiss, into any form of pleading allowable under present Nebraska law governing civil procedure.
Voyles v. DeBrown Leasing, Inc. 250

Motions to Suppress

1. This court will not overturn the trial court's factual findings when determining the correctness of the latter's rulings on the suppression of evidence unless those findings are clearly wrong.
State v. LaChappell 112

2. In determining whether a trial court's findings on a motion to suppress are clearly erroneous, the Supreme Court recognizes the trial court as the trier of fact and takes into consideration that the trial court has observed witnesses testifying regarding such motion to suppress.
State v. Dixon 787

Motor Carriers

1. The determination of public convenience and necessity is a matter peculiarly within the discretion and expertise of the Public Service Commission.
In re Application of Regency Limo 684
2. The controlling questions in determining public convenience and necessity are whether the proposed operation will serve a useful purpose responsive to a public demand or need; whether this purpose can or will be served as well by existing carriers; and whether the purpose can be served by the applicant in a specified manner without endangering or impairing the operations of existing carriers contrary to the public interest.
In re Application of Regency Limo 684

Motor Vehicles

1. A purchaser who receives possession of an automobile without also obtaining from the owner an assignment of the certificate of title properly notarized and duly executed in accordance with the statutes then in effect acquires no right, title, claim, or interest in or to a motor vehicle and does not thereby become the owner of the vehicle in question.
State Farm Mut. Auto. Ins. Co. v. Royal Ins. Co. 13
2. Manslaughter can be committed when someone causes the death of another unintentionally while operating a motor vehicle in violation of the law.
State v. Roth 119
3. The maximum penalty of confinement that may be imposed upon a person convicted of manslaughter resulting from his operation of a motor vehicle is 6 months' imprisonment in the county jail.
State v. Roth 119
4. A partial summary judgment that a claimant is a guest passenger within the purview of Nebraska's former guest statute, Neb. Rev. Stat. § 39-6,191 (Reissue 1978), while the issue of the host driver's negligence is unresolved, is not a final judgment or order reviewable by the Supreme Court.
Voyles v. DeBrown Leasing, Inc. 250
5. A motorist has a reasonable expectation of privacy which is not subject to arbitrary invasions solely at the unfettered discretion of police officers in the field.
State v. Crom 273

6. A driver's failure to see one favored over him under the rules of the road is negligence as a matter of law.
Maple v. City of Omaha 293
7. Right-of-way shall mean the right of one vehicle or pedestrian to proceed in a lawful manner in preference to another vehicle or pedestrian approaching under such circumstances of direction, speed, and proximity as to give rise to danger of collision unless one grants precedence to the other. Neb. Rev. Stat. § 39-602(81) (Reissue 1984).
Krul v. Harless 313
8. Generally, an unexcused vehicular encroachment on another's lane of traffic, such as driving to the left of the midline of a roadway contrary to the rules of the road, prevents acquisition of a right-of-way and precludes the unlawful encroachment from becoming a favored position in movement of traffic.
Krul v. Harless 313
9. A motorist colliding with an unlawfully encroaching vehicle is not, as a matter of law, guilty of contributory negligence more than slight by failing to see and avoid such approaching, encroaching vehicle.
Krul v. Harless 313
10. A motorist has the right to assume that other motorists will act in a lawful manner, and until he has warning, notice, or knowledge to the contrary, he is entitled to govern his actions in accordance with that assumption.
Remelius v. Ritter 734
11. The failure to see an approaching vehicle is negligence as a matter of law where such vehicle is indisputably located in a favored position.
Remelius v. Ritter 734

Municipal Corporations

1. The adoption of ordinances under the police power is a legislative act, and the courts cannot interfere with such matters by attempting to mandate their adoption or amendment.
Omaha City Emp. Local 251 v. City of Omaha 412
2. Generally, before a court may acquire jurisdiction over a claim against a city of the metropolitan class, the procedures set out in Neb. Rev. Stat. § 14-804 (Reissue 1983) must be followed.
Bolan v. Boyle 826
Halbleib v. City of Omaha 844

Negligence

1. In order to prevail on the defense of assumption of the risk, the burden is upon the defendant to prove the voluntary character of exposure to the risk, knowledge and appreciation of the danger on

the part of the plaintiff, and that the injury was a proximate result of the danger.
Foland v. Malander 1
2. Contributory negligence is conduct for which the plaintiff is responsible, amounting to a breach of the duty which the law imposes on persons to protect themselves from injury. It is an affirmative defense, and the burden of proving it is on the party asserting it.
Foland v. Malander 1
3. An action for the infliction of personal injury by a trespassing bull upon an occupier of land may be brought on a theory of negligence, but not on a strict liability theory.
Foland v. Malander 1
4. A person is not relieved of the duty to exercise ordinary care for his own safety by the fact that his own or another's property is in imminent danger of loss or injury arising from the negligence of a third person.
Foland v. Malander 1
5. When one is required to act suddenly and in the face of imminent danger, he is not required to act as though he had time for deliberation and the full exercise of his judgment and reasoning faculties.
Foland v. Malander 1
6. The purchaser of a product pursuant to contract cannot recover economic losses from the seller manufacturer on claims in tort based on negligent manufacture or strict liability in the absence of physical harm to persons or property caused by the defective product.
Hilt Truck Line v. Pullman, Inc. 65
7. To establish a prima facie case in negligence, a plaintiff need only establish some evidence of duty, breach, causation, and damages.
Hilt Truck Line v. Pullman, Inc. 65
8. The State's conduct in maintaining its highways falls squarely within the purview of the State Tort Claims Act, Neb. Rev. Stat. §§ 81-8,209 et seq. (Reissue 1981).
Bean v. State 202
9. A partial summary judgment that a claimant is a guest passenger within the purview of Nebraska's former guest statute, Neb. Rev. Stat. § 39-6,191 (Reissue 1978), while the issue of the host driver's negligence is unresolved, is not a final judgment or order reviewable by the Supreme Court.
Voyles v. DeBrown Leasing, Inc. 250
10. Where evidence is in conflict and such that reasonable minds may draw different conclusions therefrom, the questions of negligence and comparative and contributory negligence are factual determinations.
Maple v. City of Omaha 293

11. Contributory negligence is conduct for which plaintiff is responsible, amounting to a breach of the duty which the law imposes upon persons to protect themselves from injury, and which, concurring and cooperating with actionable negligence for which defendant is responsible, contributes to the injury complained of, as a proximate cause.
Maple v. City of Omaha 293
12. The question of comparative negligence is for the determination of the fact finder.
Maple v. City of Omaha 293
13. Under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1983), it was the intent of the Legislature, with certain exceptions noted, to hold a municipality liable to an injured party for negligence of its employees, in the same manner that a private person would be liable to such claimant. There is no requirement that the negligent act complained of be performed by such municipal employee in furtherance of a private duty owed to the claimant as opposed to a duty owed the claimant and public generally.
Maple v. City of Omaha 293
14. Although we do not engage in a special duty-general duty analysis of sovereign immunity, it is still necessary for the claimant, in order to recover from the municipality, to prove that a duty was owed to him or her, that this duty was breached, and that an injury was proximately caused by that breach.
Maple v. City of Omaha 293
15. The statute granting emergency privileges to police vehicles clearly imposes a duty of due regard or due care upon the drivers of emergency vehicles, and in a negligence action their conduct will be measured against that of a reasonable person exercising due care under the same emergency circumstances.
Maple v. City of Omaha 293
16. A driver's failure to see one favored over him under the rules of the road is negligence as a matter of law.
Maple v. City of Omaha 293
17. Generally, one is contributorily negligent if (1) he breaches the duty imposed upon him by the law to protect himself from injury; (2) his actions concur and cooperate with actionable negligence of the defendant; and (3) his actions contribute to the injuries as a proximate cause.
Krul v. Harless 313
Sierks v. Delk 360
18. A pedestrian crossing a street between intersections is held to a higher standard of care than one crossing at a crosswalk where the pedestrian is afforded the right-of-way.
Hennings v. Schufeldt 416
19. A pedestrian crossing between intersections is required to keep a

constant lookout for his own safety in all directions of anticipated danger. One who fails to keep such a lookout is ordinarily guilty of negligence to such a degree that recovery is barred as a matter of law.
Hennings v. Schufeldt 416
20. A pedestrian crossing between intersections is not required to look one way and continue to do so, but must look in the direction or directions of anticipated danger and continue to be alert to safeguard against injury.
Hennings v. Schufeldt 416
21. One who attempts to cross a street at a point between intersections without looking is guilty of such negligence as would bar recovery as a matter of law.
Hennings v. Schufeldt 416
22. When a pedestrian crosses a street between intersections without looking at all, or looks straight ahead without glancing to either side, or is in a position where he cannot see, and proceeds regardless of that fact, the situation ordinarily presents a question for the court. Where the pedestrian looks but does not see an approaching automobile, or sees it and misjudges its speed or its distance from him, or for some other reason concludes that he could avoid injury to himself, a jury question is usually presented.
Hennings v. Schufeldt 416
23. A mere statement by the injured person that he looked in the direction from which he was struck is not sufficient of itself to ensure a consideration of his case by a jury. The statement must be consistent with the facts and circumstances in evidence to present a jury question.
Hennings v. Schufeldt 416
24. A motorist has the right to assume that other motorists will act in a lawful manner, and until he has warning, notice, or knowledge to the contrary, he is entitled to govern his actions in accordance with that assumption.
Remelius v. Ritter 734
25. The failure to see an approaching vehicle is negligence as a matter of law where such vehicle is indisputably located in a favored position.
Remelius v. Ritter 734
26. Where there is no evidence that a master has been negligent other than through the imputation of the negligent conduct of his servant, based upon the doctrine of respondeat superior, as between the same parties, a judgment in favor of the servant on the merits renders invalid any judgment against the master.
White v. Lovgren 771
27. Whether a specific manner of treatment or exercise of skill by a physician or surgeon or other professional demonstrates a lack of skill or knowledge or failure to exercise reasonable care is a matter

that, usually, must be proved by expert testimony.
Reifschneider v. Nebraska Methodist Hosp. 782
28. Generally, an attending staff physician is not liable for failure of a hospital to execute reasonable instructions that he has given for the treatment of his patients.
Reifschneider v. Nebraska Methodist Hosp. 782

Negotiable Instruments

The statutory rule that a payor bank is accountable for a demand item presented to it and not settled for, paid, returned, or a notice of dishonor sent before the midnight deadline may be varied or waived by agreement. Neb. U.C.C. §§ 4-302, 4-103 (Reissue 1980).
Stauffer Seeds, Inc. v. Nebraska Sec. Bank 594

New Trial

1. Where the defendant initiates and causes jury misconduct, the defendant is estopped from maintaining that such misconduct entitles the defendant to a new trial.
State v. Bonaparte 469
2. In order for alleged jury misconduct to be a basis for a new trial, the conduct must have been prejudicial to the defendant.
State v. Bonaparte 469
3. Where a defendant causes jury misconduct, he cannot thereafter be heard to maintain that such misconduct was prejudicial.
State v. Bonaparte 469

Notice

One who has not established paternity by either court proceedings or behavior has no right to notice of termination proceedings.
In re Interest of M.B., R.P., and J.P. 757

Oaths and Affirmations

1. To sustain a conviction for perjury outside a judicial proceeding, there must exist a valid statute which requires the making of a statement under oath.
State v. Douglas 833
2. For an oath to be "required by law" as a foundation for the crime of perjury in violation of Neb. Rev. Stat. § 28-915(1) (Reissue 1985), a specific statute must explicitly require that an oath be administered.
State v. Douglas 833

Ordinances

The adoption of ordinances under the police power is a legislative act, and the courts cannot interfere with such matters by attempting to mandate their adoption or amendment.
Omaha City Emp. Local 251 v. City of Omaha 412

Parental Rights

1. An appeal from an order terminating parental rights is reviewed in this court de novo on the record.
   In re Interest of P.F. 44
2. An order terminating parental rights must be supported by clear and convincing evidence and should be issued only as a last resort where no reasonable alternative exists.
   In re Interest of P.F. 44
   In re Interest of M.B., R.P., and J.P. 757
3. The primary consideration in termination of parental rights cases is the best interests of the child.
   In re Interest of P.F. 44
   In re Interest of M.B., R.P., and J.P. 757
4. The relationship between parent and child is constitutionally protected.
   Shoecraft v. Catholic Social Servs. Bureau 574
5. The status of an unwed father is readily distinguishable from that of a separated or divorced father.
   Shoecraft v. Catholic Social Servs. Bureau 574
6. Disparate treatment of an unwed father and of an unwed mother in child adoption proceedings is a suspect classification.
   Shoecraft v. Catholic Social Servs. Bureau 574
7. The state has a compelling interest in the well-being of all children, whether born in or out of wedlock.
   Shoecraft v. Catholic Social Servs. Bureau 574
8. The transfer of children by relinquishment from unwed mothers and the adoption of those children are compelling state interests.
   Shoecraft v. Catholic Social Servs. Bureau 574
9. Custody cannot be taken from an unwed mother absent evidence of unfitness and that the removal is in the best interests of the child.
   Shoecraft v. Catholic Social Servs. Bureau 574
10. The unwed father has no automatic right to custody.
    Shoecraft v. Catholic Social Servs. Bureau 574
11. An appeal from an order terminating parental rights is reviewed by this court de novo on the record, giving weight to the fact that the trial court observed the parties and witnesses and judged their credibility.
    In re Interest of M.B., R.P., and J.P. 757
12. The burden of proof to establish parental abandonment of a child is that of clear and convincing evidence.
    In re Interest of M.B., R.P., and J.P. 757
13. There is no right to an opportunity for rehabilitation prior to termination of parental rights, but when such an opportunity is granted, the party must comply with the plan and satisfactorily complete it.
    In re Interest of M.B., R.P., and J.P. 757

