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JOHN RITUMS, APPELLANT, V. SAM HOWELL, DOUGLAS COUNTY TREASURER, AND EX OFFICIO TREASURER OF THE TRANSIT AUTHORITY OF THE CITY OF OMAHA, ET AL., APPELLEES.

209 N. W. 2d 160

Filed July 13, 1973. No. 38899.

1. **Constitutional Law: Parties: Courts.** Courts will not decide questions of constitutionality unless they have been raised by a litigant whose interests are adversely affected.
2. ———: ———: ———. A court has no power to summarily pass upon the constitutionality of an act of the Legislature. It has power only to decide justiciable disputes. Its power to declare an act of the Legislature unconstitutional arises only when it affects a right of a litigant in such a case.
3. **Constitutional Law: Parties.** One may not urge the unconstitutionality of a statute who is not harmfully affected by the particular feature of the statute alleged to be in conflict with the Constitution.

Appeal from the District Court for Douglas County: JAMES P. O'BRIEN, Judge. Affirmed.

Howard A. Kaiman and James E. McShane, for appellant.

Herbert M. Fitle, Frederick A. Brown, Edward M. Stein, James E. Fellows, Allen L. Morrow, George S. Selders, Jr., Kent N. Whinnery, Verne W. Vance, Thomas F. Dowd, Richard A. Cerveny, Roger G. Stanway, Robert J. Hamer, and John E. Finnigan, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

WHITE, C. J.

This is an injunction action in which the plaintiff, as a representative of the property taxpayers of the City of Omaha, Nebraska, seeks to prevent the defendant, as treasurer of Douglas County, from collecting a tax to support the operation of Omaha's municipal transit system. It is the plaintiff's contention that the state statute authorizing the creation of a transit authority to

operate the public transportation facilities in Omaha is unconstitutional. The District Court refused to grant the injunction and upheld the statute. We affirm the judgment of the District Court.

Only a brief review of the facts, for background purposes, is necessary. In the early part of 1971, the Omaha Transit Company, a private enterprise then engaged in operating the city's bus system, announced that it would cease such operations as of July 1, 1972, because of financial difficulties. The city council held a series of emergency meetings to formulate plans for continuing mass transit service in Omaha and three bills were drafted for introduction into the state Legislature, each providing for some form of governmental takeover of the transit system. Two of the bills were ultimately enacted into law, and one of those was L.B. 1275, the provisions of which are in dispute here. It became effective on March 21, 1972.

Basically, L.B. 1275 provides that any city of the metropolitan class, of which Omaha is one, may create a transit authority to oversee operation of a publicly owned mass transportation system. The bill outlines the procedure by which the authority's personnel are to be selected, authorizes a tax levy of not more than 1 mill to fund the system, and delineates in a general way the powers and duties of the authority so created. It is the extent of this grant of powers which is in dispute here.

In part, L.B. 1275 amends section 14-1803, R. R. S. 1943, to provide that a city's transit authority, created pursuant to the bill, "* * * shall have full and exclusive jurisdiction and control over all facilities owned or acquired by such city for a public transportation system," that it "shall have and retain full and exclusive jurisdiction and control over all public passenger transportation systems in such city, excluding taxicabs and railroad systems, with the right and duty to charge and collect revenue * * *." And, by amendment to section

14-1805, R. R. S. 1943, that it shall have the power "(t)o determine routes and to change the same * * *" and "(t)o fix rates, fares, and charges for transportation." Finally, under section 14-1822, R. R. S. 1943, as amended, the board is given the power to "make all rules and regulations, according to its discretion, governing the operation of the transportation system, and shall determine all routings and change the same whenever deemed advisable * * *."

Pursuant to these provisions, the Omaha city council passed, on May 9, 1972, an ordinance creating the Transit Authority of the City of Omaha. The ordinance became effective on May 24, 1972. A mill levy of .8 of one mill was passed to fund the project. By July 1, 1972, the Authority had taken over all the operations formerly conducted by the Omaha Transit Company, having secured the temporary approval of the State Railway Commission for doing so. Permanent approval of the transfer was granted by the Commission on September 25, 1972. Prior to that time a request for a decrease in rates had been approved by the Commission. In short, the evidence shows that, throughout its brief existence, the Transit Authority has consistently operated under the aegis of the Public Service Commission.

But it is the plaintiff's contention that despite these voluntary submissions of appropriate questions to the Commission, the Transit Authority is operating under an illegal and usurpatious grant of power. It is urged that the giving by L.B. 1275 of "full and exclusive authority" over local transit facilities to a local Authority contravenes Article IV, section 20, of the Nebraska Constitution, which grants plenary power in such matters to the Public Service Commission. Since the statute is unconstitutional, argues the plaintiff, the treasurer of Douglas County should be enjoined from collecting the property tax which supports it.

But the power of a court to scrutinize and strike down acts of the Legislature may not be invoked with such

facility. It is fundamental that parties seeking a judgment as to the constitutionality of a statute must present a justiciable controversy, and there must thus be a bona fide clash of adverse interests. This court said in Stanton v. Mattson, 175 Neb. 767, 123 N. W. 2d 844 (1963): "Courts will not decide questions of constitutionality unless they have been raised by a litigant whose interests are adversely affected. A court has no power to summarily pass upon the constitutionality of an act of the Legislature. It has power only to decide justiciable disputes. Its power to declare an act of the Legislature unconstitutional arises only when it affects a right of a litigant in such a case."

The nexus which a suitor must demonstrate between the operation of a statute and his interests must be direct; that is, he must show an interest in the statute greater than that accruing to every other taxpayer with a desire for good government, however commendable that desire may be. The plaintiff " 'may attack the constitutionality of a statute only when and so far as it is being or is about to be applied to his disadvantage; and to raise the question *he must show that the alleged unconstitutional feature of the statute injures him* and so operates to deprive him of a constitutional right, * * * one may not urge the unconstitutionality of a statute who is not harmfully affected by the *particular feature* of the statute alleged to be in conflict with the constitution.' " (Emphasis supplied.) State ex rel. Nelson v. Butler, 145 Neb. 638, 17 N. W. 2d 683. See, also, Metropolitan Utilities Dist. v. Merritt Beach Co., 179 Neb. 783, 140 N. W. 2d 626; Flast v. Cohen, 392 U. S. 83, 88 S. Ct. 1942, 20 L. Ed. 2d 947.

The portion of L.B. 1275 which the plaintiff alleges to be unconstitutional deals with the allocation of powers between the Public Service Commission and the Transit Authority of Omaha. The plaintiff has in no way demonstrated that this feature of the bill operates to his disadvantage. While it is true that he is being compelled

to pay a property tax to support the Transit Authority in general, neither the collection of that tax nor the expenditure of revenue so collected violates a constitutional right of the *plaintiff*. And it is elemental that the plaintiff must show in himself the right which is allegedly infringed by the operation of the statute. State ex rel. Nelson v. Butler, *supra*.

If there is an infringement of constitutional rights here, it must involve those held by the Public Service Commission, whose powers and functions are allegedly usurped. That plaintiff pays a tax to support the Transit Authority does not give him the power to vindicate any rights which the Public Service Commission may have, nor to redress any supposed wrongs committed against it by the Legislature. If the Transit Authority sought to govern common carriers in the City of Omaha without the approval of the Commission, then it is for the Commission to act, and not a taxpayer.

Although we reach the decision in this case on the issue of standing, there is no merit to the plaintiff's contention. The plaintiff primarily relies on State ex rel. State Railway Commission v. Ramsey, 151 Neb. 333, 37 N. W. 2d 502, where it was held that a statute giving general control over all carriers by air to the Department of Aeronautics (including regulation of rates and services) was not constitutional. The Ramsey case is clearly distinguishable from the present one in that the Legislature attempted by explicit language to absolutely exclude the jurisdiction of the State Railway Commission over the common carriers by air. The statute states, "commission shall * * * exercise *no* control over aeronautics." In the present case the Transit Authority statute under attack contains no provision prohibiting the Public Service Commission from regulating the publicly owned and operated transit system. The plaintiff misconceives the rhetoric of the present act. It is clear that the use of the term "exclusive control" refers only to local municipal government and there is no at-

tempt to delegate the Commission's "general control" or rate-making jurisdiction to the Authority. While not only is this true as a matter of construction but it is not disputed that the Transit Authority had administratively construed the law to require it to submit rate- and route-making powers to the Public Service Commission. It is clear on the merits that the powers enumerated in sections 14-1805 and 14-1822 of the Transit Authority law are enabling powers limited by the general law of the state. In the absence of specific legislation, the power to determine rates, fares, and routing is only as extensive as the power of any private transportation system to do the same. Metropolitan Utilities Dist. v. City of Omaha, 171 Neb. 609, 107 N. W. 2d 397; United Community Services v. Omaha National Bank, 162 Neb. 786, 77 N. W. 2d 576.

Moreover, it is clearly the duty of the court to give a statute an interpretation which meets constitutional requirements if it can be reasonably done, and if a statute is subject to more than one construction, the court is required to adopt the construction which would make the act constitutional. Terry Carpenter, Inc. v. Wood, 177 Neb. 515, 129 N. W. 2d 475; Mann v. Wayne County Board of Equalization, 186 Neb. 752, 186 N. W. 2d 729; Kaup v. Sweet, 187 Neb. 226, 188 N. W. 2d 891; United States v. Vuitch, 402 U. S. 62, 91 S. Ct. 1294, 28 L. Ed. 2d 601. There is no merit to this contention of the plaintiff.

There being no justiciable controversy here, the judgment of the District Court is affirmed.

AFFIRMED.

SPENCER, BOSLAUGH, NEWTON, and CLINTON, JJ., concur in the result.

RAYMOND M. SMITH, APPELLANT, V. RUAN TRANSPORT, INC., APPELLEE.

209 N. W. 2d 146

Filed July 13, 1973. No. 38946.

1. **Workmen's Compensation: Trial.** In a workmen's compensation case, the burden of proof is upon the claimant to establish that his disability was caused by an accident arising out of and in the course of his employment.
2. **Workmen's Compensation: Appeal and Error: Evidence.** On appeal of a workmen's compensation case to this court if there is reasonable competent evidence to support the findings of fact in the trial court, the judgment, order, or award will not be modified or set aside for insufficiency of the evidence.

Appeal from the District Court for Cheyenne County: JOHN H. KUNS, Judge. Affirmed.

Jack R. Knicely and Murphy, Pederson & Piccolo, for appellant.

Patrick J. Heaton, Sr., Michael McCormack of McCormack, Cooney & Mooney, and John Peetz, Jr., of Peetz & Dorwart, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, McCOWN, NEWTON, and CLINTON, JJ.

McCOWN, J.

This is a workmen's compensation case. The claim is for injuries received by plaintiff in a truck accident in the course of his employment. The single judge Workmen's Compensation Court made an award for temporary total disability and a 15 percent permanent partial disability to the body as a whole. On direct appeal to the District Court, that court, after trial de novo, affirmed the award of the single judge compensation court. The plaintiff on this appeal contends that a heart attack suffered some 4½ months after the automobile accident was also caused by the accident and that the award should be for total disability.

On September 24, 1970, while in the course of his em-

ployment as a truck driver, the plaintiff was injured as a result of a collision between his truck and another vehicle. Plaintiff suffered a compression fracture of the vertebra and hematoma and contusions of the left flank. He was released from the hospital October 16, 1970, but was advised not to return to work.

Immediately following the accident in September 1970, X-rays revealed a slightly enlarged heart and some thickening of the wall of the heart. X-rays and an electrocardiogram in April 1969, had been read as normal. The plaintiff continued under the care of his doctor for the compression fracture of his back until January 25, 1971, when he was released for work as a truck driver. At that time he was cautioned to avoid excessive lifting or bending. The plaintiff returned to work for the defendant and worked through February 6, 1971, as a truck driver, the same as before the accident.

On February 8, 1971, the plaintiff was at home watching TV and waiting for a call to go to work when he suffered a heart attack. An electrocardiogram taken on February 9, 1971, showed a myocardial infarction which established that the plaintiff had coronary artery disease.

The plaintiff was 58 years old at the time of trial. He was 5 feet 7½ inches tall and had weighed over 200 pounds since 1945. He had smoked since he was 18 or 19 years old and recently was smoking two to three packs of cigarettes a day.

There was no dispute or disagreement as to the percentage of disability caused by the injuries to plaintiff's back. The major point of disagreement involved the causal relationship of the accident to plaintiff's heart condition. Plaintiff's physician testified there was evidence that the patient's heart deterioration followed the accident and he felt there was definite evidence that the two were related. He conceded that the plaintiff was a "coronary prone individual" but attributed the heart attack to the accident and to plaintiff's enforced idleness while recuperating from his other injuries. He tes-

tified that the plaintiff was totally and permanently disabled from driving a gas transport or any sort of heavy lifting or hard manual work.

Two heart specialists, on the other hand, found no reasonable causal relationship between the accident and the heart attack. One of the heart specialists not only found no cause and effect relationship between the accident and the heart attack but also disagreed with the conclusion that plaintiff was totally disabled. In his opinion the plaintiff should be engaging in activity and is able to drive a truck.

The single judge Workmen's Compensation Court specifically found that plaintiff sustained a 15 percent permanent partial disability to his body as a whole due to the injuries to his back, and that the evidence was insufficient to sustain a finding that the coronary atherosclerotic heart disease with myocardial infarction suffered by the plaintiff was the result of an accident arising out of and in the course of his employment.

The District Court, after trial de novo in that court, found "that the evidence is insufficient to show error in the findings by the Judge of the Compensation Court" and ordered that the judgment and award of the compensation court be affirmed.

The plaintiff's basic contention is that his heart condition was a direct result of the accident. He asserts that his heart attack, coupled with his back injury, has produced permanent total disability. On both issues the evidence is in direct conflict. Plaintiff's physician attributes the heart attack to the accident 4½ months before. He also testified that plaintiff was permanently and totally disabled from driving a truck. The evidence of defendant's medical witnesses, both of whom were heart specialists, attributed plaintiff's condition to causes completely unrelated to the accident. They found no reasonable association between the accident and the subsequent heart attack. Defendant's medical evidence also directly contradicted plaintiff's contention of total

permanent disability resulting from the heart attack.

In a workmen's compensation case, the burden of proof is upon the claimant to establish that his disability was caused by an accident arising out of and in the course of his employment. The rule of liberal construction of the Workmen's Compensation Act applies to the law but not to the evidence offered in support of a claim for benefits under the act. Hartwig v. Educational Service Unit No. 13, 189 Neb. 339, 202 N. W. 2d 618.

The contentions of the plaintiff in this case all rest upon factual determinations. The judgments of the Workmen's Compensation Court and of the District Court rest upon findings of fact made in the compensation court and affirmed in the District Court. There is ample evidence to support those findings. On appeal of a workmen's compensation case to this court if there is reasonable competent evidence to support the findings of fact in the trial court, the judgment, order, or award will not be modified or set aside for insufficiency of the evidence. The cause will be considered de novo only where the findings of fact are not supported by the evidence as disclosed by the record. Gifford v. Ag Lime, Sand & Gravel Co., 187 Neb. 57, 187 N. W. 2d 285.

The plaintiff also contends that because the District Court failed to make specific affirmative findings of fact the cause was not tried de novo but was only an error proceeding. While the findings of the District Court are framed in negative fashion, they clearly reflect the affirmance of the findings of fact of the Workmen's Compensation Court as well as the affirmance of the award. The case was tried de novo in the District Court and there is no merit to plaintiff's procedural contention.

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

AFFIRMED.

VIOLET ANNE CONDREAY, APPELLEE, V. DANNY GENE CONDREAY, APPELLANT.
209 N. W. 2d 357

Filed July 13, 1973. No. 38948.

1. **Divorce: Statutes.** Chapter 42, article 8, R. R. S. 1943, is not applicable in counties in which the District Court has failed to find the procedures therein provided for to be necessary.
2. **Divorce.** It is only when there exists a reasonable possibility of reconciliation that the statutes require efforts to effect reconciliation to be made.

Appeal from the District Court for Colfax County: C. THOMAS WHITE, Judge. Affirmed.

Henry Grether and Alan Saltzman, for appellant.

Otradovsky & Bieber and Robert D. Westadt, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

NEWTON, J.

This is a divorce action heard and determined under Chapter 42, article 3, R. S. Supp., 1972. The court found that the marriage was irretrievably broken and entered judgment dissolving the marriage. We affirm that judgment.

Defendant assigns as error the determination by the court that reconciliation could not be effected. Defendant had applied for a conciliation proceeding which was denied for the reason that: "* * * the District Court of Colfax County has never made a determination pursuant to Sec. 42-803 that the conditions of said county warranted such a Conciliation Court, * * *." In its decree the court found: "Every reasonable effort to effect reconciliation has been made, without success. The marriage of Plaintiff and Defendant is irretrievably broken and should be dissolved."

The record reflects that the defendant was, on November 23, 1971, 5 months after the parties were married,

charged with rape, sodomy, kidnapping, and assault, plead guilty to assault with intent to inflict great bodily injury, and is an inmate of the Nebraska Penal and Correctional Complex, serving a term of 5 to 10 years commencing April 28, 1972. Plaintiff states she contemplated divorce after charges were filed against defendant but agreed with him that she would not proceed with it until after he was sentenced. She denied that reconciliation is possible and states she had contemplated divorce before his arrest because he had been "dating around." She visited him in prison on two occasions but divorce was not discussed.

Section 42-803, R. R. S. 1943, provides: "The provisions of sections 42-801 to 42-823 shall be applicable only in counties in which the district court determines that the social conditions in the county and the number of domestic relations cases in the courts render the procedures provided in sections 42-801 to 42-823 necessary to the full and proper consideration of such cases and the effectuation of the purposes of sections 42-801 to 42-823." The record discloses that Chapter 42, article 8, R. R. S. 1943, is not applicable to Colfax County as the necessary steps to activate it in that county were never taken by the court. It is, therefore, for the District Court, and not a conciliation court, to determine, in the first instance, the possibility of reconciliation. Does the record sustain the finding of the court in this respect?

Section 42-360, R. S. Supp., 1972, requires the court to find that every reasonable effort to effect reconciliation has been made before dissolving a marriage. It further provides that a reference for conciliation purposes should be made only when "there appears to be some reasonable possibility of a reconciliation being effected." It appears that in the absence of a "reasonable possibility" of reconciliation, strenuous efforts to bring it about are not required. The question for the court in each case is, what is reasonable under the cir-

cumstances. In cases where it is obvious that reconciliation cannot be effected, efforts in that direction would be useless and are not required.

Section 42-361, R. S. Supp., 1972, provides that the court, in determining if the marriage is irretrievably broken, shall "consider all relevant factors, including the circumstances that gave rise to the filing of the petition and the prospect of reconciliation." Certainly, experience dictates that in view of the nature of the criminal charges made against the defendant and his present incarceration, the marriage is irretrievably broken and reconciliation impossible unless plaintiff is an unusually forgiving person. She is the only one who can say whether or not she will forgive and forget what has transpired and effect a reconciliation. This she categorically refuses to do. Under such circumstances the finding of the court is not unreasonable.

The judgment of the District Court is affirmed.

AFFIRMED.

EQUITY MUTUAL INSURANCE COMPANY, A CORPORATION, APPELLANT, V. ALLSTATE INSURANCE COMPANY, A CORPORATION, ET AL., APPELLEES.

209 N. W. 2d 592

Filed July 13, 1973. No. 38951.

Insurance: Contracts: Administrative Bodies and Procedures. An endorsement which is not misleading, ambiguous, or conflicting which amends an omnibus clause in an uncertified automobile liability insurance policy by limiting the application of the omnibus clause to use of the automobile by a person over the age of 25 years, except for the insured or any resident of his household, is an authorized contract of insurance. Such an endorsement is not proscribed by any statute, nor is it against public policy. It is not rendered void merely because it has not been filed with and approved by the Department of Insurance prior to its issuance.

Appeal from the District Court for Douglas County: JOHN E. MURPHY, Judge. Reversed and remanded.

Martin A. Cannon of Matthews, Kelley, Cannon & Carpenter, for appellant.

D. Nick Caporale of Schmidt, Ford, Mooney, Frederick & Caporale, Robert G. Fraser, and Ray C. Simmons, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

MCCOWN, J.

This is a declaratory judgment action brought by the plaintiff, Equity Mutual Insurance Company, to determine whether its automobile liability insurance policy or that of the defendant, Allstate Insurance Company, offered primary coverage for the automobile accident involved here. Demurrers of the defendants were sustained and Equity Mutual has appealed.

In 1969, the plaintiff issued its automobile liability insurance policy to Sandra L. Shaw, the owner and named insured. The policy bore a printed endorsement titled "Exclusion of Additional Interests Endorsement," and recited: "In consideration of the issuance or continuance of this policy by the company, it is mutually understood and agreed that:

"1. Paragraph (a)(2) of Persons Insured under Part I-Liability is amended to read as follows: 'any other person using such automobile, provided the actual use thereof is with the permission of the named insured and such person so using the automobile is over the age of twenty-five (25) years.'" The endorsement did not apply to the named insured or any resident of the named insured's household. The endorsement was signed and accepted by Sandra L. Shaw, the named insured. The policy form, except for the endorsement, had been filed with and approved by the Department of Insurance before the policy was issued and delivered. The endorse-

ment form had not been filed with nor approved by the Department of Insurance at the time of the issuance of the policy but was filed with and approved by the Department of Insurance sometime later.

On February 26, 1971, while the insurance policy was in full force, the defendant, Rodney Morgan, was operating the Shaw automobile with the permission of Sandra L. Shaw when it was involved in an accident which caused damage to an automobile owned by Roy O. Bowers. At the time of the accident Morgan was less than 25 years old. Plaintiff notified Sandra L. Shaw, its insured, and Rodney Morgan that its insurance did not apply. At the time of the accident Rodney Morgan was the named insured in an automobile liability insurance policy issued by Allstate Insurance Company and that policy was also in full force and effect. The liability insurance carrier for Bowers had paid for the damages of $3,323 and became subrogated to Bowers' rights to that extent. Bowers' insurance carrier threatened suit against Rodney Morgan for its claim. The plaintiff here, Equity Mutual Insurance Company, demanded that Allstate Insurance Company, Rodney Morgan's liability carrier, undertake the defense and/or payment of the claim but Allstate refused. This declaratory judgment action followed.

The defendants demurred to plaintiff's petition upon the ground that the restrictive endorsement was void because it had not been filed with and approved by the Department of Insurance, and plaintiff's insurance was therefore primary. The District Court sustained the demurrers and dismissed plaintiff's petition.

The sole issue here is whether a form of printed endorsement to an automobile liability insurance policy which makes a substantial restrictive amendment to the coverage of the policy is void because the endorsement form was not filed with and approved by the Department of Insurance before the policy was issued and delivered. The defendants' case rests on that conten-

tion. The twin supports for that contention rest upon section 44-348, R. R. S. 1943, and an interpretation of the case of Workman v. Great Plains Ins. Co., Inc., 189 Neb. 22, 200 N. W. 2d 8.

Section 44-101, R. R. S. 1943, provides that the business of insurance "is public in character, and requires that all those having to do with it * * * shall abstain from deceptive or misleading practices, and shall keep, observe and practice the principles of law and equity in all matters pertaining to such business."

Section 44-348, R. R. S. 1943, provides: "No insurance policy or certificate of any kind shall be issued or delivered in this state unless and until a copy of the form thereof has been filed with the Department of Insurance, and approved by it." A major purpose of such filing and approval is to insure that the form of such policies or certificates is not deceptive or misleading and therefore in violation of public policy. It is obvious that the approval is required also to insure that the policy form complies with statutory requirements. No such statutory requirements are involved here nor were they in Workman.

With most kinds of insurance the Legislature has specified various requirements as to particular provisions required to be included or omitted. Fire insurance policies, life insurance policies, and health and accident policies all must meet this type of statutory requirement. The statutory requirements for automobile liability insurance with respect to such provisions have been under the Motor Vehicle Safety Responsibility Act. In 1965 the Legislature amended the Motor Vehicle Safety Responsibility Act to provide specifically that sections 60-516 to 60-544, R. R. S. 1943, shall not apply to any automobile liability policy which has not been certified as provided by sections 60-528 to 60-531, R. R. S. 1943. As a result of that amendment, this court held in State Farm Mut. Auto. Ins. Co. v. Pierce, 182 Neb. 805, 157 N. W. 2d 399, that the omnibus clause

requirement is applicable only to automobile liability insurance policies which have been certified as proof of financial responsibility. We held also that a driver exclusion agreement limiting the coverage of an automobile liability insurance policy to a particular driver was not against public policy. Automobile liability insurance policies which are not certified as proof of financial responsibility, except for minimum coverage limits and uninsured motorist provisions, are subject to virtually no statutory directives. The Department of Insurance is therefore called upon, under section 44-348, R. R. S. 1943, to determine whether a policy form is deceptive or misleading and contains ambiguities or conflicts and contradictions between its provisions, and must refuse to approve a form which is in violation of public policy.

The Legislature has imposed various requirements as to the provisions of an automobile liability insurance policy certified as proof of financial responsibility. Among these is the omnibus clause. As to automobile liability policies which are not required to be certified, the statutory requirements essentially involve only minimum limits of coverage and provisions as to uninsured motorists. There are undoubtedly many times more automobile liability policies which are not certified than there are certified. There is no logical reason to assume that the Legislature was interested in protecting the public where certified policies were involved but not where ordinary uncertified policies were involved. The statutorily mandated distinctions between the two varieties of automobile liability insurance policies have created discrepancies which suggest that the Legislature might well reexamine the statutory provisions dealing with automobile liability insurance.

The defendants rely upon a single case to support their contention that any restrictive endorsement to an insurance policy is void if it is issued and delivered before it has been filed with and approved by the Depart-

ment of Insurance. That case is Workman v. Great Plains Ins. Co., Inc., 189 Neb. 22, 200 N. W. 2d 8. In the Workman case we held that an endorsement which completely revoked the omnibus clause contained in the principal policy, without even a reference to the clause in the endorsement, created a direct ambiguity and conflict in the policy which was misleading, and that such an endorsement was contrary to the public policy of the State of Nebraska and therefore void and of no effect. We did not hold that the endorsement in the Workman case was void merely because it had not been filed with and approved by the Department of Insurance, but because it was in violation of public policy and could not be approved by the Department of Insurance as required by section 44-348, R. R. S. 1943.

As we said in Workman, *supra:* "Section 44-348, R. R. S. 1943, does not prohibit the insurance company from printing in or attaching to an insurance policy additional or altered terms or conditions not found in the standard approved form, provided they are not inconsistent with or a waiver of any of the provisions of such authorized approved form. Provisions not in conflict with the provisions of such an approved form may be added when necessary to express the terms of a contract of insurance which is authorized."

This case is not the Workman case. The endorsement here was not deceptive or misleading. Neither was it ambiguous or conflicting. It was not in violation of public policy. It met all the requirements for approval by the Department of Insurance, and was in fact later approved.

An endorsement which is not misleading, ambiguous, or conflicting which amends an omnibus clause in an uncertified automobile liability insurance policy by limiting the application of the omnibus clause to use of the automobile by a person over the age of 25 years, except for the insured or any resident of his household, is an authorized contract of insurance. Such an endorse-

ment is not proscribed by any statute, nor is it against public policy. It is not rendered void merely because it has not been filed with and approved by the Department of Insurance prior to its issuance.

It is quite clear that the language of section 44-348, R. R. S. 1943, prohibits the issuance or delivery of any insurance policy or certificate in this state unless and until a copy of the form has been filed with and approved by the Department of Insurance. Section 44-394, R. R. S. 1943, provides that a knowing violation of any provision of Chapter 44 for which no penalty is provided shall be deemed a misdemeanor and shall be punished by a fine or by imprisonment as specified in that section. Any violation of section 44-348, R. R. S. 1943, must be and is subject to those penalties. Such violations may also be grounds for revocation of the license of the insurance company. An otherwise valid and authorized contract of insurance is not rendered void merely because it has not been approved by the Department of Insurance prior to its issuance.

The policy of insurance issued by Allstate Insurance Company to Rodney Morgan was the primary insurance policy here. The plaintiff was entitled to the declaratory judgment prayed for. The judgment of the District Court is reversed and the cause remanded.

REVERSED AND REMANDED.

BOSLAUGH, J., concurs in the result only.

HELEN C. CZARNICK, INDIVIDUALLY, AND HELEN C. CZARNICK, ADMINISTRATRIX OF THE ESTATE OF LOUIS CZARNICK, DECEASED, APPELLANT, V. LOUP RIVER PUBLIC POWER DISTRICT ET AL., APPELLEES.

209 N. W. 2d 595

Filed July 20, 1973. No. 38844.

1. **States: Limitations of Actions.** Section 25-218, R. R. S. 1943, provides that every claim and demand against the State shall

be forever barred, unless action be brought within 2 years after the claim arose.

2. **States: Limitations of Actions: Property: Eminent Domain.** A suit against the State for the taking or damaging of private property for public use must be commenced within 2 years from the time the taking or damaging of the property occurred.
3. **Injunction: Damages.** An injunction will not be granted unless the right is clear, the damage irreparable, and the remedy at law inadequate to prevent a failure of justice.
4. **Injunction: Damages: Property.** Acts which destroy or result in a serious change of property either physically or in the character in which it has been held or enjoyed may constitute an irreparable injury and warrant injunctive relief.
5. **Injunction: Damages: Property: Actions.** Where an injury wrongfully committed is continuous or is being constantly repeated so that complainant's remedy at law requires the bringing of successive actions, that remedy is inadequate and the injury may be prevented by injunction.

Appeal from the District Court for Nance County: C. THOMAS WHITE, Judge. Affirmed in part, and in part reversed and remanded.

Robek & Geshell, for appellant.

John A. Wagoner, Thomas A. Wagoner, Deutsch & Hagen, Thomas H. DeLay, Clarence A. H. Meyer, Attorney General, Warren D. Lichty, Jr., John P. Regan, and Dale Babcock, Jr., for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

WHITE, C. J.

This is an action for money damages caused by flooding which resulted from a diversion of the Loup River from its natural course. The plaintiff also seeks injunctive relief against the State of Nebraska. From a judgment of dismissal in favor of both defendants on the pleadings, the plaintiff appeals. We affirm in part and reverse and remand in part.

The plaintiff owns certain farm land in Nance County located south of the Loup River. In August of 1966 and

again in March of 1969, flooding occurred on the north and northwest portions of this land which caused erosion, destroyed crops and fences, and deposited sand and gravel which required removal. The plaintiff brought suit against the defendant Loup River Public Power District on June 3, 1970, claiming that the District was negligent in constructing dikes along the bed of the Loup River thereby diverting the Loup from its natural course, which diversion the plaintiff alleges was the cause of the floodings and resultant damage to the plaintiff's land. On May 12, 1972, the plaintiff filed an amended petition joining the District and the State of Nebraska, Department of Roads, as parties defendant. Process, for the first time, was served on the defendant State of Nebraska, Department of Roads. In the amended petition, the plaintiff alleged that the defendants were negligent in "constructing and operating the * * * channel cut which diverted the normal and natural course of the Loup River." The plaintiff alleged that the defendants were negligent in failing to exercise ordinary care when they knew or should have known that the said diversion would cause the eventual flooding and erosion and damage to the plaintiff's land and crops thereon. She asks for money damages as the result of the actions of the defendants.

The District Court sustained the State of Nebraska, Department of Roads', motion to dismiss the plaintiff's action. Section 25-218, R. R. S. 1943, provides in part that: "Every claim and demand against the state shall be forever barred, unless action be brought thereon within two years after the claim arose." The statute requires no construction and we have held in Bordy v. State, 142 Neb. 714, 7 N. W. 2d 632, that a suit against the State for the taking or damaging of private property for public use must be commenced within 2 years from the time the taking or damaging of the property occurred. Here, the plaintiff stated in her amended petition that the damage to her property occurred in

August 1966 and March 1969. Her respective causes of action for money damages accrued on those dates and consequently the action against the State of Nebraska is barred under the statute. The State was not made a party until the amended petition was filed and service of process was had in May 1972. The trial court was therefore correct in holding that the statute of limitations, so far as the cause of action for money damages is concerned, had run.

We now turn to the question of whether or not the demurrer of the Loup River Public Power District was properly sustained and the action dismissed. In her amended petition, the plaintiff alleged that the defendant District was negligent in failing to exercise ordinary care in constructing and operating the channel cut which diverted the course of the Loup River. However, the facts alleged against the District were that it granted the easement to the Department of Roads upon which the channel cut was executed; that it consented to the execution of said channel cut upon the easement; and that in executing and constructing the channel cut, the Department of Roads excavated high ground and land fill from a dike which had been constructed by and was located on the land owned by the District. Nowhere in the petition is it stated that the District actively took part in the construction or operation of the channel cut which caused the flooding. The plaintiff contends, citing authorities including Restatement, Torts 2d, § 364, p. 259, that the District, as possessor of the land, is liable for the negligent acts of the Department of Roads committed in constructing the channel cut upon the land. However, it is clear from the petition and the exhibits attached thereto, that the District was not in possession of the land upon which the channel cut took place. The easement agreement between the District and the Department of Roads, which is attached to the amended petition and made a part thereof, specifically states that the Department of Roads was given posses-

sion of the land for the purposes of constructing the channel cut. Nor does the plaintiff allege nor contend that the *excavation* performed upon the District's land in any way contributed to the flooding of the plaintiff's land. The District was not shown, in the pleadings, to be in possession or control of any of the land upon which the negligent *channel diversion* took place. The gist of the plaintiff's cause of action against the District is, therefore, simply that it granted the easement to the Department of Roads, but the plaintiff fails to state how or why the District was negligent in so granting the easement or even that the granting of the easement was in fact a negligent act on the part of the District. It therefore follows that the District Court properly sustained the demurrer of the District to the amended petition for failure to state a claim upon which relief could be granted.

However, a much more serious question remains as to the District Court's ruling upon the plaintiff's prayer for injunctive relief against the State to prevent future damage resulting from the alleged channel diversion. It is fundamental that an injunction will not be granted unless the right is clear, the damage irreparable, and the remedy at law inadequate to prevent a failure of justice. Muchemore v. Heflin, 187 Neb. 217, 188 N. W. 2d 713. The plaintiff alleged that the channel cut altered the flow of the Loup River in such a manner that it causes and *will continue* to cause annual flooding of the plaintiff's land. The plaintiff alleged that the defendants intend to continue to operate the said channel cut; that this will irreparably damage her land; that this will result in interminable litigation; and that her remedy at law, therefore, is inadequate. She requested a mandatory injunction ordering the defendants to cease operation of the channel cut or in the alternative requiring that a dike be constructed to protect her land from flooding.

We hold that the plaintiff has alleged in her amended

petition sufficient facts in support of her request for an injunction and equitable relief, to withstand the motion to dismiss by the Department of Roads. While it is true that her action for damages because of the past acts of the Department of Roads is barred by the statute, she has alleged sufficient acts in her amended petition to require the court to hear her request for equitable relief on the merits. It is clear that she still may maintain her petition for injunctive relief to prevent damage to her land by future flooding. She alleged that the flooding occurs annually and that if an injunction is not granted, she would be required to bring an action each time flooding causes damage to her property. Almost exactly in point is Armbruster v. Stanton-Pilger Drainage Dist., 169 Neb. 594, 100 N. W. 2d 781. This court upheld the granting of an injunction upon proof of facts very similar to those alleged in the plaintiff's amended petition. That case involved damage to land from erosion caused by the defendant's construction of a ditch along the Elkhorn River for channel diversion purposes. The court stated: "Acts which destroy or result in a serious change of property either physically or in the character in which it has been held or enjoyed have been held to do an irreparable injury." And further this court said: "* * * where an injury wrongfully committed by one against another is continuous or is being constantly repeated so that complainant's remedy at law requires the bringing of successive actions, that remedy is inadequate and the injury will be prevented by injunction." The only answer that the State of Nebraska, Department of Roads, makes to this contention of the plaintiff is a general assertion that the granting or withholding of an injunction is within the sound discretion of the trial court. This rule is inapplicable here on demurrer, because the plaintiff has alleged facts which, if proved on trial, require the court to exercise, on the evidence presented, its reviewable discretion.

The State contends that the plaintiff is entitled to no injunctive relief because all actions against the State must be brought under the Nebraska Tort Claims Act. §§ 81-8,209 to 81-8,239, R. R. S. 1943. The Tort Claims Act by its terms applies *only* to claims "against the State of Nebraska for money only * * *." § 81-8,210 (4), R. R. S. 1943. There is no merit to this contention.

The demurrer of the Loup River Public Power District was properly sustained and the action dismissed. The action for money damages against the State for the 1966 and 1969 floodings was properly dismissed. The determination of the District Court dismissing the action insofar as it pertains to injunctive relief against future flooding and damage is reversed and the cause remanded for a trial on that issue.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

McCOWN, J., dissenting in part.

I concur in the affirmance of the dismissal of plaintiff's claims for damages and dissent from that portion of the judgment which remands the cause for hearing insofar as it pertains to injunctive relief against future flooding.

If the plaintiff has no enforceable claim for damages against the State for the taking or damaging of her lands, she has no right to injunctive relief. The majority opinion relies upon Bordy v. State, 142 Neb. 714, 7 N. W. 2d 632, to support the dismissal of plaintiff's causes of action for damages accruing from the floods of 1966 and 1969. Bordy holds that a suit against the State based on Article I, section 21, of the Constitution (prohibiting the taking or damaging of property for public use without just compensation), is barred by the 2-year statute of limitations of section 25-218, R. R. S. 1943. The Bordy case has never been overruled. Many other cases make it clear that passive acquiescence by an individual in the appropriation of his property, if continued for the statutory period of limitations, constitutes

a waiver of his rights under Article I, section 21, of the Constitution. See, Kime v. Cass County, on rehearing, 71 Neb. 680, 101 N. W. 2; Bridge v. City of Lincoln, 138 Neb. 461, 293 N. W. 375; Armbruster v. Stanton-Pilger Drainage Dist., 169 Neb. 594, 100 N. W. 2d 781.

The only real question here is: What is the applicable statute of limitations? If the 2-year limitation of section 25-218, R. R. S. 1943, does not apply, then the 10-year limitation of section 25-202, R. R. S. 1943, must apply. The latter section provides: "An action for the recovery of the title or possession of lands, tenements or hereditaments * * * can only be brought within ten years after the cause of action shall have accrued * * *." The pleadings here show that all the construction and diking done by the State and now sought to be enjoined was completed in 1952 and 1953, and has been maintained since that time. Plaintiff's pleadings allege and the majority opinion states that, "the channel cut altered the flow of the Loup River in such a manner that it causes and will continue to cause *annual flooding* of the plaintiff's land." (Emphasis ours.) If this be true, plaintiff's cause of action for injunctive relief arose not later than 1954.

It should also be obvious that the State as well as other public bodies can acquire easement rights by prescription. See, Pierce v. Rabe, 177 Neb. 745, 131 N. W. 2d 183; State ex rel. Game, Forestation & Parks Commission v. Hull, 168 Neb. 805, 97 N. W. 2d 535; Dawson County Irrigation Co. v. Stuart, 142 Neb. 428, 6 N. W. 2d 602; Franz v. Nelson, 183 Neb. 137, 158 N. W. 2d 606; Hall v. City of Friend, 134 Neb. 652, 279 N. W. 346.

The State's motion to dismiss specifically alleges that the statute of limitations has passed as to any and all the various causes of action mentioned in plaintiff's petition. It also alleges that the facts pleaded in the petition affirmatively show that the plaintiff is not entitled to the relief prayed for and that the plaintiff does not have the legal capacity to maintain the subject action.

The trial court's determination and judgment was proper and should have been affirmed in all respects.

BOSLAUGH, J., dissenting in part.

I concur in Judge McCown's opinion that the judgment of the District Court should have been affirmed in all respects.

JOHN A. BARBAGLIA, APPELLANT, V. GENERAL MOTORS ACCEPTANCE CORPORATION ET AL., APPELLEES.
209 N. W. 2d 353

Filed July 20, 1973. No. 38861.

1. **Workmen's Compensation: Trial: Evidence.** In a workmen's compensation case, the burden of proof is upon the claimant to establish that his disability was caused by an accident arising out of and in the course of his employment.
2. ———: ———: ———. The rule of liberal construction of the Workmen's Compensation Act applies to the law but does not apply to the evidence offered in support of a claim made for benefits under the act.
3. **Workmen's Compensation: Appeal and Error: Evidence.** On appeal of a workmen's compensation case to the Supreme Court, if there is reasonable competent evidence to support the findings of fact in the trial court, the judgment, order, or award will not be modified or set aside for insufficiency of the evidence. The cause will be considered de novo only where the findings of fact are not supported by the evidence as disclosed by the record.

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

Haney, Wintroub & Haney, for appellant.

Moore & Moore and Arthur J. Nevins, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

MCCOWN, J.

This is a workmen's compensation case involving injuries received in an automobile accident in the course

of employment. The award of the single judge in the compensation court was increased by the Workmen's Compensation Court en banc. On appeal, the District Court affirmed the award of the full compensation court. The plaintiff has appealed.

Plaintiff had been employed by the finance division of General Motors Acceptance Corporation for approximately 27 years as a district representative. His job required him to contact dealers in his territory and their retail customers in regard to their accounts. The plaintiff was severely injured in an automobile accident on November 29, 1967, while in the course of his employment. At that time he was 57 years old. He sustained two broken legs, a fractured larynx which left him with permanent residual hoarseness, and two fractured ribs. After the accident, plaintiff developed pneumonia which the treating physician attributed to exposure at the accident scene. After the pneumonia, the plaintiff was found to be suffering from emphysema. Plaintiff's physician classified the emphysema as "severe" and attributed it directly to the accident. Defendant's physician disagreed with the diagnosis of severe emphysema. He testified that the plaintiff did not have serious respiratory disease and that the emphysematic condition which plaintiff did have, in his opinion, was not the result of the pneumonia or trauma. There was substantial factual dispute not only as to the causation of the emphysema but as to the extent of plaintiff's disability. Plaintiff's physician testified that plaintiff's "condition" resulted from the accident and that the plaintiff was totally disabled for his former job which required him to do a great deal of driving, walking over rough terrain, and talking. Plaintiff's physician admitted that plaintiff could function very well at a desk job. The defendant's physician testified that plaintiff's physical condition would "certainly permit mild to moderate exertion" but that strenuous activity would be beyond his reach.

The single judge workmen's compensation court, in

addition to temporary total disability and medical expenses, awarded the plaintiff 5 percent permanent partial disability to the body as a whole due to the two-member disability of his legs. The compensation court en banc, in addition to the elements included in the initial award, found that plaintiff suffered a "25 percent permanent partial disability to the plaintiff's body as a whole due to injuries to the plaintiff's chest and larynx." The initial award was modified to include the additional award. The District Court, on appeal, determined that the findings of fact of the Workmen's Compensation Court were supported by the record and affirmed the findings and award of the compensation court.

Plaintiff's assignments of error rest upon two basic contentions. First, that plaintiff was totally and permanently disabled, and, second, that because of plaintiff's emphysema he sustained more than one schedule injury and was entitled to an increased award to compensate for the combined disabilities.

Plaintiff contends that because his former employer has refused to employ him and his own physician has testified that he is unable to do his former job or any job which requires a great deal of driving, walking, and talking, he is therefore totally disabled. Plaintiff relies upon four cases in which this court has adopted the rule that: "For workmen's compensation purposes, 'total disability' does not mean a state of absolute helplessness, but means disablement of an employee to earn wages in the same kind of work, or work of a similar nature, that he was trained for, or accustomed to perform, or any other kind of work which a person of his mentality and attainments could do." Nordahl v. Erickson, 174 Neb. 204, 116 N. W. 2d 275.

The cases relied on by plaintiff involve situations in which the employee had a limited education and had been essentially engaged in manual labor and was unfitted for any other kind of work. Here both doctors agree that plaintiff could perform a desk job or one

not involving strenuous activity. There is no evidence that plaintiff made any attempt to secure employment anywhere except from his old employer. The issue was clearly a factual one which the courts below have determined.

The plaintiff contends also that his respiratory condition was a result of the accident and, together with the schedule injury to his legs, was an unusual and extraordinary condition affecting the body as a whole and justified an increased award. The issue of causation as to emphysema is critical. Again, the evidence is in direct conflict. The plaintiff's medical witness attributes the emphysema to the accident. The defendant's medical witness attributes it to other causes completely unrelated to the accident. In a workmen's compensation case, the burden of proof is upon the claimant to establish that his disability was caused by an accident arising out of and in the course of his employment. Hartwig v. Educational Service Unit No. 13, 189 Neb. 339, 202 N. W. 2d 618.

Plaintiff urges that the rule of liberal construction of the Workmen's Compensation Act should be applied to aid the plaintiff in carrying the burden of proving his case by a preponderance of the evidence. The rule of liberal construction of the Workmen's Compensation Act applies to the law but does not apply to the evidence offered in support of a claim made for benefits under the act. See Hartwig v. Educational Service Unit No. 13, *supra*.

The contentions of the plaintiff in this case all rest upon factual determinations. The judgment of the Workmen's Compensation Court and of the District Court rest upon findings of fact made and affirmed in those courts. There is ample evidence to support those findings. On appeal of a workmen's compensation case to this court if there is reasonable competent evidence to support the findings of fact in the trial court, the judgment, order, or award will not be modified or set

aside for insufficiency of the evidence. The cause will be considered de novo only where the findings of fact are not supported by the evidence as disclosed by the record. Gifford v. Ag Lime, Sand & Gravel Co., 187 Neb. 57, 187 N. W. 2d 285.

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

AFFIRMED.

SPENCER, J., dissenting.

I respectfully dissent because I believe that the plaintiff is totally disabled under our definition of total disability. In Nordahl v. Erickson (1962), 174 Neb. 204, 116 N. W. 2d 275, we said: "For workmen's compensation purposes, 'total disability' does not mean a state of absolute helplessness, but means disablement of an employee to earn wages in the same kind of work, or work of a similar nature, that he was trained for, or accustomed to perform, or any other kind of work which a person of his mentality and attainments could do."

Plaintiff had worked for General Motors Acceptance Corporation for 27 years. His job as a district representative required him to drive an average of 150 miles a day. He often contacted persons out in the field, particularly farmers, and this required him to do a lot of strenuous walking. Since the accident he has had difficulty walking and it is necessary for him to use a cane. His ability to drive long distances is also impaired. As a result of his injuries and disability, his former employer has been unwilling to rehire him for his old job. It is undisputed that he could not do it in any event.

While there is a dispute as to whether the emphysema was the direct result of the accident, there is no dispute as to his other disabilities. Plaintiff did contract pneumonia due to exposure to the cold while trapped in the vehicle subsequent to the accident. He spent 80 days in the hospital. The emphysema limits his ability to get out in the cold or humid air. He did not have this problem during the 27 years of his employment. Al-

though he was hospitalized in 1958 for a respiratory problem, the record indicates that he missed very little time due to illness during the years of his employment. Plaintiff has a fractured larynx resulting in a permanent hoarseness, which is certainly a disabling function insofar as speaking is concerned.

In my judgment plaintiff is 100 percent disabled from doing the type of work in which he has had employment for the majority of his adult life. It has been suggested that he might be able to handle desk-type office work. This, however, would require retraining. Even so, with his larynx problem, at his present age, he would be unemployable.

BOSLAUGH, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL D. HAUCK, APPELLANT.
209 N. W. 2d 580

Filed July 20, 1973. No. 38889.

1. **Criminal Law: Statutes.** In this state all public offenses are statutory; 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 the written law.
2. **Criminal Law: Larceny: Words and Phrases.** The term "steal" as used in the criminal code includes all the elements of larceny at common law.
3. **Criminal Law: Larceny: Fraud.** Evidence that the defendant changed the price tag on a carton containing a rifle scope on a display shelf in a self service store, and openly and without any attempt to conceal or hide the carton, picked it up and carried it to the checkout counter and offered to pay for it, is insufficient to establish the essential elements of larceny necessary to sustain a conviction for stealing the rifle scope.

Appeal from the District Court for Scotts Bluff County: TED R. FEIDLER, Judge. Reversed and dismissed.

G. Randolph Reed, for appellant.

George A. Sommer, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, McCOWN, NEWTON, and CLINTON, JJ.

McCOWN, J.

The defendant was charged with stealing a rifle scope worth under $20 in violation of a municipal ordinance of the City of Scottsbluff. The case was tried to the District Court without a jury upon a stipulation of facts. The defendant was found guilty and sentenced to pay a fine of $100.

Section 14-201 of the municipal code of the City of Scottsbluff provides: "It is hereby declared unlawful for any person within the City to steal any money, goods or chattels of any kind whatever. Any person who shall within the City steal property of any kind whatever, whether the same be wholly in money or wholly in property of some other character, or partly in money and partly in other property, of value of less than One Hundred Dollars ($100.00) shall be deemed guilty of a misdemeanor."

It was stipulated that the following facts are true:

"1. That on August 17, 1972 the Defendant herein, MICHAEL D. HAUCK, was present at the Sporting Goods Department of Gibsons Discount Center, a self service store, located within the corporate limits of the City of Scottsbluff, Scotts Bluff County, Nebraska;

"2. That Defendant, at the above time and place, at a shelf where rifle scopes were on display, exchanged price tag stickers without the consent of the owner between two cartons containing rifle scopes, one sticker being marked $9.87 and the other sticker being marked $19.97;

"3. That Defendant then picked up the carton on which he had removed the $19.97 sticker and on which he had placed the $9.87 sticker and carried such carton in his hand and walked to the cash register counter in the rear sporting goods section of the store;

"4. That Defendant thereupon placed the carton with the exchanged sticker marked $9.87 on the cash register counter and offered to make payment for it whereupon Defendant was apprehended and detained by the store personnel who had observed his above described action;

"5. That at no time did the Defendant conceal or hide the rifle scope carton which he carried from the display counter to the cash register counter and such carton was at all times in view of store personnel.

"6. That the value of the rifle scope was under $20.00 and the owner of this scope was Gibsons Discount Center.

"7. That the Defendant was not an employee or an agent of Gibsons Discount Center."

The basic issue on this appeal is whether the facts stipulated are sufficient to establish the defendant's guilt of the crime of larceny. The issue turns on the determination of whether or not the removal of a carton from the shelf of a self service store without any concealment and taking it to the checkout counter and offering to pay for it constitutes a sufficient taking and asportation to support a conviction for larceny. The effect of exchanging price tag stickers in such a situation must also be a crucial part of the determination.

In this State all public offenses are statutory; 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 the written law. There are no common law crimes in this State and we only resort to common law definitions where general terms are used to designate crime. See State v. Coomes, 170 Neb. 298, 102 N. W. 2d 454.

The ordinance involved here makes it unlawful "to steal" money or property. State statutes dealing with grand and petit larceny also use the word "steal" and this court has consistently held that the term "steal" as used in the criminal code includes all the elements

of larceny at common law. Barnes v. State, 40 Neb. 545, 59 N. W. 125.

The necessary elements of larceny which are critical here require that the property must be taken and carried away with the intent to steal it and it must be without the consent of the owner. See, Nixon v. State, 89 Neb. 109, 130 N. W. 1049; Barnes v. State, *supra*.

The determination of what constitutes a taking and carrying away of property with the intent to permanently deprive the owner of possession and whether that taking is with or without the consent of the owner involves issues of intent which are often difficult of determination. Where merchandise in a store is involved, those issues are vitally affected if the store is operated on a self service basis. The cases appear to be in agreement that in a self service store, where customers select and pick up articles to be paid for at the checkout counter, the mere picking up of an article in the display area does not constitute asportation. See Durphy v. United States, 235 A. 2d 326 (D. C. App., 1967).

Under the self service method of store operation, the owner of the property authorizes a conditional temporary possession by customers between the display area and the checkout counter, at least where the possession is not clearly adverse to that of the store. The cases indicate that concealing the goods in a fashion sufficient to place them under the complete and exclusive control of the defendant may be sufficient asportation to constitute larceny, no matter what part of the store it occurs in. See Groomes v. United States, 155 A. 2d 73 (D. C., 1959). In any event, carrying of concealed articles past the checkout stand of a self service store constitutes a sufficient asportation to support a conviction for larceny. See People v. Thompson, 158 Cal. App. 2d 320, 322 P. 2d 489.

In the absence of concealment we have found no case, nor have we been cited to any, which holds that openly carrying an article to the checkout counter of a self

service store is sufficient to support a conviction for larceny, whether the price tag has been altered or not.

Under the facts stipulated here, the defendant not only carried the carton with the rifle scope to the checkout counter, but he offered to pay for it as well. It is quite obvious that he intended to purchase the scope but to pay only the lesser price shown on the changed price tag and by the misrepresentation to defraud the owner of a part of its value. Nevertheless, that is not larceny. The defendant was charged with stealing a single rifle scope. On the stipulated facts it cannot be said that taking one rifle scope from the shelf and carrying it to the cashier's stand and offering to pay for it was partly lawful and partly criminal, nor that he intended to purchase part of a rifle scope and steal part of a rifle scope. Such distinctions are wholly illogical and will not support a conviction of the crime of larceny. Evidence that the defendant changed the price tag on a carton containing a rifle scope on a display shelf in a self service store, and openly and without any attempt to conceal or hide the carton, picked it up and carried it to the checkout counter and offered to pay for it, is insufficient to establish the essential elements of larceny necessary to sustain a conviction for stealing the rifle scope.

The defendant clearly intended to defraud the store by changing the price tag and by that act or device, persuade the owner to transfer both the title and possession of the property to him for less than its value. If the defendant had been successful in carrying out and completing the transaction as intended, he would have been guilty of obtaining property by false pretenses in violation of section 28-1207, R. R. S. 1943.

The statutes dealing with the two crimes of larceny and obtaining property under false pretenses, belong to the same family of crimes, but in the ordinary case are readily distinguishable. The basic distinction between larceny and obtaining money or property under

false pretenses lies in the fact that in the latter crime, the false pretenses result in securing the consent of the owner to part with the title as well as the possession of the property. In the case of larceny the defendant does not obtain any title or property interest but only possession. While such distinctions may well rest in the subjective intent of the victim, this is generally a sound and reliable test. State v. Sabins, 256 Iowa 295, 127 N. W. 2d 107; State v. Anderson, 186 Mo. 25, 84 S. W. 946; 50 Am. Jur. 2d, Larceny, § 7, pp. 158, 159.

It is quite clear that had the defendant been successful in his attempt to defraud the store and purchase the rifle scope for a fraction of its true value, he would have obtained title as well as possession and would have been guilty of obtaining property under false pretenses. We have held, however, that an essential element of obtaining property under false pretenses is that there be reliance upon the representations made. The pretense must be an effective cause in inducing the owner to part with his property, and if the owner has knowledge of the truth, the offense has not been committed. State v. Bohannon, 187 Neb. 594, 193 N. W. 2d 153. In the case before us the store was aware of the truth, did not rely on the misrepresentations created by defendant by the false price tag, and did not part with its property. The crime of obtaining property under false pretenses was not completed, even if it had been charged.

In this state there is no statutory crime of attempted larceny nor of attempting to obtain property under false pretenses. Neither is there a general criminal attempt statute such as that contained in Article V, section 5.01(1)(a), Tentative Draft No. 10 of the Model Penal Code. Neither the changing or alteration of price tags, nor an attempt to obtain property by false pretenses, nor an attempt to commit larceny is a crime under any legislative enactment of the State of Nebraska or the City of Scottsbluff.

Many states have met the problem of criminal prose-

cution of actions in the nature of shoplifting similar to those involved here by adopting a general statute providing that an attempt to commit a crime constitutes a crime also. See the Model Penal Code, *supra*. Others have statutes specifically defining certain acts which will constitute shoplifting or larceny by trick. Others create statutory presumptions or place on the defendant the burden of producing evidence to meet statutory presumptions. Georgia and West Virginia, for example, have defined four distinct acts, any one of which constitutes the crime of shoplifting. One of them is: "* * * willfully to alter any label, price tag or marking upon any merchandise offered for sale by any store with the intention of depriving the owner of all or some part of the value thereof." West Virginia Code, § 61-3A-1(1)(c). Nebraska has not taken any such legislative action, nor has the City of Scottsbluff.

Acting within constitutional bounds a legislative body is clothed with power to define statutory offenses and prescribe punishment for their violation. A person may not be convicted of a crime unless his conduct, however reprehensible, is made penal by the plain import of the written law. See State v. Coomes, 170 Neb. 298, 102 N. W. 2d 454. The acts of the defendant here were not sufficient to constitute a violation of the criminal law, and he was not guilty of the crime with which he was charged.

The conviction and sentence are vacated and the cause dismissed.

REVERSED AND DISMISSED.

SPENCER, J., dissenting.

I respectfully dissent. I believe the majority interpretation of the city ordinance to be overly restrictive.

I understand "larceny" to include obtaining another's property by trick or artifice with the intent to convert it. That is what is involved in this case.

Defendant admittedly exchanged price tag stickers with the intent to obtain the more expensive rifle scope

at the lower price. He then took possession of the item and carried it to the checkout counter. He was apprehended when he attempted to pay the lower price.

This court said in McIntosh v. State (1920), 105 Neb. 328, 180 N. W. 573: "One of the elements of larceny is asportation. It is not necessary, however, that the property stolen be retained in the possession of the thief. To remove it with the requisite felonious intent from one part of the premises to another, or from the spot where it is found, is a sufficient asportation."

DAVID TOWNLEY, A MINOR OF THE AGE OF SEVENTEEN YEARS, BY WILLIAM TOWNLEY, HIS FATHER AND NEXT FRIEND, APPELLEE, V. LARRY W. WHETSTONE ET AL., APPELLEES, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, GARNISHEE-APPELLANT.

209 N. W. 2d 350

Filed July 20, 1973. No. 38953.

1. **Insurance: Contracts.** If an insurance contract was prepared by the insurer, and it contains provisions which under the facts are reasonably subject to different interpretations, and the purpose and intent of the provision or clause is clear, the one favorable to the insured will be adopted if harmonious with the enforcement of the intent and the purpose of the provisions of the whole policy.
2. ———: ———. A separate exclusionary clause in an insurance contract should be construed in light of the provisions of the whole contract and harmonized therewith if reasonably possible, considering the intent and purposes of the parties drawn from an examination of the whole contract of insurance.

Appeal from the District Court for Douglas County: PATRICK W. LYNCH, Judge. Affirmed.

Fraser, Stryker, Marshall & Veach, for garnishee-appellant.

J. Michael Fitzgerald of Matthews, Kelley, Cannon & Carpenter, for appellee Townley.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

WHITE, C. J.

In this case, arising out of a garnishment action, the named insured, while his insured automobile was being repaired, had an accident while using another automobile not insured and owned by his father and mother, the father also being a named insured on the son's automobile which was being repaired. The question involved is the interpretation of the policy exclusion clause governing coverage of the use of a substitute automobile. The District Court held that the insurance company was liable under the terms of the policy and entered judgment for the appellee Townley. We affirm the judgment of the District Court.

The case was tried upon the following stipulated facts: In March of 1969, Larry W. Whetstone, a minor of the age of 17 years, purchased a 1964 Ford which was to be financed through the Stockyards National Bank in Omaha, Nebraska. Because of Larry's minority, Martin J. Whetstone, his father, signed the purchase agreement and cosigned the note to the Stockyards National Bank. A title for the 1964 Ford was then issued with Larry W. and Martin J. Whetstone appearing as coowners. On April 16, 1969, a policy of insurance was issued by appellant covering said 1964 Ford and naming Larry W. and Martin J. Whetstone as the insured. The premiums for this automobile insurance policy were paid by Larry Whetstone and the policy was in full force and effect on September 3, 1969, the date of the accident.

On the morning of September 3, 1969, Larry Whetstone was driving the 1964 Ford to school when it developed mechanical difficulties and became inoperable. The automobile was towed to the Whetstone residence and, upon arriving there, Larry requested permission from his mother to drive a 1958 Buick, owned by Martin J. Whetstone and his wife, to school and then to work.

This vehicle was not covered by any policy of insurance. Mrs. Whetstone granted Larry permission to drive the 1958 Buick and he then proceeded on to school.

After school, Larry was driving to work in the 1958 Buick when he was involved in an accident with David Townley, appellee herein. Appellee brought suit for damages and injuries incurred therein and obtained a judgment in the amount of $1,500 plus attorney's fees in the amount of $155 and interest at six percent. This action for garnishment ensued.

The issue here is very narrow. The appellant insurance company denies liability on the ground that the 1958 Buick, owned by the father, was not a "temporary substitute automobile" because, since the father was one of the named insureds on the son's automobile that it was "owned by the named insured," and therefore came strictly within the provisions of the exclusion provided in the "temporary substitute automobile" provision. The exclusion in the policy reads as follows:

"TEMPORARY SUBSTITUTE AUTOMOBILE — means an automobile not owned by the named insured or his spouse while temporarily used with the permission of the owner as a substitute for the described motor vehicle when withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction."

Appellant's contention, succinctly stated, is that because the 1958 Buick was owned by Martin J. Whetstone, and because his name appears as one of the named insureds on the policy covering the 1964 Ford, the Buick was an automobile owned by the named insured which could not qualify as a temporary substitute automobile under the substitution clause and therefore was excluded from coverage under the terms of the policy. In other words, the appellant argues that there is no ambiguity under the terms of the exclusionary provisions, and that the solution of this case lies simply in enforcing the clear and unambiguous terms of the policy.

This appears to be a case of first impression in Nebraska. The only case found dealing with the precise issue before us is a West Virginia case, Farley v. American Auto. Ins. Co., 137 W. Va. 455, 72 S. E. 2d 520. A policy containing a substitution clause identical to that in the instant case had been issued in the names of Earl Farley and Harry Wallace to cover a 1950 Ford truck. While the described vehicle was being repaired, Farley drove a 1948 truck owned solely by Wallace and was involved in an accident. Suit was brought to recover under the policy when the insurance company denied liability. In holding that the demurrer of the insurance company was properly overruled, the West Virginia court said:

"Bearing in mind, the restrictive meaning of the phrase 'named insured', we think it would be illogical and untrue to say that Wallace and Farley, being the named insured, owned the substituted vehicle when it is admitted *that Wallace was the sole owner thereof.* We think that the substituted vehicle, in view of the foregoing, was not owned by the 'named insured' and therefore, according to the plain terms of the policy provisions permitting such substitution, the declaration states a cause of action and is good on demurrer." (Emphasis supplied.)

We find the reasoning of the court in Farley persuasive. This court has said on numerous occasions that if an insurance contract was prepared by the insurer, and it contains provisions reasonably subject to different interpretations, one favorable to the insurer and one advantageous to the insured, the one favorable to the insured will be adopted. American Standard Ins. Co. v. Tourner, 186 Neb. 585, 185 N. W. 2d 267; Morton v. Travelers Indemnity Co., 171 Neb. 433, 106 N. W. 2d 710. Here, as in Farley, *supra,* the named insured consisted of two people, Larry W. and Martin J. Whetstone. The contract of insurance could reasonably be construed as meaning that only both together, not either one alone,

constituted the "named insured" and therefore the 1958 Buick owned by Martin J. Whetstone was not a car owned by the "named insured." See, also, 12 Couch on Insurance 2d, § 45:237, p. 274.

It is argued that the above distinction made in the Farley case is superficial, that it is a devious distinction made for the purpose of avoiding the categorically explicit and unambiguous language of the exclusionary provision. We find the answer to this contention in a brief examination of the jurisprudential underpinnings of this clause. The problem presented is a familiar one in examining a statute or interpreting a provision in a contract. The insurer drew the clause. Its purpose is to prevent additional and nonpremium paid-for coverage for additional automobiles under the umbrella of the omnibus coverage provisions. It is also apparent that it is peculiarly applicable to family situations where various members of the family own and drive separate automobiles. This fundamental purpose should be and will be strictly enforced by the courts. The purpose of the provision and the mischief sought to be prevented are not present in this case. Undisputedly, under the stipulation, Larry's car was being repaired and it was necessary for him to use another automobile. Coverage was explicitly provided for this situation. We can find nothing peculiarly, directly, or indirectly related to the purpose of the provision in the fact that he was driving Martin J. Whetstone's Buick. This situation is even stronger because it appears that the father, Martin J. Whetstone, was on Larry's insurance contract only because Larry was a minor. An enforcement of the literal rhetorical meaning of the words in this clause would work an obvious injustice in the present case. A statute or a clause in an insurance contract always attempts, as clearly as possible, to express the change or the purpose within the range of the specific cases most likely to occur to the mind. And the parties have drawn their agreement or the Legislature may enact a statute and

if they have intimated their will or purpose, however indirectly, that will should be recognized and obeyed. Mere rhetoric or superficially arbitrary construction of the words in a statute or an agreement should not blind the courts to an examination of the real agreement and the purpose behind it. As Justice Holmes said in his classic statement in Johnson v. United States, 163 F. 30 (1908): "* * * it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before." It is undeniably clear in the present case that the meaning and the purpose of this clause was not directly or indirectly violated by the use of the substitute automobile involved. The mischief sought to be prevented was avoided. The very purpose of the whole policy was to enable Larry to drive a substitute automobile when his was being repaired, and to afford the coverage in such a situation for which the parties paid their premiums. We therefore come to the conclusion that the appellant's contention, although persuasively argued and from a rhetorical point of view unanswerable, is not the proper solution in this case.

The judgment of the District Court is affirmed and the appellee is allowed a reasonable attorney's fee in the sum of $500 as part of the costs of this appeal. § 44-359, R. S. Supp., 1972.

AFFIRMED.

BOSLAUGH, J., dissents.

HAWKINS CONSTRUCTION COMPANY, A CORPORATION, APPELLEE, V. MATTHEWS COMPANY, INC., A CORPORATION, ET AL., APPELLANTS.
209 N. W. 2d 643

Filed July 27, 1973. No. 38627.

1. **Verdicts: Appeal and Error: Evidence.** A jury verdict may not be set aside unless it is clearly wrong and it is sufficient if

there is any competent evidence presented to the jury upon which it could find for the successful party and all conflicts in the evidence, expert or lay, and the credibility of the witnesses is for the jury and not the court.

2. **Trial: Evidence: Appeal and Error.** The difficulties attending an offer of evidence of illustrative experiments requires that in such cases a wide latitude or discretion be conferred upon the trial court and unless there is a clear abuse of discretion a judgment will not be reversed on account of the admission or rejection of such testimony.

3. **Trial: Evidence: Witnesses.** The proponent of expert testimony based upon an experiment must demonstrate that the person who makes the experiment is competent to do so; that the apparatus used was of the kind and in the condition suitable for the experiment; and that the experiment was honestly and fairly made.

4. ———: ———: ———. A hypothetical question should fairly reflect the proven facts.

5. ———: ———: ———. A hypothetical question is not improper simply because it includes only a part of the facts testified to.

6. ———: ———: ———. An expert witness in giving an opinion has a right to confine the facts that he recites to those which are believed to be true, and which are believed to be material to the issue.

7. **Torts: Negligence: Sales: Strict Liability.** A manufacturer is strictly liable in tort when an article he placed in the market, knowing that it is to be used without inspection for defects, proves to have a defect which causes injury to a human being rightfully using that product.

8. **Sales: Warranty.** Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

9. ———: ———. Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

10. ———: ———. It is not necessary to the creation of an express warranty that the seller use formal words such as "warranty" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

11. ———: ———. Express warranties may be made in an advertising brochure.

12. **Sales: Warranty: Contracts: Parties.** A manufacturer or seller may be held liable under such an advertising warranty even though he is not in privity of contract with the purchaser.
13. **Torts: Negligence: Sales: Strict Liability.** Traditional "contributory negligence," in the sense of a failure to discover a defect or to guard against it, is not a defense to a suit in strict tort, or for a breach of warranty; assumption of risk and misuse of the product are.

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

Crossman, Barton & Norris and John R. Douglas of Cassem, Tierney, Adams & Henatsch, for appellants.

Knudsen, Berkheimer, Endacott & Beam, for appellee.

Heard before WHITE, C. J., BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ., and HASTINGS, District Judge.

WHITE, C. J.

This is an action for property damage sustained by plaintiff Hawkins Construction Company as a result of the collapse of a scaffold manufactured by the defendant Waco Scaffold and Shoring Company and leased to the plaintiff by the defendant Matthews Company, Inc. The jury returned a verdict for the plaintiff and against both defendants in the amount of $32,635.48. We affirm the judgment of the District Court.

Because of the complex nature of this case, a careful review of the facts is necessary. In May of 1968, the plaintiff Hawkins Construction Company entered into a contract with Swift and Company of Chicago under the terms of which plaintiff was to construct a ham canning facility for Swift at 94th and J Streets in Omaha, Nebraska. A substantial amount of scaffolding equipment was needed for the job, and the plaintiff made an investigation as to availability, cost, and similar factors. Because of the frequent need which companies like the plaintiff have for scaffolding equipment, manufacturers and suppliers periodically send it advertising brochures, and the plaintiff had a complete set of the latest brochures

in its office. Among the pamphlets was one published by the defendant Waco, which the plaintiff had received from Mr. William Matthews of the defendant Matthews Company, Inc. The back cover was rubber-stamped with one of the Matthews Company's trade names, "Scaffold Rental & Sales Co.," together with its address and phone number.

The Waco pamphlet described the various types of scaffold components manufactured by the company, and provided pictorial representations of suggested applications of the equipment. In addition, the pamphlet contained the following statement: "Waco HI-LOAD shoring equipment is designed to safely carry working loads up to 20,000 pounds per panel. This is twice the load capacity of conventional steel scaffolding." The pamphlet later reiterated the claim in the following manner: "HI-LOAD panels will safely carry individual concentric loads up to 10,000 pounds per leg as illustrated. These loads were established following test procedures recommended by the Steel Scaffolding and Shoring Institute." Accompanying this text was a drawing of a scaffold panel with the number "10,000" above each of its two legs.

Thomas Lang, plaintiff's job sponsor on the Swift project, testified that he relied on statements made in the brochure in entering the lease arrangement for Waco equipment with the defendant Matthews Company. Fred Hawkins, president and majority stockholder of the plaintiff, testified at trial that he also relied on the brochure in helping to make the decision to use Waco scaffolding, but in a deposition prior to the trial he had testified that there was "no particular thing" he read or saw that influenced his thinking, and that price was an important factor as well.

In any case, the decision was made to use Waco scaffolding, and to lease it from the defendant Matthews Company. Lang, the job sponsor, went to William Matthews, described the project and the purposes for which

the equipment was to be used, and provided him with blueprints of the job. In time, the plaintiff received back from Matthews a series of drawings prepared by Waco showing the recommended scaffolding configuration for the plant's construction, and work on the project began.

The purpose of the scaffolding involved in the collapse was the support of the roof deck cement pour. The plaintiff's men first consulted soil compact tests made by a local laboratory in an effort to determine whether the foundation upon which the scaffold would be erected was firm. Under the supervision of Thomas Flynn, the plaintiff's carpenter foreman, "mud sills" were then placed on the ground to support the structure. These sills consisted of 2 x 12 inch boards laid flat on the ground, and their purpose was to prevent sinkage by distributing the weight of the scaffold and its load more evenly over the base soil. Screw jack base plates, permitting vertical adjustment of the panels, were then nailed to the mud sills, and levels were taken at each stage of this assembly to insure that the base scaffold structure was perfectly horizontal. The tubular frame panels forming the bottom section of the structure were then fitted into the base plates.

The roof deck construction required the scaffolding to reach to a height of 20 feet and, since each scaffold panel is only 6 feet high, the job thus required panels to be stacked on top of each other until the desired height was reached. In order to accomplish this, the plaintiff had ordered tubular connectors, manufactured by the defendant Waco, from the defendant Matthews Company. These connectors are merely hollow tubes with an interior diameter slightly larger than the tubular feet of a scaffold panel. Connectors are fitted over the tubular supports of the bottom panel, and the upper panel is then stacked on top by fitting its feet into the connectors.

Originally, these connectors were manufactured by

simply welding a reinforcing ring washer to the outside center of a solid length of pipe. More recently, however, the connectors have been formed by hydraulically pressing two smaller lengths of pipe together with an amount of pressure greater than their yield value, so that the two pieces deform at the center to form an exterior ridge as they join. All this is accomplished without heating the connector components, and the procedure is correspondingly known as a "cold form process." It was the latter type of connector which Matthews Company provided for the plaintiff's use on the Swift job, and the effect of the cold form process on the stability of these connectors is actively disputed.

Once the panels have been stacked to reach the desired height they are topped off with "shore heads," U-shaped holders designed to cradle some of the supportive lumber bracing which will underly the plywood pour base. More specifically, the short heads cradle the "ledgers," which consist of a minimum of three and sometimes four 2 x 12's nailed together front to back and fitted into the shore heads on edge. That is, if three 2 x 12's are used, the ledger when installed would be 6 inches wide in the shore head and would stand 12 inches above it. The ledgers, in turn, support the "joists." Joists are lengths of lumber placed on edge on top of the ledgers and at right angles to them. It is the joists which provide direct structural support to the plywood pour base above, and, in this case, they were placed 16 inches apart on center.

In the construction of these joists the plaintiff departed from the plans supplied to it. The variances involved the size of lumber used for joists and the type of structural bracing supporting them. It is undisputed that the Waco plans called for the joists to be made from 2 x 10's and that the plaintiff used 2 x 12's instead; thus the joists supporting the plywood pour base stood 12 inches off the ledgers rather than the recommended 10 inches. The plaintiff's job sponsor admitted that one of the reasons 2 x 12's were used was that they

are more versatile, and could be reused, either as joists or as ledgers, on other jobs.

The Waco plans also called for the joists to be supported by cross-bracing, and the plaintiff used horizontal bracing. Cross-bracing involves the placement of an "X" shaped set of cross beams at specified intervals between the joists; horizontal bracing consists of running lengths of 1 x 4's along the bottom edges of the joists at specified intervals and securing them to the joist edges with double head eightpenny nails. The joists themselves are then secured to the plywood pour base above with sevenpenny block nails. The ends of both the ledgers and the joists are rested against the outer wall of the plant structure in order to add stability to the form system. Cross-bracing is more expensive and time consuming to employ, but is somewhat stronger than horizontal bracing, particularly where lateral force is involved. Horizontal bracing is commonly used in the construction industry, however, and had been used by the plaintiff on many prior projects. The supportive effectiveness of the larger joists, buttressed by horizontal rather than cross-bracing, is also actively disputed.

On October 22, 1968, the plaintiff's workmen were engaged in a cement pour on a portion of the roof deck. Edward Pechar, the "pour watcher," was stationed underneath the deck to make sure the tower legs did not settle as a result of the cement being placed on the plywood pour base. This he did by tying red indicator ribbons at premarked points on the scaffold and then sighting on them with a construction level throughout the pour. He observed nothing unusual. Thomas Flynn, the carpenter foreman, had routinely checked the connectors, shore headings and footings before the pour, and he, too, had found nothing unusual. Jack Moore, the concrete superintendent, and Stan Siedlik, the labor foreman, were both up on the pour deck, and had just waved off an empty bucket which had dumped a load of wet cement onto the plywood base.

Without warning of any kind a portion of the roof deck on which the men were working suddenly gave way. Siedlik went down with the collapse to the ground and cement and debris came down on top of him, but he miraculously escaped with only minor injuries. Pechar, who had turned away from the pour temporarily, heard a loud noise and turned to see the roof collapsing less than 10 feet away. Moore was standing just beyond the area of collapse, and was not injured. All three men agreed that prior to the collapse there was no vibration, noise, or any other unusual symptom of trouble, and that the only noise accompanying the accident was the single loud report as the roof fell.

After the collapse, Lang inspected the scene and determined that the damage had taken place in a square area approximately 48 feet on a side. The ground was covered with debris, including at least a dozen broken connectors. Flynn, the carpenter foreman, testified that all the broken connectors he observed after the accident were fractured in the middle, where the deformed ring is located. The area was also strewn with splintered lumber, bent scaffolding sections, and other debris.

At the threshhold of this case is the question of causation. The plaintiff contends that the collapse was proximately caused by the failure of defectively manufactured connectors. The defendant Waco contends that the collapse was caused by insufficient bridging applied to unstable joists, permitting the joists to roll over and thus give way. As to this point, the trial involved a conflict of expert testimony.

James Hossack, a professor of civil engineering at the University of Nebraska at Omaha, was employed by the plaintiff on December 26, 1968, to investigate the collapse. After studying the plans, interviewing persons who witnessed the accident, and consulting relevant literature, Hossack proceeded to conduct experimental tests at the University in the summer and fall of 1969, with a view toward determining the cause of the

collapse. These tests were conducted under the supervision of Flynn, the carpenter foreman, Jack Folker, the job superintendent, and Thomas Lang, the job sponsor, all of whom assisted in constructing the scaffolding for the tests.

The tests were divided into two parts. The first series of experiments involved outdoor testing of various portions of the scaffold configuration. The first two tests examined the effect of lateral force on the wood shoring system, the first test involving horizontal bracing and the second involving the recommended cross-bracing. In both cases the ultimate failure of the structure was slow — in the case of the horizontal bracing the joists held the load for 15 to 20 minutes before significant relaxation — and in both cases the failure was clearly audible before the collapse. When the horizontal bracing was tested, for example, the system held the simulated load up to the point where 5 inches of joist deflection was reached, and the deformation of wood and nailing could be heard after the 2-inch deflection point was reached. Hossack testified that "(w)ood systems literally groan and you can hear them quite loud under load." This is the result when the joist system rolls. It is to be contrasted with the testimony of the witnesses who said that the collapse was sudden and inaudible prior to the failure.

A third outdoor test was conducted to determine if the wood joist system would interact with the steel scaffolding system to produce a failure, and the result was that no collapse was produced, and no joists rolled, but 10 connectors were either partially or completely fractured at the center.

Indoor tests were conducted on the connectors to determine whether they contained a defective weakness. The tests were conducted on a Tinus Olson Axial Load simulator, which has the capability to apply either tension or compression forces to a given component subject. Two of the tests involved bending the connectors

until failure, and both resulted in breakage of the connector along the seam line at the center. A third test involved what Hossack called "straight tension," i.e., a pulling apart to determine whether the connector contained a weak spot. In a fourth test, in which compression force was applied, a connector withstood approximately 15,000 pounds of pressure, at which point the pin couplings attaching it to the simulator failed.

In addition, Hossack cut two connectors along the longitudinal axis in order to examine their interior structure. One of these connectors was found to be incompletely joined at the center, which Hossack attributed to insufficient pressure in the manufacturing process.

Over objection, Hossack was permitted to offer his opinion as to the cause of the collapse, based on his examination of photographs taken at the scene, his testing of the scaffolding system and its components, and the testimony of the witnesses who heard no noise prior to the sudden collapse. In his opinion the accident was not caused by a failure of the wood shoring system, but by a defect in the steel scaffolding, to wit: A plane of imperfection in the center of the connectors.

The defendants' expert was Fred C. Kosmach, the senior engineer for Waco and the designer of the scaffolding plans for the Swift job. He and the Waco Company had been notified of the collapse by Hawkins, and he flew to Omaha from the home office in Illinois the same day. Upon arriving at the site, Kosmach began an inspection of the debris and the remaining structure. He observed the deviations which the plaintiff made from his plans, and he also observed that some of the plywood which had fallen did not appear to have been nailed to the joists. He testified that an instantaneous collapse could occur if one or two joists which were not nailed down suddenly rolled. He further testified, based on his experience in testing over 100 Waco scaffolding configurations to failure, that the Swift system failed

because of the deviations from the Waco plans and a resulting rollover of joist supports. He computed the "leg load" on this job at 7,100 pounds, and testified that the Waco equipment could withstand a load of 22,500 pounds per leg before collapse if properly constructed. Furthermore, he testified that a connector has never failed in one of his tests.

The defendant Waco argues that there was insufficient evidence to submit to the jury the issue of the proximate cause of the collapse. Its argument, in effect, is that as a matter of law the proximate cause of the collapse was the failure of Hawkins to comply with the specifications of Waco in constructing the scaffold. As we have seen, in light of the nature of the expert testimony, this resolved itself into a dispute as to whether the collapse was lateral or vertical in nature, and if vertical in nature, whether the jury was clearly wrong in finding that the collapse was caused by defect in the "connectors." It resolved this conflict in favor of the plaintiff, since the instructions of the court required it to find not only a defect in the steel scaffolding system and delivered to plaintiff by Waco, but that such defect was the proximate cause of the accident. From the evidence that we have reviewed here it is obvious there was a direct conflict and there was ample evidence to support a finding that the connectors were defective, and that the defect did actually result in a breaking and a lack of support, causing the vertical collapse of the scaffolding structure. A jury verdict on such issues may not be set aside unless it is clearly wrong and it is sufficient if there is any competent evidence presented to the jury upon which it could find for the successful party and all conflicts in the evidence, expert or lay, and the credibility of the witnesses is for the jury and not the court. Hancock v. Parks, 172 Neb. 442, 110 N. W. 2d 69; Trailmobile, Inc. v. Hardesty, 173 Neb. 46, 112 N. W. 2d 535.

A strenuous attack is made upon the competency of

Hossack's testimony for the plaintiff. The defendant Waco argues that his tests were conducted improperly, that his opinion was based on assumptions and speculation, and that the hypothetical question which elicited the opinion did not fairly reflect the proven facts. This court has repeatedly held that a trial court has wide latitude in the admission of experimental tests. We have said that the difficulties attending an offer of evidence of illustrative experiments requires that in such cases a wide latitude or discretion be conferred upon the trial court and that unless there is a clear abuse of discretion a judgment will not be reversed on account of the admission or rejection of such testimony. Crecelius v. Gamble-Skogmo, Inc., 144 Neb. 394, 13 N. W. 2d 627; Ripp v. Riesland, 180 Neb. 205, 141 N. W. 2d 840. More precisely we have said that the proponent of such expert testimony based upon the experiment must demonstrate "that the person who makes the experiment is competent to do so, that the apparatus used was of the kind and in the condition suitable for the experiment, and that the experiment was honestly and fairly made." Omaha Street Ry. Co. v. Larson, 70 Neb. 591, 97 N. W. 824; Crecelius v. Gamble-Skogmo, Inc., *supra*. Most of the defendants' argument in this area appears to be an argument on the merits to the jury and not an argument as to admissibility or competency. Waco argues that Pechar, the employee charged with the observation of the scaffolding, had not observed, prior to the collapse, any bending or change of position of any of the scaffolding towers. It also argues that Hossack, the plaintiff's expert, failed adequately to explain why the connectors had not failed in the 2-month period prior to the collapse. Of course, it would be completely impossible to absolutely duplicate the actual conditions and repeat the scaffolding collapse. A review of the evidence we have given demonstrates that a jury could reasonably find Hossack had conducted an experiment that was reasonably if not almost a duplicate of the

conditions existing in this rather complex accident situation. The defendant Waco cites no authority that would support the proposition that the observer Pechar was required to testify to the element of bending in the tower. Pechar testified that his job was to watch for tower *settlement,* not bending. Hossack, plaintiff's expert, testified that the bending which occurs under this type of stress is slight — perhaps no more than 5/8 of an inch — and thus almost invisible to the naked eye. We hold that there was no abuse of discretion by the trial judge in admitting the results of these experiments, as testified to by Hossack, into evidence.

The defendant Waco generally contends that Hossack's opinion is based on mere speculation. From what we have said it is clear that Hossack exhaustively outlined the nature and the scope of his tests, and their results. It appears that he carefully and clearly explained the reasons for his conclusions. We point out that the defendants' expert constructed a model also and conducted an experiment, all of which was admitted into evidence. But the jury accepted Hossack's and not the defendants'. The argument that the scaffold had not collapsed previously is directed toward the merits, and is insufficient to sustain an attack upon the admissibility of Hossack's expert opinion.

In an overlapping argument the defendants assail the form of the hypothetical question and particularly because it omitted the testimony of Pechar, who observed the collapse. A hypothetical question should fairly reflect the proven facts. Great latitude is allowed the trial judge in ruling on admissibility of such a question. A hypothetical question is not improper simply because it includes only a part of the facts testified to. Landis & Schick v. Watts, 84 Neb. 671, 121 N. W. 980. An expert witness in giving an opinion has a right to confine the facts that he recites to those which are believed to be true, or which are believed to be material to the issue. The question of what facts are relevant to the

determination is one of the basic ones upon which experts in any given field may differ. Again the disregarding of Pechar's lack of evidence on the bending is an argument directly on the merits to the jury in an attack upon the credibility of Hossack's testimony, and does not affect its admissibility.

We have examined the other contentions made by the defendant Matthews Company in this area and for the same reasons find them to be without merit.

We turn now to the basic question presented in the case on the substantive issues of liability. The trial court submitted the theory of strict tort liability and liability under the Uniform Commercial Code in one combined set of instructions and requiring the jury to return one verdict either in favor of the plaintiff or the defendants. No error in the combining of these two theories and causes of action in one set of instructions is asserted and does not require our attention. Since the trial court submitted and permitted the jury to return a verdict for the plaintiff on the theory that the defendants were liable for *all* property damage occurring as a result of the defective connectors, we are required to examine these instructions comprehensively to determine the proper range of strict tort liability in this jurisdiction. We last had occasion to examine in detail the controversy surrounding strict tort liability in Kohler v. Ford Motor Co., 187 Neb. 428, 191 N. W. 2d 601 (1971). Our extension or adoption of strict liability in that case was restricted. We laid down the broad rule that "a manufacturer is strictly liable in tort when an article he placed in the market, knowing that it is to be used without inspection for defects, proves to have a defect which causes an injury to a *human being* rightfully using that product." Id. at 436, 191 N. W. 2d at 606. (Emphasis supplied.) We are faced squarely with the proposition of the extension of a doctrine beyond personal injuries to permit recovery for all property damage.

As the plaintiff argues, logically this extension seems to be irresistible. The problem arises because the maximum logical extension of strict tort liability runs headlong into the restrictive provisions of the Uniform Commercial Code setting up the standards for liability for breach of warranty, which the trial court also submitted. It appears clear that a plaintiff would sooner rely on strict tort for his recovery than on the Uniform Commercial Code warranty rules, since the latter require more of him and less of the seller or manufacturer. For example, the plaintiff is required, under section 2-607 (3)(a), U.C.C., to give the defendant notice of breach. Furthermore, a manufacturer and a consumer either may agree or the manufacturer may disclaim any warranties under section 2-316, U.C.C., providing the disclaimer is not unconscionable within the meaning of sections 2-302 and 2-719(3), U.C.C. This conflict poses a historic debate in the development of strict tort liability. See, Prosser, The Assault Upon the Citadel (Strict Liability to the Consumer), 69 Yale L. J. 1099 (1960); Restatement, Torts 2d, § 402A, and Comment m at p. 356 (1965).

Space does not permit an exhaustive discussion of this question. The total damage to the plaintiff in this case, for which it recovered, was $32,635.48. Included in the petition and the prayer were the costs of replacing the damaged structure, as well as the cost of replacing the scaffolding which was alleged to be defective. Consequently, it appears in this case, as it has in several of the authorities governing the situation, that to merely distinguish between personal injury and property damage losses is to analyze the problem incompletely. It is clear, in light of the Uniform Commercial Code, that the class of property damage situations may be further subdivided into two categories: Situations where the defective product causes damage to itself and situations where the defective product causes damage to other property. The plaintiff argues for the lode star rule of

the controversial case of Santor v. A & M Karagheusian, Inc., 44 N. J. 52, 207 A. 2d 305 (1965). Beyond personal injury, recovery was allowed in that case on a strict tort theory, in order "to insure that the cost of injuries or damage, either to the goods sold or to other property, resulting from defective products, is borne by the makers of the products who put them in the channels of trade, rather than by the injured or damaged persons who ordinarily are powerless to protect themselves." This result, as mentioned, seems inevitable, in pure logic, but the application of comprehensive strict tort liability would clearly emasculate the applicable provisions of the Uniform Commercial Code as to warranty and warranty liability which were designed to apply where the product is defective but where no damage results from the defect, either to persons or other property.

The collision between the Uniform Commercial Code and the expanding application of the doctrine of strict tort liability, is a present controversy in the law of utmost importance. We have reviewed the pertinent authorities, including the discussion and claimed ambiguity of the compromise section 402A of Restatement, Torts 2d. See, Santor v. A & M Karagheusian, Inc., *supra;* Price v. Gatlin, 241 Ore. 315, 405 P. 2d 502; Baum v. Murray, 23 Wash. 2d 890, 162 P. 801; LaHue v. Coca Cola Bottling, Inc., 50 Wash. 2d 645, 314 P. 2d 421; Seely v. White Motor Co., 63 Cal. 2d 9, 45 Cal. Rptr. 17, 403 P. 2d 145; Franklin, When Worlds Collide: Liability Theories and Disclaimers in Defective-Product Cases, 18 Stan. L. Rev. 974; Shanker, Strict Tort Theory of Products Liability and the Uniform Commercial Code: A Comentary on Jurisprudential Eclipses, Pigeonholes and Communications Barriers, 17 W. Res. L. Rev. 5; Titus, Restatement (Second) of Torts. Section 402A and the Uniform Commercial Code, 22 Stan. L. Rev. 713.

From a review of the authorities and giving maximum import to the basic doctrine of strict tort liability, we feel that the doctrine of strict tort liability was not

conceived as a substitute for warranty liability in cases where the purchaser has only lost the benefit of his bargain. It seems to us quite apparent that it was designed to make the risk of defect-caused injuries an enterprise liability, so that the burden of injury is not placed entirely on "the unfortunate victim" who is often ill-equipped to bear it. See Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P. 2d 897 (1963). If the loss is merely economic, the Uniform Commercial Code has given the purchaser an ample recourse under the particular provisions and requirements of the code. Placed broadly, it is the law of sales, and not the law of torts, which protects the buyer's interest in the benefit of his bargain.

We examine briefly the jurisprudential considerations underlying the conflict. We perceive no sound reason for extending the doctrine of strict tort liability to the point where it emasculates the law of sales and the Uniform Commercial Code, and extended to situations in which the loss involves injury to the defective product itself. The Uniform Commercial Code, adopted by our Legislature, was designed to set up standards covering the very situation present in this case concerning the defective scaffold. It balances the competing interests of the manufacturer and seller with the public policy objective of preserving the freedom of contract and the consequent acceleration of business productivity and the necessary experimentation in the development of new products. In a commercial transaction, the seller should be free to limit his liability for defects by clearly telling the purchaser what he is buying; and this the code permits him to do. The collision can be avoided and the situation reconciled by seeing clearly that public policy only demands an additional remedy be given the buyer which eliminates situations beyond the range of the Uniform Commercial Code and the applicable law of sales. Paraphrasing Justice Cardozo, we do not think it was the intent of the Legislature or proper public

policy to flay the manufacturer by punishing him for contractually limiting the risks involved as to the defective product itself. In Kohler we properly held that every purchaser has a right to be protected from *personal injury* regardless of the terms of the sale. But these jurisprudential and public policy considerations and arguments are not persuasive when losses are purely commercial, and the parties are free to contract betweeen themselves and the Uniform Commercial Code as enacted by the Legislature protects this interest and provides the remedy in case of breach.

At this point we are required, therefore, to hold that the District Court was in error in submitting the issue of strict tort liability to the jury as to the damage sustained. The jury verdict being general, this court has no way of knowing but that the jury resolved the case totally upon the issue of strict tort liability. We are faced with the proposition of the determination of whether this erroneous submission of the issue of damages from strict tort liability is prejudicial. We hold that it was not. As we shall soon see, in the discussion of the breach of warranty cause of action, the plaintiff was entitled to prevail as a matter of law on the issues presented in recovery for breach of warranty, except the issues of whether the product was defective and whether it was the proximate cause of the damage and injury. These issues being identical to both theories of recovery, the jury's verdict would necessarily have been for the plaintiff under either theory of recovery, and consequently there is no prejudicial error.

We examine briefly the defendants' contention as to error in the submission of the breach of warranty of liability. First, the defendant, Matthews Company, claims that as a mere lessor strict tort coverage should not be permitted against it for that reason. This contention has no merit. Clintrone v. Hertz Truck Leasing & Rental Service, 45 N. J. 434, 212 A. 2d 769; Martinez v. Nichols

Conveyor & Engineering Co., Inc., 243 Cal. App. 2d 795, 52 Cal. Rptr. 842.

Liability of Waco and Matthews flows from the provisions of section 2-313, U.C.C., which provides in part:

"(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

"(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description. * * *

"(2) It is not necessary to the creation of an express warranty that the seller use formal words such as 'warrant' or 'guarantee' or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty."

The Waco brochure was stamped with the Matthews Company tradename, and constituted express warranties under the above provisions. The warranties were originally made by Waco and adopted by Matthews. Express warranties may be made in an advertising brochure. Brown v. Globe Laboratories, Inc., 165 Neb. 138, 84 N. W. 2d 151. A manufacturer or seller may be held liable under such an advertising warranty even though he is not in privity of contract with the purchaser. Sylvestri v. Warner & Swasey Co., Inc., 398 F. 2d 598 (2d Cir., 1968); Henningsen v. Bloomfield Motors, Inc., 32 N. J. 358, 161 A. 2d 69; Randy Knitwear, Inc. v. American Cyanamid Co., 11 N. Y. 2d 5, 226 N. Y. S. 2d 363, 181 N. E. 2d 399 (1962); *cf.*, Burr v. Sherwin Williams Co., 42 Cal. 2d 682, 268 P. 2d 1041 (1954).

The pamphlet or advertising brochure assured the user that the equipment "is designed to safely carry working loads up to 20.000 pounds per panel" and that this figure was "established following test procedures

recommended by the Steel Scaffolding and Shoring Institute." These are statements regarding specific performance capabilities, and we hold that they constitute express warranties as a matter of law. See Greenman v. Yuba Power Products, Inc., *supra.*

The defendant Waco answers claiming that the warranties were qualified, either expressly or impliedly, by the condition in the brochure that the plaintiff comply with the specifications of the engineering plans as to lumber design, and that the plaintiff was required to demonstrate such compliance as a condition precedent to recovery. But in other language in the brochure Waco placed the final responsibility for the timber design and the placement with the user, Hawkins. This is not the statement of a manufacturer who seeks to impose an exacting and absolute condition precedent concerning lumber design on the user. It certainly gave the user leeway to change from 2 x 10's to 2 x 12's, unless such change was the proximate cause of the collapse and the damage, which issue was resolved against the defendants by the jury. Under the undisputed contents of the brochure, and the nature of the warranty, the defendants, as a matter of law, waived the absolute compliance with the conditions of timber design implied or suggested in their plans, and thus left the plaintiff free to prove that there was substantial compliance or that lack of compliance was not the proximate cause of the damage. Melcher v. Boesch Motor Co., 188 Neb. 522, 198 N. W. 2d 57.

The defendant Matthews Company argues that there was no proof of the adoption of the warranty by it. The authorities cited by Matthews are patently distinguishable. We feel that the evidence shows an adoption of Waco's warranty by Matthews as a matter of law. Matthews was the only one with whom the plaintiff dealt. It supplied the advertising brochure in an effort to induce the plaintiff to lease the Waco scaffolding from it. The warranty was adopted and presented to the plain-

tiff in an effort to gain the plaintiff as a customer, and we hold that Matthews Company, as a matter of law, is thus by its own admission bound by it.

The next issue presented in the arguments of the defendants is that these warranties did not become a part of the "basis of the bargain," within the meaning of section 2-313(1), U.C.C. It is clear that these warranties as a matter of law, became the basis of the bargain under the facts we have recited above. Comment 3 to section 2-313(1), U.C.C., states with reference to the basis of the bargain that, "no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement. Rather, any fact which is to take such affirmations, once made, out of the agreement requires clear affirmative proof."

As we have already pointed out, the issue that the product was defective, that the defect existed at the time the product left the manufacturer's control, that the product reached the consumer substantially unchanged, and was the proximate cause of the damage, were issues all resolved against the defendants by the jury and we will not disturb them. These issues are, in substance, identical issues that are necessary to prove under the strict tort theory. The jury, by its verdict, found that the cold form pressing process used to manufacture the connectors resulted in a critical plane of structural weakness along their centerline, either because of defective design or because of insufficient pressure used in the manufacturing of the connectors in this particular case. There is testimony indicating that some of the connectors were already broken at the time they were delivered and that these broken connectors were sorted out and discarded before the construction project began. We repeat the evidence no further. There is ample evidence in the record to support the jury's conclusions in these fundamental aspects of the case.

Considerable discussion and argument is made by the defendants as to the submission of the issue of con-

tributory negligence. It is clear that traditional "contributory negligence" in the sense of a failure to discover a defect or to guard against it, is not a defense to a suit in strict tort, or for a breach of warranty. Assumption of risk and misuse of the product are. Restatement, Torts 2d, § 402A, Comment n, p. 356. Whatever error there was in submitting the *broader* issue of contributory negligence obviously could not be prejudicial to the defendants but only to the plaintiff. There is no merit to this contention.

It thus becomes clear, as applied to this case, that the two theories of recovery became married and that the trial court instructed accordingly. As to the crucial issues of a defect in the product and proximate cause, the jury was required to make identical findings no matter which theory of recovery was permitted. As to all other issues the plaintiff was entitled to prevail as a matter of law. Consequently there was no prejudicial error in the over-broad submission of damages on strict tort liability.

Complaint is also made concerning certain other instructions and evidentiary rulings of the trial court. We have examined these contentions and they are without merit.

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

AFFIRMED.

BOSLAUGH, J., concurs in the result only.

SMITH, J., concurring in the result.

Submission to the jury of both theories of liability on the evidence was not reversible error. In that respect it would be a healthy instinct for us to rest our reasons there. Important information relating to policy is inadequate. W. Page Keeton, "Products Liability - Inadequacy of Information," 48 Tex. L. Rev. 398 at 402 (1970). The theory of liability conceivably is largely a matter of judicial policy.

McCOWN, J., concurring in part and dissenting in part.

I concur in much of the discussion and in the result reached in the majority opinion. I dissent from that portion of the opinion which purports to hold that the doctrine of strict liability in tort on the seller of defective products does not extend to the property damage here involved.

In Kohler v. Ford Motor Co., 187 Neb. 428, 191 N. W. 2d 601, this court adopted the doctrine of strict liability in tort on the seller of defective products where personal injuries resulted. The majority opinion now refuses to extend that doctrine to physical damage to the property of the ultimate user or consumer. The basis for that determination misconceives and misinterprets the doctrine of strict product liability in tort.

Section 402A of Restatement, Torts 2d, p. 347, provides in part: "(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if * * *."

It will be noted that the critical difference rests on the term "physical harm" and not on any distinction between person and property. Every other section of Restatement dealing with areas of strict liability refers to liability for harm to the person, land, or chattels of another. There is no logical or reasonable basis upon which the doctrine of strict liability for defective products can be applied to physical harm caused to a person, and at the same time be denied for physical harm caused to his property.

The distinction which the majority opinion attempts to make treats the damages caused here as being "commercial" or an economic loss of the bargain. The opinion therefore concludes that it is more suitable for handling under warranty provisions and the Uniform Commercial Code. The opinion also attempts to bolster that conclusion by the fact that a fractional share of the damages claimed was for replacement of the scaf-

fold itself. Nevertheless, the entire damage was in the form of physical harm to the property of the plaintiff. There is a clear distinction between a defective condition which causes direct tortious physical harm in the form of damage to the person or property of a user, and a defective condition which causes only a commercial or economic loss resting on warranty and grounded in the U.C.C.

In Seely v. White Motor Co., 63 Cal. 2d 9, 45 Cal. Rptr. 17, 403 P. 2d 145, Chief Justice Traynor, in refusing to apply the doctrine of strict liability to cover economic loss, set out the distinctions which the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss. He said: "The distinction rests, rather, on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products. He can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm. He cannot be held for the level of performance of his products in the consumer's business unless he agrees that the product was designed to meet the consumer's demands. A consumer should not be charged at the will of the manufacturer with bearing the risk of physical injury when he buys a product on the market. He can, however, be fairly charged with the risk that the product will not match his economic expectations unless the manufacturer agrees that it will. Even in actions for negligence, a manufacturer's liability is limited to damages for physical injuries and there is no recovery for economic loss alone. * * * The Restatement of Torts similarly limits strict liability to physical harm to person or property."

Following a discussion of the Uniform Commercial Code and its application to cases of commercial loss, Chief Justice Traynor said: "Plaintiff contends that, even though the law of warranty governs the economic

relations between the parties, the doctrine of strict liability in tort should be extended to govern physical injury to plaintiff's property, as well as personal injury. We agree with this contention. Physical injury to property is so akin to personal injury that there is no reason to distinguish them." He refused to apply the doctrine in that case because there was no proof in the trial court that the defect caused the physical damage to the truck involved.

In the case before us the damage was the result of "physical harm" to the plaintiff's property, which was property other than the defective product. The scaffold itself was leased by the plaintiff. While it also suffered physical harm, that fact ought not alter the situation nor impel the court into a restrictive treatment of the doctrine of strict liability. Particularly is that true here when the plaintiff clearly ought to recover under either theory, and there is no justification for the gratuitous restriction. Physical injury is not limited to personal injury and physical harm is not merely economic loss. To permit recovery in tort on the basis of strict liability when the user or consumer suffers personal injuries from an accident caused by a defective product but to deny recovery for physical injury to his property suffered in the same occurrence is a distinction inconsistent with the whole body of the law of torts.

Section 402A of Restatement, Torts 2d, p. 347, is a comprehensive and accurate statement of the law of strict tort liability on the seller of defective products. It should be adopted by this court.

CLINTON, J., concurring.

I concur in the opinion of White, C. J., but feel that the rationale for declining at this time to extend the doctrine of strict liability in tort beyond allowing recovery for personal injury should be elaborated. Three related reasons, I believe, indicate the wisdom of not extending the doctrine to property damage cases.

First: Such extension, I believe, comes into conflict

with the provisions of the Uniform Commercial Code. Where the doctrine of strict liability in tort is applicable remedies under the U.C.C. are superfluous and the U.C.C. provisions pertaining to exclusion and modification of warranties, limitation on damages, and modification and limitation of remedies are eliminated, that is, repealed by judicial fiat. §§ 2-316, 2-718, 2-719, U.C.C. On this general problem see Titus, Restatement (Second) of Torts, Section 402A and the Uniform Commercial Code, 22 Stan. L. Rev. 713.

Property damage is one of the types of damage concerning which the U.C.C. makes rules. §§ 2-715(2) (b), 2-719(3), U.C.C. Personal injuries resulting from breach of warranty are also the subject matter of regulation by the U.C.C. How then do we make a determination that damages of the one type should be compensable under the doctrine of strict liability, and damage of the other type is not compensable under that doctrine but only under the U.C.C.? Two reasons exist: (1) In personal injury cases strict liability has a foundation antecedent to and independent of the sales provisions of the U.C.C. This justifies such different treatment. The foundation rests upon the special food warranty cases. Asher v. Coca Cola Bottling Co., 172 Neb. 855, 112 N. W. 2d 252 (1961). See Titus, Maj. Op Cit., 772. In Kohler v. Ford Motor Co., 187 Neb. 428, 191 N. W. 2d 601, we indicated that we relied on Asher and felt that although that case was couched in warranty terms, what we were really doing in Kohler was only changing the label. The U.C.C. provides: "Unless displaced by the particular provisions of this act, the principles of law and equity . . . shall supplement its provisions." § 1-103, U.C.C. It may be argued on these grounds that the U.C.C. did not displace existing remedies so far as personal injury is concerned. This is the effect of our holding in Kohler. See Titus, Maj. Op Cit., 758, et seq.

(2) The U.C.C. itself contains provisions which justify such different treatment. Section 2-719(3), U.C.C.,

provides: "Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not."

Property damage is included in the term consequential damage as defined by the U.C.C. § 2-715(2), U.C.C. It does not appear to me that the U.C.C. provisions justify the distinction that some of the cases make between property damage and consequential commercial damage and which allow recovery under the doctrine of strict liability for the former but deny it for the latter. See Seely v. White Motor Co., 63 Cal. 2d 9, 45 Cal. Rptr. 17, 403 P. 2d 145. A reading of sections 2-715(2) and 2-719(3), U.C.C., together leads me to believe that the U.C.C. clearly authorizes warranty limitations so far as property damage is concerned.

Second: A primary justification — although often unstated (as it was in Kohler) — for the doctrine of strict liability is that of spreading the cost of risk loss from the injured to the manufacturer who in turn passes that cost on either through insurance or in higher charges for his products. This was the rationale in Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P. 2d 897, on which we placed primary reliance in Kohler. See, also, Franklin, When Worlds Collide: Liability Theories and Disclaimers in Defective-Product Cases, 18 Stan. L. Rev. 974, 1009. Damages of the type here involved are ordinarily already covered by insurance, the contractor's collapse or builder's risk policy, or if the contractor is his own insurer he is already spreading the cost of the risk among all his customers. As I see it, there is no social utility in transferring the risk of loss from one insurer to another, in this case probably to the products liability carriers of the scaffold manufacturer and the lessor of the scaffolding. Transferring risk between insurers simply gives rise to additional subrogation claims between insurers and the social utility of this I fail to

see. No doubt a reasonable argument can be made for the fact that it probably increases cost because now both insurers must consider the same risks and consequently be compensated in higher premiums.

The great value which we as a society place upon life and health justifies the strict liability doctrine so far as personal injury is concerned. First party personal injury insurance does not remotely match the damages which are recoverable from a tortfeasor, while ordinarily insurance of the type we have earlier mentioned completely covers the loss and spreads the risks.

Third: I agree with Smith, J., that important information relating to policy in this area is inadequate. This, I believe is an added reason for not expanding the legal liability of the manufacturer beyond our holding in Kohler.

LYELL MITCHELL MAGRUDER, APPELLEE AND CROSS-APPELLANT, V. PATSY L. MAGRUDER, APPELLANT AND CROSS-APPELLEE.
209 N. W. 2d 585

Filed July 27, 1973. No. 38852.

1. **Divorce: Alimony.** When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, 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. § 42-365, R. S. Supp., 1972.
2. **Divorce: Alimony: Property.** Alimony may be ordered in addition to a property settlement award. § 42-366(6), R. S. Supp., 1972.
3. **Divorce: Alimony.** Unless otherwise agreed by the parties in writing or by the order of the court, an alimony order shall terminate upon the death of either party or the remarriage of the recipient. § 42-365, R. S. Supp., 1972.
4. ———: ———. The relevant circumstances in determining whether alimony should be awarded and in what amount will vary from case to case.

Appeal from the District Court for Dawes County: ROBERT R. MORAN, Judge. Affirmed as modified.

Crites, Shaffer & Slavik, for appellant.

Michael V. Smith, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

CLINTON, J.

This action commenced as one by the plaintiff husband for divorce. Previous to trial on the merits, L.B. 820, Laws 1972, p. 246, was enacted and the action proceeded as one for dissolution of the marriage under that act on the ground alleged in an amendment to the plaintiff's petition that the marriage was irretrievably broken. The defendant wife denied the marriage was irretrievably broken and prayed for a legal separation to allow time to effect a reconciliation.

The matter proceeded to trial and the court found that every reasonable effort to effect reconciliation had been made and that the marriage was irretrievably broken. The court ordered a division of property between the parties and granted the defendant alimony of $416.66 per month beginning September 15, 1972, to continue until either of the parties dies or the defendant remarries.

The defendant appeals, claiming that the alimony award is inadequate and that the court erred in appraising the property of the parties and in its division between them. The plaintiff cross-appeals, attacking the alimony award on the ground that the court erred in making it in the form of an annuity and also on the ground that it is excessive. The defendant requested that supersedeas bond be set. This was done and the bond furnished by her. Upon her application she was awarded $750 per month temporary support pending this appeal. The plaintiff on this appeal attacks the amount as excessive.

We modify the award of alimony and affirm the decree as modified.

The parties were married at Kirksville, Missouri, on May 20, 1962. At that time the plaintiff was completing a premedical course at Kirksville Teacher's College and working as a motel clerk. The defendant was then attending college half days and working in an abstract office in the afternoons. In the fall of that year the plaintiff entered medical school at Columbia, Missouri. The defendant continued both her employment and college attendance and commuted between Columbia and Kirksville. They lived in a mobile home purchased at cost from the defendant's father and her parents gave her the automobile in which she traveled between the two cities. In the spring of 1963 the defendant finished her college course and obtained a job teaching in the Columbia schools. The defendant continued to work and also obtained her Master's Degree during this time. The plaintiff continued in medical school and received his M.D. Degree in 1966. In 1963, 1964, 1965, and the first part of 1966, the parties were supported largely by the earnings of the defendant. The plaintiff's tuition was paid by grants and income from livestock he owned and which were cared for by an uncle.

In the year following his graduation from medical school, during a 1 year internship of the plaintiff in Des Moines, Iowa, the parties lived largely on the plaintiff's salary as an intern. The defendant had a small income from part-time employment. In 1967, the plaintiff entered the Air Force as a medical officer and after that the defendant was no longer employed. Following 2 years of active duty, the plaintiff entered the practice of medicine in an established medical partnership at Chadron, Nebraska. He prospered. In 1970, his first full year of medical practice, his adjusted gross income was $22,718. In 1971 it was $27.900, and he estimated his income for 1972 would be $36,000. At the time of trial the plaintiff was 32 and the defendant 28. Both

parties are in good health. They have no children.

The first apparent rift in the marriage occurred while the plaintiff was in the military service when he informed the defendant that he wanted a divorce and that other women looked good to him. The matter went no further until, shortly before the divorce action was filed, he made an unannounced departure from the home of the parties in Chadron and took up a separate residence. The parties did not live together thereafter.

The court determined the value of the property of the parties to be about $42,000 and ordered it divided equally between them. We have examined the evidence relative to the appraisal of the property and conclude that the valuations by the trial judge are not erroneous and are justified by the evidence. The division of the property is approved.

We next discuss the matter of alimony. Section 42-365, R. S. Supp., 1972, provides: "When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, 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." Section 42-366(6), R. S. Supp., 1972, provides that alimony may be ordered in addition to a property settlement award. Section 42-365, R. S. Supp., 1972, also provides that unless otherwise agreed by the parties in writing or by the order of the court, the alimony shall terminate upon the death of either party or the remarriage of the recipient.

In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criteria under the statute as well as under the former decisions of this court is one of reasonableness. The relevant considerations will vary from case to case. See, Prosser v. Prosser, 156 Neb. 629, 57 N. W. 2d 173; Mandelberg v. Mandelberg, 187 Neb. 844, 195 N. W. 2d

148. The determination of whether it is reasonable to award alimony and if so how much takes into consideration all the circumstances of the parties, as well as the duration of the marriage and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children of the parties in the supported party's custody. § 42-365, R. S. Supp., 1972.

This court has held that alimony awards payable in the form of an annuity for life or some indefinite period of time are not generally desirable although they may be proper in some circumstances. Card v. Card, 174 Neb. 124, 116 N. W. 2d 21; Metschke v. Metschke, 146 Neb. 461, 20 N. W. 2d 238.

In the case at hand, both parties are young, both are in good health, and both are or can be self-supporting. The marriage having been dissolved, it does not appear desirable to have their lives bound together by financial ties which may continue for their lifetimes if the defendant does not remarry. On the other hand, the marriage did endure for about 9 years and during that time the defendant made substantial contributions to the future economic well-being of the parties. The parties at the time of the separation had just reached the point where they would begin to reap some of the economic rewards of their efforts. The defendant would have liked to have had the marriage continue. These considerations lead us to believe that the alimony to be awarded the defendant should be substantial, but in the light of the ages of the parties and the capacity of the defendant to ultimately be self-supporting in a teaching or secretarial capacity, we think the award should be payable over a relatively shorter period of time than that made by the trial court. We determine, therefore, that the defendant should receive monthly alimony for a shorter period of time, but the present value of the award should be an amount approximately equivalent to that made by the trial court. The alimony award is

thus modified as follows: The defendant shall receive monthly alimony in the amount of $833.33 for a period of 10 years and 2 months, beginning with the filing of our mandate in the trial court, but such alimony shall terminate upon the death of either party or the remarriage of the defendant.

The award of temporary support of the defendant of $750 a month during the pendency of this appeal was not an abuse of discretion by the trial court and is affirmed.

The defendant is awarded an attorney's fee of $1,250 for the services of her attorney in this court.

AFFIRMED AS MODIFIED.

WHITE, C. J., dissenting.

I respectfully dissent. I cannot come to any other conclusion but that the alimony award in this case is grossly excessive and is not harmonious with the present statute creating the "no fault" provisions for the dissolution of a marriage. As the majority opinion points out, both parties are young (around 30 years of age), both are in good health, and both are, or can be, self-supporting. They have no children, and they are both educated, sophisticated, and cultured people. The award of over $100,000 in alimony, in my opinion, is unconscionable. It seems to me that the award in this case is a sub silentio approval of applying the harsh and punitive considerations present in the traditional picture of a lifetime marriage, with family and children, in many of the cases cited by the court prior to the enactment of the "no fault" divorce law. Even under our old law, there is no evidence to support, on the grounds of fault, an award of the income of earnings of the husband present in this case. It is true that the defendant in this case aided and furnished financial support to the plaintiff during the period of his education. She should be amply compensated for whatever investment and time she contributed in this area. But the new law specifically eliminates the element of fault

in the enactment of the considerations present in an award of alimony. It completely disregards the new factor placed in the statute, "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." There are no children to interfere with her gainful employment. Despite that fact, this court awards alimony of over $100,000 to the plaintiff.

This issue presented here is very important, because it is abundantly apparent that the court, despite the statute, has determined to follow the traditional philosophy of fault. And if this be so, the plaintiff is entitled to a hearing in which this issue is explained, and if that should happen, we are back where we started from and in violation of the whole philosophy of the new statute.

My views on this matter are supported almost conclusively by the decisions and jurisdictions interpreted almost identically in the following statutes. It should be noted that our statutes were drawn and follow the "no fault" divorce statute of California.

There is no Nebraska case law on this issue under the new statute, and there is no pertinent legislative history. Therefore, other "no fault" divorce jurisdictions will be examined. The jurisdictions examined are only those which have judicial decisions interpreting a no fault divorce statute; these are Florida, Oregon, Iowa, and California.

FLORIDA: F.S.A. § 61.08 (West Pocket Part, 1972) provides: "(1) In a proceeding for dissolution of marriage, the court may grant alimony to either party * * *. The court may consider the adultery of a spouse and the circumstances thereof in determining whether alimony shall be awarded to such spouse and the amount of alimony, if any, to be awarded to such spouse.

"(2) In determining a proper award of alimony, the

court may consider any factor necessary to do equity and justice between the parties."

There appears to be only one Florida appellate decision in point. In Lefler v. Lefler, 264 So. 2d 112 (Dist. Ct. of Appeal, 4th Dist., 1972), the husband received as lump sum alimony his wife's interest in certain real and personal property. The wife attacked the alimony provisions. The court stated: Alimony's "* * * basic nature and purpose remains the same as heretofore, i.e., to provide nourishment, sustenance and the necessities of life to a former spouse who has neither the resources nor ability to be self-sustaining." Therefore, to receive alimony under Florida's no fault divorce act, the party must show need and the ability of the other party to pay. Since the husband in Lefler could not show that he had need for the alimony, the judgment granting him such alimony was reversed. Inferentially, at least, it seems that except for the statutory adultery provision, Florida courts apply a two-part test of need and ability to determine alimony and ignore misconduct or fault.

OREGON: O.R.S. § 107.036 (Supp., 1971) provides:

"(1) The doctrines of fault and of in pari delicto are abolished in suits for * * * the dissolution of a marriage.

"(2) The court shall not receive evidence of specific acts of misconduct, excepting where child custody is an issue and such evidence is relevant to that issue, or excepting at a hearing when the court finds such evidence necessary to provide irreconcilable differences."

O.R.S. § 107.105 (Supp., 1971) provides in part:

"(c) For the support of a party, in gross or in installments, or both, such amount of money for such period of time as it may be just and equitable for the other party to contribute. * * * In making such support order, the court shall consider the following matters:

"(A) The duration of the marriage;

"(B) The ages of the parties;
"(C) Their health and conditions;
"(D) Their work experience and earning capacities;
"(E) Their financial conditions, resources and property rights;
"(F) The provisions of the decree relating to custody of the minor children of the parties;
"(G) The ages, health and dependency conditions of the children of the parties, or either of them; and
"(H) Such other matters as the court shall deem relevant."

In Minovsky v. Minovsky, 500 P. 2d 1234 (Ct. of Appeals, Dept. 1, Ore., 1972), the trial court allowed testimony that the wife had been the only real source of support of the parties' daughter for a number of years. Husband also contended that the trial court, in allowing the wife $7,500 in lump sum alimony, considered other aspects of fault. The husband appealed the alimony award, contending that fault should not have been allowed into evidence under the Oregon no fault divorce act.

The appellate court affirmed the trial court's award of alimony to the wife: "It is justified in view of the parties' disparate earning abilities and financial conditions, plus the quite unusual circumstance that plaintiff married and brought to this country a wife unprepared by training, or even knowledge of the language, to financially fend for herself. To arrive at this conclusion, a court need not consider at all the previous marriage and the parties' relative participation in the upbringing of their daughter." Although the trial court may have considered fault, the appellate court felt that the decision could have been reached considering just the factors enumerated in the statute. Therefore, the trial court had reached a permissible result by perhaps examining impermissible factors. It seems clear that if the fault or guilt of either party had been the *only* reason for the trial court to have granted alimony, the appellate

court would not have allowed the decision to stand.

IOWA: I.C.A. § 598.21 (Pocket Part, 1972) provides: "When a dissolution of marriage is decreed, the court may make such order in relation to the children, property, parties, and the maintenance of the parties as shall be justified."

In a series of cases construing this provision, the Iowa Supreme Court arrived at this conclusion: "* * * (W)e determined from the legislative history of chapter 1266 that the intent and purpose of the revised statute was to eliminate the fault concept as a standard for granting dissolution of the marital relationship and held that not only the 'guilty party' concept must be eliminated as a factor but evidence of the conduct of the parties insofar as it tends to place fault for the marriage breakdown on either spouse must also be rejected as a factor in awarding property settlement or an allowance of alimony or support money." In re Marriage of Tjaden, 199 N. W. 2d 475 (Iowa, 1972), referring to In re Marriage of Williams, 199 N. W. 2d 339 (Iowa, 1972). See, also, In re Marriage of Harrington, 199 N. W. 2d 351 (Iowa, 1972). After examining legislative history and other sources, the Iowa court felt that the overriding purpose of the no fault divorce act was to remove all considerations of fault from the entire divorce proceeding. "In fact, we find no dissent in the sources examined from the proposition that fault is not a factor to be considered in awarding property settlement or an allowance of alimony under the dissolution acts." In re Marriage of Williams, *supra*.

CALIFORNIA: Cal. Civil Code, § 4509, provides: "In any pleadings or proceedings for legal separation or dissolution of marriage under this part, * * * evidence of specific acts of misconduct shall be improper and inadmissible, except where child custody is in issue and such evidence is relevant to that issue, or at the hearing where it is determined by the court to be necessary to establish the existence of irreconcilable differences."

Cal. Civil Code, § 4801, provides: "(a) In any judgment decreeing the dissolution of a marriage or a legal separation of the parties, the court may order a party to pay for the support of the other party any amount, and for such period of time, as the court may deem just and reasonable having regard for the circumstances of the respective parties, including the duration of the marriage, and the ability of the supported spouse to engage in gainful employment without interfering with the interests of the children of the parties in the custody of such spouse."

In re Marriage of Rosan, 24 Cal. App. 3d 885, 101 Cal. Rptr. 295 (4th Dist., Div. Two, 1972), appears to be a leading case interpreting the new California statute. In determining whether a wife's alimony award was sufficient, the court noted that: "Under the preexisting law an award of spousal support rested in the judicial discretion of the trial court upon consideration of the circumstances of the parties, but one of the circumstances to be considered was the comparative marital fault of the parties." The court concluded that "the change effected by Civil Code, section 4801 was the elimination of the consideration of the comparative marital fault of the parties and the 'concept of granting support to the "innocent" or against the "guilty."' " Id. Therefore, California also appears to be among the jurisdictions which have eliminated fault or misconduct as a consideration in the granting of alimony.

The four jurisdictions surveyed all appear to disregard fault as a factor in the awarding of alimony. It is contended that "the alimony section is but a part of a total, new scheme of divorce law by which traditional conceptions of marital relationship are undergoing substantial changes, and a court should view the alimony proceeding in this new context." 34 U. Pitt. L. Rev. 493 (1972). The new context for divorce law under no fault is best summarized in this statement: "When a personal relationship with another under the institution

of marriage has deteriorated to the point that the parties can no longer live together and provide our society with the sort of stable socio-economic unit on which this country so depends, it is time to call a spade a spade and dissolve it without acrimony, moral judgments or benedictions." Henderson, Practice and Problems Under Nebraska's New Divorce Laws, 52 Neb. L. Rev. 1 at p. 23 (1972). Viewed from this perspective, a trial court should consider two broad factors in determining alimony: Social surroundings and the ability to help oneself. 34 U. Pitt. L. Rev. at 498. Social surroundings includes the length of the marriage and present health and age. The ability to help oneself includes amount of assets, ability to obtain employment, and the size of the income of the supporting spouse. Id. Consideration of these factors would provide sufficient alimony and would also "* * * destroy the state of secured indolence known as the 'alimony drone' by denying alimony to one who is able to be self-supporting." Id.

In conclusion, the thrust of Nebraska's new divorce law is that all divorce proceedings should be conducted without reference to fault. To allow references to fault or misconduct into evidence under the guise of setting alimony is a mere perversion of the Legislature's intent. Alimony "* * * should not be allowed as a matter of sympathy to the wife or as a penalty imposed for the misconduct of the husband." Prosser v. Prosser, 156 Neb. 629, 57 N. W. 2d 173 (1953) (Dictum).

The foundation of the court's decision is clearly a response and rejection of the fundamental philosophy of the new statute. I think this defendant should be liberally awarded and paid for the monetary investment that she has made to the plaintiff's education. I do not believe that she acquired over a $100,000 interest in her husband's earnings in the future.

McCOWN and NEWTON, JJ., join in this dissent.

STATE OF NEBRASKA, APPELLEE, V. HORACE MYLES, APPELLANT.

210 N. W. 2d 927

Filed October 5, 1973. No. 38837.

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

Frank B. Morrison, Sr., and Bennett G. Hornstein, for appellant.

Clarence A. H. Meyer, Attorney General, and James J. Duggan, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, McCOWN, NEWTON, and CLINTON, JJ.

NEWTON, J.

On trial to a jury, defendant was convicted of unlawfully entering a bank and of shooting with intent to kill, wound, or maim. The only assignment of error challenges the sufficiency of the evidence to sustain the verdict.

The record discloses the uncontradicted identification of defendant as a participant by two eyewitnesses. The evidence is sufficient. See Rule 20.

The judgment of the District Court is affirmed.

AFFIRMED.

CLINTON, J., concurs in the result.

STATE OF NEBRASKA, APPELLEE, V. ANTHONY BAZIS, ALSO KNOWN AS BUTCH BAZIS, APPELLANT.
210 N. W. 2d 919

Filed October 5, 1973. No. 38885.

1. **Criminal Law: Searches and Seizures: Affidavits.** In determining the sufficiency of an affidavit for a search warrant, only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause.
2. **Criminal Law: Searches and Seizures.** In judging probable cause, magistrates are not to be confined by niggardly limitations or by restrictions on the use of their common sense and their determination is entitled to reasonable deference by reviewing courts.
3. **Criminal Law: Arraignment: Time.** Delay of arraignment over the weekend of one arrested on a Sunday is not unreasonable.
4. **Criminal Law: Trial: Confessions.** A statement made by a defendant, although inadmissible, due to a failure to comply with Miranda, during the State's case-in-chief, is admissible for impeachment purposes.
5. **Criminal Law: Witnesses: Constitutional Law.** In order to deny a claim to the privilege against self-incrimination by a witness, it must be perfectly clear to the judge from a careful consideration of all the circumstances in the case that the witness is mistaken and that the answer or answers cannot possibly have a tendency to incriminate.
6. **Criminal Law: Sentences.** Where the punishment of an offense created by statute is left to the discretion of the trial court within prescribed limits, the sentence imposed within those limits will not be disturbed on appeal unless there appears to be an abuse of discretion.

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

Paul E. Watts, for appellant.

Clarence A. H. Meyer, Attorney General, and James J. Duggan, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

NEWTON, J.

Defendant was convicted of possessing amphetamines

with an intent to deliver or distribute them. He assigns as error the failure to suppress evidence of the amphetamines seized under a search warrant; delay of arraignment over the weekend and the admission of a statement of defendant made prior to arraignment; the sustaining of a witness' claim to privilege against self-incrimination; and the failure to grant probation.

The affidavit for a warrant to search defendant's premises reflects surveillance by officers in response to complaints received and information obtained from informants of drug trafficking on the premises. Numerous parties were observed entering and shortly leaving and three had been recently arrested for possession of controlled substances. An informant, previously found to be reliable, stated he had been in the defendant's residence within the past month and observed what he believed to be amphetamines. Another reliable informant stated he had purchased drugs in the residence "in the last six months," and made such purchases directly from the defendant. Another reliable informant reported illegal drug activity on a large scale was carried on by defendant.

In determining the sufficiency of an affidavit for a search warrant, only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause. In judging probable cause, magistrates are not to be confined by niggardly limitations or by restrictions on the use of their common sense and their determination is entitled to reasonable deference by reviewing courts. See Spinelli v. United States, 393 U. S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637. Taken as a whole the affidavit meets necessary requirements and the drugs seized were properly admitted in evidence.

Delay of arraignment over the weekend of one arrested on a Sunday is not unreasonable. See State v. O'Kelly, 175 Neb. 798, 124 N. W. 2d 211. The statement volunteered by defendant before being given the Miranda warnings to the effect that one person was "clean" was

properly admitted. A statement made by a defendant, although inadmissible, due to a failure to comply with Miranda, during the State's case-in-chief, is admissible for impeachment purposes. See Harris v. New York, 401 U. S. 222, 91 S. Ct. 643, 28 L. Ed. 2d 1. Furthermore, neither this question nor that of the sufficiency of the affidavit for a search warrant were raised in the motion for a new trial. The assignment is without merit.

A witness called by the defendant answered one question indicating knowledge of one sale of amphetamines and to all other questions pleaded the Fifth Amendment. The one question was answered as the result of an apparent misunderstanding of a ruling by the trial court. "In order to deny a claim to the privilege against self-incrimination by a witness, it must be perfectly clear to the judge from a careful consideration of all of the circumstances in the case that the witness is mistaken and that the answer or answers cannot possibly have a tendency to incriminate." State v. Holloway, 187 Neb. 1, 187 N. W. 2d 85. The court properly upheld the witness' privilege against self-incrimination.

The defendant's insistence on probation is not well founded. "Where the punishment of an offense created by statute is left to the discretion of the trial court within prescribed limits, the sentence imposed within those limits will not be disturbed on appeal unless there appears to be an abuse of discretion." State v. Kelly, 190 Neb. 41, 205 N. W. 2d 646. The defendant is a former inmate of the Kearney Boy's Training School, has a lengthy traffic and misdemeanor record, and was in possession of a sufficiently large quantity of drugs to give credence to his reputation as a "pusher." There was no abuse of discretion.

The judgment of the District Court is affirmed.

AFFIRMED.

MAYME CHAPPELEAR, APPELLEE AND CROSS-APPELLANT, V. GRANGE & FARMERS INSURANCE CO. OF BLAIR, NEBRASKA, APPELLANT AND CROSS-APPELLEE.

210 N. W. 2d 921

Filed October 5, 1973. No. 38909.

1. **Insurance: Contracts.** An insurance policy is a contract which requires an offer and acceptance to be effective.
2. **Insurance: Estoppel.** The essential elements of equitable estoppel are: As to party estopped, (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts; as to the other party, (4) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice.
3. **Insurance: Estoppel: Fraud.** A party may not properly base a claim of estoppel in his favor on his own wrongful act or dereliction of duty, or fraud committed or participated in by him, or on acts or omissions induced by his own conduct, concealment, or representations.
4. **Insurance: Estoppel.** The essential element of estoppel is a representation relied upon by the party claiming the benefit of the estoppel, which induced him to act, or refrain from acting to his prejudice.

Appeal from the District Court for Washington County: ROBERT L. FLORY, Judge. Reversed and dismissed.

O'Hanlon & Martin, for appellant.

Neil W. Schilke of Sidner, Svoboda, Schilke & Wiseman, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

NEWTON, J.

This is an action to recover windstorm damage to farm buildings from the defendant insurance company. Verdict and judgment were for plaintiff. We reverse that judgment.

There are numerous assignments of error, only two of which need be considered, namely: Failure to sustain defendant's motion for a directed verdict and insufficiency of the evidence to sustain the verdict.

The defendant Grange and Farmers Insurance Company is a local assessment company writing fire and wind insurance. For a number of years plaintiff and her now deceased husband had carried insurance with defendant. The policies were issued for 5-year periods. In 1962 their policy expired and plaintiff took out insurance with another company. On December 11, 1964, she took out another policy with defendant which expired December 11, 1969. The policy provides: "(a) At the time of making application for insurance to the Company, the applicant shall pay a cash percentage of $2.00 for the first $1,000.00 of insurance applied for and 75c for each additional $1,000.00, or fraction thereof, of such insurance." This new policy charge was paid when the policy was delivered. Annual assessments were made on November 1st of each year to cover the preceding year's losses. Checks were produced showing payment of assessments for each of the years 1965 through 1969. Notwithstanding the above-quoted policy provision, plaintiff now contends the payment made when she obtained the policy was the premium for the year 1965 paid in advance and that each of her other payments were likewise made in advance for the ensuing year; this, notwithstanding the undisputed evidence that assessments were made in November of each year for the *preceding year*. On this basis she insists the payment made by her on December 13, 1969, was for a new policy. The evidence is clear that she never received a new policy and that none was ever issued by defend-

ant as no application for it was submitted. An agent of defendant did deliver to plaintiff's son an application form. The son and his wife testified that on its face it resembled the former policy in that it referred to buildings insured and amounts of insurance. Neither would state it was a policy rather than an application and the instrument was not produced. Representatives of defendant denied that a policy had been issued. There is a total failure of proof to sustain plaintiff's contention that she is entitled to recover on a new policy issued in December 1969. "An insurance policy is a contract which requires an offer and acceptance to be effective." Siewerdsen v. United States F. & G. Co., 184 Neb. 870, 173 N. W. 2d 27.

Plaintiff contends that when she forwarded her December 13, 1969, check she asked for a new policy which she never received although the check was cashed. On this basis she alleges she was led to believe that a policy was issued and that defendant is estopped to deny it. She concedes she did not hear from defendant and states, although this is denied by defendant, that she again wrote 2 or 3 months later inquiring about the policy. Again she concedes there was no answer. The policy, as she knew, did not provide for an automatic renewal. In an effort to bolster her contention that the December 13, 1969, check was a payment in advance on a new policy, plaintiff testified that the notations "Dec 11, 67 to Dec 1968" on the May 13, 1967, check, "Dec. 11, 1968-1969" on the April 5, 1969, check, and "New Policy" on the December 13, 1969, check were affixed at the time she forwarded the checks. Bank microfilms of the checks conclusively disproved this. It will be noted that if plaintiff did ask for a new policy she failed to specify its terms relating to property to be insured, amount of insurance, etc.; also, that she was mistaken in her assumption that the check she forwarded was an advance premium rather than payment for an assessment past due. She does not contend that she ever

executed and forwarded an application for a new policy on the company's form and she knew the old policy had expired.

The following rules appear to be pertinent: "The essential elements of equitable estoppel are: As to party estopped, (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts; as to the other party, (4) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice." Pester v. American Family Mut. Ins. Co., 186 Neb. 793, 186 N. W. 2d 711.

"A party may not properly base a claim of estoppel in his favor on his own wrongful act or dereliction of duty, or fraud committed or participated in by him, or on acts or omissions induced by his own conduct, concealment, or representations." Sanitary & Improvement Dist. v. City of Ralston, 182 Neb. 63, 152 N. W. 2d 111.

"The essential element of estoppel is a representation relied upon by the party claiming the benefit of the estoppel, which induced him to act, or refrain from acting to his prejudice." Willan v. Farrar, 176 Neb. 1, 124 N. W. 2d 699.

There is nothing in this record to indicate that defendant did anything to mislead plaintiff or to sustain an estoppel. Plaintiff's sole contentions were that a new policy had been issued or that defendant was estopped to deny that this had been done. In our view of

the record, the evidence is not sufficient to sustain the verdict and the motion for a directed verdict should have been sustained.

The judgment of the District Court is reversed and the cause dismissed.

REVERSED AND DISMISSED.

STATE OF NEBRASKA, APPELLEE, V. DEAN L. DONOHO, APPELLANT.
210 N. W. 2d 850

Filed October 5, 1973. No. 38952.

Criminal Law: Limitations of Actions: Time. The filing of a felony complaint before a magistrate charging embezzlement and the issuance of an arrest warrant within 3 years after the date of the offense tolls the statute of limitations. § 29-110, R. S. Supp., 1972.

Appeal from the District Court for Cherry County: JOHN H. KUNS, Judge. Affirmed.

Charles A. Fisher, for appellant.

Clarence A. H. Meyer, Attorney General, and Melvin K. Kammerlohr, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

BOSLAUGH, J.

The defendant was convicted of embezzling $7,895.12 while acting as guardian for Harold Leonard Grosse. The information which was filed April 28, 1969, alleged the embezzlement occurred between March 1, 1966, and October 17, 1967. The defendant contends the judgment should be reversed because the information charged an offense that occurred in part more than 3 years before the date on which it was filed.

Under section 29-110, R. S. Supp., 1972, as amended in 1965, filing of a felony complaint before a magistrate

and the issuance of an arrest warrant within 3 years after the date of the offense tolls the statute of limitations. The record here shows the complaint was filed in the county court on or about February 20, 1969, and a warrant was issued on that date. This was sufficient to toll the statute, and the assignment of error is without merit.

The defendant also complains that one of the prosecutors in his closing argument referred to the fact that the defendant would "not have the right to get up and rebut what I am saying now." The remark had reference to the fact that the State was making the closing argument. It did not refer to the fact that the defendant, who had appeared pro se, had not testified.

The defendant was sentenced to imprisonment for 1 to 4 years. There is nothing in the record that indicates the sentence was excessive or an abuse of discretion by the trial court.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT RICHARD BAYLISS, APPELLANT.

210 N. W. 2d 851

Filed October 5, 1973. No. 38961.

1. **Criminal Law: Homicide: Evidence.** To sustain a conviction for manslaughter, the evidence must be sufficient to justify the finding of a causal connection between the unlawful act and the death of the victim.
2. **Criminal Law: Sentences.** Where the punishment of an offense created by statute is left to the discretion of a court, to be exercised within certain prescribed limits, a sentence imposed within such limits will not be disturbed on appeal unless there appears to be an abuse of discretion.

Appeal from the District Court for Sheridan County: ROBERT R. MORAN, Judge. Affirmed.

Lawrence E. Mitchell, for appellant.

Clarence A. H. Meyer, Attorney General, and Betsy G. Berger, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

CLINTON, J.

The defendant, Robert Richard Bayliss, was charged with the false imprisonment and manslaughter of Raymond Yellow Thunder. He was found guilty by a jury on both counts, sentenced to a term of 4 years to the Division of Corrections of the State of Nebraska for the manslaughter conviction, and fined for the false imprisonment. Errors assigned and discussed on appeal, see Rule 8a 2 (3), relate solely to the manslaughter conviction and are: (1) That the evidence was insufficient to establish that the acts of the defendant and of those with whom he acted were the cause of Yellow Thunder's death; and (2) that the sentence is excessive. We affirm.

The events involved in this case are the same as those in State v. Leslie D. Hare and State v. Melvin P. Hare, *ante* p. 339, 208 N. W. 2d 264, where this court affirmed the convictions in those cases. The evidence in the trial of the Hare brothers and that in this is substantially the same with the one exception. That exception is that Ghost Dog, who was a witness in the Hare trial, did not testify in the present case. Because the evidence in the two cases is substantially the same, we will not set forth in detail all the background or evidence except as it bears upon the determination of the errors assigned in this case.

The evidence, which is not contradicted, shows that the defendant and the Hare brothers acting in concert committed an assault and battery upon Yellow Thunder on the night of February 12, 1972. Yellow Thunder was found dead on February 20, 1972, in the cab of a motor

vehicle on a used car lot. An autopsy indicated that the cause of death was a subdural hemorrhage. The battery resulted in wounds and bruises, among others, upon the right side of the head of Yellow Thunder. Following the assault and his release from imprisonment in the trunk of the Bayliss automobile, Yellow Thunder sought and obtained shelter for the remainder of the night (the early morning of February 13th) in the Gordon, Nebraska, city jail. Officer Paul of the Gordon police department testified that when the victim appeared at the jail he had a fresh cut near the right eye and other cuts, scratches, and bruises or dirt along the side of his face and on his forehead. Paul inquired of Yellow Thunder if he was the one who had earlier been thrown into the Legion Club. Yellow Thunder responded that he was and that four white boys had done it but he did not know who they were. Paul next saw Yellow Thunder's body when it was found on February 20th. At that time he observed the same marks upon the face of Yellow Thunder that he had observed on February 13th. Photographs of the body taken at the time of its discovery were introduced into evidence.

The autopsy was performed on February 21st by Frank W. O. Brown, M.D., a specialist in pathology. He testified that his opinion was that death had occurred several days earlier. He described the cuts and bruises on the face and body of the deceased and indicated: "One in particular, of which went through the entire thickness of the skin and appeared to be more significant and more important than the others."

The examination of the brain of the victim disclosed a subdural hematoma, or hemorrhage, beneath the outer of the three membranes of the brain. The doctor testified that the mechanical pressure of the hemorrhage ultimately caused unconsciousness and later death. He testified that the bleeding was the result of injury, and that a contributing factor to the death was bronchial

pneumonia. He stated that the subdural hematoma developed from slow bleeding over a period of days. It did not cause immediate disability. It eventually produced a coma and during that period the bronchial pneumonia developed and this is a usual concomitant of the coma. The hemorrhage was in the right side of the head and probably was caused by the trauma which inflicted the more significant of the wounds which the doctor observed. The doctor was asked to give his opinion as to the apparent age of the wounds. He responded: "Well, they appeared to all be about of the same age. There was little evidence of inflammatory reaction about them, so that I would suggest that they occurred within - well, a reasonable time before his death; certainly a matter of a couple of days or something of that sort."

The defendant's argument and contention that the evidence does not permit a finding that the acts in which the defendant participated caused Yellow Thunder's death is founded primarily upon the doctor's testimony concerning the apparent age of the wounds and the discrepancy between that opinion and the time of the actual assault. The identity of the wounds caused by the assault with those observed by the doctor is sufficiently established by the testimony of Officer Paul. The jury was not required to accept the opinion evidence of the doctor as being absolutely accurate.

The assault upon Yellow Thunder took place when one of the Hare brothers forcibly removed the victim from the cab of a motor vehicle in which he was apparently sleeping. The evidence shows that this was on the same used car lot at which his body later was found. The evidence permits the conclusion that some time after Yellow Thunder left the jail on February 13th he returned to the used car lot, again sought shelter in a motor vehicle, became unconscious, and later died of the injuries inflicted in the assault and battery upon him. The evidence is clearly sufficient to justify a

finding by a jury of a causal connection between the unlawful act of the defendant and the death of the victim. Morris v. State, 109 Neb. 412, 191 N. W. 717; State v. Hare, *supra*. The first assignment of error is not well taken.

We now examine the participation of the defendant in the crime and his previous history and activities until the time of sentencing to determine whether the sentence of 4 years' imprisonment is excessive.

The evidence shows without contradiction that Bayliss was the owner and operator of the automobile which was used by the participants in the various assaults upon Yellow Thunder. Bayliss readily followed the directions of Leslie Hare to stop the car enabling Hare to commit a minor assault and battery upon the victim upon the street previous in time to the one where the injuries which caused the death were inflicted. The defendant then drove the automobile to the used car lot where a short time later the main battery was committed. He observed Leslie Hare "stomping" Yellow Thunder while the latter lay on the ground. Then while the victim still lay upon the ground, Bayliss raised the victim's head with one hand and struck him with the other two or three times saying, " 'Come on, Butch. This is a lot of fun.' " Later he opened the trunk of his car to permit Yellow Thunder's imprisonment, locked it, and unlocked it later to permit Yellow Thunder to be removed for the purpose of forcing the latter, while he was partially unclothed, into the Legion Club where a dance was in progress. He repeated the process of locking and unlocking the trunk when Yellow Thunder was imprisoned a second time later on the same night and when he was returned to the used car lot after the participants had finished with the victim.

The defendant has no prior felony conviction, but two misdemeanor convictions of offenses not involving violence. He is 26 years old and a competent mechanic with a good work history. He has family responsibilities

which he seems to fulfill adequately. However, there seem to be no factors substantially excusing the depravity of the defendant's conduct on February 12 or 13, 1972. The sentence authorized by statute for manslaughter is 1 to 10 years. § 28-403, R. R. S. 1943. The 4-year term imposed is well within those limits. We have frequently said that where the punishment of an offense created by statute is left to the discretion of a court, to be exercised within certain prescribed limits, a sentence imposed within such limits will not be disturbed on appeal unless there appears to be an abuse of discretion. Pribyl v. State, 165 Neb. 691, 87 N. W. 2d 201. We are unable to say that the trial court abused its discretion.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM EARL MICHIGAUD, SOMETIMES KNOWN AS BOB WESTON, APPELLANT.
210 N. W. 2d 926

Filed October 5, 1973. No. 38974.

Criminal Law: Sentences. Where the punishment of an offense created by statute is left to the discretion of the trial court within prescribed limits, the sentence imposed within those limits will not be disturbed on appeal unless there appears to be an abuse of discretion.

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

Leo M. Williams for appellant.

Clarence A. H. Meyer, Attorney General, and Chauncey C. Sheldon, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

NEWTON, J.

Defendant received an indeterminate sentence of not

less than 3 nor more than 5 years for forgery. His sole assignment of error is that the sentence is excessive.

Defendant was 37 years of age when sentenced. He has been previously convicted of six felonies including burglary, joy riding, escape from custody, and forgery, and was on parole from the last conviction in Michigan when this offense was committed. "Where the punishment of an offense created by statute is left to the discretion of the trial court within prescribed limits, the sentence imposed within those limits will not be disturbed on appeal unless there appears to be an abuse of discretion." State v. Kelly, *ante* p. 41, 205 N. W. 2d 646. There was no abuse of discretion.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ELMER WELTON, JR., APPELLANT.

210 N. W. 2d 925

Filed October 5, 1973. No. 39043.

1. **Criminal Law: Sentences.** In passing sentence, it is proper for the trial court to take into consideration other offenses that have been committed by the accused.
2. ———. ———. A sentence within statutory limits will not be disturbed on appeal in the absence of an abuse of discretion.

Appeal from the District Court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed.

T. Clement Gaughan and Richard L. Goos, for appellant.

Clarence A. H. Meyer, Attorney General, and Harold Mosher, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SPENCER, J.

Defendant, Elmer Welton, Jr., appeals from his conviction on the felony offense of receiving stolen property. The only assignment of error is that the sentence received of not less than 18 months nor more than 2 years in the Penal and Correctional Complex is excessive. We affirm.

Defendant urges this court to consider the fact that he had no felony convictions from 1964 to 1973; and that this indicates he was responsive to rehabilitative programs offered to him during his prior confinement in the Penal Complex. Defendant overlooks the fact that since his previous felony conviction he has been in difficulty with the authorities for misdemeanors and that he was serving county jail time on another offense at the time he was sentenced herein. Furthermore, the defendant admitted that he gave a .38 caliber revolver and $300 for the two snowmobiles and a trailer which he knew had been stolen.

The penalty for the offense on which defendant pleaded nolo contendere was not more than 7 years nor less than 1 year. There was no abuse of discretion herein. On defendant's record, the sentence imposed was on the lenient side for a previous offender. As we said in State v. Melvin (1972), 187 Neb. 797, 194 N. W. 2d 178: "In passing sentence, it is proper for the trial court to take into consideration other offenses that have been committed by the accused.

"A sentence within statutory limits will not be disturbed in the absence of an abuse of discretion."

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES BUDDY DANIELS, APPELLANT.
211 N. W. 2d 127

Filed October 12, 1973. No. 38779.

1. **Statutes: Courts.** An obvious, inadvertent omission from a statute may be supplied judicially.
2. **Criminal Law: Guilty Plea: Trial.** In determining whether a factual basis for a plea of guilty exists, a court is not required to interrogate the defendant. Inquiry of the prosecutor or examination of the presentence report is an alternative.
3. ———: ———: ———. In the absence of a showing in a criminal prosecution that a withdrawal is necessary to correct a manifest injustice, a defendant may not withdraw his plea of guilty or nolo contendere as a matter of right once the plea has been accepted by the court.
4. ———: ———: ———. Before sentence in a criminal prosecution the court in its discretion may allow the defendant to withdraw his plea for any fair and just reason unless the prosecution has been substantially prejudiced by reliance upon the defendant's plea.

Appeal from the District Court for Douglas County: DONALD BRODKEY and JOHN C. BURKE, Judges. Reversed and remanded with directions.

Duane L. Nelson, for appellant.

Clarence A. H. Meyer, Attorney General, and Chauncey C. Sheldon, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SMITH, J.

On a criminal charge of unlawful possession of Robitussin A-C, a narcotic medicinal preparation, James Daniels was found guilty and placed on probation. Afterward he pleaded guilty to another charge of unlawful possession of Robitussin A-C and violation of the probation. The District Court sentenced him to imprisonment, and he appeals.

This opinion considers (1) sufficiency of the evidence

of the first offense, shown at Doc. 80, No. 91, (2) the inquiry by the court into the facts of the charge shown at Doc. 85, No. 369, and to which Daniels pleaded guilty, (3) the status of a plea bargain, and (4) the wisdom of review of the fact or duration of the sentence in Doc. 85, No. 369.

The court in the case at Doc. 80, No. 91, found Daniels guilty on the charge of unlawful possession on March 1, 1970, and placed him on probation for 2 years. The prosecution subsequently charged him with violation of probation and in the case at Doc. 85, No. 369, with possession of Robitussin A-C on July 20, 1972, in violation of section 28-4,125(3), R. S. Supp., 1972. The District Court sentenced Daniels to imprisonment for 2 years in each case, the sentences to run concurrently. The offense in the second case is punishable by (1) imprisonment for not less than 1 nor more than 2 years, (2) a fine of not more than $500, (3) imprisonment in county jail for a term of not more than 6 months, or (4) both such fine and imprisonment. § 28-4,125(3), R. S. Supp., 1972.

At the trial of the case at Doc. 80, No. 91, the parties stipulated the facts as follows. On March 1, 1970, Daniels with knowledge possessed 23 cases of Robitussin A-C, one case containing 8 16-ounce bottles and each of the other cases containing 24 4-ounce bottles. An ingredient of a fluid ounce of the Robitussin A-C was codeine phosphate in a quantity of less than one grain.

Some statutory provisions relating to the above alleged offense were repealed in 1971. See Laws 1971, L.B. 326, § 31. Under them it was unlawful for a person to possess any narcotic drug, except as authorized in the act. § 28-452, R. S. Supp., 1969. Except as otherwise specifically provided, the act did not apply to cases of administering, dispensing, or selling at retail any medicinal preparation that contained not more than one grain of codeine or any of its salts or derivatives in one fluid ounce. Conditions attached to the exemption were

limited to preparations administered, dispensed, or sold in good faith as a medicine. The provision did not refer to possession of a medicinal preparation, and it expressly left the kind and quantity unlimited upon compliance with the general provisions of the act. § 28-458, R. S. Supp., 1969. Exempted preparations were to be recorded. § 28-459, R. R. S. 1943. A provision prohibited a person from obtaining the exempt preparations by fraud or certain other means. § 28-467, R. R. S. 1943; State v. Goodwin, 181 Neb. 616, 150 N. W. 2d 135 (1967).

In the tangle of statutory provisions, the evidence is sufficient to bring Daniels within the literal language of former section 28-452, R. S. Supp., 1969, which prohibited possession except as authorized in the act. However, the omission from the exemption which did not include possession unrelated to acquisition by fraud or other means under section 28-467, R. R. S. 1943, was an obvious oversight. Cf. People v. Williams, 23 Ill. 2d 549, 179 N. E. 2d 639 (1962). We may and do supply this inadvertent omission, which is not subject to the requirement that "the burden of proof of any . . . exception . . . or exemption . . . " be on the defendant. Former § 28-468, R. R. S. 1943.

Under the stipulation of facts the conviction of Daniels in the case at Doc. 80, No. 91, was erroneous and that information should have been dismissed.

On the second topic, the inquiry by the court into the facts of possession of Robitussin A-C on July 20, 1972, in the case at Doc. 85, No. 369, was general. Daniels, defense counsel, and the prosecutor stated that the evidence was sufficient. Presence or absence of a presentence report prior to sentencing is not shown.

In determining whether a factual basis for a plea of guilty exists, a court is not required to interrogate the defendant. Inquiry of the prosecutor or examination of the presentence report is an alternative. State v. Leger, *ante* p. 352, 208 N. W. 2d 276 (1973) (Boslaugh, J., concurring); State v. Le Gear, 187 Neb. 763, 193 N.

W. 2d 763 (1972). The inquiry by the court in the case at Doc. 85, No. 369, was adequate.

The parties had entered into a plea bargain as follows: ". . . if . . . Daniels would plead to the violation of probation and plead to a felony charge, which arose out of an arrest on July 20, 1972, that a later arrest which occurred last week . . . around August 23 (1972) . . ., that the felony charge arising out of that latest arrest would be dismissed, so there are three charges involved and . . . Daniels would plead to the first two in time and that we would dismiss the third." The circumstances relating to the arrest on August 23 are not shown.

Daniels attacks the plea bargain, but we conclude that he cannot withdraw his plea as a matter of right. Daniels is, however, given leave to move the District Court to withdraw the plea. The applicable standard relating to withdrawal of a plea of guilty is as follows: In the absence of a showing that a withdrawal is necessary to correct a manifest injustice, a defendant may not withdraw his plea of guilty or nolo contendere as a matter of right once the plea of guilty or nolo contendere has been accepted by the court. Before sentence the court in its discretion may allow the defendant to withdraw his plea for any fair and just reason unless the prosecution has been substantially prejudiced by reliance upon the defendant's plea. Cf. State v. Turner, 186 Neb. 424, 183 N. W. 2d 763 (1971). See, ABA Standards Relating to Pleas of Guilty, Approved Draft, 1968, § 2.1, p. 52, and Proposed Revisions, 1968, § 2.1, p. 3. Under the circumstances, the District Court in the case at Doc. 85, No. 369, must at least hold a hearing for probation or resentence, provided that the plea of guilty is not withdrawn.

The judgment in the case at Doc. 80, No. 91, is reversed and the cause remanded with directions to dismiss the information. The judgment in the case at Doc. 85,

No. 369, is reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

GERALD D. JOHNSTON, APPELLANT, V. DEPARTMENT OF MOTOR VEHICLES, JOHN W. KISSACK, DIRECTOR, AND STATE OF NEBRASKA, APPELLEES.

212 N. W. 2d 342

Filed October 12, 1973. No. 38800.

1. **Motor Vehicles: Licenses: Compacts: Administrative Law.** In exercising the authority granted by the Driver License Compact, the Director of the Nebraska Department of Motor Vehicles has no power or authority other than that specifically conferred.
2. ———: ———: ———: ———. To be applicable in Nebraska, a report of a conviction in another jurisdiction must substantially comply with the provisions set out in Article II of the Driver License Compact.
3. **Motor Vehicles: Licenses: Compacts: Evidence: Administrative Law.** For a report of an out-of-state conviction to be effective in Nebraska under the provisions of the Driver License Compact, it must be authenticated in due form for admission in evidence in the courts of this State.

Appeal from the District Court for Lancaster County: WILLIAM C. HASTINGS, Judge. Reversed and remanded with directions.

Robert C. Vondrasek, for appellant.

Clarence A. H. Meyer, Attorney General, and James J. Duggan, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SPENCER, J.

Plaintiff appeals from the dismissal of his petition to set aside an order of suspension of his motor vehicle operator's license. We reverse.

Plaintiff, a resident of Sarpy county, received the order of suspension, dated July 20, 1972, from the Nebraska Department of Motor Vehicles. The order indicated the action was taken pursuant to the Driver License Compact, Appendix (T), Vol. 2A, R. R. S. 1943, on plaintiff's conviction in the municipal court of Purcell, Oklahoma, on May 4, 1972, of driving while intoxicated. Plaintiff was directed to surrender his operator's license immediately, and was informed that he would be required to furnish proof of financial responsibility to the department until May 4, 1975. Plaintiff filed this action in the District Court for Lancaster county to restrain the defendants from pursuing this course of action, requesting that the order of suspension be set aside, and the court stay enforcement of suspension pending a final determination of the matter.

The Department of Motor Vehicles acted on the strength of three documents in issuing the order. These are certified by the office supervisor of the Department of Motor Vehicles of the State of Nebraska as true and exact copies of the originals on file with the department. The first document is a photostatic copy of an Oklahoma Uniform Violations Complaint of the Purcell Police Department. This document, dated May 4, 1972, indicates that plaintiff was charged with "operating motor veh. under influence." It is signed by "Nelson," patrolman. Plaintiff's signature does not appear on the ticket on the line provided therefor. On the reverse side of the ticket the following appears: "Date 5/4/72 * * * Finding by Court Guilty * * * Fined $20.00 * * * Signature of Judge or Clerk W. L. Little (signed)." The second document is a copy of an order of revocation or suspension of the State of Oklahoma Department of Public Safety, addressed to the plaintiff. It is dated June 23, 1972, and notifies him that his privilege to operate a motor vehicle in the State of Oklahoma is suspended. It recites the reason as "conviction of driving while intoxicated on May 4, 1972, in the Municipal Court

of McClain County." The document purports to bear the stamped signature of the Commissioner of Public Safety. The third document is a receipt for $40, dated "5/4/72," showing that amount received from Gerald D. Johnston for "fine," signed by W. L. Little. None of this documentary evidence is authenticated in any manner by the Oklahoma authorities.

Plaintiff testified these documents were in error. He stated he was arrested in Purcell, Oklahoma, on the evening of May 4, 1972, for making an illegal U-turn. The arresting officer informed him that he would be incarcerated until the next morning, at which time he would have to appear before the judge and pay a fine. He spent the night in jail. The next morning he appeared before the judge, was informed he was charged with making an illegal U-turn, and pled guilty to the charge. He paid a fine of $40 and received a receipt for that amount, signed by W. L. Little. He then returned to Nebraska and gave the matter no further consideration until he received the order of suspension from the Nebraska Department of Motor Vehicles.

Plaintiff denied pleading guilty to any charge involving alcoholic liquor, and denied receiving the order of revocation or suspension from the Oklahoma Department of Public Safety. The discrepancy between a $20 fine assessed on the traffic ticket and the receipt showing $40 collected from the plaintiff is not explained. It would be unusual for an individual to be incarcerated overnight for making an illegal U-turn. However, plaintiff's evidence was not contradicted except by the documentary evidence referred to above. In passing, we observe the licensee cannot relitigate the question of his guilt in Nebraska. Here he raises only the question that the documents are erroneous.

Article II of the Driver License Compact provides as follows: "The licensing authority of a party state shall report each conviction of a person from another party state occurring within its jurisdiction to the licensing

authority of the home state of the licensee. Such report shall clearly identify the person convicted; describe the violation specifying the section of the statute, code, or ordinance violated; identify the court in which action was taken; indicate whether a plea of guilty or not guilty was entered, or the conviction was a result of the forfeiture of bail, bond or other security; and shall include any special findings made in connection therewith."

The documents submitted do not meet the criteria required. There are: (1) No specifications of the section of the statute, code, or ordinance which plaintiff allegedly violated; and (2) no indication of the plea which plaintiff presumably entered.

This appears to be a case of first impression in Nebraska, and the briefs do not disclose cases from other jurisdictions passing on the exact point. It is obvious that in exercising the authority granted by the Driver License Compact, the Director of the Nebraska Department of Motor Vehicles has no power or authority other than that specifically conferred. It is equally obvious that to be applicable herein, a report of a conviction from another jurisdiction must comply with the provisions set out in Article II of the Driver License Compact.

The question concerning the accuracy of the foreign documents is occasioned largely because there was no authenticated copy of the judgment entered by the Oklahoma court. Accordingly, we hold that for a report of an out-of-state conviction to be effective in Nebraska, under the provisions of the Driver License Compact, it must be authenticated in due form for admission in evidence in the courts of this state.

Judgment reversed and cause remanded with directions to dismiss the order of the Director of the Department of Motor Vehicles suspending plaintiff's motor vehicle operator's license.

REVERSED AND REMANDED WITH DIRECTIONS.

CAROL ANN KARRER, APPELLEE, V. JOHN W. KARRER, APPELLANT.
211 N. W. 2d 116

Filed October 12, 1973. No. 38917.

1. **Divorce: Alimony: Judgments.** An unqualified allowance of alimony in gross, whether payable immediately in full or periodically in installments, and whether intended solely as a property settlement or as an allowance for support, or both, is such a definite and final adjustment of mutual rights and obligations between husband and wife as to be capable of a present vesting and to constitute an absolute judgment.
2. **Statutes: Constitutional Law: Judgments.** A legislative act will not be permitted, even if an intent so to do is clear, to operate retrospectively where it will have the effect of invalidating or impairing rights which have vested by virtue of the judgment of a court.
3. **Statutes: Constitutional Law: Judgments: Divorce: Alimony: Time.** The provisions of section 42-365, R. S. Supp., 1972, authorizing the modification of alimony awards, do not apply to judgments entered previous to July 6, 1972, awarding alimony in gross.

Appeal from the District Court for Scotts Bluff County: TED R. FEIDLER, Judge. Affirmed.

Lovell, Raymond & Hippe, for appellant.

James R. Hancock, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

CLINTON, J.

This appeal arises upon an application to modify a divorce decree in respect to the provision for alimony. The pertinent provision of the decree was as follows: "The defendant shall pay through the Clerk of the District Court the sum of $350.00 per month for a period of 121 months as alimony. The sum of $350.00 shall be due and payable on June 1, 1971, and a like payment on the 1st day of each month thereafter until said alimony is paid in full." The decree was entered on May 24, 1971.

Two principal questions are presented by the appeal. Is the provision one for alimony in gross, which under the previous holdings of this court is not subject to modification? Even if it is an award of alimony in gross, is it nonetheless subject to modification under the provisions of sections 42-365 and 42-379(3), R. S. Supp., 1972, which became effective July 6, 1972?

The application for modification was filed on October 11, 1972. The plaintiff demurred and filed a motion for summary judgment. The court sustained the demurrer and the motion for summary judgment. The defendant appeals. We affirm.

We have previously held that under the provisions of section 42-324, R. R. S. 1943, repealed July 6, 1972, a decree for alimony not in gross may be modified as to installments not yet due. Young v. Young, 138 Neb. 294, 292 N. W. 923. On the other hand, we have held that an unqualified allowance of alimony in gross, whether payable immediately in full or periodically in installments, vests presently and constitutes an absolute judgment not subject to modification. Ziegenbein v. Damme, 138 Neb. 320, 292 N. W. 921.

This court has on several occasions been called upon to interpret decrees for the purpose of determining whether the alimony provisions were or were not in gross. To support his claim that the award in the present case is not one for alimony in gross, the appellant relies upon Ball v. Ball, 183 Neb. 216, 159 N. W. 2d 297; Shomaker v. Shomaker, 183 Neb. 609, 163 N. W. 2d 102; and Wolter v. Wolter, 183 Neb. 160, 158 N. W. 2d 616. All these cases involved alimony not in gross and are not applicable to the case at hand. In Ball v. Ball, *supra,* the decree specifically provided that the installment payments should cease on the death or remarriage of the plaintiff. In Shomaker v. Shomaker, *supra,* the installment payments, although for a definite total sum, were " 'for the full support and maintenance of plaintiff and the three children of the parties hereto,

including the education of the children through high school and college.'" The single award in that case was a combination of alimony and child support and we there held it was not alimony in gross and was always subject to modification under the principles applicable to child support payments. In Wolter v. Wolter, *supra,* the monthly alimony award was specifically limited "until further order of the court." It was not therefore an award of alimony in gross.

Insofar as a determination of the question of whether the award in the present case was in gross is concerned, our holding in Ziegenbein v. Damme, *supra,* is determinative. In that case the applicable principle was stated: "An unqualified allowance of alimony in gross, whether payable immediately in full or periodically in instalments, and whether intended solely as a property settlement or as an allowance for support, or both, is such a definite and final adjustment of mutual rights and obligations between husband and wife as to be capable of a present vesting and to constitute an absolute judgment." The language of the award in that case was: "'by way of temporary and permanent alimony there is awarded (to the wife) * * * the total sum of Three Thousand Dollars * * * payable * * * at the rate of Thirty-five Dollars per month * * * until said sum is paid in full.'" We there said: "If the judgment in this case was intended to be subject to a defeasance in case of the wife's remarriage, it was necessary, since a vested right was involved, to have provided for such defeasance in the decree."

It is true that the decree in the present case does not set forth the total award as a sum. But this is not necessary. It is self-evident that the sum, $42,350, is no more certain than $350 multiplied by 121.

The appellant contends that Ball v. Ball, *supra,* modified the principles of Ziegenbein v. Damme, *supra,* and calls attention to the court's analysis on page 220 of 183 Nebraska. However, the language of the analysis was

obviously not intended to impose a requirement that the decree set forth in express terms propositions numbered (2) and (3) of that analysis. In Ball v. Ball, *supra,* we expressly reaffirmed the principle of Ziegenbein v. Damme, *supra,* and said that it "clearly meets all the requirements of 'alimony in gross.'" The award in Ball v. Ball, *supra,* was held not to be an award in gross because it specifically provided for a termination of the payments upon death or remarriage.

We find in this case that the award was one of alimony in gross.

We next consider the question of whether or not, because of the provisions of sections 42-365 and 42-379(3), R. S. Supp., 1972, the court nonetheless had the power to modify the alimony provision of the decree. The language of these sections of the statutes is clear. Section 42-365, R. S. Supp., 1972, provides in part: "Except as to amounts accrued prior to the date of service of process on a petition to modify, orders for alimony may be modified or revoked for good cause shown, but where alimony is not allowed in the original decree dissolving a marriage, such decree may not be modified to award alimony. Except as otherwise agreed by the parties in writing or by order of the court, alimony orders shall terminate upon the death of either party or the remarriage of the recipient." Section 42-379(3), R. S. Supp., 1972, provides: "Sections 42-347 to 42-379 shall apply to all proceedings commenced after its effective date for the modification of a judgment or order entered prior to July 6, 1972." It is obvious that the Legislature intended to give the courts power to modify any alimony award even though entered prior to July 6, 1972. The question then becomes, to what extent can such authority be granted?

The power of the courts to vacate or modify their own judgments is limited. Sherman County v. Nichols, 65 Neb. 250, 91 N. W. 198; Harris v. State, 24 Neb. 803, 40 N. W. 317; 49 C. J. S., Judgments, § 228, p. 433, § 230,

p. 438, § 238, p. 451. The underlying basis of our holdings in Ziegenbein v. Damme, *supra,* and like cases is that rights have vested and are not therefore subject to modification. The Legislature is subject to similar limitations and the foundation is constitutional and lies in the due process clause of the Fourteenth Amendment to the Constitution of the United States. Statutes may not operate retroactively so as to impair vested rights. Travelers Ins. Co. v. Ohler, 119 Neb. 121, 227 N. W. 449. This is the almost universal rule. Hodges v. Snyder, 261 U. S. 600, 43 S. Ct. 435, 67 L. Ed. 819; 16A C. J. S., Constitutional Law, § 417, p. 99; 2 Sutherland, Statutory Construction (4th Ed.), Sands, § 41.06, p. 268. Private rights of parties which have vested by the judgment of a court cannot be taken away by subsequent legislation, but must be enforced by the courts regardless of such legislation. Hodges v. Snyder, *supra;* Travelers Ins. Co. v. Ohler, *supra.* We have many times clearly recognized this principle. Mooney v. Drainage District, 134 Neb. 192, 278 N. W. 368. See, also, 1 Black on Judgments (2d Ed.), § 298, p. 455; 1 Freeman on Judgments (5th Ed.), § 204, p. 395.

A legislative act will not be permitted, even if an intent so to do is clear, to operate retrospectively where it will have the effect of invalidating or impairing rights which have vested by virtue of the judgment of a court. Travelers Ins. Co. v. Ohler, *supra;* Hodges v. Snyder, *supra;* Mooney v. Drainage District, *supra.*

We accordingly hold that the provisions of section 42-365, R. S. Supp., 1972, do not apply to judgments awarding alimony in gross entered previous to July 6, 1972.

The appellant makes one further contention. It is claimed that the alimony judgment was entered in error and conflicts with the judge's notes on the trial docket and that therefore the appellant's motion to correct the judgment nunc pro tunc should have been granted. The docket entry was as follows: "In addition the Plain-

tiff is allowed alimony from the Defendant at the rate of $350.00 per month for a period of 121 months. First payment payable on June 1, 1971. Any delinquent payments are to draw interest at the legal rate." It is true that the journal entry contains the words "until paid in full," but we perceive no conflict between the journal and the docket entry. There was no other evidence supporting a claimed clerical error in journalizing the judgment. The same judge who entered the alimony judgment heard the application for modification. There was no error in denying the motion to correct the decree nunc pro tunc. § 25-1318, R. R. S. 1943; Midwest Laundry Equipment Corp. v. Berg, 174 Neb. 747, 119 N. W. 2d 509.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. FENLEY STOWELL, APPELLANT.
211 N. W. 2d 130

Filed October 12, 1973. No. 38921.

1. **Criminal Law: Searches and Seizures: Trial: Evidence.** A waiver of objections to evidence on the ground that it was seized in an unreasonable search occurs when no objection is made at least 10 days before trial and where the exceptions thereto have no application.
2. **Criminal Law: Property: Trial: Evidence.** Where the value of property is an element of the offense, the State must prove by competent evidence that the value of the property at the time and place of the alleged offense equalled or exceeded the requisite minimum value.

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

Russell S. Daub, for appellant.

Clarence A. H. Meyer, Attorney General, and Bernard L. Packett, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SMITH, J.

Fenley Stowell was convicted of the offense of receiving stolen property of the value of $100 or more. He appeals. His contentions are: (1) The court erred in overruling his motion to suppress evidence seized in an unreasonable search; and (2) the evidence was insufficient to support a finding of guilt, especially in respect to (a) the element of intent and (b) the value of the property in question.

A waiver of objections to evidence on the ground that it was seized in an unreasonable search occurs when no objection is made at least 10 days before trial and where the exceptions thereto have no application. See, § 29-822, R. R. S. 1943; State v. Smith, 184 Neb. 363, 167 N. W. 2d 568 (1969); cf. 3 Wright, Federal Practice and Procedure, § 673, pp. 111 to 115 (1969). Stowell pleaded not guilty on April 20, 1972. On October 25 the court set the case for trial November 6. The filing date of the motion to suppress was November 1. Stowell did not attempt to bring himself within any exceptions to delay in the filing of the motion. Under the statute Stowell waived his objections to the evidence, and denial of the motion was not erroneous.

A summary of the evidence relating to Stowell's contention respecting intent would serve no useful purpose. The testimony covered many acts and items of property, and it was highly conflicting. Apart from the last contention of Stowell, the evidence was sufficient to sustain a finding of guilt.

The last contention requires a summary of part of the evidence. The stolen property was a Sony color television set owned by Virgil Chandler. It was taken in a burglary of his home January 20, 1972. Police seized it at the home of Stowell on January 22, the date of the offense alleged in the information. The only evi-

dence of value of the Sony television set is in the record of the testimony of Chandler. There were some conflicts. A friend gave him the set approximately one year prior to the date of the burglary. On the latter date a small black tip of an antenna and a knob that controlled color contrast was missing, but the set functioned properly. Chandler was not acquainted with the value of television sets, and the only effort he made was an investigation of prices of new sets. He learned that the price of "this caliber of television" ranged between $375 and $400. A question about the fair market value of his set on January 20, 1972, was answered by him as follows: ". . . the only thing that I could say in that respect is that having been involved in the automobile market, I can only relate it to used merchandise, and with less than a year's age on the thing, I would presume that it was worth at least $250." He knew nothing of the secondhand market and he had received no offer to buy the set.

The value of goods which may be the subject of feloniously receiving stolen property must be $100 or more under section 28-508, R. R. S. 1943. Where the value of property is an element of the offense, the State must prove by competent evidence that the value of the property at the time and place of the alleged offense equalled or exceeded the requisite minimum value. State v. Hayes, 187 Neb. 325, 190 N. W. 2d 621 (1971); Spreitzer v. State, 155 Neb. 70, 50 N. W. 2d 516 (1951); Lambert v. State, 91 Neb. 520, 136 N. W. 720 (1912).

The evidence in this case was insufficient to sustain a jury finding that the Sony television set had a fair market value of $100 or more in January 1972. The judgment is therefore reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

WILLIAM R. BAKER, APPELLANT, V. JOSEPH S. DALY, SPECIAL ADMINISTRATOR OF THE ESTATE OF LEONARD LOUIS DUFFY, ET AL., APPELLEES.

211 N. W. 2d 123

Filed October 12, 1973. No. 38926.

1. **Trial: Evidence.** When part of a declaration or conversation is given in evidence by one party, the whole on the same subject may be inquired into by the other.
2. ———: ———. The admission of evidence under the provisions of section 25-1215, R. R. S. 1943, falls within the area reserved to the sound discretion of the trial court. The trial court must determine whether the evidence offered is on the same subject. Its ruling will not be regarded as erroneous unless there is a clear abuse of discretion.
3. **Pleadings: Negligence.** A general averment that the defendant was negligent, without setting out the negligent acts or omissions, is sufficient, unless the pleading be attacked by motion.
4. **Trial: Instructions.** It is the duty of the trial court to submit to the jury all material issues which are presented by the pleadings and supported by evidence.

Appeal from the District Court for Douglas County: RUDOLPH TESAR, Judge. Affirmed.

David A. Johnson and Ronald H. Stave, for appellant.

Martin A. Cannon and Francis P. Matthews of Matthews, Kelley, Cannon & Carpenter, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, McCOWN, NEWTON, and CLINTON, JJ.

NEWTON, J.

In this action plaintiff seeks to recover for personal injuries received, as a pedestrian, when struck by the automobile of defendant's decedent Duffy. Verdict and judgment were for defendant. We affirm that judgment.

There are three assignments of error. The first two charge certain items of evidence were erroneously admitted and the third questions the propriety of an instruction.

The accident occurred at an open intersection in Omaha, Nebraska. Plaintiff was crossing the street from east to west and was struck by the Duffy car proceeding south in the southbound lane. Whether or not plaintiff was in the crosswalk is disputed. A more detailed statement of the facts appears in a former opinion rendered in this case and found in Baker v. Daly, 188 Neb. 156, 195 N. W. 2d 755.

A police officer who investigated the accident was called by plaintiff. He testified he talked with Leonard Louis Duffy, the driver of the car who was deceased at the time of trial. Duffy estimated his speed at 20 to 25 miles per hour, said he was southbound, and first noticed danger at a distance of 5 to 10 feet. On cross-examination the officer was permitted, over objection, to relate further statements made by Duffy to the effect that the pedestrian appeared to stop and Duffy thought the pedestrian saw the approaching car. Duffy further told the officer that the pedestrian appeared to have run into the side of his left-front fender and was moving at an angle. Plaintiff insists that the statements elicited on cross-examination were inadmissible as hearsay and self-serving. When part of a declaration or conversation is given in evidence by one party, the whole on the same subject may be inquired into by the other. See § 25-1215, R. R. S. 1943. It will be noted that the only qualification of this rule requires that the additional statements be "on the same subject" matter. It is apparent that such additional statements are admissible when they tend to explain or make the statements brought out by plaintiff more understandable. The statement by Duffy that he ascertained the existence of danger only when at a distance of 5 or 10 feet is ambiguous. The meaning becomes clear when the further statements to the effect that plaintiff appeared to stop, to see the approaching car, and to run into it are considered. An eyewitness testified she saw plaintiff walk or lope into the side of the car; consequently admission of the state-

ment to this effect made by Duffy could scarcely be prejudicial. "The admission of evidence under the provisions of section 25-1215, R. R. S. 1943, falls within the area reserved to the sound discretion of the trial court. The trial court must determine whether the evidence offered is on the same subject. Its ruling will not be regarded as erroneous unless there is a clear abuse of discretion." Spani v. Whitney, 172 Neb. 550, 110 N. W. 2d 103.

Plaintiff maintains that error occurred when a lay witness was permitted to give his definition of a crosswalk. Examination of the record fails to sustain this allegation as the witness was asked only if he knew what was meant by a crosswalk. The assignment is without merit.

The final assignment of error criticizes the giving of the following instruction: "It is the duty of a pedestrian who is in a place of safety, and who sees or could have seen the approach of a moving vehicle in close proximity to him, not to move from his place of safety into the path of such vehicle." Defendant pleaded contributory negligence generally. "A general averment that the defendant was negligent, without setting out the negligent acts or omissions, is sufficient, unless the pleading be attacked by motion." Union P. Ry. Co. v. Vincent, 58 Neb. 171, 78 N. W. 457. See, also, Hamilton v. Omaha & C. B. St. Ry. Co., 152 Neb. 328, 41 N. W. 2d 139.

There was testimony that plaintiff walked or loped into the Duffy car, that he then sat down, and that the spot where he sat was some little distance south of the crosswalk. The jury could have concluded that plaintiff did not cross the street at the crosswalk and consequently did not have the right-of-way. Similar instructions have been approved under like circumstances. See Larsen v. Omaha Transit Co., 168 Neb. 205, 95 N. W. 2d 554. Plaintiff concedes he saw the Duffy car before he entered the street. He did not look again until he had

crossed the centerline and the car was upon him. Had he waited at the curb, or at the centerline, for the car to pass, the accident would have been avoided. "It is the duty of the trial court to submit to the jury all material issues which are presented by the pleadings and supported by evidence." Munson v. Bishop Clarkson Memorial Hospital, 186 Neb. 778, 186 N. W. 2d 492.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. KEVIN SULLIVAN, APPELLANT.
211 N. W. 2d 125

Filed October 12, 1973. No. 38958.

Criminal Law: Controlled Substances: Intent. Possession of a large quantity of a controlled substance packaged in a form customarily used for distribution will support a finding of possession with intent to distribute.

Appeal from the District Court for Scotts Bluff County: TED R. FEIDLER, Judge. Affirmed.

Charles F. Fitzke and James T. Hansen, for appellant.

Clarence A. H. Meyer, Attorney General, and Melvin K. Kammerlohr, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

BOSLAUGH, J.

The defendant appeals from a conviction for possession of marijuana with intent to distribute. The sole issue is whether the evidence of intent to distribute was sufficient to sustain the conviction.

The record shows the defendant and Rick Strong lived at 1313 ½ 16th Avenue in Scottsbluff, Nebraska. In a search of the premises on June 9, 1972, the police discovered 29 small plastic bags containing marijuana. Each

bag contained a quantity referred to as a "lid." Two of the bags of marijuana were found in a sleeping bag inside the house. Twenty-seven bags of marijuana were found in a paper sack under some boards along the north side of the house. The officers also found some stems in a wastebasket in the house. The total weight of the marijuana found was 442.8 grams or slightly less than 1 pound. There was evidence that this quantity was sufficient to make between 800 and 900 cigarettes, a 2- to 3-years' supply for an average user.

The defendant and Strong claimed they had purchased 31 small bags of the marijuana on June 6, 1972, for $150, the price normally charged for a 1-pound "brick" of marijuana. The evidence shows that a "lid" then sold at retail for $15. They testified they intended to use the marijuana themselves and that the dealer had sold them "lids" at the "brick" price because he had no "bricks" on hand at that time.

The evidence, although circumstantial and in dispute, presented a question for the trier of fact. The possession of a large quantity of a controlled substance packaged in a form customarily used for distribution will support an inference of possession with intent to distribute. See Turner v. United States, 396 U. S. 398, 90 S. Ct. 642, 24 L. Ed. 2d 610. We conclude the evidence was sufficient to sustain the conviction for possession with intent to distribute.

The judgment of the District Court is affirmed.

AFFIRMED.

McCOWN, J., concurring in result.

The holding of the majority opinion places undue emphasis upon the amount of marijuana involved here by using the term "large quantity" in referring to less than one pound of marijuana. The Legislature has already made one pound of marijuana the dividing line between minimal and serious offenses where possession alone is involved. See § 28-4,125, R. S. Supp., 1972. In view of the statutory distinctions, less than one pound

of marijuana in the joint possession of two individual users can hardly be classified as a "large quantity." Particularly is this so where the record indicates that the marijuana here was in a form in which it may commonly be possessed either for distribution or use.

Nevertheless, in this case there was substantial evidence other than mere quantity on the issue of possession with intent to distribute. For that crime, even a fraction of an ounce is sufficient. Here, in addition to the packaged marijuana which was found concealed in two locations in the house, the officers also found a quantity of marijuana stems in a wastebasket. They also testified that they found a quantity of plastic bags of the kind used for packaging marijuana. Although perhaps marginal, the evidence was sufficient to sustain the conviction for possession with intent to distribute.

STATE OF NEBRASKA, APPELLEE, V. DONALD SMITH, APPELLANT.
STATE OF NEBRASKA, APPELLEE, V. JAMES H. MAI, APPELLANT.
STATE OF NEBRASKA, APPELLEE, V. JAMES H. MAI, APPELLANT.
211 N. W. 2d 415

Filed October 12, 1973. Nos. 38987, 38988, 38989.

Criminal Law: Sentences. This court having affirmed a judgment against a defendant in a criminal prosecution, it is not error for the District Court to overrule a motion that simply requests a redetermination of the sentence in the judgment on these grounds alone: (1) A lapse of time between conviction and affirmance, and (2) a sufficient change in the circumstances of the defendant to warrant the redetermination.

Appeals from the District Court for Scotts Bluff County: TED R. FEIDLER, Judge. Affirmed.

Van Steenberg, Brower & Chaloupka, for appellants.

Clarence A. H. Meyer, Attorney General, and Calvin E. Robinson, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SMITH, J.

The question is the authority of the District Court in a criminal prosecution to resentence a defendant after appeal to this court and affirmance of the judgment. The District Court denied motions of defendants for redetermination of their sentences, and defendants appeal.

We affirmed the judgments in these three cases in State v. Brown, 189 Neb. 297, 202 N. W. 2d 585 (1972). Our mandates, dated December 14, 1972, were filed with the clerk of the District Court on December 18, 1972. On the latter date each defendant moved the District Court to redetermine his sentence for two reasons: (1) The lapse of 2 years between conviction and affirmance, and (2) a sufficient change in the circumstances of the defendant to warrant the redetermination. No motions set out any detail or any other ground for relief. The motions were overruled.

This court having affirmed a judgment against a defendant in a criminal prosecution, it is not error for the District Court to overrule a motion that simply requests a redetermination of the sentence in the judgment on these grounds alone: (1) A lapse of time between conviction and affirmance, and (2) a sufficient change in the circumstances of the defendant to warrant the redetermination. Cf. State v. Keyser, *ante* p. 445, 209 N. W. 2d 187 (1973); State v. Carpenter, 186 Neb. 605, 185 N. W. 2d 663 (1971); Housand v. Sigler, 186 Neb. 414, 183 N. W. 2d 493 (1971).

The judgments are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES L. SANDERS, APPELLANT.
211 N. W. 2d 412

Filed October 19, 1973. No. 38833.

1. **Criminal Law: Trial: Waiver.** Generally, the failure to object promptly to an offer of evidence waives the objection.
2. **Criminal Law: Attorneys at Law.** A charge of inadequate representation can prevail only if it can be said that what was or was not done by the defendant's attorney for his client made the proceedings a farce and a mockery of justice, shocking to the conscience of the court.

Appeal from the District Court for Douglas County: JOHN C. BURKE, Judge. Affirmed.

James L. Sanders, pro se.

Clarence A. H. Meyer, Attorney General, and Calvin E. Robinson, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

WHITE, C. J.

The defendant, James L. Sanders, was jury convicted and sentenced by the District Court for the crime of maliciously shooting with intent to kill, wound, or maim. § 28-410, R. S. Supp., 1972. The defendant, in a pro se brief, challenges the sufficiency of the evidence, the admissibility of the in-court identification of the defendant, and the adequacy of counsel. On appeal, we affirm the judgment and sentence of the District Court.

The defendant makes no consecutive, coherent analytical argument with relation to the sufficiency of the evidence. His argument consists of interspersing statements as to the credibility of the testimony in different areas of his brief. We have examined, out of consideration for the lack of the defendant's expertise in this area, all the evidence. A brief recital of the pertinent and undisputed testimony in this case demonstrates the absence of merit to this contention.

The evidence shows that on June 18, 1972, the defendant was ordered to leave a bar in Omaha, Nebraska, and that he was forcibly ejected. The defendant stated at the time, "I am going to get all of you."

The next day, June 19, 1972, an employee of the establishment, Robert Brown, who was present but did not participate in the ejection, went to work at the bar at 10:55 a.m. Brown was standing at the bar when the defendant approached and said, "I am going to get you." The defendant had a "shiny" object in his hand and at this same point a second man struck Brown across the shoulder with a club. Brown ran behind the bar and out the front door. As he did this he heard a "pop" and felt pain in his shoulder as he was running. He heard the defendant shouting, "I am going to get you, I am going to kill you." Brown ran into his home across the street and found that his shoulder was bleeding. He received medical care but the bullet was not removed and remained in Brown's shoulder at the time of the trial. Brown had known the defendant for about a year prior to this incident. A patron at the bar confirmed all Brown's testimony and specifically identified the defendant as the man who raised his gun and shot Brown. Another customer at the bar also corroborated, in many material respects, Brown's testimony. There is other testimony in the record but from what we have recited it is readily apparent that there was ample evidence in the record, mostly direct in nature, to sustain the jury's verdict of conviction. There is no merit to this contention.

The defendant asks us to examine the admissibility of the in-court identifications of the defendant by Brown and the patron. There are at least three answers to this contention. In the first place there was no objection to the introduction into evidence of the in-court identifications. Secondly, and more importantly, there is absolutely no evidence in this record which suggests in any manner that the independent eyewitness iden-

tifications at the scene of the crime were tainted in any manner under the doctrine of United States v. Wade, 388 U. S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149; and Gilbert v. California, 388 U. S. 263, 87 S. Ct. 1951, 18 L. Ed. 2d 1178. The record does not suggest nor is it even contended that any of the eyewitnesses, or any other witness, ever observed the defendant or was taken to a line-up for that purpose. Moreover, it is obvious from the brief recital of the evidence, and the familiarity of the witnesses with the defendant's appearance, that their identification was independently founded. The defendant's pro se argument is apparently founded upon an erroneous reading of Wade and Gilbert, *supra,* where, of course, the court was concerned with the admissibility of an in-court identification after a prior extrajudicial or "line-up" identification. There is no merit to this contention.

The defendant objects and assigns error in relation to the admissibility in evidence of exhibit 1, a pistol, that was found under the right front seat of the vehicle when he was arrested. The evidence is that the defendant was seated in the rear seat of a parked automobile the day following the shooting when a police officer spotted the car. The defendant at that time admitted ownership of the gun and the evidence is uncontradicted that the defendant consented to the search of the car and does not deny it in the course of his argument in his brief. Even if there were merit to this contention, it could not be presented to this court because there was no objection to the introduction of the gun into evidence. The failure to object promptly to an offer of evidence waives the objection. State v. Haynes, 186 Neb. 238, 182 N. W. 2d 199; State v. Weiland, 186 Neb. 325, 183 N. W. 2d 244.

The defendant argues generally error in giving all the instructions and contends they were weighted or slanted against him. Ignoring the inadequacy of these assignments of error and argument in this respect, we

have carefully examined all the instructions and the contention is wholly without merit. The instructions given are the standard instructions as to the applicable law and contain no intimation of prejudice or expression of opinion by the court as to guilt. On the contrary, the court specifically instructed the jury that it could not construe any statements, actions, or rulings of the court, nor any of the inflections of the voice in the reading of the instructions, as reflecting an opinion of the court as to how the case should be decided.

The defendant challenges the adequacy of his trial counsel. The record shows that he was represented by an experienced member of the staff of the public defender's office in Douglas County, Nebraska. His assertion that his counsel was ineffective is without support from the record. For example, he asserts that his counsel failed to ask any witness the number of cartridges which the pistol would hold. The evidence indicated that it held five cartridges at the time it was seized. The pistol was in evidence, and the jury could readily determine for itself the number of cartridges it would hold. The defendant complains that the defense counsel did not cause the prosecution to remove the bullet from the victim's shoulder for purposes of comparison with bullets from the defendant's weapon. No authority is cited, nor do we know of any, that would require the prosecution to have such an operation performed, or for the witness to submit to it. This contention is particularly illusory when it is apparent from the whole record that the truly damning evidence against the defendant was the unchallenged testimony of the victim and the other eyewitnesses. From an examination of this record it is apparent that the defendant was represented by a seasoned and mature defense attorney. He cross-examined the prosecution witnesses carefully as to their credibility and opportunity to see things that they testified to; objected to certain of the State's evidence; and presented a stipulation, from an

absent witness, to support the defendant's alibi. There is nothing in the record before us which would support a claim for ineffectiveness of counsel under State v. Goham, 187 Neb. 34, 187 N. W. 2d 305; and Hanger v. United States (8th Cir.), 428 F. 2d 746, which require that it must be said that what was or was not done by the defendant's attorney for his client made the proceedings a farce and a mockery of justice, shocking to the conscience of the court.

The judgment and sentence of the District Court are correct and are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. HUBERT R. ETCHISON, APPELLANT.

211 N. W. 2d 405

Filed October 19, 1973. No. 38903.

1. **Criminal Law: Trial: Waiver.** Defects which might have been attacked by motion to quash or plea in abatement are waived when defendant pleads to the general issue or when such a plea is entered for him by the court.
2. **Statutes: Constitutional Law.** Section 60-430.07, R. R. S. 1943, is not vague, indefinite, or uncertain.
3. **Criminal Law: Statutes: Constitutional Law.** The fixing of criminal penalties is primarily a legislative function and courts will not interfere except in those cases where the punishment is so excessive as to shock the sense of mankind.

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

Riedmann, Welsh & Jeffries, for appellant.

Clarence A. H. Meyer, Attorney General, and Betsy G. Berger, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SPENCER, J.

Defendant, Hubert R. Etchison, was found guilty of fleeing in a motor vehicle in an effort to avoid arrest, and was sentenced to 18 months imprisonment in the Nebraska Penal and Correctional Complex. We affirm.

The information filed against defendant on April 5, 1972, contained two counts: Count I charged operation of a motor vehicle while under the influence of alcoholic liquor; and count II charged the offense upon which defendant was convicted and sentenced herein by the District Court for Sarpy County.

Defendant was arrested on December 13, 1971, and charged in county court with drunken driving and motor vehicle flight to avoid arrest. He was found guilty on the first count, sentenced to 30 days in jail, and bound over to the District Court on the second count. Defendant failed to perfect an appeal from his conviction for driving while intoxicated. When he appeared for trial in the District Court on October 4, 1972, the judge struck count I of the information upon which defendant had already been tried and convicted, and remanded him to the custody of the sheriff to carry out the sentence imposed by the county judge. Defendant waived his right to a jury trial on the remaining count and was tried by the court on October 19 and 20, 1972.

The evidence would indicate that defendant's automobile was observed by the occupants of a Sarpy county sheriff's patrol car heading west on State Highway No. 370 at a high rate of speed. They pursued and stopped it and informed defendant that he was under arrest for drunken driving. Defendant then pulled away from the scene and a chase ensued through the Golden Hills area of Sarpy county, then easterly on highway No. 370, and finally northerly on U. S. Highway Nos. 73-75, where, with the assistance of two Bellevue police cruisers, defendant was stopped.

Defendant makes three assignments of error: First, the court erred in failing to quash the information for

the reason that it did not state facts sufficient to constitute an offense; second, the court erred in overruling defendant's motion to dismiss, for the reason that section 60-430.07, R. R. S. 1943, is unconstitutional; and, third, the court erred in overruling defendant's motion for a new trial. From defendant's brief his third assignment of error is predicated on the first two, so those are the ones we consider.

Under section 29-1812, R. R. S. 1943, a defendant who pleads to the general issue waives all defects which might have been attacked by a motion to quash. This statute has long been interpreted to include the situation where a plea is entered for the defendant by the court. Trimble v. State (1901), 61 Neb. 604, 85 N. W. 844; Huette v. State (1910), 87 Neb. 798, 128 N. W. 519. The applicable rule is that defects which might have been attacked by motion to quash or plea in abatement are waived when defendant pleads to the general issue, or when such a plea is entered for him by the court. Trimble v. State, *supra;* Huette v. State, *supra.*

Although the information was filed herein on April 5, 1972, trial did not commence until October 19, 1972. Defendant was represented by counsel during this period. A plea of not guilty was entered on behalf of the defendant by the court on September 8, 1972. Defendant's motion to quash was not made until October 19, 1972, the first day of the trial, and it was denied by the court on that date. The motion to quash was filed without leave of court while the plea of not guilty was upon the record. Defendant at no time requested leave of the court to withdraw the plea to the general issue. Under such circumstances, the motion to quash was properly denied. Even if defendant had timely filed his motion there would remain serious questions concerning whether it sufficiently raises the particular objections argued in the brief. These are points we need not decide.

Defendant, in his second assignment of error, contends

that section 60-430.07, R. R. S. 1943, is so vague, indefinite, and uncertain as to be unconstitutional. This statute was adopted when we declared its predecessor, section 60-430.02, R. S. Supp., 1965, unconstitutional. The present statute eliminates the language objected to in Heywood v. Brainard (1967), 181 Neb. 294, 147 N. W. 2d 772. It is obvious from reading Heywood that we had no question as to the constitutionality of the language now objected to by the defendant: " 'It shall be unlawful for any person operating any motor vehicle to flee in such vehicle in an effort to avoid arrest for violating any law of this state.' " This is the only part of the statute defining the offense. The subsequent language deals solely with the statute's penal provisions. The statute in its present form is not vague, indefinite, or uncertain. It clearly specifies the elements of the offense. No one should be misled by it. To be guilty the accused must be fleeing in a motor vehicle in an effort to avoid arrest for violating some law of this state.

Defendant next attacks the statute as contravening the state and federal constitutional provisions against cruel and unusual punishment. These constitutional provisions were intended to prohibit torture and agonizing punishment, and do not abridge the power of the Legislature to select such penalties as it deems most effective in the suppression of crime. State v. Tucker (1968), 183 Neb. 577, 162 N. W. 2d 774. The fixing of criminal penalties is primarily a legislative function and courts will not interfere except in those cases where the punishment is so far excessive as to shock the sense of mankind. McMahon v. State (1904), 70 Neb. 722, 97 N. W. 1035. The maximum imprisonment provided by this statute is not less than 1 year nor more than 3 years in the Nebraska Penal and Correctional Complex. We hold that this does not constitute cruel or unusual punishment.

The penal provisions of section 60-430.07, R. R. S. 1943, give substantial discretion to the sentencing judge.

The possible punishments range from a minimum of a $500 fine to the maximum set out above. It is axiomatic that the Legislature may make motor vehicle flight to avoid arrest a felony and provide a range of penalties graduated to the seriousness of the offense. Here, the Legislature placed discretion in the trial judge to impose penalties within the limits set by it, depending upon the individual characteristics of the offender, and the factors which mitigate or aggravate the gravity of the offense. This is the prevailing norm of sentencing theory. All sentences imposed by the trial judge are, of course, subject to appellate review for an abuse of discretion.

At the time of the occurrence of this offense the defendant had on appeal to this court his conviction for failing to stop after being involved in an accident resulting in personal injuries. There, we set aside the sentence and remanded the cause to the trial court with instructions to place the defendant on probation. See State v. Etchison (1972), 188 Neb. 134, 195 N. W. 2d 498. Under the circumstances of the present case, we cannot say that the sentence imposed is an abuse of discretion.

The judgment is affirmed.

AFFIRMED.

McCOWN, J., dissenting as to sentence.

This is another case in which it might well be said that the punishment does not fit the crime, although it may well fit the defendant! Eighteen months in the penitentiary for fleeing to avoid arrest for driving while under the influence of alcoholic liquor is in sharp contrast with the 30 days in jail which the defendant received on the conviction for the original offense itself. There is no showing as to any other traffic charges filed or the penalties received as a result of the facts involved in this case. The record reveals that the defendant had been previously convicted for a traffic offense of a different kind which was also a felony for

which this court later directed probation. Neither the probation violation nor the penalty for it are directly involved here. The defendant's record does not justify any leniency as to him but the nature of the crime raises issues as to the extent of punishment apparently authorized.

The attention of the Legislature ought to be drawn to the provisions of section 60-430.07, R. R. S. 1943, the statute involved here. That statute was presumably intended as an additional weapon in the enforcement of motor vehicle traffic laws. It applies to flight in a motor vehicle to avoid arrest for violating "any law of this state." It seems obvious that the evil aimed at by the Legislature would be better dealt with in more specific terms than the broad generality of "any law of this state." It seems equally apparent that the penalties provided have no specified relationship to the nature or seriousness of the violation which initiated the flight. It should not be assumed that the Legislature specifically intended to authorize or approve a punishment of 3 years imprisonment in the penitentiary for the crime of fleeing in a motor vehicle in an effort to avoid arrest for a traffic violation. The facts suggest the advisability of legislative review.

MABEL CASEY, APPELLEE, V. PATRICIA ADDISON, APPELLANT.
211 N. W. 2d 410

Filed October 19, 1973. No. 38913.

1. **Words and Phrases: Negligence: Property: Licensee.** A social guest is a mere licensee.
2. **Negligence: Property: Licensee.** The owner or occupant of property owes to a licensee the duty only to refrain from injuring him by willful or wanton negligence or a designed injury, or by failure to warn of a hidden danger or peril known to the owner or occupant but unknown to or unobservable by the licensee in the exercise of ordinary care.

Appeal from the District Court for Douglas County: RUDOLPH TESAR, Judge. Reversed and remanded with directions.

William J. Brennan, Jr., and C. L. Robinson, for Fitzgerald, Brown, Leahy, Strom, Schorr & Barmettler, for appellant.

J. William Gallup of Gallup & Matejka, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

BOSLAUGH, J.

The plaintiff, Mabel Casey, was injured in a fall at the home of her daughter, Patricia Addison, the defendant. The latter appeals from a verdict and judgment in the amount of $15,000 in favor of the plaintiff.

The plaintiff is a resident of North Carolina. On August 25, 1970, she came to Omaha, Nebraska, to visit in the home of the defendant. The plaintiff was then 78 years of age and had severe impairment of the vision in her right eye.

On the morning of September 19, 1970, the plaintiff noticed a boot belonging to one of the grandchildren on the terrace outside the house. The terrace was a raised area with concrete steps leading to it from a patio. The plaintiff went outside to get the boot and was injured when she fell on the steps.

The petition alleged the defendant was negligent in maintaining a defective cement staircase with a loose, crumbling step and in failing to warn the plaintiff of that condition. The answer alleged contributory negligence and assumption of risk.

The plaintiff testified that when she stepped on the corner of the lower step, "something gave way" and she fell. After the accident it was found that a part of the right corner of the lower step had broken off. The exact size of the fragment is not shown in the record. The plaintiff further testified that the step

appeared to be normal, but on cross-examination admitted that she had not looked at the step that morning.

The defendant testified that before the accident she had noticed the bottom part of the step was eroding and there was a hollowed-out area near the edge. There was no direct evidence that the corner of the step broke because of the erosion of the lower step.

The plaintiff was a social guest in the home of the defendant. It is a well-established rule in this state that a social guest is a mere licensee. Hackney v. Klintworth, 182 Neb. 219, 153 N. W. 2d 852; Johnson v. Goodier, 182 Neb. 172, 153 N. W. 2d 445; Roan v. Bruckner, 180 Neb. 399, 143 N. W. 2d 108. The owner or occupant of property owes to a licensee the duty only to refrain from injuring him by willful or wanton negligence or a designed injury, or by failure to warn of a hidden danger or peril known to the owner or occupant but unknown to or unobservable by the licensee in the exercise of ordinary care. Hackney v. Klintworth, *supra*.

The plaintiff argues the eroding step was a concealed defect or hidden danger for which the defendant should be held liable. The evidence shows, however, that the eroded condition of the step was not concealed and could have been observed by anyone looking at the step. The evidence will not support a finding that the eroded condition of the step was a concealed defect or hidden danger. The evidence failed to establish any basis for liability of the defendant to the plaintiff.

It is unnecessary to consider the other assignments of error. The judgment is reversed and the cause remanded with directions to dismiss the action.

REVERSED AND REMANDED WITH DIRECTIONS.

LARRY L. HAUMONT, APPELLEE, V. W. GLENN ALEXANDER, APPELLANT.

211 N. W. 2d 119

Filed October 19, 1973. No. 38975.

1. **Assault and Battery: Trial: Damages: Evidence.** In an action for assault and battery, the recovery is limited to compensatory damages and evidence of threats or words and acts of provocation are not admissible in mitigation thereof.
2. **Assault and Battery: Trial: Instructions.** In a civil action for assault and battery where the evidence conclusively shows that defendant made a voluntary attack upon plaintiff without provocation and was the sole active aggressor throughout the assault, the plea of self-defense has no proper place in the transaction and a request for an instruction looking to the exoneration of the defendant on that ground is properly refused.
3. **Trial: Instructions.** It is not error for the trial court to refuse to submit to the consideration of the jury a defense which finds no support in the evidence.
4. **Trial: Instructions: Waiver.** The failure to object to instructions after they have been submitted to counsel for review will preclude raising an objection on appeal.
5. ———: ———: ———. The purpose of the instruction conference is to give the trial court an opportunity to correct any errors being made by it. Consequently, the parties should object to any errors of commission or omission.

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

Dean E. Erickson, for appellant.

Miles W. Johnston, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, McCOWN, NEWTON, and CLINTON, JJ.

SPENCER, J.

Defendant appeals from a personal injury judgment for $1,000, entered against him as the result of an assault and battery committed upon plaintiff. Defendant alleges three assignments of error. His argument is limited solely to the refusal to give a tendered instruc-

tion, which is the only assignment of error we consider. We affirm.

A junker automobile belonging to plaintiff was removed from its place of storage. A few days after its disappearance plaintiff discovered it with other junked cars on a vacant lot behind defendant's service station. The altercation in question occurred while plaintiff was removing parts from this automobile.

Plaintiff's testimony is that defendant appeared and accused him of putting the car on the lot. Plaintiff denied placing the automobile upon the property and told defendant it was his car and he was removing certain parts which he required. Defendant then told him to take the car and get off the property. As plaintiff straightened up he was assaulted by the defendant and knocked down. When plaintiff arose he told defendant, " 'Get the police out here. I am not going to fight you. This is child stuff.' " He was then struck again and knocked down. Plaintiff states that he did not threaten or assault defendant and denies provoking defendant in any manner. He sustained injuries necessitating dental services in the amount of $542.

Defendant alleges plaintiff made an assault upon him. However, defendant admits he took the first offensive action. Defendant also admits he struck plaintiff three times and that there was blood on plaintiff's mouth after the second blow. Defendant testified he told plaintiff he leased the property and was responsible for the wrecked automobiles. He ordered him off the premises. He pushed the plaintiff when he refused to leave and the plaintiff struck him with a wrench, saying " 'Don't you touch me.' " Plaintiff then made some uncomplimentary remarks, whereupon defendant slapped him. Defendant then testified he "came at me like a wild man and he never made any advances to hit me, so, I did reach out to hit him with my left hand," and he "slid on the gravel and went right under the rear bumper of his car." Plaintiff "got up again and started at me

and blood was coming out of his mouth at that time, and I hit with my right hand and evidently he dodged and slipped and went back down, * * *." Defendant's explanation of plaintiff's injuries is they were sustained when plaintiff struck his face on his own automobile in attempting to rise after the second blow.

Defendant does not deny plaintiff's ownership of the junker automobile and claims no interest in it. He admits plaintiff told him he owned the automobile.

Defendant impliedly contends provocation can be considered in mitigation of damages. Our law has long been otherwise. In Horky v. Schroll (1947), 148 Neb. 96, 26 N. W. 2d 396, we said: "In an action for assault and battery, the recovery is limited to compensatory damages and evidence of threats or words and acts of provocation are not admissible in mitigation thereof."

Defendant's entire argument is devoted to the refusal of the trial court to give the following instruction requested by him: "If you find from the evidence that the defendant assaulted the plaintiff, and that the plaintiff was injured thereby, he will be entitled to a verdict at your hands for such damages as may be shown by the testimony that the plaintiff has sustained, not exceeding 4,077.00 claimed in the petition. However, this instruction is given you subject to the proposition of law, that the defendant in the protection of his property or person, would be justified in using so much force as was necessary to protect his person from injury, or his property." The denial of the requested instruction was proper. The trial court adequately submitted the issues which were supported by the evidence.

The trial court did not give a specific instruction on self-defense because none was warranted by the evidence. It was apparent defendant was the aggressor. In Acree v. North (1923), 110 Neb. 92, 192 N. W. 947, we held in a civil action for assault and battery where the evidence conclusively shows that defendant made a voluntary attack upon plaintiff without provocation and

was the sole active aggressor throughout the assault, the plea of self-defense has no proper place in the transaction and a request for an instruction looking to the exoneration of the defendant on that ground is properly refused.

Defendant suggests that he was acting in defense of his property. Plaintiff's evidence indicates that the property is owned by Harold P. Jacobs. Defendant leases his filling station from the Skelly Oil Company. Defendant did testify he was requested to mow the weeds. The record would indicate any person could dump a used or junked car on the lot. The defendant would then "cannibalize" the car by using parts from it and haul the residue to the Northwestern Metal Company when he no longer had use for it, as he did with the plaintiff's car the day after the assault. If he has a lease covering the property in question that fact was not sufficiently established to warrant a defense of property instruction.

It is not error for the trial court to refuse to submit to the consideration of the jury a defense which finds no support in the evidence. Fink v. Busch (1909), 83 Neb. 599, 120 N. W. 167.

While we have expressed our reaction to the evidence on defense of property, the issue actually is not before us. In Swearingen v. Sloggett (1973), 189 Neb. 482, 203 N. W. 2d 442, we held: "When a litigant has approved instructions in the trial court, either by word or act, he cannot thereafter actively complain of instructions given."

In Libbey-Owens Ford Glass Co. v. L & M Paper Co. (1973), 189 Neb. 792, 205 N. W. 2d 523, we said: "The failure to object to instructions after they have been submitted to counsel for review will preclude raising an objection on appeal." In this case defendant submitted five proposed instructions, none of which were given by the trial court. The trial court did submit the instructions given to the attorneys for the parties

and asked them if they had any objections. Defendant's counsel said: "The only question I would have in regard to the instructions is to whether there should be any instruction as to the rights of the parties in self defense."

The submission of proposed instructions by counsel does not relieve the parties in an instruction conference from calling the court's attention by objection to any omission or misstatement in the instructions given by the court. In most instances the trial court covers the substance of proper submitted instructions in those given by it. The purpose of the instruction conference is to give the trial court an opportunity to correct any errors being made by it. Consequently, the parties should object to any errors of commission or omission.

The judgment of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ALAN HACKBARTH, APPELLANT.
211 N. W. 2d 609

Filed October 19, 1973. No. 38979.

Criminal Law: Property: Damages. An error by the jury in calculating the amount of damage sustained in a prosecution under section 28-572, R. R. S. 1943, is not material where the amount proved is found to be in excess of $100.

Appeal from the District Court for Gage County: WILLIAM B. RIST, Judge. Affirmed.

A. James McArthur, for appellant.

Clarence A. H. Meyer, Attorney General, and Ralph H. Gillan, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SPENCER, J.

Alan Hackbarth, defendant-appellant, was convicted of malicious destruction of property of the value of more than $100, and was fined $500. We affirm.

Defendant sets out seven assignments of error, but argues only two in his brief. They are as follows: (1) A verdict which is the result of surmise or conjecture cannot support a conviction; and (2) insufficiency of the evidence to sustain a conviction.

While defendant listed 28 assignments of error in his motion for a new trial, he did not include the first point argued by him except as it may be embraced within the general assignment of insufficiency of the evidence to sustain a conviction. In accordance with Revised Rules of the Supreme Court, 1971, Rule 8 a 2(3), defendant has limited himself to the sole assignment of insufficiency of the evidence to sustain his conviction.

It would serve no purpose to review the evidence in detail or even to set forth the substance thereof. We are satisfied that it amply supports the conviction herein. The prosecution is predicated upon defendant's admission which he denied at the trial. A review of the record, in the light of the other evidence, makes it obvious why the jury did not believe defendant's story.

Defendant argues that the jury erroneously set the value of the damage at $350, when the only amount fully supported by the evidence is "less than $148.00." Defendant was prosecuted under section 28-572, R. R. S. 1943, which provides that any person willfully and maliciously destroying or injuring property causing loss or damage in the sum of $100 or more shall be guilty of a felony. Assuming $148 to be the full damage, defendant could not be prejudiced. An error by the jury in calculating the amount of damage sustained in a prosecution under section 28-572, R. R. S. 1943, is not material where the amount proved is found to be in excess of $100. See Hoffman v. State (1957), 164 Neb. 679, 83 N. W. 2d 357, where we held: "An error by

the jury in calculating the amount embezzled is not material where it does not have the effect of changing the punishment of the defendant to his prejudice." It is undisputed that the evidence amply sustained a finding that the property damage was in excess of $100. Defendant does not contend the damage was less than that amount. If the property damage is $100 or more, it comes within the ambit of the statute.

The judgment is affirmed.

AFFIRMED.

WHITE, C. J., not participating.

RAYMOND WARNER ET AL., APPELLANTS, V. STATE OF NEBRASKA, APPELLEE.
211 N. W. 2d 408

Filed October 19, 1973. No. 38980.

1. **Workmen's Compensation.** The purpose of the Workmen's Compensation Act is to compensate an employee for the loss of his earning power, and in case of the death of the employee, to compensate his dependents for the loss of support which they had been receiving and which, but for the injury to the employee, they had a reasonable right to expect would continue.
2. **Workmen's Compensation: Words and Phrases.** A dependent in fact is a person who was dependent upon the earnings of the deceased employee for support.
3. **Workmen's Compensation.** Proof of economic loss or financial injury alone is not sufficient to establish dependency in fact.
4. ———. A contribution of labor to the parents of a deceased employee, as distinguished from a contribution from his wages, will not support a finding of partial dependency in fact.

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

William G. Whitford, for appellants.

Clarence A. H. Meyer, Attorney General, Harold S. Salter, and William J. Orester, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

BOSLAUGH, J.

This is a proceeding under the Workmen's Compensation Act. The plaintiffs are the parents of Van Raymond Warner who died on December 4, 1970, as the result of an accident arising out of and in the course of his employment by the defendant. The sole issue is whether the plaintiffs were in fact partially dependent upon him for support. The Workmen's Compensation Court and the District Court both found the action should be dismissed.

Van Raymond Warner was 21 years of age at the time of his death. He had been living at home with the plaintiffs. Occasionally, he purchased things for the family but he made no contribution of money to the plaintiffs. In the evenings and on weekends he helped with the work on the farm. The question is whether this contribution of labor, which averaged about 25 hours per week, was sufficient to establish dependency in fact.

The purpose of the Workmen's Compensaction Act is to compensate an employee for the loss of his earning power, and in case of death of the employee, to compensate his dependents for the loss of support which they had been receiving and which, but for the injury to the employee, they had a reasonable right to expect would continue. Meyer v. Nielsen Chevrolet Co., 137 Neb. 6, 287 N. W. 849.

In the language of the act, a dependent in fact is a person who was dependent upon the earnings of the deceased employee for support. § 48-122, R. S. Supp., 1969. Compensation for partial dependency is computed upon the basis of the proportion that the amount regularly contributed by the deceased from his wages bears to the total wages.

Proof of economic loss or financial injury alone is not sufficient to establish dependency in fact. Pieters v. Drake-Williams-Mount Co., 142 Neb. 315, 6 N. W. 2d 69. It is the loss of support, the loss of regular financial

contributions from the wages of the employee for a reasonable time prior to the accident, that determines the right of a dependent in fact to compensation.

Since there was no evidence in this case of any regular contribution by Van Raymond Warner from his wages for the support of the plaintiffs, there was no basis upon which a finding of dependency in fact could be made. Although there are decisions in other states which hold that contributions of labor will support a finding of dependency, the prior decisions of this court are controlling in this case.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RICHARD HAINES, APPELLANT.
211 N. W. 2d 414

Filed October 19, 1973. No. 38996.

1. **Criminal Law: Sentences.** A sentence imposed within the statutory limits will not be disturbed on appeal unless an abuse of discretion appears in the record.
2. ———: ———. A 1-year consecutive sentence for escape from custody is not excessive.

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

T. Clement Gaughan and Richard L. Goos, for appellant.

Clarence A. H. Meyer, Attorney General, and Calvin E. Robinson, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SPENCER, J.

Defendant, Richard Haines, was granted a 12-hour furlough from the Nebraska Penal and Correctional Com-

plex on August 20, 1972. He failed to return and on August 30, 1972, a warrant was issued for his arrest. On a plea of nolo contendere he was found guilty of escape from custody and sentenced to 1 year in the Nebraska Penal and Correctional Complex, said sentence to be consecutive with the sentence then being served by the defendant. He assigns as error the failure of the trial court to make this sentence concurrent with the one he was already serving, and contends the sentence was excessive. We affirm.

We have repeatedly said that a sentence imposed within the statutory limits will not be disturbed on appeal unless an abuse of discretion appears in the record. State v. Medina (1973), 189 Neb. 765, 204 N. W. 2d 785.

We have also repeatedly held that a 1-year consecutive sentence for escape from custody is not excessive. State v. Maddox (1973), *ante* p. 361, 208 N. W. 2d 274.

The defendant has had two prior felony convictions. On this record there is no basis for a finding that the trial court abused its discretion. The judgment is affirmed.

AFFIRMED.

IN RE INTEREST OF COLIN L. BELDING, A MINOR CHILD UNDER 18 YEARS OF AGE.

STATE OF NEBRASKA, APPELLEE, V. COLIN L. BELDING, A MINOR, BY AND THROUGH HIS MOTHER, GWENDOLYN M. BELDING, APPELLANT.

211 N. W. 2d 715

Filed October 26, 1973. No. 38637.

1. **Courts: Infants: Appeal and Error.** For purposes of appeal a final order of a county court in a juvenile proceeding encompasses every dispositive order that rests on an adjudication of delinquency.
2. **Courts: Infants: Limitations of Actions: New Trial.** A limita-

tion of 1 year for filing of a motion for new trial on the ground of newly discovered evidence and the filing of a supporting affidavit is not controlling in a juvenile proceeding in county court, but they affect the requirement of the exercise of reasonable diligence.

Appeal from the District Court for Gage County: WILLIAM B. RIST, Judge. Reversed and remanded with directions.

C. E. Danley, for appellant.

Ronald G. Sutter and Ralph J. Fischer, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SMITH, J.

A county court as a juvenile court adjudicated Colin L. Belding a delinquent and entered several dispositive orders. Belding moved the court for a new trial on the ground of newly discovered evidence germane to the delinquency adjudication. The motion was overruled, and an appeal of that ruling to District Court from the county court was dismissed. Belding appeals.

The State contends that the motion of Belding was defective. The defects included lack of (1) detail to establish no trespass at the time and place in question, (2) supporting affidavits, (3) reasonable diligence by Belding, and (4) probability of a different result on a new trial.

In order to outline the reasons for our conclusions in this proceeding, we must discuss (1) some procedural steps, (2) the relevant statutory provisions, and (3) the development of juvenile courts.

The adjudication of delinquency rested on allegations that Belding on July 18, 1970, and at age 16, had trespassed upon property of the St. Paul Lutheran School in Beatrice. At the hearing, counsel for the defense was waived and the allegations of the State were admitted. The court adjudicated Belding a delinquent on the

admissions and without evidence. It placed him on "temporary" probation to the juvenile probation officer, but permitted him to remain in the home of his parents. No appeal was lodged.

On June 4, 1971, a hearing without any allegations was held, notification having been given. Clarence Danley, then counsel for Belding, made a statement, and the probation officer submitted a report. The court, having investigated the matter, found that Belding "should be placed on probation in the temporary custody of . . . (the) Probation Officer to be placed in a suitable family home." It ordered temporary custody and continued the dispositive hearing indefinitely. The order of June 4, 1971, was appealed to District Court. On the appeal, Belding attacked generally the sufficiency of the evidence and specifically the procedural aspects of the delinquency adjudication. The State moved to dismiss the appeal for lack of a final, appealable judgment. The District Court sustained the motion, ordering the dismissal on August 16, 1971. No appeal was taken to this court.

On August 20, 1971, Belding moved the county court for a new hearing on the adjudication of delinquency, alleging newly discovered evidence. The evidence consisted of a conditional consent of the school board to the use of outside facilities by children for "legal activities." The motion was unsupported by affidavit. The State moved the court to overrule the motion on 6 grounds which included lack of due diligence, lack of any affidavit, and lapse of more than 1 year since the adjudication. The court on December 2, 1971, sustained the State's motion and overruled Belding's motion. Belding appealed to District Court where the State moved to dismiss the appeal without alleging any grounds. The motion was sustained on June 1, 1972, and the present appeal was taken to this court.

Supplemental transcripts filed in this court contain copies of supporting affidavits, and a motion for new

trial filed January 5, 1973, in the county court on the ground of newly discovered evidence. One affiant, Leonard Esch, stated that on July 18, 1970, he and two others had comprised the board of the St. Paul Lutheran School. The members had discussed the events in question: ". . . including the fact that Doug . . . and Colin Belding, as well as Kim Klostermeier were present on the . . . school grounds at . . . 11:30 . . . P.M.; that Kim . . . was driving . . . (an) automobile . . . and that the trunk . . . contained the remains of a case of beer, some of which was not opened; . . . that . . . (the) members of the . . . board, . . . (relying) on information furnished to them by . . . (defense counsel), determined that while they were unhappy and concerned at . . . (the presence of the three teenagers) on the fire escape at . . . (the) school, and while on past occasions they did ask the police to investigate, they did not wish to prosecute nor had they requested the police to prosecute persons found on . . . (the) school grounds, rather it was determined that as long as there was no destruction of property or vandalism, that children of all ages were welcome to use the facilities of the . . . grounds for . . . all legal activities; . . . that . . . while they felt the privilege of public use had been abused, none of the . . . board members had advised the police to prosecute anyone for trespassing on . . . (the school grounds), and they expressly stated that they did not wish to prosecute . . . (Doug . . ., Colin . . . or Kim) . . . for trespassing on the night in question." The supplemental transcripts further indicate that on June 18, 1972, Belding had departed from his foster home overnight without permission. The county court, on March 13, 1973, overruled Belding's motion of January 5, 1973.

We have summarized the transcripts alone, for we have no verbatim record of any proceedings in county court. According to the State, as late as June 4, 1971, no verbatim record of juvenile proceedings in the county court of Gage County was being made, and no bill of

exceptions exists for any of the proceedings in that court against Belding.

Statutory provisions relating to the juvenile proceedings against Belding read as follows. Provisions of the code of civil procedure relative to justices of the peace, in the absence of provisions to the contrary, applied to proceedings in all civil actions in county court. Former § 24-502, R. R. S. 1943. In the code of civil procedure in District Court, provisions that by their nature were applicable and in respect to which no special provisions were made applicable by other statute, applied to proceedings before justices of the peace. Former § 27-1801, R. R. S. 1943. The jurisdiction of the county court continued until final disposition of the juvenile proceedings, provided, however, that appeal might be had to District Court in the same manner as was provided by law in civil cases. Laws 1971, LB 670, § 1 (former § 43-202, R. R. S. 1943). The manner of appeal from county court in civil cases was that provided for appeals from justices of the peace. Former § 24-544, R. R. S. 1943. In all cases not otherwise specifically provided for, either party might appeal from the final judgment of any justice of the peace to District Court. The appeal vested the District Court with jurisdiction of all the issues presented to the justice of the peace by the pleadings. Former § 27-1301, R. R. S. 1943. Appeals were not allowed from judgments rendered on confession. Former § 27-1314, R. R. S. 1943.

Under the civil code of the District Court, a decision was to be vacated and a new trial granted on the ground of newly discovered evidence that was material for the applicant and that he could not with reasonable diligence have discovered and produced at the trial. An application on that ground was required to be supported by affidavit. §§ 25-1142 to 25-1144, R. R. S. 1943.

Juvenile courts developed in response to demands for humane, clinical treatment of children and in rebellion against the concept of punishment. The proceedings

were not to be adversary or self-defeating because of "apparent rigidities, technicalities, and harshness . . . in both substantive and procedural criminal law." In re Gault, 387 U. S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967). Nebraska followed the national trend. § 43-206.03(5), R. S. Supp., 1972; DeBacker v. Brainard, 183 Neb. 461, 161 N. W. 2d 508 (1968) (separate opinion by McCown, J.).

The District Court orders of dismissal of appeal on August 16, 1971, and June 1, 1972, to the extent that the court considered the dispositive orders of the county court not to have been final, were erroneous. The insertion of the word "temporary" in the dispositive orders was ineffective to deny Belding a right of appeal. For purposes of appeal, a final order in a juvenile proceeding in county court encompassed every dispositive order that rested on an adjudication of delinquency.

In the civil code of the District Court the provisions in question would clearly lead us to affirm, had this been an original action in District Court. The language of the provisions relating to operation of the code in a juvenile proceeding commenced in county court, however, was highly ambiguous. The provision for appeal from county court intimated that all civil cases and juvenile proceedings were not necessarily of the same class. It authorized appeal in juvenile proceedings in the same manner as provided by law in civil cases. See Laws 1971, LB 670, § 1 (former § 43-202, R. R. S. 1943). Incorporation of the civil code of the District Court into procedure of the county court was limited to provisions that by their nature were applicable. See former § 27-1801, R. R. S. 1943.

In reaching our conclusion, we consider all legal and factual circumstances. Emphasis is placed upon the following: (1) The objective of juvenile proceedings ideally is therapeutic in character. (2) References to use of the civil code of the District Court in juvenile proceedings in county court permitted flexibility of ap-

plication. (3) Belding was adjudicated a delinquent on his admission and without production of evidence. (4) No verbatim record of the proceeding was made. (5) He might reasonably but erroneously believe that he had entered the school grounds without consent of the school board. The probability of dismissal of the delinquency petition on a new trial existed.

We decide that the provision relating to judgment on confession was not applicable and that the 1-year limitation for filing of motions for new trial on the ground of newly discovered evidence was not controlling in the juvenile proceeding in county court. Passage of time and absence of affidavits in support of the motion were, however, material circumstances. Belding exercised reasonable diligence.

The county court erred in overruling the motion of Belding for a new trial on the ground of newly discovered evidence. The District Court erred in dismissing the appeal from the county court.

The judgment of the District Court is reversed and the cause remanded with directions to remand the cause to the county court of Gage County with directions to vacate the adjudication of delinquency and all dispositive orders based on the adjudication, and to grant Belding a new trial.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE APPLICATION OF E & B RIGGING & TRANSFER, INC. HOWARD N. DAHLSTEN, DOING BUSINESS AS DAHLSTEN TRUCK LINE, ET AL., APPELLEES, V. LLOYD HARRIS, DOING BUSINESS AS HARRIS TRANSFER, ET AL., APPELLANTS.
211 N. W. 2d 714

Filed October 26, 1973. No. 38855.

1. **Carriers: Words and Phrases: Public Service Commissions.** Under section 75-315, R. R. S. 1943, relating to motor common carriers, the phrase "willful failure" ordinarily means be-

havior that justifies the belief in intentional failure. The latter may be inferred from nonperformance of the requisite act over a long period of time.

2. **Evidence: Appeal and Error: Public Service Commissions.** If evidence sustains the findings of the Nebraska State Railway Commission, the court cannot decide that the findings are unreasonable.

Appeal from the Nebraska State Railway Commission. Affirmed.

Peterson, Bowman, Coffman & Larsen, A. J. Swanson, and Joseph L. Krause, for appellants.

James E. Ryan and Richard A. Knudsen, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SMITH, J.

The Nebraska State Railway Commission heard a complaint of dormancy in respect to part of the operating authority of a motor common carrier. It revoked in part, otherwise approving a transfer of the certificate in a consolidated proceeding. The transferor and the transferee appeal. The question is whether the order in respect to the partial revocation should be reversed.

The transferor was Lloyd Harris, doing business as Harris Transfer, and the transferee, E & B Rigging & Transfer, Inc. The application for transfer of the certificate resulted from the death of Harris, whose widow was unable to continue the business. Because of the revocation both parties lack authority to transport cement and limestone in bulk.

Harris Transfer, which has operated since 1937, did not transport cement in bulk, and the only time it transported limestone dust in bulk occurred in October 1966. On the latter haul, it used a truck owned by its customer. Pneumatic trailers have been necessary for transportation of the commodities in question. Harris Transfer has not possessed such equipment, has not held itself

out as a common carrier of either commodity, nor petitioned the commission for relief. Expansion of the business was considered but rejected because of the advanced age of Lloyd Harris. Rigging intends to compete for transportation of the commodities.

Prior to 1965 the railroads possessed a monopoly over transportation of cement, for paper rates barred competition from motor carriers. The policy was modified in 1965 by the introduction of commodity rates known as "ex-rail rates" on cement. In 1966 the commission established competitive truck rates for cement. Ready Mix, Inc. v. Nebraska Railroads, 181 Neb. 697, 150 N. W. 2d 275 (1967).

The commission may revoke a common carrier's operating authority for willful failure to comply with a commission rule or with sections 75-101 to 75-801, R. R. S. 1943. § 75-315, R. R. S. 1943.

The phrase "willful failure" in the statutory provision ordinarily means behavior that justifies the belief in intentional failure. The latter may be inferred from nonperformance of the requisite act over a long period of time. If evidence sustains the findings of the commission, the court cannot decide that the findings are unreasonable. Schmunk v. West Nebraska Express, Inc., 159 Neb. 134, 65 N. W. 2d 386 (1954); Safeway Cabs, Inc. v. Honer, 155 Neb. 418, 52 N. W. 2d 266 (1952); In re Application of Resler, 154 Neb. 624, 48 N. W. 2d 718 (1951); Union Transfer Co. v. Bee Line Motor Freight, 150 Neb. 280, 34 N. W. 2d 363 (1948); cf. Canning v. McKay, 173 Neb. 103, 112 N. W. 2d 737 (1962).

The evidence was ample to sustain the finding and order of the commission on willful failure of Harris Transfer.

The order is affirmed.

AFFIRMED.

SPENCER, J., dissenting.

I respectfully dissent from the majority opinion herein for the reasons stated by Commissioner John W. Swan-

son in his dissent from the order entered February 28, 1972, by the Nebraska State Railway Commission. Commissioner Swanson has adequately reviewed the facts and the law therein. It would serve no purpose to further review it herein.

EVELYN MAY SNOW, APPELLEE AND CROSS-APPELLANT, V. DEWEY BERDET SNOW, APPELLANT AND CROSS-APPELLEE.
211 N. W. 2d 719

Filed October 26, 1973. No. 38919.

Divorce: Alimony: Property. Where, in an action for dissolution of marriage, the wife is awarded a judgment for alimony the court should, if possible, divide the property in such a manner as to permit the husband the means of paying the judgment awarded the wife.

Appeal from the District Court for Sherman County: S. S. SIDNER, Judge. Affirmed in part, and modified in part and remanded with directions.

Mitchell & Beatty, Larry R. Demerath, and Timothy D. Whitty, for appellant.

Norman E. Stephens and Brian F. Beckner, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

CLINTON, J.

This appeal arises from an action for the dissolution of marriage. The only issues on appeal are the appropriateness of the award for alimony and the division of property. The defendant husband appeals and the plaintiff cross-appeals.

The trial court awarded the wife real property having a stipulated value of $41,600; $8,000 in cash payable $250 per month beginning January 1, 1973; and alimony of $100 a month payable monthly beginning January 1,

1976, until death of either of the parties or the remarriage of the plaintiff. The plaintiff was also awarded household goods of the value of $1,500; an automobile, subject to any obligation arising out of the purchase; and bank accounts and stocks which she now has in her own name. The trial court awarded the husband livestock, feed, and farm machinery of the value of approximately $77,000, and farmland of the approximate value of $52,000; directed him to pay encumbrances and debts of about $47,000; and charged him with costs of $3,563.27.

The defendant does not challenge the fairness of the amounts of the property division, but does challenge the award of alimony of $100 per month and argues that he should have either all the farmland and the plaintiff should receive an award of alimony in gross in lieu of the land allocated to her, or that the allocation of tracts among the parties should be readjusted so that he will have a more unified farm and a better economic unit.

The plaintiff, on her cross-appeal, argues that she should receive a greater share of the property and claims errors in the court's calculations.

Most of the evidence at the trial was directed to the issues of contributions by the parties to the acquisition of the property, charges and counter-charges of concealment of assets, and claims of additional indebtedness. The court made findings against both parties on these issues and no reason exists to disturb these findings. Neither is there any reason to reexamine the court's calculations. It is clear from the decree the court made the awards as it intended and the recital in the decree of certain fractions was specifically stated by the court to be only approximations.

We now examine the contentions of the defendant relative to the allocation of the tracts of farmland. The evidence shows the defendant conducted a cattle raising operation and at the time of trial had on hand 111 cows, 55 yearlings, 84 calves, and 5 bulls. The farmland of

the parties totals approximately 800 acres of which most of one-quarter section, part of that awarded to the defendant, is cropland apparently devoted to raising feed crops. The balance is pastureland. The three tracts, including the cropland, awarded the defendant are separated by substantial distances, 1½ miles and 1 mile respectively. The defendant has under lease from a relative an additional 380 acres, but the duration of this lease is not shown. It is evident that pastureland divided into noncontiguous tracts is at least somewhat less useful and economic than would be the same amount of land in a contiguous tract. This court has frequently said that the court should if possible divide the property in such a manner as to permit the husband to retain the means of paying off any judgment awarded the wife. Martin v. Martin, 188 Neb. 393, 197 N. W. 2d 388; Kula v. Kula, 181 Neb. 531, 149 N. W. 2d 430.

We modify the award to direct that the plaintiff be awarded the north half of the northwest quarter of Section 11, the south half of the southeast quarter of Section 7, and the north half of the northeast quarter of Section 18, hereinafter referred to as tracts (a), in lieu of the northwest quarter of Section 8 and the north half of the southwest quarter of Section 8, which latter tracts are awarded to the defendant. This arrangement will, when taken together with the land which the defendant holds under lease, give him contiguous tracts totaling 760 acres.

As so modified we direct that the defendant be given the option for a period of 180 days from the date of filing of this opinion to pay to the plaintiff alimony in gross in the sum of $41,600. If he elects this option and pays the amount within the time provided, he shall be awarded the land referred to as tracts (a) in the preceding paragraph hereof and the southwest quarter of Section 5.

It is recognized that the defendant, in order to exercise this option, may be required to borrow upon the security of all the land, and that the existence of the

judgment of $8,000 payable in installments and the award for child support and for periodic alimony constitute liens against the land which the defendant has or may receive hereunder. The lower court, of course, having jurisdiction both of the res and the parties, may, during the existence of the defendant's option provided for above, make such orders as may be required to subordinate the judgment liens to the liens of any mortgage which the defendant may be called upon to make to exercise his option.

For reasons which we have set forth in Magruder v. Magruder, *ante* p. 573, 209 N. W. 2d 585, we believe that the alimony award of $100 per month beginning January 1, 1976, payable until the death of the parties or the remarriage of the plaintiff, should be modified to provide that it shall in no event continue for a period longer than 121 months.

If the defendant does not, by paying the $41,600 to plaintiff within the time hereinbefore prescribed, elect to exercise the option granted to him, the decree of the lower court is affirmed as otherwise modified.

Each party shall pay his own costs in this court.

AFFIRMED IN PART, AND MODIFIED IN PART AND REMANDED WITH DIRECTIONS.

NEBRASKA CONFERENCE ASSOCIATION OF SEVENTH DAY ADVENTISTS, APPELLEE, V. BOARD OF EQUALIZATION OF HALL COUNTY, NEBRASKA, ET AL., APPELLANTS.
211 N. W. 2d 613

Filed October 26, 1973. No. 38941.

Taxation: Property: Exemptions. If property is partly exempt and partly nonexempt, the value of the nonexempt portion is subject to taxation and the value of the exempt portion is not subject to taxation.

Appeal from the District Court for Hall County: LLOYD W. KELLY, JR., Judge. Affirmed.

Sam Grimminger, for appellants.

Luebs, Tracy, Huebner, Dowding & Beltzer and Asa A. Christensen, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

McCOWN, J.

This is an appeal by the board of equalization and the county assessor of Hall County from a judgment of the District Court exempting from taxation certain property owned by the Nebraska Conference Association of Seventh Day Adventists. The District Court found all the property of Platte Valley Academy, a coeducational boarding high school to be tax exempt, with the exception of the property occupied and used for profit by two privately owned and operated industries, and a residence rented to the owner of one of the industries. These were found taxable along with certain other property previously determined by this court to be taxable. We affirm the judgment of the District Court.

The general facts involving the ownership and operation of the Platte Valley Academy are set out in Nebraska Conference Association of Seventh Day Adventists v. Board of Equalization, 179 Neb. 326, 138 N. W. 2d 455. It was stipulated that but for the location and operation of the two private industries and the residence on a portion of the school real estate, all the real estate and personal property owned by the conference in Hall County as described in this proceeding qualifies for exemption from taxation under the Nebraska Revised Statutes. The sole issue presented on this appeal is whether the location and operation of the two factories upon the academy campus destroy the tax exempt status of all the remaining property of the school which would otherwise be tax exempt.

The Platte Valley Academy is a fully accredited coeducational boarding high school. It has approximately

150 students. All students are required to work 6 to 30 hours per week in addition to classroom assignments as an essential part of their training. Their work performance is evaluated periodically, along with classroom work. Most students need such work in order to pay their tuition, room, and board. Those students having greater financial need generally work more hours per week. The academy itself provides work for many of the students in maintenance and operation of the academy and grounds, including laundry, cafeteria, maintenance, custodial, secretarial, and other jobs.

In addition to the work provided by the school, two privately owned factories, a broom factory and a plastics factory, have been located on the campus expressly for the purpose of providing work experience for the students. Both private businesses are obliged to employ only students, except for supervisory employees or sales personnel who are required to travel. The broom factory employs 12 to 15 students and the plastics factory employs 5 or 6 students. Students are all part-time employees, except in the summer when some work full-time and stay in the school dormitory with other school personnel. All student work, both that performed for the academy and that performed for the private industries, is assigned by the principal in consultation with faculty and staff on the basis of age, financial need, schedule, class load, and capabilities. All students receive at least the legal minimum wage. They are not paid in cash except in rare instances. Instead, they receive credit against their academy account for room, board, and tuition. Both private industries compute student earnings, and make the necessary withholdings. These payroll lists are forwarded to the academy, together with checks for the earnings, which are credited to each student's academy account.

The respective owners exclusively supervise the operation of both the broom factory and the plastics factory and all profits go to them. Both private industries

received loans from the conference to assist in establishing the businesses at the academy. The loans are secured by mortgages. Under the agreements with the respective owners of the factories, the conference provided space for the operation of the businesses which was to be rent free for an initial period with the rental to be negotiated thereafter. The industries agreed to maintain the buildings and to assume responsibility for such items as insurance, utilities, and taxes, and to return the space to the conference upon any termination of the agreement in as good condition as received, less ordinary wear and tear.

The broom factory occupies a building approximately 28 x 100 feet in size. The plastics factory occupies space constituting approximately one-third of the total space in another building. In addition to the buildings occupied by the factories, the owner of one of them rents a residence from the academy for which he pays rental of $100 per month. The building space occupied by the two factories and this residence were found taxable by the District Court and there is no appeal from that portion of the judgment.

The appellants contend that the uses of the private businesses from which the owners receive financial gain and profit are so intermingled with the uses of the Platte Valley Academy as to render the property incapable of separation into exempt and taxable portions. Therefore, they argue that the entire tax exemption of the academy should be denied. There is no evidence of any kind that the basic operation of the academy as an educational institution has been altered or changed in any way by the addition of the two private factories except to provide additional student work.

In Young Men's Christian Assn. v. Lancaster County, 106 Neb. 105, 182 N. W. 593 (1921), this court considered the issue of whether it was feasible to segregate the space occupied by a cafeteria, open to the public, from the rest of a Y.M.C.A. building for purposes of taxation.

We quoted with approval a statement that: "The fact that the building is so constructed, that the parts leased or otherwise used with a view to profit cannot be separated from the residue by definite lines, is no obstacle to a valuation of such parts for purposes of taxation, having due reference to the taxable value of the entire property." This court stated: "No reason appears why the taxing authorities cannot arrive at a just valuation of that portion of the building which is taxable, in its relation to the entire property, and assess the property in that amount."

Later in Masonic Temple Craft v. Board of Equalization, 129 Neb. 293, 261 N. W. 569, this court held: "That part of a building owned by a religious, charitable and educational institution, but leased and used by the tenant for business purposes, is not exempt from taxation." On rehearing, the same holding was applied to the lot upon which the building stood. Masonic Temple Craft v. Board of Equalization, 129 Neb. 827, 263 N. W. 388.

Nebraska Conference Association of Seventh Day Adventists v. Board of Equalization, 179 Neb. 326, 138 N. W. 2d 455, involved the same academy and most of the same property involved here. There this court found part of the academy property taxable and the remainder exempt and said: "* * * if property is partly exempt and partly nonexempt, the value of the nonexempt portion is subject to taxation." Quite obviously the corollary is that the value of the exempt portion of the property is not subject to taxation.

This court has consistently held that property owned and used exclusively for educational, religious, or charitable purposes and not owned or used for financial gain or profit to either the owner or user is tax exempt. Property not so owned and used is taxable and we have separated the taxable property from the tax exempt property in many cases similar to that now before us. See Union College v. Board of Equalization, 183 Neb. 579, 162 N. W. 2d 772.

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

AFFIRMED.

ESTATE OF EMMA RUWE, THELMA H. WINDHUSEN, EXECUTRIX, APPELLEE, V. ALLEN RUWE, APPELLANT.
211 N. W. 2d 610

Filed October 26, 1973. No. 38960.

1. **Pleadings: Trial: Appeal and Error.** The general rule that the allegations of the pleadings and proof thereunder must agree will not be applied to reverse a judgment, where an issue is tried by both parties without objection from either that such issue is not sufficiently pleaded. Under such conditions, the appellate court will consider the pleadings as sufficient to raise the particular issue.
2. **Limitations of Actions: Payment.** A voluntary payment upon a claim otherwise barred by the statute of limitations is one that was intentionally and consciously made and accepted as part payment of the particular indebtedness in question under such circumstances as would warrant a clear inference that the debtor assented to and acknowledged the greater debt to be due as an existing liability.
3. **Estates: Landlord and Tenant: Crops.** Where a tenant for life of farm land leases the land, with the rent payable in a share of the crop, and dies while the crop is growing, title to the share of the crop reserved as rent passes to the executor of the estate of the tenant for life as assets of that estate.
4. **Interest: Evidence.** A claim is liquidated if the evidence furnishes data which, if believed, makes it possible to compute the amount, without reliance upon opinion or discretion.

Appeal from the District Court for Dodge County: ROBERT L. FLORY, Judge. Affirmed as modified.

Richard L. Kuhlman, for appellant.

Sidner, Svoboda, Schilke & Wiseman, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

NEWTON, J.

This is an action in equity for an accounting of farm rentals. Plaintiff sought recovery on the theory of a tenancy from year to year created by holding over under a 1960 written lease. Defendant claimed the lease was terminated by agreement and that in lieu of rent, he was to pay the owner's living and other expenses; also, that the statute of limitations had run as to the earlier years involved. Following trial to the court, judgment was entered for plaintiff. We affirm the judgment except as to prejudgment interest.

By stipulation the issue of liability was tried first and, at its conclusion, the court stated: "Since the trial of the first stage of this case on March 29, 1972 the court has indicated a determination that there was no fixed agreement and that the estate is entitled to the reasonable rental value of the land for the years 1966, 1967, 1968 and possibly, the year 1969. Therefore, it is the understanding of the court that the evidence now will be limited to the reasonable rental value of the real estate and as to the year of 1969, when the rent is due, and credits due the defendant for any payment of taxes, payments to the life tenant, repairs, and insurance and maintenance." Trial was then held, without objection by either party, on the issue of rents due on the basis of quantum meruit.

Plaintiff's decedent held a life estate in the 316-acre farm occupied by her son, the defendant. A lease was executed for the ensuing year commencing March 1, 1960. There was evidence to the effect that the parties later terminated the lease by agreement. Defendant maintained that in lieu of a lease he agreed to pay his mother whatever money she required and to set up a bank account for this purpose. The bank account was never established and he failed to produce a single check showing a payment to his mother, but he did pay real estate taxes. It is evident that, if there was such an agreement, it was not adhered to nor complied with.

The court found that the written lease had been terminated but that no other agreement was entered into. This was the basis for the court's finding that rentals were due on a quantum meruit basis.

Defendant now asserts that plaintiff cannot recover in quantum meruit after pleading a written contract. This assignment was not mentioned in his motion for a new trial but is ineffective in any event. "The general rule that the allegations of the pleadings and proof thereunder must agree will not be applied to reverse a judgment, where an issue is tried by both parties without objection from either that such issue is not sufficiently pleaded. Under such conditions, the appellate court will consider the pleadings as sufficient to raise the particular issue." Hensley v. Chicago, St. P., M. & O. Ry. Co., 118 Neb. 690, 226 N. W. 421. See, also, Johnson v. Weskamp, 122 Neb. 381, 240 N. W. 514.

This action was commenced on April 16, 1971. In August 1967, defendant paid the balance of the 1966 real estate taxes on the farm. The court held that this tolled the statute of limitations as to the 1966 rent. It is conceded that the payment of taxes was the responsibility of the plaintiff life tenant and that defendant is entitled to credit for taxes paid. " 'A voluntary payment upon a claim otherwise barred by the statute of limitations is one that was intentionally and consciously made and accepted as part payment of the particular indebtedness in question under such circumstances as would warrant a clear inference that the debtor assented to and acknowledged the greater debt to be due as an existing liability.' " Beacom v. Daley, 164 Neb. 120, 81 N. W. 2d 907. The payment of real estate taxes by a tenant must logically be deemed a payment on rent due rather than a donation. The evidence indicates that the payment was made voluntarily and was acquiesced in as a payment on rents due.

Defendant also questions the requirement that he pay rent for the March 1, 1969, to March 1, 1970, year

as the life tenant died on January 20, 1970, and defendant was the remainderman. His contention is based upon the theory that the rent did not accrue until March 1, 1970, after the termination of the life tenancy. In support of his theory he cites Beacom v. Daley, *supra.* That case holds that rents accruing after the death of the life tenant belong to the remainderman. There was no evidence to show when the rent accrued and it was therefore deemed to fall due when the lease period terminated. In the present case the uncontradicted evidence shows that cash rent would be payable in advance and that crop-share rents fell due when the crops were harvested which was prior to December 1, 1969. The rent had already accrued to the life tenant prior to her death. It was personal property and as such belonged to the executrix of the estate of the life tenant. This court held in In re Estate of Mischke, 136 Neb. 875, 287 N. W. 760: "Where a tenant for life of farm land leases the land, with the rent payable in a share of the crop, and dies while the crop is growing, title to the share of the crop reserved as rent passes to the executor of the tenant for life as assets of that estate." The decision is based on the well-founded theory that growing crops are personal property. It is in line with holdings generally in other jurisdictions. See Annotation, 47 A. L. R. 3d 801.

The rule announced in Beacom v. Daley, *supra,* is frequently unsuited for application to rentals of agricultural lands, and insofar as it may conflict with In re Estate of Mischke, *supra,* it is overruled.

A question arises as to the allowance of interest on the sum found due. It will be noted that the trial court permitted recovery on a quantum meruit basis and found that no oral or written lease existed. Under such circumstances the rental terms were not fixed and definite. Recovery was on the basis of the "fair and reasonable rental value." The amount due was not liquidated. "A claim is liquidated if the evidence furnishes

data which, if believed, makes it possible to compute the amount, without reliance upon opinion or discretion." Abbott v. Abbott, 188 Neb. 61, 195 N. W. 2d 204. The ascertainment of "reasonable rental value" is a matter of judgment or opinion. It is not determined or readily determinable by computation. Under such circumstances prejudgment interest cannot be allowed.

The judgment entered in the District Court is affirmed with the exception of the allowance of prejudgment interest.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. DAVID LEE BREWER, APPELLANT.
212 N. W. 2d 90

Filed November 9, 1973. No. 38763.

1. **Criminal Law: Searches and Seizures: Probable Cause: Police Officers and Sheriffs.** A police officer may in appropriate circumstances and in an appropriate manner approach a person for the purpose of investigating possible criminal behavior even though there is no probable cause to make an arrest.
2. ———: ———: ———: ———. A peace officer may stop any person in a public place whom he reasonably suspects of committing, who has committed, or who is about to commit a crime and may demand of him his name, address, and an explanation of his actions. § 29-829, R. S. Supp., 1972.
3. **Criminal Law: Arrest: Probable Cause: Evidence.** Probable cause does not require the same type of specific evidence of each element of the offense as would be needed to support a conviction.
4. **Criminal Law: Arrest: Probable Cause.** Probable cause exists where the facts and circumstances, within the officers' knowledge and of which they have reasonably trustworthy information, are sufficient in themselves to warrant a belief by a man of reasonable caution that a crime is being committed.
5. **Criminal Law: Searches and Seizures: Motor Vehicles: Arrest.** An automobile may be searched without a warrant as an incident to a valid arrest. The justification for such search grows

out of the inherent necessities of the particular situation at the time of the arrest.

6. **Criminal Law: Sentences: Time.** A sentence validly imposed takes effect from the day it is pronounced and a subsequent sentence fixing a different term is a nullity.

Appeal from the District Court for Douglas County: SAMUEL P. CANIGLIA, Judge. Affirmed in part, and in part reversed and remanded with directions.

Frank B. Morrison, Sr., Stanley A. Krieger, and David Lee Brewer, for appellant.

Clarence A. H. Meyer, Attorney General, and Harold S. Salter, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

CLINTON, J.

The defendant, Brewer, was charged in count I of an information with possessing a firearm with a barrel less than 12 inches in length after having been convicted of a felony. § 28-1011.15, R. S. Supp., 1972. In count II of the information he was charged with conviction of previous felonies which, if proved, would subject him to punishment as a habitual criminal. Following a verdict of guilty on count I which was rendered on August 16, 1972, on August 31, 1972, the defendant was sentenced by the court to a term of 20 months to 5 years in the Nebraska Penal and Correctional Complex. This sentence was imposed without a representative of the prosecutor's office being present. Later on the same day another hearing was held at which the prosecuting officer was represented and the State informed the court that it intended to prove the convictions necessary to punish Brewer as a habitual criminal. The court then purported to set aside the sentence imposed earlier that same day. On September 8, 1972, a hearing was held, proof was received on the prior felony convictions, and the court determined that

the defendant had twice before been convicted of felonies, had been sentenced thereon, and was a habitual criminal. The court then imposed a sentence of 10 to 15 years.

Two issues are raised on this appeal. In a brief filed by counsel the setting aside of the first sentence and the resentencing as a habitual criminal is attacked. In a brief filed by Brewer pro se it is contended that the court erred in receiving into evidence a certain 357 magnum Colt revolver and certain other items because they were the fruit of an illegal arrest and an unlawful search, and the trial court therefore erred in denying the defendant's motion to suppress.

We treat the second issue first because, if the error assigned in connection therewith is well taken, the entire conviction must be set aside.

The evidence as adduced at the suppression hearing and at trial, insofar as it pertains to the admission of the physical evidence which was sought to be suppressed, was substantially as follows: On the evening of April 8, 1972, at about the hour of 7 or 8 o'clock p.m., Sergeant Pfeffer of the Omaha police department received from an identified informant a telephone call advising him that the informant had information about a robbery that might be committed that evening. Pfeffer had known the informant for 6 to 8 months and had given him both his office and home telephone numbers for the purpose of relaying information. The sergeant had previously received from the informant information which required no action but which was accurate because the police already had the information as the result of their own investigations. Pfeffer considered the informant reliable.

Pfeffer was off duty at the time the phone call was received on April 8th and made arrangements for the informant to meet Sergeant Swanson of the intelligence division in the neighborhood where the informant claimed a robbery was to take place. Pursuant to this arrangement Swanson and the informant met near a Target

Store and talked for 15 or 20 minutes. There Swanson was given certain details of the planned robbery, including the location, the time, 9:30 p.m., names of three putative participants, viz., David Brewer, Warren Dittrich, and a man named Powell, and some information concerning a possible fourth participant, an alleged escaped convict. The information included the fact that two of the named participants were black and one, Dittrich, was an Indian or Caucasian. It also included description of two motor vehicles which might be used, a blue Oldsmobile and a bronze Buick, both bearing Nebraska plates. A general description of the weapons to be used was also given. These were described as being a shotgun and two handguns. This information was based upon the personal observation of the informant who had been asked to participate in the proposed crime by creating a diversion at another location. The original plan for this diversion included a discharge of a firearm by the informant with a weapon to be furnished by the informant's cohorts. Two of the named parties were neighbors of the informant and the third, Powell, was an acquaintance. The informant came to his meeting with Sergeant Swanson in a white Cadillac which was the property of Warren Dittrich, one of the alleged participants. Swanson recognized the Cadillac as belonging to Dittrich.

It is not clear from the testimony just how much of this information was given to Pfeffer in the earlier conversation with the informant, but the informant testified with reference to his conversation with Pfeffer: ". . . I informed him of what they wanted me to do, and asked him what should I do, you know, and he said, 'You go on down there at nine o'clock,' and he would have someone down there waiting for me." Neither is it clear that all the above details were given to Swanson by the informant, but it is clear that the more significant information was included. Swanson testified that he gave all the information he received to Officer

Gutchewsky who later made the arrest and supervised the search.

While Swanson and the informant were engaged in the conversation standing outside Swanson's unmarked car, the informant called to Swanson's attention an automobile which passed by, stating that it was one of the autos which was being used and that the planners were in it. Swanson saw enough of the automobile to recognize it as a blue Oldsmobile and thus fitting the description given earlier, but could not see the occupants well enough to identify them.

The informant then left the meeting with Swanson to keep a rendezvous with his associates. Swanson was informed that he was doing this. When he met them they quizzed him concerning his meeting with Swanson which they apparently observed. The informant made excuses. They told him to go back home. But, according to the informant's story at trial, they immediately followed him, stopped him, told him to go back and break a window with rocks in the Target Store, and cause a big commotion and get the police down there. The informant then went back to Swanson and advised him of what he had been told to do. Swanson at least acquiesced in the informant's carrying out his assignment or directed him to go do it. This item is in dispute.

In the meantime, the liquor lounge which was to be the target of the robbery was staked out by the police officers. No robbery took place at the time designated or at any time the evening in question.

At about 9:30, Sergeant Swanson communicated to Officer Gutchewsky and his partner, members of a strike force, the information which he had obtained. Officer Gutchewsky and his partner, apparently pursuant to instructions, established a stake out near the Warren Dittrich residence. These two officers were assisted by two other officers in the car nearby. This was at about 10 o'clock p.m. At about 10:30 p.m., a bronze Buick automobile driven by the defendant drove by and the

defendant sounded the horn and waved to the officers. The description of the car met that which the officers had been given. They stopped the car without difficulty. The defendant was asked to get out, which he did. When he was asked his name, he stated that it was Clarence Brewer. When asked for identification, he stated he had none. When asked about his business in the neighborhood, his answers were evasive and equivocal. Gutchewsky and his companion conferred. Gutchewsky said to his companion that because of past contacts he believed he recognized the defendant as David Brewer, one of the persons named by the informant. The officers then placed the defendant under arrest for giving false information to a police officer. See § 28-744, R. S. Supp., 1972.

At this point as the officers were preparing to make what they termed an inventory search of the car they received a radio call from another surveillance car stating that the blue Oldsmobile was coming down the street. They signaled with their flashlights to stop it. It continued past them. Gutchewsky followed on foot while his companion kept the defendant in custody. The other police car, which was following, placed its spotlight on the Oldsmobile and it stopped about ½ block beyond the Gutchewsky car. Dittrich and Powell were in that car. It was searched by other officers and a sawed-off shotgun and a handgun were found and those two were placed under arrest. Gutchewsky and his partner knew of this and realized one weapon still had not been found. The informant testified at trial that he had seen the 357 magnum in the waistband of Brewer at an earlier time. Whether this specific information had been relayed to the officers is not clear. However, Sergeant Swanson testified at the suppression hearing that the informant told him he had personally seen the weapons.

Other police cars were called to the scene. Gutchewsky and his partner returned to the Brewer car. At some

point Gutchewsky verified by a radio check that the car was registered to Clarence Brewer. