CIVIL PROCEDURE

L.B. 42: APPEAL PROCEDURE IN NEBRASKA

INTRODUCTION

During the survey period the Nebraska Unicameral passed L.B. 42, an important bill governing the procedure for appeals from county court and municipal court to district court. The bill amends or repeals several statutory sections which had previously governed appeals procedure, and seeks to make appellate practice between the various levels of courts in Nebraska more uniform.

Significant changes are made in the basic appeals procedure, as well as in the probate area, where now there are optional transfer provisions from the county court to the district court. Another important change allows the small claims defendant to transfer the case to the regular docket of the county court in order to obtain a jury trial and the representation of an attorney.

Other developments in civil procedure during the survey period included a bill that awards reasonable attorney fees to successful plaintiffs in mandamus actions, and a provision making a

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1. L.B. 42, 1981 Neb. Laws —.
2. JUDICIARY COMM. 87TH UNICAMERAL, COMMITTEE STATEMENT ON L.B. 42 (Comm. Print 1981). A thorough analysis of the changes by the Supreme Court Committee on Practice and Procedure reflects three important principles: (1) The need to make uniform, whenever possible, all appeals in civil cases from county or municipal court to district court; (2) The need, in all civil cases other than small claims, to base the appeal to district court on the record made in the lower court so that there is true appellate review and not a second trial; and (3) The need to eliminate all unnecessary steps and hidden traps that can work to the detriment of the litigants.

Included in the new procedure are all appeals from the following: the regular civil docket of the county court or municipal court, the small claims court of county or municipal court, forcible entry and detainer actions, residential landlord and tenant actions, probate matters including guardianship and conservatorship, adoptions, juvenile matters in the county court sitting as a juvenile court, tuberculosis commitment proceedings and inheritance tax matters. Eminent domain proceedings are specifically omitted from coverage because the district court in such proceedings does not perform appellate review of the county court's judicial action.

SUPREME COURT COMM. ON PRACTICE AND PROCEDURE, COMMITTEE COMMENTS ON APPEALS FROM COUNTY AND MUNICIPAL COURT TO DISTRICT COURT 1-2 (Sept. 1980) [hereinafter cited as COMMITTEE COMMENTS].

motion for a new trial unnecessary as a prerequisite for appellate review of errors occurring at trial. Finally, the Nebraska Supreme Court in *Moackler v. Finley* held that a court retains the authority at a later term to vacate or modify a judgment rendered during a previous term, if the motion to vacate was made during that original term.

**GENERAL APPEALS PROCEDURE**

The procedure governing appeals from county or municipal court to district court in civil matters is found in sections 1-10 of L.B. 42. Section 1 defines who may appeal to the district court from a final judgment or final order of the county or municipal court. The new section is consistent with the old law in several important ways. It retains the limitation of the prior statutory provision that only a party may appeal in ordinary civil actions. It also conforms to the principle found in the former law that an appeal is allowed only from a final judgment. The new statute's more inclusive definition of who may appeal in adoption proceedings and proceedings under the probate code is also consistent with the old law in that it includes "any person against whom the final judgment or final order may be made or who may be affected thereby."

The new appeals procedure defines who may appeal from proceedings in the county court sitting as a juvenile court. Former law provided that "appeal may be had to the district court as in civil cases . . ." The new law follows the recommendations of the Institute of Judicial Administration of the American Bar Asso-

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8. 207 Neb. 353, 299 N.W.2d 166 (1980).
9. Id. at 357, 299 N.W.2d at 168. See notes 207-16 and accompanying text infra.
11. Id. at § 1.
15. L.B. 42, § 1(2), 1981 Neb. Laws—.
These recommendations provide that the child can always appeal. Furthermore, the parents, custodian or guardian may at times have an interest so independently significant from that of the child that they may appeal if the child does not choose to do so.

Subsection 3(c) of the new law, which determines when the county attorney or petitioner may appeal, reflects the decision of the United States Supreme Court in *Breed v. Jones* that certain juvenile cases must be considered criminal cases for purposes of the double jeopardy clause. The Court decided that a juvenile had been placed in jeopardy at a juvenile court adjudicatory hearing which had determined that he had committed a criminal act. Therefore, prosecution of the individual as an adult in superior court after he had been found unfit for treatment as a juvenile violated the double jeopardy clause.

The Nebraska Supreme Court has upheld the constitutionality of the statute defining juvenile proceedings as civil, a holding in conflict with *Breed*; however, these decisions were made before the Supreme Court's decision in *Breed*. Therefore, under the new provisions, the county attorney is not permitted to appeal delinquency issues once the child is placed in jeopardy.

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19. *Id.*

20. *Id.*, Commentary on Standard 2.2, at 26. The commission decided that a parent's custodial right to his or her children was so rooted in a citizen's fundamental right to privacy as to mandate an independent opportunity to appeal an order which might affect that custodial right even if the juvenile might not wish to appeal.


22. *Id.* at 541.

23. *Id.* at 531.

24. *Id.* The fifth amendment to the Constitution provides that "[n]o person shall... be subject for the same offence to be twice put in jeopardy of life or limb..." U.S. Const. amend. V. The clause operates in criminal settings to prevent a second prosecution after a first trial for the same offense. *Black's Law Dictionary* 578 (5th ed. 1979).

25. See DeBacker v. Brainard, 183 Neb. 461, 161 N.W.2d 508 (1968). Furthermore, a majority of justices in this case held Neb. Rev. Stat. § 43-206.03 (Reissue 1978) unconstitutional to the extent that it denies a jury trial in juvenile court to a juvenile charged with violation of state law even when the offense is one which would give rise to a constitutional right to a jury trial if committed by an adult and triable in an adult criminal court. The law survived the constitutional challenge only because article V, section 2 of the Nebraska Constitution requires a concurrence of five judges before a law can be found to be unconstitutional. See, e.g., DeBacker v. Sigler, 185 Neb. 352, 175 N.W.2d 912 (1970); McMullen v. Geiger, 184 Neb. 581, 169 N.W.2d 431 (1969).

26. L.B. 42, § 1(3)(c), 1981 Neb. Laws — The court in *Breed v. Jones*, 421 U.S. 519 (1975), said that a juvenile is placed in jeopardy by a procedure "whose object is to determine whether he has committed acts that violate a criminal law and whose
be appealed because of the double jeopardy clause can be reviewed in the district court pursuant to the exception proceedings used in criminal cases.\textsuperscript{27} The new statute leaves unsettled what a delinquency issue is, when jeopardy would attach, and in what circumstances the county attorney may appeal a final order.\textsuperscript{28}

Several significant changes are made in section 2 of L.B. 42. Generally, the method for appealing from county or municipal court to district court is made more consistent with the method of appealing from the district court to the supreme court.\textsuperscript{29} The current section governing such appeals provides that “an appeal shall be deemed perfected, and the Supreme Court shall have jurisdiction of the cause when . . . notice of appeal shall have been filed, and . . . docket fee deposited in the office of the clerk of the district court . . . .”\textsuperscript{30} Subsection 1 of L.B. 42 establishes that these same jurisdictional steps are necessary to perfect an appeal from county or municipal court.\textsuperscript{31} In addition, the time allowed for accomplishing these steps is increased from ten days to thirty days from rendition of judgment,\textsuperscript{32} the same time allowed for appeals from the district court to the supreme court.\textsuperscript{33}

Under former law, notice of appeal had to be filed within ten days of judgment.\textsuperscript{34} The appellant was also required to file the transcript and bill of exceptions within thirty days.\textsuperscript{35} Under the new law, the steps required to perfect an appeal are simplified.\textsuperscript{36}

Immediate transfer of jurisdiction to the district court occurs

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potential consequences include both the stigma inherent in such a determination and the deprivation of liberty for many years.” \textit{Id.} at 529.

\begin{itemize}
  \item \textsuperscript{27} NEV. REV. STAT. §§ 29-2317 and 29-2319 (Reissue 1979). Section 29-2317 provides that a prosecuting attorney may take exception to any rulings or decisions of the lower court by presenting to the court a notice of intent to take an appeal to the district court. The notice should refer to the rulings or decisions complained of. \textbf{Neb. Rev. Stat.} § 29-2317 (Reissue 1979). Section 29-2319 provides that if the defendant has been placed in legal jeopardy by the earlier proceedings, the decision of the district court shall determine the law to govern in any similar cases which may be pending or may later arise. \textbf{Neb. Rev. Stat.} § 29-2319 (Reissue 1979).
  \item \textsuperscript{28} L.B. 42, § 1, 1981 Neb. Laws —.
  \item \textsuperscript{30} \textit{Id}.
  \item \textsuperscript{31} L.B. 42, § 2(1), 1981 Neb. Laws —.
  \item \textsuperscript{32} \textit{Id}.
  \item \textsuperscript{34} \textbf{Neb. Rev. Stat.} § 24-542 (Reissue 1979) (Repealed 1981).
  \item \textsuperscript{35} \textbf{Neb. Rev. Stat.} § 25-544 (Reissue 1979) (Repealed 1981). The Nebraska Supreme Court found that these requirements were mandatory under the old statutory scheme and that when, as in First National Bank of Omaha v. Mitchell, 194 Neb. 628, 234 N.W.2d 220 (1975), appellants filed the transcript three days after the thirty day period had expired, the district court had not acquired jurisdiction. \textit{Id.} at 629, 234 N.W.2d at 221.
  \item \textsuperscript{36} \textit{See} notes 31-33 and accompanying text \textit{supra}.
\end{itemize}
once the appeal is perfected, as all further steps are taken by the clerk of the county or municipal court rather than by the appellant.\textsuperscript{37} The bill makes special reference to juvenile appeals\textsuperscript{38} to emphasize that the county court has the power to exercise jurisdiction over the juvenile until such time as the district court can enter an order after a hearing.\textsuperscript{39}

Subsection 3 deals in specific terms with the confusing and recurring problem of determining when a judgment has been rendered.\textsuperscript{40} It defines rendition of judgment as the time when announcement of judgment is noted on the trial docket, or, if there is no trial docket, the time when the journal entry is filed.\textsuperscript{41}

The provisions of section 2, subsection 4, as well as section 3,\textsuperscript{42} eliminate the requirement of an appeal bond in most cases.\textsuperscript{43} Former law required the posting of a cash bond of at least fifty dollars within ten days of rendition of judgment.\textsuperscript{44} Bond is now eliminated as unnecessary, since appeal is on the record, and the appellant should incur no further costs after the required transcript fee, docket fee and cost of the bill of exceptions.\textsuperscript{45}

Two exceptions to the no-bond requirement are in the areas of probate and small claims. Bond in probate matters is consistent with former law and the new provisions exempt the same parties from the requirement.\textsuperscript{46} Bond is required in the small claims

\begin{footnotes}
\textsuperscript{37} L.B. 42, § 2, 1981 Neb. Laws —. \textit{See} notes 71-74 and accompanying text \textit{infra}.
\textsuperscript{38} \textsc{Nebraska Rev. Stat.} § 43-202.03 (Reissue 1978) (Amended 1981).
\textsuperscript{39} \textsc{Committee Comments, supra} note 2, at 7.
\textsuperscript{40} \textit{See} Volkmour, \textit{The Appeal Procedure in Nebraska; Pitfalls, Perspective, and a Prognosis,} 11 Creighton L. Rev. 1227 (1978).
\textsuperscript{41} L.B. 42, § 2(3), 1981 Neb. Laws —. The definition used is that of current statutory section 25-1301(2) which provides that “[r]endition 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, or one made at the direction of the court or judge thereof, of the relief granted or denied in an action.” \textsc{Nebraska Rev. Stat.} § 25-1301(2) (Reissue 1979). The definition is expanded, however, to also include final orders, whose statutory definition is found in § 25-1902. A final order is “[a]n order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment, is a final order which may be vacated, modified or reversed, as provided in this chapter.” \textsc{Nebraska Rev. Stat.} § 25-1902 (Reissue 1979).
\textsuperscript{43} L.B. 42, § 2(4), 1981 Neb. Laws —.
\textsuperscript{44} \textsc{Nebraska Rev. Stat.} § 24-542 (Reissue 1979) (Repealed 1981).
\textsuperscript{45} \textsc{Committee Comments, supra} note 2, at 7. \textit{See} notes 89-92 and accompanying text \textit{infra}.
\textsuperscript{46} \textit{See} \textsc{Nebraska Rev. Stat.} § 30-1603 (Reissue 1979) (Repealed 1981) and L.B. 42, § 2(4)(a), 1981 Neb. Laws —, exempting from the bond requirement the executor, administrator, personal representative, conservator, trustee, or guardian ad litem.
\end{footnotes}
because these are the only cases heard de novo in the district court and may, therefore, require additional costs on appeal. However, failure to post bond even in these two situations does not automatically defeat district court jurisdiction. Section 2, subsection 7 provides that in such cases the court may take whatever action it deems appropriate and just.

Section 2, subsection 5 governs the procedure when a notice of appeal is filed prematurely. In Dale Electronics Inc. v. Federal Insurance Co., the Nebraska Supreme Court held that when a notice of appeal is filed after the trial court announces its decision but before there has been an entry of judgment, the appeal should not be defeated if "the record shows that a judgment was subsequently rendered or entered in accordance with the decision which was announced and to which the notice of appeal relates." The new statutory language generally provides that such a premature filing shall be treated as a timely filing.

Provision for service of a copy of the notice of appeal, found in section 2, subsection 6, closely follows the requirement of former law. However, under the old provision, such service was to be made within ten days of the filing of the notice of appeal and was a jurisdictional requirement. Under the new subsection, filing of notice is mandatory, but failure to do so is not a jurisdictional defect. Such a failure, however, gives the district court the prerogative to dismiss the appeal or take whatever other action it may feel is necessary.

The major change made by section 3 is the establishment of an optional supersedeas bond filing by the defendant. This makes

47. L.B. 42, § 2(4)(b), 1981 Neb. Laws —.
48. Id. at § 7. See notes 115-17 and accompanying text infra.
49. L.B. 42, § 2(7), 1981 Neb. Laws —.
52. Id., at 137, 277 N.W.2d at 574. See also Pfeiffer v. Pfeiffer, 203 Neb. 137, 141-42, 277 N.W.2d 575, 578 (1979).
53. COMMITTEE COMMENTS, supra note 2, at 76. The definition of the various situations where this may be applicable is left to the determination of the courts on a case by case basis.
55. Neb. Rev. Stat. § 24-542 (Reissue 1979) (Repealed 1981). The Nebraska Supreme Court had found that failure to serve a copy of the notice of appeal within ten days of the entry of judgment in the lower court was a fatal defect which defeated the jurisdiction of the district court. Simmons v. Mutual Benefit Health and Accident Ass'n, 183 Neb. 175, 177, 159 N.W.2d 197, 198 (1968).
56. COMMITTEE COMMENTS, supra note 2, at 7b.
57. L.B. 42, § 2(7), 1981 Neb. Laws —.
58. Id. at § 3.
procedure more consistent with appeals to the supreme court.\(^5\) Under former law, each defendant was required to file a supersedeas bond in the amount of the judgment and costs or at least fifty dollars.\(^6\) Yet, this statutory requirement ignored the fact that sometimes such a bond may not be desired and would only serve as a bond for appeal costs.\(^7\) Under the new procedure there should be no additional costs since the appellant has prepaid those costs.\(^8\)

The thirty day time period allowed for the posting of the optional bond is consistent with the time allowed for filing a notice of appeal, and thereby provides procedural consistency for a party choosing to appeal and to post a bond.\(^9\) Former statutory provisions allowed only a ten day period for accomplishing both of those procedures.\(^10\)

In cases involving a money judgment, the amount of bond required is "the amount of the judgment, costs, and estimated interest pending appeal . . . ."\(^11\) In cases involving a judgment for the possession of specified personal property, the amount of bond required by the new statute is "an amount at least double the value of the property . . . ."\(^12\) Though the supersedeas bonds in forcible entry and detainer and landlord and tenant actions are also made optional by section 3, subsections 3 and 4, those subsections make specific cross references to existing law for determining the amount of bond required.\(^13\)

The remaining provisions of new statutory section 3 are consistent with the old law. First, appeals in probate matters still do not act as a supersedeas in any other matter than that specifically appealed.\(^14\) Second, subsection 5 provides that in no cases other than those in which the optional bond is filed does a perfected appeal stay the proceedings.\(^15\) Finally, subsection 6 acknowledges

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\(^{61}\) Committee Comments, *supra* note 2, at 9.
\(^{62}\) *Id.*
\(^{63}\) *See* L.B. 42, §§ 3(1) and 2(1), 1981 Neb. Laws —.
\(^{65}\) L.B. 42, § 3(1), 1981 Neb. Laws —. This amount is comparable to that required by the current procedure governing such appeals from the district court to the supreme court. Neb. Rev. Stat. § 25-1916(1) (Reissue 1979).
\(^{66}\) L.B. 42, § 3(1), 1981 Neb. Laws —. This is the same as the bond required on similar appeals to the supreme court. Neb. Rev. Stat. § 25-1098 (Reissue 1979).
that the district court always has the power to enter a stay of the judgment appealed from or additional security as justice may require.\footnote{70}{L.B. 42, § 3(6), 1981 Neb. Laws — See also Committee Comments, supra note 2, at 9-10.}


Another change deals with the bill of exceptions. The definition of the bill of exceptions as the transcription of testimony certified by the reporter who made it and approved by the court is the same as that provided by former law.\footnote{78}{Compare L.B. 42, § 5(4), 1981 Neb. Laws — with Neb. Rev. Stat. § 24-545(3) (Reissue 1979) (Repealed 1981). The former law required that the clerk of the county court transmit the bill of exceptions to the appellant who would then file...
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new law adds a statutory standard of sixty days for when a bill of exceptions should be completed.81 No such standard was provided under the predecessor statute.82

Section 6 includes a significant departure from the former law. The standard of review in civil appeals to the district court is changed from de novo on the record83 to error on the record,84 the standard used in criminal appeals.85 This change effectively eliminates the possibility of two distinct trials by establishing true appellate review in all cases.86 The only excepted cases are appeals from small claims court which are tried de novo without a jury in the district court.87

In Von Seggern v. Kassmeier Implement,88 the Nebraska Supreme Court interpreted the meaning of de novo on the record review.89 The term "de novo" indicates that a new trial is held in the appellate court just as if no other trial had occurred.90 Thus, the district court judge is granted discretion for making independent decisions on cases reviewed in his court. The phrase "on the record" establishes that the "review is limited to the issues, pleadings, and evidence presented in the county court,"91 unless additional evidence is admitted as was formerly permitted by statute.92 The court concluded that the district court judge was justified in reaching his own decision after evaluating the record, even if it was contrary to the decision of the county court judge based on the same record.93 In interpreting this former law, the supreme court noted that it is indeed the obligation of the district court to reach an independent conclusion without reference to the lower court with the clerk of the district court anytime within thirty days from entry of judgment. NEB. REV. STAT. § 24-544 (Reissue 1979) (Repealed 1981).

5. See NEB. REV. STAT. § 29-613 (Reissue 1979).
6. COMMITTEE COMMENTS, supra note 2, at 13. See also notes 88-94 and accompanying text infra.
7. L.B. 42, § 6(1), 1981 Neb. Laws —. See also notes 115-17 and accompanying text infra.
9. Id. at 794, 240 N.W.2d at 844.
10. The term de novo means anew, afresh, a second time. BLACK'S LAW DICTIONARY 392 (5th ed. 1979). A trial de novo indicates that the matter is tried anew as if it had not been heard before and as if no decision had been previously rendered. Farmingdale Supermarket, Inc. v. United States, 336 F. Supp. 534, 536 (D.C.N.J. 1971).
11. 195 Neb. at 794, 240 N.W.2d at 844.
12. Id. at 795, 240 N.W.2d at 844; see also NEB. REV. STAT. § 24-541 (Reissue 1979) (Repealed 1981).
13. 195 Neb. at 795, 240 N.W.2d at 844.
decision.94

Current statutory section 29-613 provides a definition of the standard of review which now will be used in all civil appeals from the county or municipal court to the district court.95 Section 29-613 states, "[t]he district court shall hear and determine any cause brought by appeal from a county or municipal court upon the record, and may affirm, modify, or vacate the judgment, or may remand the case to the county or municipal court for new trial."96 The supreme court has interpreted this standard as limiting the district court to an examination of the record presented for either error or abuse of discretion.97 When neither is present, the decision of the lower court must be affirmed.98 Thus the ability of the district court to arrive at an independent decision based on the lower court record or to hear new evidence is removed.99

Subsection 1 of section 6 makes two additional, but minor, changes. First, the power of the district court to remand a case with controlling instructions is explicitly provided.100 The previous statutory section which dealt with the district court's power to affirm, modify, vacate, or remand101 had provided this only by implication.102 Second, the judgment rendered is clearly described as that of the district court in order to eliminate unnecessary steps in the registration of judgment.103 The former situation presented a needlessly circuitous route. For instance, a successful plaintiff who wished to obtain a lien on real property with a lower court judgment affirmed by the district court had to first pay for a transcript of judgment from the county or municipal court and then pay again to have that transcript filed in district court.104 Under the new provision, the judgment rendered is specifically declared to be that of the district court, and, since the district court has both original and appellate jurisdiction, it can directly execute on the judgment.105

95. Neb. Rev. Stat. § 29-613 (Reissue 1979); see also Committee Comments, supra note 2, at 13.
98. Id. at 374, 259 N.W.2d at 19.
100. Id.
102. Committee Comments, supra note 2, at 13.
103. Id.
105. Committee Comments, supra note 2, at 14. The Committee Comments note that subsection 1 makes the decision a judgment of the district court and subsection 3 provides that in most cases the judgment of the county or municipal court is
Subsection 2 anticipates and eliminates a potential trap for the litigant who may later need to appeal the district court judgment to the supreme court.\(^\text{106}\) It provides that the bill of exceptions from county or municipal court is automatically admitted into evidence in the district court on the hearing of the appeal.\(^\text{107}\) It therefore automatically becomes a part of the bill of exceptions from the district court and the possibility of its being inadvertently omitted is avoided.\(^\text{108}\)

Finally, section 6 deals with the taxation of costs and what happens to the judgment of the lower court after the district court has rendered judgment.\(^\text{109}\) Since the decision on appeal is now expressly made the judgment of the district court,\(^\text{110}\) the judgment of the lower court is vacated in all cases except those from the county court sitting as a juvenile court, appeals in adoption proceedings, and appeals under the Nebraska Probate Code.\(^\text{111}\) However, those cases will still be certified to the county court for further disposition, a procedure consistent with the former law.\(^\text{112}\)

Taxation of costs after judgment includes the costs of both the district and the lower court, the same procedure currently used in assessing costs in criminal appeals.\(^\text{113}\) Because the new statute provides that the date of accrual of interest on a judgment affirmed by the district court runs from the date of the lower court judgment, a successful party will not lose the interest he is properly entitled to.\(^\text{114}\)

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\(^{106}\) Id. at 14.

\(^{107}\) L.B. 42, § 6(2), 1981 Neb. Laws — Under previous practice some appeals to district court of cases originating in county or municipal court have failed on later appeal to the supreme court. Appellate Judge's Conference of the ABA, Practitioner's Handbook for Appeals in the Courts of Nebraska 4 (1979). The supreme court has noted that if a case is tried in the district court on the lower court's record, that record must be certified as the bill of exceptions. State v. Jacobsen, 194 Neb. 105, 108, 230 N.W.2d 219, 221 (1975).

\(^{108}\) Committee Comments, supra note 2, at 14.

\(^{109}\) L.B. 42, § 6, 1981 Neb. Laws —

\(^{110}\) Id. at § 6(1); see also notes 100-02 and accompanying text supra.

\(^{111}\) L.B. 42, § 6(3)(4), 1981 Neb. Laws —


\(^{114}\) L.B. 42, § 6(3), 1981 Neb. Laws — Thus, if the judgment of the lower court is affirmed, the appellee will receive all the interest earned as computed from the date of the first judgment, not the date of the district court judgment. It should also be noted that L.B. 42, § 24 amends Neb. Rev. Stat. § 45-103 (Reissue 1978) on judg-
Section 7 provides that appeals from the small claims court to the district court be tried de novo without a jury. This represents a return to the procedure which existed prior to the passage of L.B. 892 in 1980. The right to a jury trial is preserved by reinstating the defendant's right to transfer from the small claims to the regular docket of the county court.

Upon dismissal of an appeal or a judgment rendered against the appellant by the district court, section 8 provides that the sureties in the undertaking become liable to the appellee for the judgment, interest and any costs recovered against the appellant. The practice of automatic entry of judgment against the surety and automatic payment of the cash bond is eliminated.

Removing the procedure for automatic entry of judgment against the surety eliminates the inconsistency with current statutory section 25-1544 which provides that "in all cases the property, both personal and real, of the principal debtor, within the jurisdiction of the court, shall be exhausted before any of the property of the surety or bail shall be taken in execution." Also, by providing a cross reference to L.B. 42, § 6(3), this eliminates any possible confusion between the two sections. Committee Comments, supra note 2, at 15.

118. L.B. 42, § 8, 1981 Neb. Laws —. Though bond is not required in most cases (see notes 43-48 and 58-62 and accompanying text supra), this section deals with the liability of the surety in cases where bond is posted.
119. Id. The Committee Comments note that these practices were inconsistent with the practice followed on appeals from the district court to the supreme court and also provided a questionable grant of power to the district court. Committee Comments, supra note 2, at 19. The language in the former statute which had provided for these automatic procedures had originally been a part of the separately codified procedure for municipal courts and had governed appeals from those courts from 1929 to 1972. Compare Neb. Rev. Stat. § 24-548 (Reissue 1979) (Repealed 1981) with Neb. Rev. Stat. § 26-1114 (Reissue 1964) (Repealed 1972). It provided that from the time dismissal or judgment was entered in the district court, the entry had the effect of a judgment against the surety and his property and was to be indexed as a judgment by the clerk of the district court. Neb. Rev. Stat. § 26-1114 (Reissue 1964) (Repealed 1972). Furthermore, if a cash bond had been given, the money was delivered to the clerk of the district court who immediately applied it to the final judgment. Id. These provisions were not originally present in the statutory section which, until 1972, governed appeals from the county courts. Committee Comments, supra note 2, at 19; see Neb. Rev. Stat. § 27-1311 (Reissue 1964) (Repealed 1972). However, when the municipal court and the county court systems were merged in 1972, the section which had governed municipal court appeals was retained, though the reasons why it was retained are not clear from the legislative history of the merger provisions. Committee Comments, supra note 2, at 19.
120. Neb. Rev. Stat. § 25-1544 (Reissue 1979). In interpreting this statutory sec-
elimination of the automatic execution of the cash bond leaves the appellee with the remedy of a separate action against the surety on the bond in which both the principal and surety are principal debtors. Whenever an appeal is dismissed there is an immediate right of action on the bond since the dismissal operates as a breach of the condition of the bond.

No important major changes are made by the final two sections on basic civil appeals procedure. Section 9 is consistent with prior statutes and provides that in situations where an appeal to the district court is dismissed for procedural reasons, the clerk of the district court is to certify the order to the lower court and the proceedings will then continue in that court as if no appeal had been taken.

Section 10 and the prior statute tax the costs of appeal to the winning appellant in cases where he does not recover a greater sum than the lower court judgment. The new statute differs only slightly in that it is limited to money judgments. Subsection 2 deals with appeals under the Nebraska Probate Code and, as did prior law, taxes the costs of appeal, attorney's fees, and any bond required by section 4(2) to any party the court decides has taken an appeal vexatiously or for delay. Finally, it should be noted that section 24-551 of the Nebraska Revised Statutes has not been changed by this law and therefore, no appeal is allowed from judgments rendered on confession.

The appeal bond is a contract that gives rise to a cause of action once the appeal has failed. See Committee Comments, supra note 2, at 19. But see Fed. R. Civ. P. 65.1 allowing for enforcement of a surety's liability by a motion, thereby eliminating the necessity of an independent action against the surety. Under the federal procedure each surety submits himself to the jurisdiction of the court and appoints the clerk of the court as his agent upon whom notice of the motion may be served. This rule provides a more expeditious procedure than an entirely separate lawsuit brought by the appellee against the surety, which is the current Nebraska procedure.

The Nebraska Supreme Court held that the district court had erred in not complying with the statute by first failing to exhaust the existing property of the principal debtor before levying on the property of one of the sureties. Sonneman v. Dolan, 124 Neb. 830, 834, 248 N.W. 402, 404 (1933).


2. Id. The appeal bond is a contract that gives rise to a cause of action once the appeal has failed. See Committee Comments, supra note 2, at 19. But see Fed. R. Civ. P. 65.1 allowing for enforcement of a surety's liability by a motion, thereby eliminating the necessity of an independent action against the surety. Under the federal procedure each surety submits himself to the jurisdiction of the court and appoints the clerk of the court as his agent upon whom notice of the motion may be served. This rule provides a more expeditious procedure than an entirely separate lawsuit brought by the appellee against the surety, which is the current Nebraska procedure.


4. Committee Comments, supra note 2, at 21.


6. Id.


APPEALS IN PROBATE CASES

The changes made for appeals in probate matters are contained in sections 17-21 of L.B. 42. Section 17 changes the basic procedure for appealing matters under the probate code. It eliminates any special provisions for such appeals and instead makes them subject to the regular appeals procedure of sections 1-10.

A major change brought about by the new statute is the addition of a new transfer provision for probate matters. Prior law required that appeals from probate or denial of probate were to be heard de novo in the district court with the right to a jury trial. Nebraska grants the county courts exclusive original jurisdiction in all probate cases. However, in other civil and criminal areas, the county courts are courts of limited jurisdiction. Will contests may often involve large estates with the amount at stake far beyond the jurisdictional limit of the county court. Thus, it has always appeared unwise to provide the only jury trial on probate of a will or allowance of a claim in the county court. However, a jury trial is guaranteed by statute on those issues.

The old system effectively guaranteed the right to a jury trial in the district court by providing for de novo review, but only after a complete trial had already been held in county court. This two-trial system was procedurally wasteful and was more costly to the litigants. Section 18 of the new statute provides for immediate transfer to the district court of matters involving the probate of a will, thus eliminating the unnecessary first trial in county court. Under the new provision, any party to a proceeding contesting the validity of a decedent’s will may transfer the proceedings. Other probate matters, such as the determination of heirship if no will exists, would not be transferred, but would still be determined by

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130. Id. at § 17. This was accomplished by amending former statutory section 30-1601 and repealing former sections 30-1602 to 30-1610. L.B. 42, 1981 Neb. Laws —
131. L.B. 42, § 18, 1981 Neb. Laws — See also notes 138-51 and accompanying text infra.
133. NEB. REV. STAT. § 24-517(1) (Reissue 1979).
134. NEB. REV. STAT. § 24-517(4) (Reissue 1979).
135. COMMITTEE COMMENTS, supra note 2, at 29.
136. L.B. 42, § 18(4), 1981 Neb. Laws —. Formerly, the guarantee was found in NEB. REV. STAT. § 30-1606 (Reissue 1979) (Repealed 1981). See also In re Estate of Hagan, 143 Neb. 459, 463, 9 N.W.2d 794, 798 (1943), where the court noted this statutory guarantee.
139. Id.
the county court. On appeal to the district court, those matters would be reviewed for error on the record following the standard provided by section 6 of L.B. 42.

Following the filing of a notice of transfer, the clerk of the county court must transmit the docket fee and the record only of the matter transferred, that is, the proceeding to determine the validity of the will. Filing of this transcript with the district court establishes immediate jurisdiction in that court. Since the county court had already obtained jurisdiction according to the provisions of section 30-2427 of the Nebraska Statutes, there is no need for the district court to reserve or republish notice.

Provisions of section 18, subsection 3 are necessary because subsection 1 now provides for a continuance if an objection is filed. Current law establishes that one who objects to the probate of a will must do so in a pleading, but sets no time limit. If no objections are filed by the time of the hearing, the court may order probate. The new statutory provision sets a time limit of thirty days after the district court obtains jurisdiction for the filing of any further objections. The district court could allow any ob-

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140. COMMITTEE COMMENTS, supra note 2, at 32.
141. L.B. 42, § 6(1), 1981 Neb. Laws —.

The transfer procedure involves the following steps:
1) If there is an objection to the probate of a will the county court will continue the originally scheduled hearing for fourteen days from the date of that hearing. L.B. 42, § 18(1), 1981 Neb. Laws —.
2) If a party wishes to transfer the case, he must file a notice of transfer with the clerk of the county court. Id.
3) The party must deposit a docket fee with the clerk in the amount of the filing fee for a case originally commenced in the district court. Id. This docket fee is the same amount required by L.B. 42, § 2(1)(b) to perfect an appeal in other civil cases. See note 31 and accompanying text supra.
4) The party must pay to the clerk of the county court the fee set for proceedings under the Nebraska Probate Code. L.B. 42, § 18(1), 1981 Neb. Laws —. The fee is determined according to the provisions of NEB. REV. STAT. § 33-125 (Reissue 1978). If the county court should for any reason continue the hearing for more than fourteen days, the time for transfer is still limited to fourteen days after the originally scheduled hearing, a period of time adequate for considering the importance and necessity of such a transfer. COMMITTEE COMMENTS, supra note 2, at 32. If the parties choose not to transfer, they waive the right to a jury trial and an appeal will be heard by the district court for error on the record. L.B. 42, § 6(1), 1981 Neb. Laws —.

142. Id. at § 18(2).
143. Id. at § 18(3).
144. COMMITTEE COMMENTS, supra note 2, at 33.
145. See L.B. 42, § 18(1), (3), 1981 Neb. Laws —.
146. Id. at § 18(1).
147. NEB. REV. STAT. § 30-2428 (Reissue 1979).
148. COMMITTEE COMMENTS, supra note 2, at 32. See NEB. REV. STAT. § 30-2429 (Reissue 1979).
149. L.B. 42, § 18(3), 1981 Neb. Laws —.
jections which had been filed with the county court before the
transfer to be heard by ordering the necessary additional plead-
ings.150 The final subsection provides, as did the former appeals
procedure, that the final decision in the transferred matter is to be
certified to the county court which will execute that decision.151

Sections 19, 20, and 21 amend former probate sections so that
they are consistent with the new transfer provision.152 Section 19
deals generally with the filing of a petition for modification or vaca-
tion of a probate order and probate of a later will.153 The subsec-
tion which is added to the former statute provides that even if the
original proceedings were transferred to district court, the petition
for modification is to be filed in county court.154 After the filing of
the petition, any party may transfer the proceedings for a vacation
or modification to the district court.155

Section 20 removes the power of the county court to hear a
claimant’s written statement in a separate action, regardless of the
amount in controversy.156 It thereby limits the claims filed on the
regular docket of the county court to the five thousand dollar limit
on subject matter jurisdiction already set by statute.157 The
amended subsection does not in any way change the provisions of
current law that allow the county court to hear a claim filed in a
probate proceeding, even if it exceeds five thousand dollars.158

The claimant can file the action only where the personal repre-
sentative is already subject to jurisdiction, since the subsection
does not create any new basis of personal jurisdiction.159 The
claimant can obtain a jury trial by filing the action in any court in
which subject matter jurisdiction and personal jurisdiction are
present. This would include the regular docket of the county court,
the municipal court, the district court, or the federal court.160

Section 21 changes procedure by allowing the personal repre-
sentative two alternatives for obtaining a jury trial depending on

150. Id. at § 18(4).
(Reissue 1979) (Repealed 1981). See In re Estate of Farr, 150 Neb. 67, 80, 33 N.W.2d
454, 462 (1948).
Laws —.
(Reissue 1979) (by adding new subsection (6).
154. L.B. 42, § 19(6), 1981 Neb. Laws —.
155. Id. at §§ 18, 19(6).
156. Id. at § 20(2), which amends Neb. Rev. Stat. § 30-2486(2) (Reissue 1979).
159. COMMITTEE COMMENTS, supra note 2, at 35.
160. Id.
the amount involved. Under former law, a personal representative could obtain a jury trial on the allowance of a claim only by the old procedure of de novo appeal to the district court. Under the new law, if the amount at stake is five thousand dollars or less, the individual may obtain a jury trial by transferring the case from the probate to the regular docket of the county court. However, if the amount exceeds five thousand dollars, the personal representative must transfer to the district court in order to obtain a jury trial.

Former sections 30-1601 to 30-1610 have been absorbed into the new appeals procedure. The old law and section 1(1)(2) of L.B. 42 allow appeals from any final order of the county or municipal court by anyone against whom that order is made or who may be affected by it. The old law and section 2 of L.B. 42 allow for thirty days in which to take the appeal. Section 2, however, clarifies when the thirty day period begins to run by providing a definition of the rendition of judgment or the making of a final order. The former law and section 2(4)(a) of L.B. 42 require a filing of bond by all those who might appeal except an executor, administrator, personal representative, conservator, trustee, guardian, or guardian ad litem. Provision for assessing costs in vexatious appeals, though included in this bond section under former law, is now found in section 10. Prior law and section 3(2) of L.B. 42 provide that the appeal shall act as a supersedeas only for the matter from which the appeal is taken. The former law and section 4(1) of L.B. 42 provide that within ten days of the perfection of ap-

163. L.B. 42, § 21(b)(1), 1981 Neb. Laws —.
164. Id. at § 21(b)(2). The fourteen day time frame allowed for such transfers is consistent with that allowed by section 18. Compare L.B. 42, § 21, 1981 Neb. Laws — with L.B. 42, § 18, 1981 Neb. Laws —.
peal, the clerk of the county court shall transmit a certified transcript to the clerk of the district court.\textsuperscript{172} Section 4 also specifically provides for the transfer of the docket fee required to perfect the appeal initially and any bond that might be required.\textsuperscript{173} The former practice of de novo review on appeal has been replaced by the transfer provisions of sections 18, 19, and 21 of L.B. 42.\textsuperscript{174} Provision for certification of the district court's final judgment to the county court is found in both the old law and section 6(4) of L.B. 42.\textsuperscript{175} The new statute clarifies that the remand is to be for “further proceedings consistent with the determination of the district court.”\textsuperscript{176} Section 9 of L.B. 42 consolidates two sections of the prior law, both of which dealt with the failure to perfect a proper appeal.\textsuperscript{177} Under the new statute if an appeal is dismissed for any procedural reason the order is certified to the lower court and proceedings there continue as if no appeal had been taken.\textsuperscript{178}

The former law provided that any person interested in the estate as creditor, devisee, legatee, beneficiary, ward, protected person, or heir could appeal by filing a written application. This procedure is now covered by section 1(2) of L.B. 42 allowing any person who is affected by the final order to appeal.\textsuperscript{179} The bond provisions of the old law are covered by section 2(4)(a) of L.B. 42.\textsuperscript{180}

**Small Claims Court Procedure**

Prior to the passage of L.B. 892 in 1980, a small claims court defendant could transfer to the regular docket of the county court


\textsuperscript{173} L.B. 42, § 4(1), 1981 Neb. Laws —.


\textsuperscript{176} L.B. 42, § 6(4), 1981 Neb. Laws —. See also notes 100-01 and accompanying text supra.


\textsuperscript{178} L.B. 42, § 9, 1981 Neb. Laws —. See also notes 123-24 and accompanying text supra.


to preserve the right to representation of counsel or a jury trial.\textsuperscript{181} L.B. 892 eliminated the transfer provision.\textsuperscript{182} Thus, the defendant had to appeal to the district court in order to preserve these rights.

Sections 11 and 12 of L.B. 42 return the procedure of small claims court to what it was before the passage of L.B. 892 in 1980.\textsuperscript{183} Section 11 restores the ability of a defendant in such an action to transfer from the small claims docket to the regular docket of the county or municipal court.\textsuperscript{184} Section 12 provides that appeals in small claims matters be heard according to sections 1-10 of this law.\textsuperscript{185} Accordingly, the provisions of section 7 provide that appeals to the district court will be heard de novo without a jury.\textsuperscript{186} A fifty dollar bond is required by section 2(4)(b).\textsuperscript{187} The 1980 change in small claims procedure arose out of the concern that the ability of a defendant to transfer the case from small claims to the regular docket would overburden an unrepresented plaintiff, and a fear that multiple transfers of this kind were widespread throughout the state.\textsuperscript{188}

The 1977 report of the Nebraska State Bar Association Special Committee to Study the Nebraska Court System had recommended that the transfer provision be retained as it then existed prior to the enactment of L.B. 892.\textsuperscript{189} Sections 11 and 12\textsuperscript{190} reestablish this provision for several reasons. Elimination of the procedure was no solution;\textsuperscript{191} it simply moved the problem of an overburdened plaintiff from the county court after a possible transfer to the district court after a possible appeal. In the district court the costs would be greater for both parties.\textsuperscript{192}

There are legitimate reasons why a defendant may wish to

\begin{footnotes}
\footnotetext[181]{NEB. REV. STAT. § 24-525 (Reissue 1979) (Amended 1980).}
\footnotetext[183]{COMMITTEE COMMENTS, supra note 2, at 22. Section 11 reinstates essentially the same language as was deleted from this section by NEB. REV. STAT. § 24-525 (Cum. Supp. 1980) (Amended 1981).}
\footnotetext[184]{L.B. 42, § 11, 1981 Neb. Laws —, which amends NEB. REV. STAT. § 24-525 (Reissue 1979).}
\footnotetext[185]{L.B. 42, § 12, 1981 Neb. Laws —, which amends NEB. REV. STAT. § 24-527 (Reissue 1979).}
\footnotetext[186]{L.B. 42, § 7, 1981 Neb. Laws —. See notes 115-17 and accompanying text supra.}
\footnotetext[187]{L.B. 42, § 2(4)(b), 1981 Neb. Laws —. See note 48 and accompanying text supra.}
\footnotetext[188]{COMMITTEE COMMENTS, supra note 2, at 22-23.}
\footnotetext[189]{III NEBRASKA STATE BAR ASSOCIATION SPECIAL COMMITTEE TO STUDY THE NEBRASKA COURT SYSTEM, FINAL REPORT-NEBRASKA COURT ORGANIZATION PROJECT 11-12 (1977).}
\footnotetext[189]{L.B. 42, §§ 11-12, 1981 Neb. Laws —.}
\footnotetext[191]{COMMITTEE COMMENTS, supra note 2, at 22.}
\footnotetext[192]{Id. at 22-23.}
\end{footnotes}
transfer a case, such as the desire to be represented by counsel or the desire to have a jury trial.\textsuperscript{193} It does not seem just to subject one with such legitimate reasons for transfer to the more costly procedure of appeal to district court because of an undetermined number of defendants who may transfer for unjustified reasons.\textsuperscript{194} In addition, statistical analysis of 1979 small claims cases showed that these problems were not statewide, but were essentially problems of the Omaha Municipal Court whose transfer rate was twice that of the eight next most active small claims courts.\textsuperscript{195}

L.B. 120: AWARDING ATTORNEY’S FEES IN MANDAMUS ACTIONS

L.B. 120, signed into law by Governor Thone on February 27, 1981, amended section 25-2165 of the Nebraska Revised Statutes to provide that successful plaintiffs in mandamus actions should be awarded reasonable attorney’s fees.\textsuperscript{196} Mandamus is a command issued by a court of competent jurisdiction in the name of the state and directed to an inferior tribunal, court, or officer requiring the performance of a particular duty which is a part of its official responsibility.\textsuperscript{197} Issuance of such a writ may be had when the applicant has an immediate legal right to the duty demanded after the defendant has in some way failed to perform that duty.\textsuperscript{198}

In \textit{Singleton v. Kimball County Board of Commissioners},\textsuperscript{199} the Nebraska Supreme Court stated that “if the duties are ministerial in nature, mandamus is available to enforce performance.”\textsuperscript{200} However, “if the duties are quasi-judicial or discretionary, mandamus is generally not available as a remedy.”\textsuperscript{201} The court has also noted, however, that an act may be held to be ministerial even though the person performing it may have to satisfy himself that a certain set of facts exists under which it is his duty to perform the act.\textsuperscript{202}

\textsuperscript{193} \textit{Id.} at 23.
\textsuperscript{194} \textit{Id.} at 25. See note 188 and accompanying text \textit{supra}.
\textsuperscript{195} \textit{Id.}
\textsuperscript{196} L.B. 120, 1981 Neb. Laws —.
\textsuperscript{197} NEB. REV. STAT. § 25-2156 (Reissue 1971).
\textsuperscript{198} People ex rel. Albright v. Board of Trustees of Firemen’s Pension Fund of Denver, 103 Colo. 1, —, 82 P.2d 765, 772 (1938).
\textsuperscript{199} 203 Neb. 429, 279 N.W.2d 112 (1979).
\textsuperscript{200} \textit{Id.} at 433, 279 N.W.2d at 115, citing State ex rel. Agricultural Extension Serv. v. Miller, 182 Neb. 285, 154 N.W.2d 469 (1967).
\textsuperscript{201} 203 Neb. at 433, 279 N.W.2d at 115, citing State ex rel. Goossen v. Board of Supervisors, 98 Neb. 9, 251 N.W.2d 655 (1977), and NEB. REV. STAT. 25-2156 (Reissue 1979).
\textsuperscript{202} State ex rel. McIlvain v. Falls City, 177 Neb. 677, 680, 131 N.W.2d 93, 95 (1964).
Understandable concern arose among public officials about the possibility of personal liability for attorney's fees when the choice of performance or nonperformance of certain ministerial duties might involve an element of discretion. Reasonable minds may differ as to when a state of facts exists under which a duty to perform is present. Thus, a public official would run the risk of personal liability because of a discretionary, but good faith decision not to perform. The attorney general confirmed that under L.B. 120 attorney's fees for successful plaintiffs would be recoverable from the individual public official.

To correct this unjust situation, the legislature passed an amendment to L.B. 273. The bill amends Nebraska Revised Statute section 25-2165, and provides that the court's granting of attorney's fees to successful plaintiffs in mandamus actions is discretionary. Furthermore, there would be no possibility of personal liability for public officials of either political subdivisions or the state itself. If such fees are awarded by the court, they will be paid by the governmental body represented by that public official.

**MOACKLER v. FINLEY: THE POWER TO MODIFY OR VACATE A JUDGMENT AFTER TERM**

The recent decision of the Nebraska Supreme Court in *Moackler v. Finley* establishes the rule that a court retains the authority at a later term to vacate or modify a judgment rendered during a previous term if the motion to vacate was made during the original term. This decision overrules the previous position in Nebraska represented by *Johnston Grain Co. v. Tridle*. There the court held that it was clear in Nebraska that a court had no such power.

This decision brings the Nebraska courts under the same general rule followed by the majority of jurisdictions in this country. When the motion to modify or vacate a judgment is made within the time in which the court has the power to grant it, it is not absolutely essential that the motion be disposed of within that
The rights of the parties in such a situation become fixed at the time the motion is made and not at the time the motion is acted upon even if that is at a later term.

This rule is particularly applicable where the court has continued its jurisdiction in some manner. For example, Nebraska law provides that "[u]pon any final adjournment of the court, all business not otherwise disposed of shall stand continued generally." Thus, if the motion to vacate a default judgment has been made during the term of court in which the judgment was rendered, that motion, though not acted upon during the term, is continued and can be acted upon at a subsequent term.

AMENDMENT TO L.B. 411: ELIMINATING THE NECESSITY OF A MOTION FOR NEW TRIAL

An amendment to L.B. 411, passed by the 1981 Unicameral, creates an important procedural change. That change, accomplished by amending Nebraska Revised Statutes section 25-1912, provides that a motion for a new trial is no longer necessary for consideration on appeal of errors which occurred during the trial. This eliminates a potential trap for the litigant. Previous practice required that the motion for new trial must be filed within ten days of rendition of judgment, although the notice of appeal could be filed anytime within thirty days. The new law, by not requiring a motion for a new trial, eliminates the possibility that an unwary litigant may properly file the notice of appeal within thirty days, but have missed the much shorter deadline for filing the motion for new trial.

Prior law required that this motion must be made in order for errors at law occurring at trial to be considered by the supreme court on appeal. Furthermore, that motion had to be made within ten days of the judgment rendered unless the making of the motion was unavoidably prevented or there was newly discovered

213. 207 Neb. at 358, 299 N.W.2d at 169.
216. 207 Neb. at 357, 299 N.W.2d at 168.
evidence which could not have been discovered in time for the trial.\textsuperscript{221} The purpose of such a motion was to allow the district court the opportunity to review any question or error before an appeal was taken.\textsuperscript{222} If no such motion was filed, the supreme court would consider the record only for the purpose of determining whether or not the judgment was supported by the pleadings.\textsuperscript{223}

The new practice eliminating the necessity of such a motion brings the Nebraska courts into conformity with the same procedure followed by the federal courts.\textsuperscript{224} In the federal courts, a motion for a new trial is not a prerequisite to an appeal from a judgment.\textsuperscript{225} Other states have also eliminated the necessity of this motion as a procedural requirement.\textsuperscript{226} Thus, in these states and under the new practice in Nebraska, a party, on appeal, may challenge the sufficiency of the evidence or errors of law which occurred at trial without having first filed a motion for a new trial.

\textit{Mary K. Beerling—'83}

\begin{itemize}
\item \textsuperscript{221} \textit{NEB. REV. STAT.} § 25-1143 (Reissue 1979).
\item \textsuperscript{222} Christensen v. Eastern Nebraska Equip. Co. Inc., 199 Neb. at 745, 261 N.W.2d at 370 (1978).
\item \textsuperscript{223} Id.
\item \textsuperscript{224} \textit{FED. R. CIV. P.} 59.
\end{itemize}