14. One who has not established paternity by either court proceedings or behavior has no right to notice of termination proceedings.
In re Interest of M.B., R.P., and J.P. 757

Parties

1. One who claims title to or the right to the possession of property replevied, adversely to the plaintiff, is not a necessary party.
Arcadia State Bank v. Nelson 704
2. The person in possession of the property sought to be replevied is ordinarily the proper and only necessary party defendant.
Arcadia State Bank v. Nelson 704
3. Replevin will not lie against one who is not detaining the property when the writ is sued out. It is the condition of things when the suit is commenced which furnishes the ground for the action.
Arcadia State Bank v. Nelson 704

Paternity

One who has not established paternity by either court proceedings or behavior has no right to notice of termination proceedings.
In re Interest of M.B., R.P., and J.P. 757

Pedestrians

1. A pedestrian crossing a street between intersections is held to a higher standard of care than one crossing at a crosswalk where the pedestrian is afforded the right-of-way.
Hennings v. Schufeldt 416
2. When crossing a street at a point between intersections and outside of marked crosswalks, a pedestrian is required to yield the right-of-way to all vehicles on that roadway.
Hennings v. Schufeldt 416
3. A pedestrian crossing between intersections is required to keep a constant lookout for his own safety in all directions of anticipated danger. One who fails to keep such a lookout is ordinarily guilty of negligence to such a degree that recovery is barred as a matter of law.
Hennings v. Schufeldt 416
4. A pedestrian crossing between intersections is not required to look one way and continue to do so, but must look in the direction or directions of anticipated danger and continue to be alert to safeguard against injury.
Hennings v. Schufeldt 416
5. One who attempts to cross a street at a point between intersections without looking is guilty of such negligence as would bar recovery as a matter of law.
Hennings v. Schufeldt 416
6. When a pedestrian crosses a street between intersections without looking at all, or looks straight ahead without glancing to either side, or is in a position where he cannot see, and proceeds

regardless of that fact, the situation ordinarily presents a question for the court. Where the pedestrian looks but does not see an approaching automobile, or sees it and misjudges its speed or its distance from him, or for some other reason concludes that he could avoid injury to himself, a jury question is usually presented.
Hennings v. Schufeldt 416

7. A mere statement by the injured person that he looked in the direction from which he was struck is not sufficient of itself to ensure a consideration of his case by a jury. The statement must be consistent with the facts and circumstances in evidence to present a jury question.
Hennings v. Schufeldt 416

Pensions

1. It is proper to consider retirement benefits in determining whether support should be awarded to a spouse.
Anderson v. Anderson 212
Ray v. Ray 324

2. The award of alimony to a nonmilitary spouse for her lifetime, as a method of dealing with her interest in her husband's military pension, falls within the method of dealing with that pension approved in *Kullbom v. Kullbom*, 209 Neb. 145, 306 N.W.2d 844 (1981).
Ray v. Ray 324

Perjury

1. To sustain a conviction for perjury outside a judicial proceeding, there must exist a valid statute which requires the making of a statement under oath.
State v. Douglas 833

2. For an oath to be "required by law" as a foundation for the crime of perjury in violation of Neb. Rev. Stat. § 28-915(1) (Reissue 1985), a specific statute must explicitly require that an oath be administered.
State v. Douglas 833

Perpetuities

A trust is not created unless there is a beneficiary who is definitely ascertained at the time of the creation of the trust or definitely ascertainable within the period of the rule against perpetuities.
First Nat. Bank v. Schroeder 330

Physicians and Surgeons

1. Whether a specific manner of treatment or exercise of skill by a physician or surgeon or other professional demonstrates a lack of skill or knowledge or failure to exercise reasonable care is a matter that, usually, must be proved by expert testimony.
Reifschneider v. Nebraska Methodist Hosp. 782

2. Generally, an attending staff physician is not liable for failure of a hospital to execute reasonable instructions that he has given for the treatment of his patients.
Reifschneider v. Nebraska Methodist Hosp. 782

Pleadings

1. An answer sufficiently pleads accord and satisfaction when it contains or presents all of the elements of an accord and satisfaction, even if it does not use the terms accord and satisfaction and even if it could have been more technically or artfully drawn.
Cass Constr. Co. v. Brennan 69
2. The overruling of a motion in limine does not eliminate the need to object to the introduction of evidence in order to preserve the error.
State v. Lieberman 95
3. A pretrial motion to dismiss is not permissible as a pretrial pleading but may sometimes be recognized as a demurrer on stipulation of the parties or by rule of court.
Voyles v. DeBrown Leasing, Inc. 250
4. An evidentiary hearing on a motion to dismiss does not convert an irregular pleading, such as a pretrial motion to dismiss, into any form of pleading allowable under present Nebraska law governing civil procedure.
Voyles v. DeBrown Leasing, Inc. 250
5. As required by Neb. Rev. Stat. §§ 25-1905 and 25-1931 (Reissue 1979), within 1 calendar month after rendition of the final judgment or order sought to be reversed, vacated, or modified, a petitioner in error must file a petition and an appropriate transcript containing the final judgment or order to be judicially reviewed.
Glup v. City of Omaha 355
6. Timely filing of both the petition in error and the certified transcript is mandatory to confer jurisdiction on a court asked to review a final judgment or order, as provided by Neb. Rev. Stat. § 25-1905 (Reissue 1979).
Glup v. City of Omaha 355
7. Where a proceeding in error pursuant to Neb. Rev. Stat. § 25-1905 (Reissue 1979) is utilized to seek reversal, vacation, or modification of a final judgment or order, jurisdiction of a court does not attach until a petition and transcript, containing the final judgment or order, are filed in the court requested to review such judgment or order.
Glup v. City of Omaha 355
8. Unless a petitioner in an error proceeding demonstrates that lack of a timely filed transcript is the result of failure in performance of a public duty owed by the official charged with preparation or

furnishing the transcript, absence of a mandatory transcript prevents or defeats jurisdiction of a court asked to review a final judgment or order.
Glup v. City of Omaha 355
9. In an action on a promissory note in which defendants fail to plead affirmative defenses, such as lack of consideration or any other defense that would controvert the amount due, no issue of fact is presented for determination and plaintiff is entitled to summary judgment.
Pabst v. First American Distrib., Inc. 591
10. Permission to amend pleadings is addressed to the sound discretion of the trial court, and absent an abuse of discretion, its decision will be affirmed.
Christian Servs., Inc. v. Northfield Villa, Inc. 628
11. A motion for judgment on the pleadings by the defendants admits the truth of all the well-pleaded facts in the petition, together with all reasonable inferences to be drawn therefrom, and treats as untrue all the controverted facts contained in the answer.
Wood v. Tesch 654
12. In the absence of a reply, allegations contained in the answer must be considered denied by plaintiff.
Wood v. Tesch 654
13. A petition for the allowance of a claim against a county which is subject to the provisions of Neb. Rev. Stat. § 23-135 (Reissue 1983) is demurrable unless it shows on its face that the claim was filed with the county clerk within the statutory time.
Zeller Sand & Gravel v. Butler Co. 847

Pleas

1. In order to make an intelligent and voluntary plea where there has been a group arraignment, the defendant must have been present when the court advised those charged of their constitutional rights. The record must disclose that defendant was present at that time.
State v. Martens 870
2. The proper procedure for a group arraignment is to call each person being arraigned before the bench, identify him, and advise him that the remarks of the court apply to each person individually.
State v. Martens 870

Police Officers and Sheriffs

1. Neb. Rev. Stat. § 39-669.09 (Reissue 1984) does not require the officer to inform the person to be tested of his privilege to request an independent test.
State v. Klingelhoefer 219
2. One purpose of the false reporting statute, Neb. Rev. Stat.

§ 28-907(1)(a) (Cum. Supp. 1984), is to prevent a waste of time and effort by law enforcement personnel.
In re Interest of McManaman 263
3. A police officer must be allowed to rely on the emergency status of the dispatch for his or her own protection and that of the public. As long as such officer acts in good faith in operating emergency equipment, he or she enjoys the privileges provided in Neb. Rev. Stat. §§ 39-608 and 39-640 (Reissue 1984).
Maple v. City of Omaha 293
4. Although a state may not impose greater restrictions on police activity as a matter of federal constitutional law, a state may impose higher standards governing police practices on the basis of state law.
State v. Havlat 554
5. Concerning the open fields doctrine, our state Constitution does not afford more protection than does the fourth amendment to the federal Constitution as interpreted in *Oliver v. United States*, 466 U.S. 170, 104 S. Ct. 1735, 80 L. Ed. 2d 214 (1984), and we decline to judicially impose higher standards governing law enforcement officers under the provisions of the state Constitution.
State v. Havlat 554
6. Whether an officer has made a promise for a defendant's statement is a question of fact to be determined by a trial court—a decision which will not be set aside unless clearly wrong.
State v. Dixon 787

Political Subdivisions

A sanitary and improvement district, existing pursuant to the sanitary and improvement districts act, Neb. Rev. Stat. §§ 31-727 et seq. (Reissue 1984), is a legislative creature, a political subdivision of the State of Nebraska.
Rexroad, Inc. v. S.I.D. No. 66 618

Political Subdivisions Tort Claims Act

1. Under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1983), it was the intent of the Legislature, with certain exceptions noted, to hold a municipality liable to an injured party for negligence of its employees, in the same manner that a private person would be liable to such claimant. There is no requirement that the negligent act complained of be performed by such municipal employee in furtherance of a private duty owed to the claimant as opposed to a duty owed the claimant and public generally.
Maple v. City of Omaha 293
2. Although we do not engage in a special duty-general duty analysis of sovereign immunity, it is still necessary for the claimant, in

order to recover from the municipality, to prove that a duty was owed to him or her, that this duty was breached, and that an injury was proximately caused by that breach.
Maple v. City of Omaha 293

Post Conviction

1. An evidentiary hearing is not required on a motion seeking post conviction relief under Neb. Rev. Stat. § 29-3001 (Reissue 1979) where the motion and the files and records of the case show that the petitioner is not entitled to such relief.
State v. Grotzky 39
2. A defendant is entitled to post conviction relief only when there has been a denial or infringement of his constitutional rights so as to render the judgment void or voidable.
State v. Galvan 104
3. The defendant bears the burden of establishing the basis for relief, and in order to state a cause of action the application must allege facts which, if proved, constitute a denial of his constitutional rights.
State v. Galvan 104
4. Allegations which are conclusory are not grounds for post conviction relief, nor do they require the court to grant an evidentiary hearing.
State v. Galvan 104
5. The trial court may properly deny an evidentiary hearing when the records and files in the case affirmatively establish that the defendant is entitled to no relief.
State v. Galvan 104

Presumptions

1. A use is adverse and under a claim of right if the claimant proves uninterrupted and open use for the necessary period. Once the claimant has established this presumption, it will prevail unless the owner of the land proves by a preponderance of the evidence that the use was by license, agreement, or permission.
Werner v. Schardt 186
2. Where a violent death is shown under circumstances indicating that death occurred within the time and place limits of the employment without evidence as to the cause of death, there is no presumption that the death arose out of and in the course of the employment by virtue of Neb. Rev. Stat. § 48-151 (Reissue 1984).
Breckenridge v. Midlands Roofing Co. 452
3. There exists in Nebraska a presumption against death by suicide, but that presumption is rebuttable and is overcome and disappears when either direct or circumstantial evidence is introduced showing that the death was caused by suicide. The burden is then upon the party asserting such to adduce evidence

that the death was accidental and not from suicide.
Breckenridge v. Midlands Roofing Co. 452
4. When a case is tried to the court without a jury, it is presumed that the trial court considered only competent and relevant evidence in reaching its decision.
State v. Havlat 554
5. A party seeking to disqualify a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality.
State v. Dondlinger 741

Pretrial Procedure

1. A motion for judgment on the pleadings by the defendants admits the truth of all the well-pleaded facts in the petition, together with all reasonable inferences to be drawn therefrom, and treats as untrue all the controverted facts contained in the answer.
Wood v. Tesch 654
2. Where a party properly serves a request for admission of relevant matters of fact or the genuineness of relevant documents, and all objections thereto are heard and appropriately denied by the court, and the other party has been ordered to respond thereto, his failure to do so within the time allotted constitutes an admission of the facts sought to be elicited. In such situation a motion for summary judgment is appropriate and may be granted if admissions made or failure to deny as required by the statute, together with the pleadings, show that there is no genuine issue as to any material fact or that the court is without jurisdiction of the subject matter.
Arcadia State Bank v. Nelson 704
3. When a request for admission is made under Neb. Ct. R. of Disc. 36 (rev. 1983), the party served must answer, even though he has no personal knowledge, if the means of obtaining the information are available to him. It is not a sufficient answer that he does not know, when it appears that he can obtain the information. It is immaterial that the plaintiff is acquainted with the facts as to which admission is sought. The purpose of the rule is to expedite the trial and to relieve parties of the cost and inconvenience of proving facts which will not be disputed on the trial, the truth of which can be ascertained by reasonable inquiry.
Arcadia State Bank v. Nelson 704
4. A bad response to a request for admission is treated as no response at all, and hence as an admission.
Arcadia State Bank v. Nelson 704
5. A motion to disqualify a trial judge on account of prejudice is addressed to the sound discretion of the trial court. Generally, the ruling on a motion to disqualify a trial judge on the ground of bias and prejudice will be affirmed on appeal unless the record

establishes bias and prejudice as a matter of law.
State v. Dondlinger 741

Principal and Agent

1. Because the power of attorney creates an agency relationship, the authority and duties of an attorney in fact are governed by the principles of the law of agency, including the prohibitions against an agent's profiting from the agency relationship to the detriment of his principal or having a personal stake that conflicts with the principal's interest in a transaction in which the agent represents the principal.
In re Estate of Lienemann 169
2. Apparent authority or agency for which a principal may be liable must be traceable to him and cannot be established by the acts, declaration, or conduct of an agent.
Hassett v. Swift & Company 819
3. An officer of a corporation has no apparent authority to bind the corporation to an unusual, extraordinary, or unreasonable contract.
Hassett v. Swift & Company 819

Prior Convictions

1. The records of prior convictions of a defendant relied on to establish a finding that defendant is a habitual criminal must show that at the time of the prior convictions defendant was represented by counsel or knowingly, intelligently, and voluntarily waived counsel.
State v. Huffman 512
State v. Fraser 862
2. A defendant may not relitigate a former conviction in an enhancement proceeding.
State v. Fraser 862
3. At an enhancement hearing the trial court is required to advise the defendant that he has a right to review the record of a prior conviction, bring mitigating facts to the attention of the court prior to sentencing, and object to the validity of a prior conviction as provided in Neb. Rev. Stat. § 39-669.07 (Reissue 1984).
State v. Fraser 862

Prior Statements

Although prior contradictory statements made by the prosecutrix may cause the jury to doubt the account of facts testified to by her at trial, generally such prior statements do not negate, erase, or eradicate the evidence that a certain fact exists.
State v. Schenck 523

Probable Cause

1. Probable cause to seize an individual exists at the moment the

collective knowledge and trustworthy information of all the police officers engaged in a common investigation are such as to warrant a conclusion by a prudent person that the individual seized committed a felony.
State v. LaChappell 112

2. It is not required that an officer see the commission of the felony, nor does the finding of probable cause require the same specific evidence of each element of the offense as would be needed to support a conviction.
State v. LaChappell 112

3. The test of probable cause for a warrantless arrest is whether at the moment the facts and circumstances within the officers' knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense.
State v. Klingelhoefer 219
State v. Halligan 866

Products Liability

1. In order to recover in strict liability for the cost of repairs to the product, there must be proof that a sudden, violent event occurred which aggravated the inherent defect or caused it to manifest itself.
Hilt Truck Line v. Pullman, Inc. 65

2. The purchaser of a product pursuant to contract cannot recover economic losses from the seller manufacturer on claims in tort based on negligent manufacture or strict liability in the absence of physical harm to persons or property caused by the defective product.
Hilt Truck Line v. Pullman, Inc. 65

Promissory Notes

In an action on a promissory note in which defendants fail to plead affirmative defenses, such as lack of consideration or any other defense that would controvert the amount due, no issue of fact is presented for determination and plaintiff is entitled to summary judgment.
Pabst v. First American Distrib., Inc. 591

Proof

1. In order to prevail on the defense of assumption of the risk, the burden is upon the defendant to prove the voluntary character of exposure to the risk, knowledge and appreciation of the danger on the part of the plaintiff, and that the injury was a proximate result of the danger.
Foland v. Malander 1

2. Contributory negligence is conduct for which the plaintiff is responsible, amounting to a breach of the duty which the law

imposes on persons to protect themselves from injury. It is an affirmative defense, and the burden of proving it is on the party asserting it.
Foland v. Malander 1
3. Upon an application to modify an award under the workmen's compensation statutes, the burden of proof rests upon the petitioner to establish by a preponderance of the evidence that the disability has increased, decreased, or terminated as alleged. In other words, the defendant has the burden of establishing a decrease of incapacity and the plaintiff has the burden of showing an increase of incapacity.
Oham v. Aaron Corp. 28
4. Neb. Rev. Stat. §§ 39-669.07 and 39-669.08 (Reissue 1984) do not require intent as an element necessary to be proved by the State to show a violation of such statutes.
State v. Grotzky 39
5. In order to recover in strict liability for the cost of repairs to the product, there must be proof that a sudden, violent event occurred which aggravated the inherent defect or caused it to manifest itself.
Hilt Truck Line v. Pullman, Inc. 65
6. 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. Wilkening 107
7. It is not required that an officer see the commission of the felony, nor does the finding of probable cause require the same specific evidence of each element of the offense as would be needed to support a conviction.
State v. LaChappell 112
8. In order to obtain rights in the real property of another by prescriptive easement, a claimant must show that his use was exclusive, adverse, under a claim of right, continuous and uninterrupted, and open and notorious for the full 10-year prescriptive period.
Werner v. Schardt 186
9. A use is adverse and under a claim of right if the claimant proves uninterrupted and open use for the necessary period. Once the claimant has established this presumption, it will prevail unless the owner of the land proves by a preponderance of the evidence that the use was by license, agreement, or permission.
Werner v. Schardt 186
10. The nature and extent or scope of the easement claimed by prescription must be clearly established.
Werner v. Schardt 186
11. In order to sustain an action for fraud and false representation,

the plaintiff must, in substance, prove (1) that a representation was made as a statement of fact; (2) that it was false; (3) that the party making the representation knew it was false, or else made it without knowledge as a positive statement of known fact, i.e., recklessly made; (4) that it was made with intent to deceive and for the purpose of inducing the other party to act upon it; (5) that the party hearing the false statement had a reasonable basis to rely on the statement and did in fact rely on it and was damaged thereby; and (6) the amount of the damage.
Hahn & Hupf Constr. v. Highland Heights Nsg. Home 189

12. The party seeking to enforce a contract containing a condition precedent bears the burden of proof as to the occurrence of the condition.
K & K Pharmacy v. Barta 215

13. Although we do not engage in a special duty-general duty analysis of sovereign immunity, it is still necessary for the claimant, in order to recover from the municipality, to prove that a duty was owed to him or her, that this duty was breached, and that an injury was proximately caused by that breach.
Maple v. City of Omaha 293

14. One asserting that an absolute conveyance of real estate is in fact an equitable mortgage has the burden of proving such fact by clear and convincing evidence.
Stava v. Stava 343

15. To sustain a conviction for a crime, the corpus delecti must be proved beyond a reasonable doubt.
State v. Rich 394

16. The burden of establishing a constructive trust is always upon the person who bases his rights thereon, and he must do so by evidence that is clear, satisfactory, and convincing.
Ruppert v. Breault 432

17. In an action to obtain an award of benefits under the Nebraska workmen's compensation law, the burden of proof is on the plaintiff to establish by a preponderance of the evidence that the injury or death was sustained by an accident arising out of and in the course of the employment.
Breckenridge v. Midlands Roofing Co. 452

18. In a workmen's compensation case the claimant must establish that the injury for which compensation is sought arose out of and in the course of the employment.
Badgett v. St. Joseph Hosp. 467

19. A conviction may rest on the uncorroborated testimony of an accomplice.
State v. Huffman 512

20. Before reformation of an instrument will be allowed, the party seeking such reformation on a claim of mutual mistake must, by clear and convincing evidence, prove existence of such mistake in

reference to the instrument to be reformed.
Newton v. Brown 605
21. The elements necessary to be established to warrant the rejection of a written instrument on the ground of undue influence are (1) that the person who executed the instrument was subject to undue influence, (2) that there was opportunity to exercise undue influence, (3) that there was a disposition to exercise undue influence for an improper purpose, and (4) that the result was clearly the effect of such undue influence.
Bishop v. Hotovy 623
22. The burden is on the party alleging the execution of a deed was the result of undue influence to prove such undue influence by clear and convincing evidence.
Bishop v. Hotovy 623
23. A person claiming the existence of a lien has the burden of proving the existence of the lien.
Bishop v. Hotovy 623
24. The burden is on the plaintiff in replevin to establish facts necessary for him to recover, and these must be shown to have existed at the time the action was commenced. The gist of a replevin action is the unlawful detention of the property at the inception of the suit and the rights of the parties with respect to possession of the property at that time.
Arcadia State Bank v. Nelson 704
25. Where the contract contains no express condition precedent, a party who claims that the contract is subject to a condition has the burden to prove that the contract is conditional.
Mary Young Men's Christian Assn. v. Hall 738
26. A party seeking to disqualify a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality.
State v. Dondlinger 741
27. The burden of proof to establish parental abandonment of a child is that of clear and convincing evidence.
In re Interest of M.B., R.P., and J.P. 757
28. To avoid disqualification from unemployment benefits under Neb. Rev. Stat. § 48-628 (Reissue 1984), an employee, who has voluntarily left employment, has the burden of proving there was good cause for the employee's terminating an employment relationship.
Stackley v. State 767
29. Whether a specific manner of treatment or exercise of skill by a physician or surgeon or other professional demonstrates a lack of skill or knowledge or failure to exercise reasonable care is a matter that, usually, must be proved by expert testimony.
Reifschneider v. Nebraska Methodist Hosp. 782

Property

1. A constructive trust is a relationship, with respect to property, subjecting the person by whom the title to the property is held to an equitable duty to convey it to another on the ground that his acquisition or retention of the property is wrongful and that he would be unjustly enriched if he were permitted to retain the property.
   Ruppert v. Breault 432
2. Constructive trusts arise from actual or constructive fraud or imposition, committed by one party on another. Thus, if one person procures the legal title to property from another by fraud or misrepresentation, or by an abuse of some influential or confidential relation which he holds toward the owner of the legal title, obtains such title from him upon more advantageous terms than he could otherwise have obtained it, the law constructs a trust in favor of the party upon whom the fraud or imposition has been practiced.
   Ruppert v. Breault 432
3. It is the general rule that improvements made while a party is in possession of premises under a lease which does not grant the right of reimbursement are not reimbursable to that tenant.
   Schmeckpeper v. Koertje 800
4. Improvements which become a part of the real estate may not be removed and do not become the property of the lessee unless such removal or ownership is provided for by agreement or statute.
   Schmeckpeper v. Koertje 800

Property Division

1. Awards of alimony and the division of marital property are matters which are initially entrusted to the discretion of the trial court and will not be disturbed on appeal unless the record establishes that the trial court has abused its discretion.
   Bryan v. Bryan 180
2. There is no mathematical formula by which awards of alimony and division of property can be precisely determined.
   Bryan v. Bryan 180
3. In actions for legal separation the adjustment of property and the award of support are matters initially entrusted to the sound discretion of the trial judge, which matters, on appeal, will be reviewed de novo on the record and modified only in the event of an abuse of that discretion.
   Anderson v. Anderson 212
4. In the de novo review of the adjustment of property or award of support in an action for legal separation, the Nebraska Supreme Court, where the evidence is in conflict, will give weight to the fact

that the trial judge observed and heard the witnesses and accepted one version of the facts rather than another.
Anderson v. Anderson 212
5. There are no mathematical formulas by which property adjustments or awards of support can be precisely determined; ultimately, the test is whether the property adjustment and support award are reasonable under the facts of each case.
Anderson v. Anderson 212
6. Pension benefits are properly to be considered by the court in exercising its discretion in property division or award of alimony.
Ray v. Ray 324
7. While the criteria for reaching a reasonable division of property and a reasonable award of alimony may overlap, the two serve different purposes and are to be considered separately. The purpose of a property division is to distribute the marital assets equitably between the parties. The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances and the other criteria enumerated in this section make it appropriate. Neb. Rev. Stat. § 42-365 (Reissue 1984).
Taylor v. Taylor 721
8. The division of property and the awarding of alimony in marriage dissolution cases are matters initially entrusted to the sound discretion of the trial judge, which matters, on appeal, will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion. In a de novo review by the Supreme Court, where the evidence is in conflict, the Supreme Court will give weight to the fact that the trial judge observed and heard the witnesses and accepted one version of the facts rather than another.
Taylor v. Taylor 721
9. While earning capacity or expectations of income may properly be considered in an allowance of alimony, they are not proper considerations in determining the appropriate division of property.
Taylor v. Taylor 721
10. To be properly within the purview of Neb. Rev. Stat. § 42-365 (Reissue 1984) as property divisible and distributable in a dissolution proceeding, goodwill must be a business asset with value independent of the presence or reputation of a particular individual, an asset which may be sold, transferred, conveyed, or pledged.
Taylor v. Taylor 721
11. The ultimate test for determining an appropriate division of marital property is reasonableness.
Taylor v. Taylor 721
12. A division of marital property is not subject to a precise

mathematical formula but, rather, turns upon the circumstances of a particular case and upon a careful case-by-case examination of the criteria set forth in Neb. Rev. Stat. § 42-365 (Reissue 1984).
Taylor v. Taylor 721

Proximate Cause

1. Proximate causation is a question of fact.
Bean v. State 202
2. Contributory negligence is conduct for which plaintiff is responsible, amounting to a breach of the duty which the law imposes upon persons to protect themselves from injury, and which, concurring and cooperating with actionable negligence for which defendant is responsible, contributes to the injury complained of, as a proximate cause.
Maple v. City of Omaha 293
3. Conduct is a cause of an event if the event in question would not have occurred but for that conduct; conversely, conduct is not a cause of an event if that event would have occurred without such conduct.
State v. Dixon 787
4. An act or omission to act is the proximate cause of death when it substantially and materially contributes, in a natural and continuous sequence, unbroken by an efficient, intervening cause, to the resulting death. It is unnecessary for proximate cause purposes that the particular kind of harm that results from the defendant's act be intended by him.
State v. Dixon 787
5. A victim's fatal heart attack, proximately caused by a defendant's felonious conduct toward that victim, establishes the causal connection between felonious conduct and homicide necessary to permit a conviction for felony murder in violation of Neb. Rev. Stat. § 28-303(2) (Reissue 1979).
State v. Dixon 787

Public Officers and Employees

1. Unless a petitioner in an error proceeding demonstrates that lack of a timely filed transcript is the result of failure in performance of a public duty owed by the official charged with preparation or furnishing the transcript, absence of a mandatory transcript prevents or defeats jurisdiction of a court asked to review a final judgment or order.
Glup v. City of Omaha 355
2. Statements of individual county commissioners acting separately do not constitute the statements of the county.
Wood v. Tesch 654
3. While one who is a governmental at-will employee may be discharged for no reason at all, he or she may not be discharged on

a basis that infringes upon constitutionally protected interests.
Wood v. Tesch 654
4. A governmental employee may not constitutionally be compelled to relinquish his or her first amendment right to comment on matters relating to his or her employment which are of public concern.
Wood v. Tesch 654
5. In discharging a governmental at-will employee who has exercised his or her right of free speech on matters of public concern, the interest of the governmental employee in commenting as a citizen upon such matters and the interest of the governmental employer in promoting the efficiency of the public services it performs through its employees must be balanced.
Wood v. Tesch 654
6. The closeness of working relationships is a factor to be considered in balancing the governmental employee's constitutional right to free speech and the governmental employer's interest in efficiency.
Wood v. Tesch 654
7. When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment in discharging an employee is appropriate; it is not necessary for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships are manifest before taking action.
Wood v. Tesch 654
8. The more substantially involved in matters of public concern is the employee's speech, the stronger must be the employer's showing as to the disruptive effect upon close working relationships and efficiency.
Wood v. Tesch 654

Public Service Commission

1. The determination of public convenience and necessity is a matter peculiarly within the discretion and expertise of the Public Service Commission.
In re Application of Regency Limo 684
2. The standard of review on an appeal to the Nebraska Supreme Court from an order of the Public Service Commission granting a certificate of public convenience and necessity is limited to determining whether the commission acted within the scope of its authority and whether the order in question was reasonable and not arbitrarily made.
In re Application of Regency Limo 684
3. The controlling questions in determining public convenience and necessity are whether the proposed operation will serve a useful purpose responsive to a public demand or need; whether this purpose can or will be served as well by existing carriers; and

whether the purpose can be served by the applicant in a specified manner without endangering or impairing the operations of existing carriers contrary to the public interest.
In re Application of Regency Limo 684

Records

1. The responsibility for filing a bill of exceptions on appeal in the Supreme Court rests upon the appellant.
Taylor v. Wallesen 411
2. When, on appeal, this court is asked to review errors which require a consideration of the evidence, we cannot give them consideration in the absence of a bill of exceptions.
Taylor v. Wallesen 411
3. Where the bill of exceptions in a case is not filed with this court as required by Neb. Ct. R. 5C(5) (rev. 1983), the judgment appealed from will be affirmed if the pleadings in the case support the judgment.
Pabst v. First American Distrib., Inc. 591
4. The record of the trial court imports absolute verity in all appellate proceedings, and if such record is incomplete or incorrect, the remedy is by appropriate proceedings to secure a correction thereof in the trial court.
State v. Martens 870

Recusal

1. A party seeking to disqualify a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality.
State v. Dondlinger 741
2. A motion to disqualify a trial judge on account of prejudice is addressed to the sound discretion of the trial court. Generally, the ruling on a motion to disqualify a trial judge on the ground of bias and prejudice will be affirmed on appeal unless the record establishes bias and prejudice as a matter of law.
State v. Dondlinger 741

Reformation

1. Equitable relief by reformation depends on whether an instrument to be reformed expresses the intent of the parties. The remedy of reformation is designed to correct an erroneous instrument and, by such correction, reflect the real intent of the parties regarding that instrument.
Newton v. Brown 605
2. Reformation is based on the premise that the parties had reached an agreement concerning an instrument, but while reducing their agreement to a written form, and as the result of mutual mistake or fraud, some provision or language was omitted from, inserted, or incorrectly stated in the instrument intended to be an

expression of the actual agreement of the parties.
Newton v. Brown 605
3. Before reformation of an instrument will be allowed, the party seeking such reformation on a claim of mutual mistake must, by clear and convincing evidence, prove existence of such mistake in reference to the instrument to be reformed.
Newton v. Brown 605
4. A mutual mistake is a belief shared by the parties, which is not in accord with the facts. A mutual mistake is one common to both parties in reference to the instrument to be reformed, each party laboring under the same misconception about their instrument.
Newton v. Brown 605
5. If incorrect language or wording is inserted by mistake, including a scrivener's mistake, into an instrument intended to reflect the agreement of the parties, such mistake is mutual and contrary to the real intention and agreement of the parties.
Newton v. Brown 605
6. An erroneous omission or deletion, even by a scrivener, from an instrument intended to reflect the agreement of the parties is a mutual mistake and is contrary to the real intention and agreement of the parties.
Newton v. Brown 605
7. The statute of limitations for reformation of an instrument, as prescribed by Neb. Rev. Stat. § 25-207 (Reissue 1979), contains a discovery rule.
Newton v. Brown 605

Replevin

1. Replevin is an action for possession only and does not properly lie against one who is not, at the time of the commencement of the action, in possession of any of the property sought to be recovered.
Arcadia State Bank v. Nelson 704
2. The object of an action of replevin is to recover specific personal property, and liability for the value of the property accrues only if a return of the property cannot be had.
Arcadia State Bank v. Nelson 704
3. One who claims title to or the right to the possession of property replevied, adversely to the plaintiff, is not a necessary party.
Arcadia State Bank v. Nelson 704
4. The person in possession of the property sought to be replevied is ordinarily the proper and only necessary party defendant.
Arcadia State Bank v. Nelson 704
5. Replevin will not lie against one who is not detaining the property when the writ is sued out. It is the condition of things when the suit is commenced which furnishes the ground for the action.
Arcadia State Bank v. Nelson 704

6. As a general rule, since the main issue in a replevin action is one of title and right to possession, all matters foreign thereto must be excluded from consideration and are not available as defenses.
Arcadia State Bank v. Nelson 704
7. The burden is on the plaintiff in replevin to establish facts necessary for him to recover, and these must be shown to have existed at the time the action was commenced. The gist of a replevin action is the unlawful detention of the property at the inception of the suit and the rights of the parties with respect to possession of the property at that time.
Arcadia State Bank v. Nelson 704
8. The cardinal question in every replevin action is whether the plaintiff therein was entitled to the immediate possession of the property replevied at the commencement of the action.
Arcadia State Bank v. Nelson 704
9. A plea of the right to possession in a third person cannot be sustained unless the right is an absolute one.
Arcadia State Bank v. Nelson 704

Rescission

An action for rescission of a contract is equitable in nature and, as such, is reviewable by this court de novo on the record. However, when the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and adopted one version of the facts rather than the opposite.
Equitable Life Assurance Soc'y v. Joiner 504

Restrictive Covenants

1. There are three general requirements relating to partial restraints of trade: First, is the restriction reasonable in the sense that it is not injurious to the public; second, is the restriction reasonable in the sense that it is no greater than is reasonably necessary to protect the employer in some legitimate interest; and, third, is the restriction reasonable in the sense that it is not unduly harsh and oppressive on the employee.
Boisen v. Petersen Flying Serv. 239
American Sec. Servs. v. Vodra 480
2. Not every employer-employee relationship infuses validity and enforceability into a postemployment restraint on competition by a former employee.
Boisen v. Petersen Flying Serv. 239
3. Regarding a postemployment covenant not to compete, an employer has a legitimate business interest in protection against competition by improper and unfair methods, but an employer is not entitled to enforcement of a restrictive covenant which merely

protects the employer from ordinary competition.
Boisen v. Petersen Flying Serv. 239
American Sec. Servs. v. Vodra 480
4. Where an employee has substantial personal contact with the employer's customers, develops goodwill with such customers, and siphons away the goodwill under circumstances where the goodwill properly belongs to the employer, the employee's resultant competition is unfair, and the employer has a legitimate need for protection against the employee's competition.
Boisen v. Petersen Flying Serv. 239
5. An employer has a legitimate need to curb or prevent competitive endeavors by a former employee who has acquired confidential information or trade secrets pertaining to the employer's business operations.
Boisen v. Petersen Flying Serv. 239
6. Ordinarily, an employer has no legitimate business interest in postemployment prevention of an employee's use of some general skill or training acquired while working for the employer, although such on-the-job acquisition of general knowledge, skill, or facility may make the employee an effective competitor for the former employer.
Boisen v. Petersen Flying Serv. 239
7. A covenant not to compete, as a partial restraint of trade, is available to prevent unfair competition by a former employee but is not available to shield an employer against ordinary competition.
Boisen v. Petersen Flying Serv. 239
8. In reference to an employer-customer relationship, good will is that value which results from the probability that old customers will continue to trade or deal with the members of an established concern.
American Sec. Servs. v. Vodra 480
9. Reasonableness of a specific restrictive covenant must be assessed upon the facts of a particular case and must be determined on all the circumstances.
American Sec. Servs. v. Vodra 480
10. The restriction imposed by a covenant not to compete must be no wider in scope than is necessary to protect the business of the employer.
American Sec. Servs. v. Vodra 480
11. A balancing test is applied in determining whether the restraint of a postemployment covenant not to compete is unduly harsh or oppressive and, therefore, unenforceable.
American Sec. Servs. v. Vodra 480

Right-of-Way

1. The statutory law granting the right-of-way to emergency vehicles

generally does not condition that right-of-way on other drivers' perception of emergency equipment.
Maple v. City of Omaha 293
2. Right-of-way shall mean the right of one vehicle or pedestrian to proceed in a lawful manner in preference to another vehicle or pedestrian approaching under such circumstances of direction, speed, and proximity as to give rise to danger of collision unless one grants precedence to the other. Neb. Rev. Stat. § 39-602(81) (Reissue 1984).
Krul v. Harless 313
3. Generally, an unexcused vehicular encroachment on another's lane of traffic, such as driving to the left of the midline of a roadway contrary to the rules of the road, prevents acquisition of a right-of-way and precludes the unlawful encroachment from becoming a favored position in movement of traffic.
Krul v. Harless 313
4. A motorist colliding with an unlawfully encroaching vehicle is not, as a matter of law, guilty of contributory negligence more than slight by failing to see and avoid such approaching, encroaching vehicle.
Krul v. Harless 313
5. A pedestrian crossing a street between intersections is held to a higher standard of care than one crossing at a crosswalk where the pedestrian is afforded the right-of-way.
Hennings v. Schufeldt 416
6. When crossing a street at a point between intersections and outside of marked crosswalks, a pedestrian is required to yield the right-of-way to all vehicles on that roadway.
Hennings v. Schufeldt 416

Right to Counsel

1. A defendant in a criminal action is not only entitled to counsel but to the effective assistance of counsel.
State v. Grotzky 39
2. Under the implied consent law a driver is not entitled to consult with an attorney before submitting to a chemical test, nor is a delay in the test required due to a driver's request to consult with an attorney.
State v. Klingelhoefer 219
3. If a defendant in a criminal case chooses to represent himself, he must be held responsible for his ineptness of counsel even though that counsel was himself.
State v. Stickney 465
4. The records of prior convictions of a defendant relied on to establish a finding that defendant is a habitual criminal must show that at the time of the prior convictions defendant was represented

by counsel or knowingly, intelligently, and voluntarily waived counsel.
State v. Huffman 512
5. A defendant may object to the validity of a prior conviction for enhancement purposes where there is no showing that at the time of the previous conviction he was represented by counsel or knowingly and voluntarily waived the right to counsel.
State v. Fraser 862

Rules of Evidence

As a result of Neb. Evid. R. 1101(4)(b) the Nebraska Evidence Rules do not apply at a sentence hearing. Neb. Rev. Stat. § 27-1101(4)(b) (Reissue 1979).
State v. Dillon 131

Rules of the Supreme Court

1. Failure to comply with the rules of the Supreme Court regarding presentation of a question concerning constitutionality of a statute—written notice of a constitutional question filed with the Clerk of the Supreme Court when the brief of the one contesting constitutionality is filed with the court, and service of the contestant's brief on the Attorney General within the prescribed time—precludes the Supreme Court's considering a question about constitutionality of a statute.
Voyles v. DeBrown Leasing, Inc. 250
2. When a request for admission is made under Neb. Ct. R. of Disc. 36 (rev. 1983), the party served must answer, even though he has no personal knowledge, if the means of obtaining the information are available to him. It is not a sufficient answer that he does not know, when it appears that he can obtain the information. It is immaterial that the plaintiff is acquainted with the facts as to which admission is sought. The purpose of the rule is to expedite the trial and to relieve parties of the cost and inconvenience of proving facts which will not be disputed on the trial, the truth of which can be ascertained by reasonable inquiry.
Arcadia State Bank v. Nelson 704

Sanitary and Improvement Districts

1. A sanitary and improvement district, existing pursuant to the sanitary and improvement districts act, Neb. Rev. Stat. §§ 31-727 et seq. (Reissue 1984), is a legislative creature, a political subdivision of the State of Nebraska.
Rexroad, Inc. v. S.I.D. No. 66 618
2. Only a taxpayer of a sanitary and improvement district organized pursuant to the sanitary and improvement districts act, Neb. Rev.

Stat. §§ 31-727 et seq. (Reissue 1984), has standing to contest validity of contractual obligations for expenditure of such district's funds.
Rexroad, Inc. v. S.I.D. No. 66 618

Schools and School Districts

When any territory not included in a school district offering secondary education becomes a part of such a district, the territory's proportionate share of any balance remaining in the nonresident tuition fund as of September 15 shall be credited to the district of which the territory has become a part.
School Dist. of Santee v. Anderson 446

Search and Seizure

1. Determinations of whether one has been seized and whether such a seizure was reasonable are questions of fact.
State v. LaChappell 112
2. One who voluntarily accompanies the police for questioning has not been seized.
State v. LaChappell 112
3. One's initially consensual encounter with the police may be transformed into a seizure or detention by subsequent events.
State v. LaChappell 112
4. A seizure takes place if the circumstances of an involuntary encounter with the police are so intimidating as to demonstrate that a reasonable person would have believed himself not free to leave.
State v. LaChappell 112
5. Probable cause to seize an individual exists at the moment the collective knowledge and trustworthy information of all the police officers engaged in a common investigation are such as to warrant a conclusion by a prudent person that the individual seized committed a felony.
State v. LaChappell 112
6. It is not required that an officer see the commission of the felony, nor does the finding of probable cause require the same specific evidence of each element of the offense as would be needed to support a conviction.
State v. LaChappell 112
7. A motorist has a reasonable expectation of privacy which is not subject to arbitrary invasions solely at the unfettered discretion of police officers in the field.
State v. Crom 273
8. A person's capacity to claim the protection of article I, § 7, of the Nebraska Constitution as to unreasonable searches and seizures, like its counterpart, the fourth amendment to the U.S. Constitution, depends upon whether the person who claims such

protection has a legitimate expectation of privacy in the invaded place.
State v. Havlat 554
9. The open fields doctrine of *Hester v. United States*, 265 U.S. 57, 44 S. Ct. 445, 68 L. Ed. 898 (1924), is applicable under our Constitution.
State v. Havlat 554
10. Concerning the open fields doctrine, our state Constitution does not afford more protection than does the fourth amendment to the federal Constitution as interpreted in *Oliver v. United States*, 466 U.S. 170, 104 S. Ct. 1735, 80 L. Ed. 2d 214 (1984), and we decline to judicially impose higher standards governing law enforcement officers under the provisions of the state Constitution.
State v. Havlat 554
11. A warrantless search of a house may be justified when the police have obtained the consent to search from a party who possessed common authority over, or other sufficient relationship to, the premises sought to be inspected.
State v. Daniels 850

Security Interests

1. Under an authorized hypothecation agreement a debtor may confer a right on a creditor in property belonging to another sufficient to create a security interest in such property which may be perfected under the Uniform Commercial Code.
Mid City Bank v. Omaha Butcher Supply 671
2. Under the Uniform Commercial Code a financing statement is sufficient in describing the collateral stated in the financing statement if it sets out an address of the secured party from which information concerning the security interest may be obtained, gives a mailing address of the debtor, and contains a statement indicating the types, or describing the items, of collateral, and reasonably defines the collateral.
Mid City Bank v. Omaha Butcher Supply 671

Self-Defense

The exception to the duty to retreat before employing deadly force is inapplicable if the defendant has in fact retreated voluntarily from his dwelling.
State v. Menser 36

Sentences

1. The maximum penalty of confinement that may be imposed upon a person convicted of manslaughter resulting from his operation of a motor vehicle is 6 months' imprisonment in the county jail.
State v. Roth 119
2. As a result of Neb. Evid. R. 1101(4)(b) the Nebraska Evidence

Rules do not apply at a sentence hearing. Neb. Rev. Stat. § 27-1101(4)(b) (Reissue 1979).
State v. Dillon 131
3. Use of an affidavit for the purpose of sentencing is not objectionable, provided the affidavit contains information relevant to a sentence to be imposed.
State v. Dillon 131
4. In the absence of an abuse of discretion, a sentence imposed within statutory limits will not be disturbed on appeal.
State v. Dillon 131
State v. Jackson 384
State v. Tate 586
State v. Perdue 679
State v. Martens 870
State v. Ryan 875
5. A district court may modify a sentence imposed by a county court only where the county court has so abused its discretion as to render its sentence an error upon the record presented.
State v. Schott 456
6. When the punishment of an offense created by statute is left to the discretion of the trial court, to be exercised within certain prescribed limits, a sentence imposed within those limits will not be disturbed on appeal unless the record reveals an abuse of discretion.
State v. Schenck 523
7. Information as to an alleged discriminatory sentencing not appearing in the record may not be considered by this court on appeal.
State v. Tate 586
8. The Nebraska Supreme Court is not required to disturb on appeal an otherwise entirely appropriate sentence solely because someone else was treated more leniently.
State v. Tate 586
9. Error without prejudice is harmless and will not afford a basis for vacating a proper sentence.
State v. Ryan 875

Sexual Assault

1. In a prosecution for sexual assault the victim need not be independently corroborated on the particular acts constituting sexual assault, but must be corroborated on the material facts and circumstances tending to support the victim's testimony about the principal fact in issue.
State v. Jackson 384
2. Nebraska's rape shield law, Neb. Rev. Stat. § 28-321 (Cum. Supp. 1984), which generally excludes evidence in the form of details of the victim's prior sexual conduct, does not prevent defendants

from presenting *relevant* evidence in their own defense. It merely denies a defendant the opportunity to harass and humiliate the complainant at trial and divert the attention of the jury to issues not relevant to the controversy. A defendant has no constitutional right to inquire into irrelevant matters.
State v. Schenck 523

3. Where there is a genuine or real question of fact regarding a victim's lack of consent regarding an alleged first degree sexual assault, it is not within the province of the Supreme Court to reconsider the factual matters resolved by the jury in reaching a verdict that a defendant overcame the victim by force, threat of force, express or implied, coercion, or deception.
State v. Dondlinger 741

4. For use of a firearm, in violation of Neb. Rev. Stat. § 28-1205(1) (Reissue 1979), to subject a victim to sexual penetration by force or threat of force, Neb. Rev. Stat. § 28-319(1)(a) (Reissue 1979), it is only necessary that the victim be aware of the firearm's presence; that the assailant, in proximity to the firearm and knowing the firearm's location, has realistic accessibility to that firearm; and that the victim reasonably believes that the assailant will discharge the firearm to harm the victim unless the victim submits to the act of the assailant.
State v. Dondlinger 741

5. In a prosecution for sexual assault, the prosecutrix may testify in chief on direct examination, if within a reasonable time under all the circumstances after the act was committed she made complaint to another, to the fact and nature of the complaint, but not as to its details.
State v. Daniels 850

6. One to whom the complaining witness has complained may testify to the fact and nature of the complaint if the complaint was made voluntarily and without unreasonable delay.
State v. Daniels 850

7. The rule which permits testimony of a witness that a sexual assault victim complained to such witness of the assault is for the purpose of confirming the fact of complaint, and does not permit consideration of the complaint as substantive proof of the facts of the assault. A jury should be given a limiting instruction to this effect.
State v. Daniels 850

Standing

1. Mere assignees who are strangers to contracts are not in privity with assignors for the purpose of asserting the assignors' usury defense or claims under the Nebraska Installment Loan Act, Neb. Rev. Stat. §§ 45-114 et seq. (Reissue 1984).
General Electric Credit Corp. v. Best Refr'd Express 499

2. Before one is entitled to invoke jurisdiction of a court, one must have standing—some real interest in a cause of action, a right (legal or equitable), title, or interest in the subject matter in controversy. To establish such standing, a litigant must demonstrate a danger of injury to the litigant, resulting from an action to be contested. Generally, sufficient standing as a party in litigation may not be based merely on a general interest common to all members of the public.
Rexroad, Inc. v. S.I.D. No. 66 618
3. Only a taxpayer of a sanitary and improvement district organized pursuant to the sanitary and improvement districts act, Neb. Rev. Stat. §§ 31-727 et seq. (Reissue 1984), has standing to contest validity of contractual obligations for expenditure of such district's funds.
Rexroad, Inc. v. S.I.D. No. 66 618

State Racing Commission

The State Racing Commission is an administrative agency as defined in Neb. Rev. Stat. § 84-901(1) (Reissue 1981).
B. T. Energy Corp. v. Marcus 207

States

1. The state may lay its sovereignty aside and consent to be sued on such terms and conditions as the Legislature may provide.
VisionQuest, Inc. v. State 228
2. Although a state may not impose greater restrictions on police activity as a matter of federal constitutional law, a state may impose higher standards governing police practices on the basis of state law.
State v. Havlat 554
3. Freedom of speech and the right of assembly provided by the first amendment to the U.S. Constitution are among the fundamental liberties protected from state impairment by the due process clause of the fourteenth amendment to the U.S. Constitution.
Wood v. Tesch 654

Statutes

1. We will, if possible, discover the legislative intent from the language of the statute and give it effect. We will not read a statute as if open to construction as a matter of course.
Cass Constr. Co. v. Brennan 69
2. Repeals by implication are not favored. A statute will not be considered repealed by implication unless the repugnancy between the new provision and the former statute is plain and unavoidable. A construction of a statute which, in effect, repeals another statute, will not be adopted unless such construction is

made necessary by the evident intent of the Legislature.
State v. Roth 119
3. With respect to questions about a statute, our role is limited to interpretation and application of statutes, irrespective of our personal agreement or disagreement with a particular legislative enactment, so long as a questioned statute does not violate a constitutional requirement. Whether a court considers particular legislation as wise or unwise is irrelevant to the judicial task of construing or applying a statute.
State v. Roth 119
4. Where general and special provisions of statutes are in conflict, the general law yields to the special, without regard to priority of dates in enacting the same, and a special law will not be repealed by general provisions unless by express words or necessary implication.
State v. Roth 119
5. Failure to comply with the rules of the Supreme Court regarding presentation of a question concerning constitutionality of a statute—written notice of a constitutional question filed with the Clerk of the Supreme Court when the brief of the one contesting constitutionality is filed with the court, and service of the contestant's brief on the Attorney General within the prescribed time—precludes the Supreme Court's considering a question about constitutionality of a statute.
Voyles v. DeBrown Leasing, Inc. 250
6. One of the basic rules of statutory construction is that statutory language will be given its plain and ordinary meaning.
Caruso v. City of Omaha 257
7. Where the words of the statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning, and the words used must be given their ordinary meaning.
Galyen Petroleum Co. v. Svoboda 268
Maple v. City of Omaha 293
Meyers v. Meyers 370
8. In matters relating to the dissolution of marriages, courts have only such power as is conferred upon them by statute.
Meyers v. Meyers 370
9. It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language; neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute.
Meyers v. Meyers 370
10. The dissolution statutes do not empower courts to order a parent to contribute to the support of an adult handicapped child.
Meyers v. Meyers 370
11. Generally, the word "may" in a statute will be given its ordinary,

permissive, and discretionary meaning unless the intent of the drafters would be defeated by the application of such a meaning.
State ex rel. Douglas v. Schroeder 473

12. No act is criminal unless the Legislature has in express terms declared it to be so, and no person can be punished for any act or omission which is not made penal by the plain import of written law.
State v. Douglas 833

13. It is a fundamental principle of statutory construction that a penal statute is to be strictly construed.
State v. Douglas 833

14. To sustain a conviction for perjury outside a judicial proceeding, there must exist a valid statute which requires the making of a statement under oath.
State v. Douglas 833

15. For an oath to be "required by law" as a foundation for the crime of perjury in violation of Neb. Rev. Stat. § 28-915(1) (Reissue 1985), a specific statute must explicitly require that an oath be administered.
State v. Douglas 833

Stock

The trial court is not required to accept any one method of stock valuation as more accurate than another accounting procedure.
Bryan v. Bryan 180

Strict Liability

1. In order to recover in strict liability for the cost of repairs to the product, there must be proof that a sudden, violent event occurred which aggravated the inherent defect or caused it to manifest itself.
Hilt Truck Line v. Pullman, Inc. 65

2. The purchaser of a product pursuant to contract cannot recover economic losses from the seller manufacturer on claims in tort based on negligent manufacture or strict liability in the absence of physical harm to persons or property caused by the defective product.
Hilt Truck Line v. Pullman, Inc. 65

Subrogation

1. Under Neb. Rev. Stat. § 48-118 (Reissue 1984), the subrogated interest of the employer, for computation and allocation of fees and expenses, is not restricted to the workmen's compensation benefits actually paid, but is measured by the workmen's compensation liability relieved or discharged by the recovery against the third party.
Nekuda v. Waspi Trucking, Inc. 806

2. Under Neb. Rev. Stat. § 48-118 (Reissue 1984), the trial court has

discretion to prorate and apportion the reasonable expenses and fees between the employer and employee as their interests appear at the time of recovery in a suit against a third party.
Nekuda v. Waspi Trucking, Inc. 806

3. Where an employer refuses to lump-sum periodic lifetime workmen's compensation benefits due an employee or dependents, and where a recovery is made against a third party, the obligation of the employer to continue to make lifetime payments is not extinguished but merely suspended for the period of time the employer's share of the recovery satisfies the continuing obligation due the employee.
Nekuda v. Waspi Trucking, Inc. 806

4. In calculating the fees and expenses of both an employee and an employer, in connection with the recovery of damages from a third party under Neb. Rev. Stat. § 48-118 (Reissue 1984), where a lump-sum agreement is not reached, the fees and expenses are to be deducted immediately from the recovery, and the employer's share of such fees and expenses is to be repaid weekly by the employer to the employee over the period of time benefit payments are due to the employee.
Nekuda v. Waspi Trucking, Inc. 806

Summary Judgment

1. A party is entitled to summary judgment if the pleadings, depositions, and admissions on file, together with any affidavits, show that there is no genuine issue of material fact, that the ultimate inferences to be drawn from those facts are clear, and that the moving party is entitled to judgment as a matter of law.
Cass Constr. Co. v. Brennan 69
Schrodt v. Sullivan Transfer & Storage Co. 347
Hassett v. Swift & Company 819

2. The requirements to sustain the motion are the same whether one party or both parties have moved for summary judgment.
Cass Constr. Co. v. Brennan 69

3. On a motion for summary judgment, the moving party bears the burden of proving that no genuine issue as to any material fact exists and that the movant is entitled to judgment as a matter of law. The movant may discharge this burden by showing that if the case proceeded to trial, the opponent could produce no competent evidence to support a contrary position.
Cass Constr. Co. v. Brennan 69

4. A partial summary judgment that a claimant is a guest passenger within the purview of Nebraska's former guest statute, Neb. Rev. Stat. § 39-6,191 (Reissue 1978), while the issue of the host driver's negligence is unresolved, is not a final judgment or order reviewable by the Supreme Court.
Voyles v. DeBrown Leasing, Inc. 250

5. The burden is on the moving party to show that no issues of material fact exist, and unless the party can conclusively do so, the motion must be overruled.
Schrodt v. Sullivan Transfer & Storage Co. 347
6. Summary judgment is not appropriate, even where there are no conflicting evidentiary facts, if the ultimate inferences to be drawn from those facts are not clear.
Schrodt v. Sullivan Transfer & Storage Co. 347
7. The party against whom the motion is directed is entitled to the benefit of all favorable inferences to be drawn from the facts.
Schrodt v. Sullivan Transfer & Storage Co. 347
8. In an action on a promissory note in which defendants fail to plead affirmative defenses, such as lack of consideration or any other defense that would controvert the amount due, no issue of fact is presented for determination and plaintiff is entitled to summary judgment.
Pabst v. First American Distrib., Inc. 591
9. Where a party properly serves a request for admission of relevant matters of fact or the genuineness of relevant documents, and all objections thereto are heard and appropriately denied by the court, and the other party has been ordered to respond thereto, his failure to do so within the time allotted constitutes an admission of the facts sought to be elicited. In such situation a motion for summary judgment is appropriate and may be granted if admissions made or failure to deny as required by the statute, together with the pleadings, show that there is no genuine issue as to any material fact or that the court is without jurisdiction of the subject matter.
Arcadia State Bank v. Nelson 704
10. A party is entitled to summary judgment if it is shown that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. In considering a motion for summary judgment, the evidence is to be viewed most favorably to the party against whom the motion is directed, giving to that party the benefit of all the favorable inferences which may reasonably be drawn from the evidence.
Remelius v. Ritter 734
Reifschneider v. Nebraska Methodist Hosp. 782
Hassett v. Swift & Company 819
11. The party moving for summary judgment has the burden of showing that no genuine issue as to any material fact exists; that party must therefore produce enough evidence to demonstrate his entitlement to a judgment if the evidence remains uncontroverted, after which the burden of producing contrary evidence shifts to the party opposing the motion.
Remelius v. Ritter 734
12. The moving party must first show that if the evidence were

uncontroverted at trial he would be entitled to judgment as a matter of law. Such a prima facie showing shifts the burden of producing evidence as to a factual issue to the party opposing the motion. The court then views the evidence in a light most favorable to the party against whom the motion is directed and decides only if there is a genuine issue as to any material fact, but not how that issue is to be decided.
Reifschneider v. Nebraska Methodist Hosp. 782
Hassett v. Swift & Company 819

13. The movant on a motion for summary judgment may discharge his burden of proof by a showing that if the case proceeded to trial his opponent could produce no competent evidence to support a contrary position.
Hassett v. Swift & Company 819

14. A prima facie showing for summary judgment having been made, it should be granted to the movant unless the opposing party offers competent evidence that there is a genuine issue as to a material fact.
Hassett v. Swift & Company 819

Taxation

1. In its appellate review of a question whether property is exempt from taxation pursuant to Neb. Rev. Stat. § 77-202(1)(c) (Reissue 1981), the Supreme Court determines tax exemption in an equitable trial of factual questions de novo on the record, subject to the rule that where credible evidence is in conflict on material issues of fact, the Supreme Court will consider the fact that the trial court observed the witnesses and accepted one version of the facts over another.
Immanuel, Inc. v. Board of Equal. 405

2. When the tax is void, either because the person assessed was not subject to taxation, or because it was assessed for an unlawful purpose, or without compliance with provisions of law imposed, it can be recovered back or treated as void in proceedings to enforce payment of tax.
Beshore v. Sidwell 441

3. In cases where property is assessed at a higher proportion of its actual value than other property similarly located, the taxpayer should first apply to the board of equalization to correct any errors therein. This appears to be a prerequisite to bringing legal action.
Beshore v. Sidwell 441

4. The claim that property is assessed too high for taxation purposes cannot be made in the first instance by direct application to any other body or by a collateral attack in law or equity in the event of failure to bring the matter before the county board of equalization and to appeal therefrom in case of an adverse determination. A

collateral attack may be made upon an assessment of property for tax purposes only if the assessment, or some part thereof, is wholly void.
Beshore v. Sidwell 441

Termination of Employment

1. A uniquely personal termination of employment does not constitute an industrial dispute notwithstanding the fact it may involve a controversy concerning terms, tenure, or conditions of employment.
Wood v. Tesch 654
2. While one who is a governmental at-will employee may be discharged for no reason at all, he or she may not be discharged on a basis that infringes upon constitutionally protected interests.
Wood v. Tesch 654
3. A governmental employee may not constitutionally be compelled to relinquish his or her first amendment right to comment on matters relating to his or her employment which are of public concern.
Wood v. Tesch 654
4. In discharging a governmental at-will employee who has exercised his or her right of free speech on matters of public concern, the interest of the governmental employee in commenting as a citizen upon such matters and the interest of the governmental employer in promoting the efficiency of the public services it performs through its employees must be balanced.
Wood v. Tesch 654
5. The closeness of working relationships is a factor to be considered in balancing the governmental employee's constitutional right to free speech and the governmental employer's interest in efficiency.
Wood v. Tesch 654
6. When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment in discharging an employee is appropriate; it is not necessary for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships are manifest before taking action.
Wood v. Tesch 654
7. The more substantially involved in matters of public concern is the employee's speech, the stronger must be the employer's showing as to the disruptive effect upon close working relationships and efficiency.
Wood v. Tesch 654
8. When employment is not for a definite term, and there are no contractual or statutory restrictions upon the right of discharge, an employer may lawfully discharge an employee whenever and

for whatever cause it chooses without incurring liability.
Jeffers v. Bishop Clarkson Memorial Hosp. 829
9. Except in cases where an employee is deprived of constitutional or statutory rights or where contractual agreements guarantee that employees may not be fired without just cause, the law in this state continues to deny any implied covenant of good faith or fair dealing in employment termination.
Jeffers v. Bishop Clarkson Memorial Hosp. 829

Testimony

1. Testimony concerning an insurer's estimated cost of repairing damage is, when offered to prove the amount of damage, hearsay evidence and inadmissible.
State v. Larkin 398
2. Where an objection has been overruled, it is unnecessary to object to further testimony of the same nature by the same witness.
State v. Larkin 398
3. It is not reversible error for a trial court to fail to give a specific instruction on credibility of the testimony of an accomplice where such an instruction is not requested.
State v. Huffman 512
4. A conviction may rest on the uncorroborated testimony of an accomplice.
State v. Huffman 512
5. Although Neb. Rev. Stat. § 42-364(1)(b) (Reissue 1984) provides that a court, in determining custody and visitation, shall consider the desires and wishes of a child affected by a dissolution decree if such child is of an age of comprehension, such statute does not require that a court derive a minor child's wishes only from the child's testimony, as opposed to evidence from some source other than the child's testimony which adequately establishes the child's desire and wishes regarding custody and visitation.
Smith v. Smith 752

Time

1. As required by Neb. Rev. Stat. §§ 25-1905 and 25-1931 (Reissue 1979), within 1 calendar month after rendition of the final judgment or order sought to be reversed, vacated, or modified, a petitioner in error must file a petition and an appropriate transcript containing the final judgment or order to be judicially reviewed.
Glup v. City of Omaha 355
2. Timely filing of both the petition in error and the certified transcript is mandatory to confer jurisdiction on a court asked to review a final judgment or order, as provided by Neb. Rev. Stat. § 25-1905 (Reissue 1979).
Glup v. City of Omaha 355
3. Filing in the district court does not satisfy the requirement of Neb.

Rev. Stat. § 60-420 (Reissue 1984) that the bond be filed in the office of the director of the Department of Motor Vehicles within 20 days of the order concerning which complaint is made.
Bammer v. Jensen 400

4. The time within which an appeal must be taken is mandatory and must be met in order for an appellate tribunal to acquire jurisdiction of the subject matter.
Federal Land Bank v. McElhose 448

5. Under the provisions of Neb. Rev. Stat. § 21-20,121 (Reissue 1983), objection to a nonauthorized corporation's maintaining a lawsuit may be raised at any time during the pendency of such litigation, and the court may, in its discretion, limit the time that the plaintiff can have for procuring the necessary certificate of authority.
Christian Servs., Inc. v. Northfield Villa, Inc. 628

6. A petition for the allowance of a claim against a county which is subject to the provisions of Neb. Rev. Stat. § 23-135 (Reissue 1983) is demurrable unless it shows on its face that the claim was filed with the county clerk within the statutory time.
Zeller Sand & Gravel v. Butler Co. 847

Tort Claims Act

1. The State's conduct in maintaining its highways falls squarely within the purview of the State Tort Claims Act, Neb. Rev. Stat. §§ 81-8,209 et seq. (Reissue 1981).
Bean v. State 202

2. Findings of fact made by the trial court in an action brought under the State Tort Claims Act have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong.
Bean v. State 202

Torts

1. The purchaser of a product pursuant to contract cannot recover economic losses from the seller manufacturer on claims in tort based on negligent manufacture or strict liability in the absence of physical harm to persons or property caused by the defective product.
Hilt Truck Line v. Pullman, Inc. 65

2. In order for there to exist a cause of action for tortious interference with a business relationship, it is necessary to prove: (1) The existence of a valid business relationship or expectancy; (2) Knowledge by the interferer of the relationship or expectancy; (3) An intentional act of interference on the part of the interferer; (4) Proof that the interference caused the harm sustained; and (5) Damage to the party whose relationship or expectancy was disrupted.
Mike Pratt & Sons, Inc. v. Metalcraft, Inc. 333

Trespass

The herd laws pertain to damage to property and do not alter the common-law liability for personal injuries caused by trespassing bulls.
Foland v. Malander 1

Trial

1. Where the evidence is in conflict, this court will, on its de novo review of the record, give weight to the fact that the trial judge observed and heard the witnesses and accepted one version of the facts rather than another.
Delaney v. Delaney 33
2. Neb. Rev. Stat. § 25-1220 (Reissue 1979) permits comparisons between known genuine writing and the disputed writing to be made by a jury either with or without the aid of experts.
Aetna Cas. & Surety Co. v. Nielsen 92
3. The overruling of a motion in limine does not eliminate the need to object to the introduction of evidence in order to preserve the error.
State v. Lieberman 95
4. The decision to object or not to object is part of trial strategy, and this court gives due deference to defense counsel's discretion in formulating trial tactics.
State v. Lieberman 95
5. It is a well-established rule in this state that a decision to call or not to call a witness, made by counsel as a matter of trial strategy, even if the choice may prove to be incorrect, does not, without more, sustain a finding of ineffectiveness of counsel.
State v. Lieberman 95
6. Where no issue as to the propriety of an arrest is raised and the evidence of the preliminary breath test is relevant only for the limited purpose of establishing probable cause to require the driver to submit to a test of his or her blood, urine, or breath under Neb. Rev. Stat. § 39-669.08 (Reissue 1984) and thereby make the results of the second test admissible in evidence for the purpose of seeking to convict a driver for operating a motor vehicle while under the influence of alcohol, the admissibility of the preliminary breath test is a question of law and should therefore be admitted into evidence out of the presence of the jury.
State v. Klingelhoefer 219
7. When a pedestrian crosses a street between intersections without looking at all, or looks straight ahead without glancing to either side, or is in a position where he cannot see, and proceeds regardless of that fact, the situation ordinarily presents a question for the court. Where the pedestrian looks but does not see an approaching automobile, or sees it and misjudges its speed or its distance from him, or for some other reason concludes that he

could avoid injury to himself, a jury question is usually presented.
Hennings v. Schufeldt 416
8. A mere statement by the injured person that he looked in the direction from which he was struck is not sufficient of itself to ensure a consideration of his case by a jury. The statement must be consistent with the facts and circumstances in evidence to present a jury question.
Hennings v. Schufeldt 416
9. The Nebraska Consumer Protection Act, Neb. Rev. Stat. §§ 59-1601 et seq. (Reissue 1984), is equitable in nature; as such, trials thereunder are to the court.
State ex rel. Douglas v. Schroeder 473
10. An abuse of discretion takes place where the trial court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result.
State ex rel. Douglas v. Schroeder 473
11. Restoration of the purchase price under the Nebraska Consumer Protection Act, Neb. Rev. Stat. §§ 59-1601 et seq. (Reissue 1984), rests within the discretion of the trial court; its ruling thereon will not be disturbed on appeal in the absence of an abuse of that discretion.
State ex rel. Douglas v. Schroeder 473
12. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.
State v. Schenck 523
13. It is for the trial court to make the initial decision on whether the testimony of an expert will assist the trier of fact. The soundness of its determination depends upon the qualification of the witness, the nature of the issue on which the opinion is sought, the foundation laid, and the particular facts of the case.
State v. Schenck 523
14. Because of the wide variety of facts that may have circumstantial probative value, courts are liberal in admitting such evidence of facts which appear to have some degree of relevance to the matters in issue.
State v. Havlat 554
15. When a case is tried to the court without a jury, it is presumed that the trial court considered only competent and relevant evidence in reaching its decision.
State v. Havlat 554
16. A judicial abuse of discretion does not denote or imply improper motive, bad faith, or intentional wrong by a judge, but requires the reasons or ruling of a trial judge to be clearly untenable, unfairly depriving a litigant of a substantial right and denying a

just result in matters submitted for disposition through a judicial system.
Newton v. Brown 605
17. A motion for judgment on the pleadings by the defendants admits the truth of all the well-pleaded facts in the petition, together with all reasonable inferences to be drawn therefrom, and treats as untrue all the controverted facts contained in the answer.
Wood v. Tesch 654
18. Where the facts adduced on an issue are such that reasonable minds can draw but one conclusion, the court must decide the question as a matter of law rather than submit it to the jury for determination.
Remelius v. Ritter 734

Trusts

1. Generally, a court, sitting in equity, will not impose a constructive trust and constitute an individual as a trustee of the legal title for property, unless it be shown, by clear and convincing evidence, that the individual, as a potential constructive trustee, had obtained title to property by fraud, misrepresentation, or an abuse of an influential or confidential relationship and that, under the circumstances, such individual should not, according to the rules of equity and good conscience, hold and enjoy the property so obtained.
In re Estate of Lienemann 169
2. Mere receipt of a benefit by a confidant, as the result of a transaction in which the confidant has participated on behalf of or in concert with the entrusting individual, does not, itself, furnish a basis for imposition of a constructive trust on property acquired by or benefiting the confidant as a consequence of the transaction.
In re Estate of Lienemann 169
3. A trust is not created unless there is a beneficiary who is definitely ascertained at the time of the creation of the trust or definitely ascertainable within the period of the rule against perpetuities.
First Nat. Bank v. Schroeder 330
4. It is essential to the creation and existence of a trust that a beneficiary be designated with sufficient clarity and certainty to be capable of identification, although not necessarily by name.
First Nat. Bank v. Schroeder 330
5. A constructive trust is a relationship, with respect to property, subjecting the person by whom the title to the property is held to an equitable duty to convey it to another on the ground that his acquisition or retention of the property is wrongful and that he would be unjustly enriched if he were permitted to retain the property.
Ruppert v. Breault 432

6. Constructive trusts arise from actual or constructive fraud or imposition, committed by one party on another. Thus, if one person procures the legal title to property from another by fraud or misrepresentation, or by an abuse of some influential or confidential relation which he holds toward the owner of the legal title, obtains such title from him upon more advantageous terms than he could otherwise have obtained it, the law constructs a trust in favor of the party upon whom the fraud or imposition has been practiced.
Ruppert v. Breault 432
7. The burden of establishing a constructive trust is always upon the person who bases his rights thereon, and he must do so by evidence that is clear, satisfactory, and convincing.
Ruppert v. Breault 432

Undue Influence

1. The undue influence which will void a gift is an unlawful and fraudulent influence which controls the will of the donor.
Bishop v. Hotovy 623
2. The court, in examining the matter of whether a deed was procured by undue influence, is not concerned with the rightness of the conveyance but only with determining whether it was the voluntary act of the grantor.
Bishop v. Hotovy 623
3. The elements necessary to be established to warrant the rejection of a written instrument on the ground of undue influence are (1) that the person who executed the instrument was subject to undue influence, (2) that there was opportunity to exercise undue influence, (3) that there was a disposition to exercise undue influence for an improper purpose, and (4) that the result was clearly the effect of such undue influence.
Bishop v. Hotovy 623
4. The burden is on the party alleging the execution of a deed was the result of undue influence to prove such undue influence by clear and convincing evidence.
Bishop v. Hotovy 623

Uniform Commercial Code

1. The language of Neb. U.C.C. § 1-207 (Reissue 1980) and its history, purpose, and policy do not alter the common-law principles of accord and satisfaction.
Cass Constr. Co. v. Brennan 69
2. The statutory rule that a payor bank is accountable for a demand item presented to it and not settled for, paid, returned, or a notice of dishonor sent before the midnight deadline may be varied or

waived by agreement. Neb. U.C.C. §§ 4-302, 4-103 (Reissue 1980).
Stauffer Seeds, Inc. v. Nebraska Sec. Bank 594
3. Under an authorized hypothecation agreement a debtor may confer a right on a creditor in property belonging to another sufficient to create a security interest in such property which may be perfected under the Uniform Commercial Code.
Mid City Bank v. Omaha Butcher Supply 671
4. Under the Uniform Commercial Code a financing statement is sufficient in describing the collateral stated in the financing statement if it sets out an address of the secured party from which information concerning the security interest may be obtained, gives a mailing address of the debtor, and contains a statement indicating the types, or describing the items, of collateral, and reasonably defines the collateral.
Mid City Bank v. Omaha Butcher Supply 671

Unjust Enrichment

A suit to prevent unjust enrichment is tried in equity, and our review of equitable actions is by trial de novo.
Schmeckpeper v. Koertje 800

Usury

1. Usury laws are enacted for the protection of needy borrowers and not to punish extortion in moneylenders.
General Electric Credit Corp. v. Best Refr'd Express 499
2. The defense of usury is for the benefit of the borrower and is personal to the borrower.
General Electric Credit Corp. v. Best Refr'd Express 499
3. Mere assignees who are strangers to contracts are not in privity with assignors for the purpose of asserting the assignors' usury defense or claims under the Nebraska Installment Loan Act, Neb. Rev. Stat. §§ 45-114 et seq. (Reissue 1984).
General Electric Credit Corp. v. Best Refr'd Express 499

Valuation

1. A trial court is free to assess expert opinion and determine the fair market value of a closely held corporation in light of the expert testimony regarding the type of business done, the fixed and liquid assets of the business at actual or book value, the business' net worth, the market for the shares, the past earnings, future losses, and earning potential of the business.
Bryan v. Bryan 180
2. The trial court is not required to accept any one method of stock valuation as more accurate than another accounting procedure.
Bryan v. Bryan 180
3. A trial court's valuation of a closely held corporation is reasonable if it has an acceptable basis in fact and principle.
Bryan v. Bryan 180

4. In cases where property is assessed at a higher proportion of its actual value than other property similarly located, the taxpayer should first apply to the board of equalization to correct any errors therein. This appears to be a prerequisite to bringing legal action.
Beshore v. Sidwell 441
5. The claim that property is assessed too high for taxation purposes cannot be made in the first instance by direct application to any other body or by a collateral attack in law or equity in the event of failure to bring the matter before the county board of equalization and to appeal therefrom in case of an adverse determination. A collateral attack may be made upon an assessment of property for tax purposes only if the assessment, or some part thereof, is wholly void.
Beshore v. Sidwell 441

Verdicts

1. After a jury has considered all of the evidence and returned a verdict of guilty, that verdict may not, as a matter of law, be set aside on appeal for insufficiency of evidence if the evidence sustained some rational theory of guilt.
State v. Wilkening 107
State v. Schenck 523
2. The verdict of the trier of fact must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
State v. Wilkening 107
State v. Rich 394
State v. Dixon 787
3. In determining the sufficiency of the evidence to sustain a criminal conviction, this court does not resolve conflicts in the evidence, pass upon the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence, and a verdict rendered thereon must be sustained if, taking the view of such evidence most favorable to the State, there is sufficient evidence to support it.
State v. Blattner 396
4. The Supreme Court will not interfere with a guilty verdict based on evidence, unless that evidence, so lacking probative force, is insufficient to support a verdict beyond a reasonable doubt.
State v. Schott 456
5. Once a jury verdict has been rendered, the verdict should be upheld as against the challenge of an error in the proceedings unless the error was somehow prejudicial.
White v. Lovgren 771

Visitation

1. The primary consideration in determining custody and visitation is the best interests of the child.
   State ex rel. Ross v. Jacobs 380
2. Although Neb. Rev. Stat. § 42-364(1)(b) (Reissue 1984) provides that a court, in determining custody and visitation, shall consider the desires and wishes of a child affected by a dissolution decree if such child is of an age of comprehension, such statute does not require that a court derive a minor child's wishes only from the child's testimony, as opposed to evidence from some source other than the child's testimony which adequately establishes the child's desire and wishes regarding custody and visitation.
   Smith v. Smith 752

Waiver

1. Once the right to remain silent has been invoked, there is a strong presumption against its subsequent waiver.
   State v. LaChappell 112
2. The state may lay its sovereignty aside and consent to be sued on such terms and conditions as the Legislature may provide.
   VisionQuest, Inc. v. State 228
3. The records of prior convictions of a defendant relied on to establish a finding that defendant is a habitual criminal must show that at the time of the prior convictions defendant was represented by counsel or knowingly, intelligently, and voluntarily waived counsel.
   State v. Huffman 512
4. The statutory rule that a payor bank is accountable for a demand item presented to it and not settled for, paid, returned, or a notice of dishonor sent before the midnight deadline may be varied or waived by agreement. Neb. U.C.C. §§ 4-302, 4-103 (Reissue 1980).
   Stauffer Seeds, Inc. v. Nebraska Sec. Bank 594
5. A defendant may object to the validity of a prior conviction for enhancement purposes where there is no showing that at the time of the previous conviction he was represented by counsel or knowingly and voluntarily waived the right to counsel.
   State v. Fraser 862

Warrants

Neb. Rev. Stat. § 23-135 (Reissue 1983) applies where a claim is not a mere formal prerequisite to the issuance of a warrant in payment but, rather, requires quasi-judicial action in the sense that an exercise of discretion is required in ascertaining or fixing the amount to be allowed, or resolution of the claim otherwise involves a determination of factual questions based upon evidence.
Zeller Sand & Gravel v. Butler Co. 847

Weapons

For use of a firearm, in violation of Neb. Rev. Stat. § 28-1205(1) (Reissue 1979), to subject a victim to sexual penetration by force or threat of force, Neb. Rev. Stat. § 28-319(1)(a) (Reissue 1979), it is only necessary that the victim be aware of the firearm's presence; that the assailant, in proximity to the firearm and knowing the firearm's location, has realistic accessibility to that firearm; and that the victim reasonably believes that the assailant will discharge the firearm to harm the victim unless the victim submits to the act of the assailant.
State v. Dondlinger 741

Wills

There is no such position known as "attorney of an estate." When an attorney is employed to render services in securing the probate of a will or settling of an estate, he or she acts as attorney for the personal representative and not for the estate.
In re Estate of Wagner 699

Witnesses

1. Where the evidence is in conflict, this court will, on its de novo review of the record, give weight to the fact that the trial judge observed and heard the witnesses and accepted one version of the facts rather than another.
Delaney v. Delaney 33
2. To warrant a continuance because of the absence of a witness or evidence, the expected evidence must be credible and such as probably to affect the result. The absence of evidence that plainly cannot alter the result of the action is clearly no ground for a motion to continue a cause.
First Nat. Bank v. Schroeder 330
3. Where an objection has been overruled, it is unnecessary to object to further testimony of the same nature by the same witness.
State v. Larkin 398
4. It is not for the Supreme Court to resolve conflicts in the evidence. Credibility of witnesses and the weight to be given their testimony are for the administrative agency as a trier of fact.
IBEW Local 244 v. Lincoln Elec. Sys. 550
5. In a prosecution for sexual assault, the prosecutrix may testify in chief on direct examination, if within a reasonable time under all the circumstances after the act was committed she made complaint to another, to the fact and nature of the complaint, but not as to its details.
State v. Daniels 850
6. One to whom the complaining witness has complained may testify to the fact and nature of the complaint if the complaint was made voluntarily and without unreasonable delay.
State v. Daniels 850

7. The rule which permits testimony of a witness that a sexual assault victim complained to such witness of the assault is for the purpose of confirming the fact of complaint, and does not permit consideration of the complaint as substantive proof of the facts of the assault. A jury should be given a limiting instruction to this effect.
State v. Daniels 850
8. Where a statement of a witness is used erroneously as substantive evidence but is merely cumulative of other competent evidence of the same facts which are sufficient to support the conviction, the trial court's failure to control such error generally will not constitute reversible error.
State v. Daniels 850

Words and Phrases

1. 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.
Werner v. Schardt 186
2. The word "impair," as used in the U.S. Constitution, requires no construction and may be given its ordinary meaning, which, according to the most basic dictionary definition, is "to make worse."
Caruso v. City of Omaha 257
3. Not every change constitutes an impairment under the federal Constitution. The change must take something away and not work to the parties' benefit.
Caruso v. City of Omaha 257
4. Purchase price, under Neb. Rev. Stat. § 52-903 (Reissue 1984), means more than money and may include credits applied to a debt.
Galyen Petroleum Co. v. Svoboda 268
5. Right-of-way shall mean the right of one vehicle or pedestrian to proceed in a lawful manner in preference to another vehicle or pedestrian approaching under such circumstances of direction, speed, and proximity as to give rise to danger of collision unless one grants precedence to the other. Neb. Rev. Stat. § 39-602(81) (Reissue 1984).
Krul v. Harless 313
6. "Misconduct" within the meaning of Neb. Rev. Stat. § 48-628(b) (Reissue 1984) is a deliberate, willful, or wanton disregard of an employer's interest or of the standards of behavior which the employer has a right to expect of his employees, or carelessness or negligence of such a degree or recurrence as to manifest culpability, wrongful intent, or evil design.
Barada v. Sorensen 391
7. As used in an exclusionary definition in an insurance policy,

"money damages" means money sued for by a plaintiff which plaintiff prays should be paid by the insured directly to, or for the direct or indirect benefit of, the plaintiff allegedly damaged by actions of the insured.
Sandy Creek P.S. v. St. Paul Surplus Lines Ins. Co. 424

8. Intentionally means willfully or purposely, and not accidentally or involuntarily.
State v. Schott 456

9. Recklessly shall mean acting with respect to a material element of an offense when any person disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation. Neb. Rev. Stat. § 28-109(19) (Reissue 1979).
State v. Schott 456

10. The intent with which an act is committed is a mental process and may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident.
State v. Schott 456

11. Generally, the word "may" in a statute will be given its ordinary, permissive, and discretionary meaning unless the intent of the drafters would be defeated by the application of such a meaning.
State ex rel. Douglas v. Schroeder 473

12. 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. Schenck 523

13. The meaning of words used by medical experts may be ascertained by the sense in which they are used.
Snyder v. IBP, Inc. 534

14. Impairments of the body as a whole are compensated in terms of loss of earning power or capacity rather than in terms of loss of physical function.
Snyder v. IBP, Inc. 534

15. Loss of earning power or capacity is measured by an evaluation of a worker's general eligibility to procure and hold employment, his or her capacity to perform the tasks required by the work, and his or her ability to earn wages in employment in which he or she is engaged or is fitted.
Snyder v. IBP, Inc. 534

16. Loss of earning power or capacity is the means by which a physical impairment to the body as a whole is measured for the purpose of determining the benefits due under the act; there can be no loss of

earning power or capacity in the absence of a physical impairment to the body as a whole.
Snyder v. IBP, Inc. 534
17. Vocational rehabilitation cannot be ordered in the absence of total or partial disability which is or is likely to be permanent.
Snyder v. IBP, Inc. 534
18. "Misconduct" under Neb. Rev. Stat. § 48-628(b) (Cum. Supp. 1982) is defined as " 'behavior which evidences (1) wanton and willful disregard of the employer's interests, (2) deliberate violation of rules, (3) disregard of standards of behavior which the employer can rightfully expect from the employee, or (4) negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard of the employer's interests or of the employee's duties and obligations.' " *McCorison v. City of Lincoln*, 215 Neb. 474, 476, 339 N.W.2d 294, 295-96 (1983).
Smith v. Sorensen 599
19. Clear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of the fact to be proved.
Newton v. Brown 605
20. A mutual mistake is a belief shared by the parties, which is not in accord with the facts. A mutual mistake is one common to both parties in reference to the instrument to be reformed, each party laboring under the same misconception about their instrument.
Newton v. Brown 605
21. 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. Neb. Evid. R. 401 (Neb. Rev. Stat. § 27-401 (Reissue 1979)). Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Neb. Evid. R. 403 (Neb. Rev. Stat. § 27-403 (Reissue 1979)).
State v. Bostwick 631
22. There is no such position known as "attorney of an estate." When an attorney is employed to render services in securing the probate of a will or settling of an estate, he or she acts as attorney for the personal representative and not for the estate.
In re Estate of Wagner 699
23. Goodwill is the advantage or benefit which is acquired by an establishment beyond the mere value of the capital, stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position or

common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices.
Taylor v. Taylor 721
24. *Use* means to carry out a purpose or action by means of, or make instrumental to an end.
State v. Dondlinger 741
25. The Department of Labor's definition of a systematic and sustained job search constitutes reasonable compliance with federal directives and is not outside the authority granted by the Legislature.
Carson v. Sorensen 878

Workmen's Compensation

1. The right to and the amount of recovery in a workmen's compensation proceeding are purely statutory.
Oham v. Aaron Corp. 28
2. Upon an application to modify an award under the workmen's compensation statutes, the burden of proof rests upon the petitioner to establish by a preponderance of the evidence that the disability has increased, decreased, or terminated as alleged. In other words, the defendant has the burden of establishing a decrease of incapacity and the plaintiff has the burden of showing an increase of incapacity.
Oham v. Aaron Corp. 28
3. In reviewing a decision of the Nebraska Workmen's Compensation Court, findings of fact made by the Workmen's Compensation Court on rehearing have the same effect as a jury verdict in a civil case, and an order disposing of a case may not be set aside where the findings are supported by the evidence. The facts are not reweighed on appeal.
Oham v. Aaron Corp. 28
Laffin v. Nelson Enterprize 226
Breckenridge v. Midlands Roofing Co. 452
Badgett v. St. Joseph Hosp. 467
Snyder v. IBP, Inc. 534
Evans v. American Community Stores 538
Beavers v. IBP, Inc. 647
Smith v. Hastings Irr. Pipe Co. 663
4. In testing the sufficiency of the evidence to support the 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. Every controverted fact must be resolved in favor of the successful party, who should have the

benefit of every inference that can reasonably be drawn therefrom.
Oham v. Aaron Corp. 28
Badgett v. St. Joseph Hosp. 467
Beavers v. IBP, Inc. 647
Smith v. Hastings Irr. Pipe Co. 663
5. The findings of the Nebraska Workmen's Compensation Court will not be overturned on appeal unless they are clearly wrong.
Oham v. Aaron Corp. 28
6. As the trier of fact, the Nebraska Workmen's Compensation Court is the sole judge of the weight to be given to testimony.
Oham v. Aaron Corp. 28
7. It is clear from both Neb. Rev. Stat. § 48-106(2) (Reissue 1984) and the cases that it is the nature of the employer's business which determines the exemption, and not the work performed by the employee.
Bartunek v. Becker 126
8. The fact that the employer or employers are engaged in farming does not remove from the coverage of the statute other businesses or occupations carried on by the employer which are otherwise in the coverage of the statute.
Bartunek v. Becker 126
9. One employer may engage in two separate businesses, one subject to the workmen's compensation law and one exempt from that law, and the employer's actions with regard to the business which is subject to the workmen's compensation law do not affect the employer's business which is statutorily exempt from the compensation law.
Bartunek v. Becker 126
10. Factual determinations by the Workmen's Compensation Court will not be set aside on appeal unless such determinations are clearly wrong. Regarding facts determined and findings made upon rehearing in the Workmen's Compensation Court, Neb. Rev. Stat. § 48-185 (Reissue 1984) precludes the Supreme Court's substitution of its view of facts for that of the Workmen's Compensation Court if the record contains evidence to substantiate the factual conclusions reached by the Workmen's Compensation Court.
Vredeveld v. Gelco Express 363
11. Where the record presents nothing more than conflicting medical testimony, the Supreme Court will not substitute its judgment for that of the Workmen's Compensation Court.
Vredeveld v. Gelco Express 363
Beavers v. IBP, Inc. 647
12. In an action to obtain an award of benefits under the Nebraska workmen's compensation law, the burden of proof is on the plaintiff to establish by a preponderance of the evidence that the

injury or death was sustained by an accident arising out of and in the course of the employment.
Breckenridge v. Midlands Roofing Co. 452
Badgett v. St. Joseph Hosp. 467
13. Where a violent death is shown under circumstances indicating that death occurred within the time and place limits of the employment without evidence as to the cause of death, there is no presumption that the death arose out of and in the course of the employment by virtue of Neb. Rev. Stat. § 48-151 (Reissue 1984).
Breckenridge v. Midlands Roofing Co. 452
14. The weight and credibility of expert witnesses in workmen's compensation cases is for the trier of fact.
Snyder v. IBP, Inc. 534
15. Impairments of the body as a whole are compensated in terms of loss of earning power or capacity rather than in terms of loss of physical function.
Snyder v. IBP, Inc. 534
16. Loss of earning power or capacity is measured by an evaluation of a worker's general eligibility to procure and hold employment, his or her capacity to perform the tasks required by the work, and his or her ability to earn wages in employment in which he or she is engaged or is fitted.
Snyder v. IBP, Inc. 534
17. Loss of earning power or capacity is the means by which a physical impairment to the body as a whole is measured for the purpose of determining the benefits due under the act; there can be no loss of earning power or capacity in the absence of a physical impairment to the body as a whole.
Snyder v. IBP, Inc. 534
18. Vocational rehabilitation cannot be ordered in the absence of total or partial disability which is or is likely to be permanent.
Snyder v. IBP, Inc. 534
19. An employee is not entitled to an attorney fee or to interest where the employer applies for rehearing and succeeds in reducing the award an employee obtained upon original hearing.
Snyder v. IBP, Inc. 534
20. An employee suffering a schedule injury is entitled only to the compensation provided for in Neb. Rev. Stat. § 48-121(3) (Reissue 1984), unless some unusual or extraordinary condition as to the other members or parts of the body develops as a result of the injury.
Evans v. American Community Stores 538
21. The right of an injured workman to vocational rehabilitation depends upon his inability to perform work for which he has previous training and experience.
Evans v. American Community Stores 538
Smith v. Hastings Irr. Pipe Co. 663

22. Whether an injured workman is entitled to vocational rehabilitation is ordinarily a question of fact to be determined by the compensation court.
Evans v. American Community Stores 538
Smith v. Hastings Irr. Pipe Co. 663
23. A good faith self-contradiction of an expert presents a question of fact to be resolved by the compensation court.
Beavers v. IBP, Inc. 647
24. Neb. Rev. Stat. § 48-125 (Reissue 1984) does not authorize the award of an attorney fee where there exists a reasonable controversy between the parties as to the entitlement of compensation.
Beavers v. IBP, Inc. 647
25. Whether there was a reasonable controversy as to the entitlement to workers' compensation is a question of fact.
Beavers v. IBP, Inc. 647
26. When the employer files an application for rehearing before a panel of the compensation court, it is the employer's failure to reduce the award on original hearing which triggers the taxing of a reasonable attorney fee as costs.
Beavers v. IBP, Inc. 647
27. Under Neb. Rev. Stat. § 48-118 (Reissue 1984), the subrogated interest of the employer, for computation and allocation of fees and expenses, is not restricted to the workmen's compensation benefits actually paid, but is measured by the workmen's compensation liability relieved or discharged by the recovery against the third party.
Nekuda v. Waspi Trucking, Inc. 806
28. Under Neb. Rev. Stat. § 48-118 (Reissue 1984), the trial court has discretion to prorate and apportion the reasonable expenses and fees between the employer and employee as their interests appear at the time of recovery in a suit against a third party.
Nekuda v. Waspi Trucking, Inc. 806
29. Where an employer refuses to lump-sum periodic lifetime workmen's compensation benefits due an employee or dependents, and where a recovery is made against a third party, the obligation of the employer to continue to make lifetime payments is not extinguished but merely suspended for the period of time the employer's share of the recovery satisfies the continuing obligation due the employee.
Nekuda v. Waspi Trucking, Inc. 806
30. In calculating the fees and expenses of both an employee and an employer, in connection with the recovery of damages from a third party under Neb. Rev. Stat. § 48-118 (Reissue 1984), where a lump-sum agreement is not reached, the fees and expenses are to be deducted immediately from the recovery, and the employer's

share of such fees and expenses is to be repaid weekly by the employer to the employee over the period of time benefit payments are due to the employee.
Nekuda v. Waspi Trucking, Inc. 806

Wrongful Death

1. A child born dead cannot maintain an action at common law for injuries received by it while in its mother's womb, and consequently the personal representative cannot maintain it under a wrongful death statute limiting such actions to those which would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof.
Smith v. Columbus Community Hosp. 776
2. The right to maintain an action for wrongful death did not exist under the common law, and exists in Nebraska, as in other states, solely by statute and is a matter for legislative enactment.
Smith v. Columbus Community Hosp. 776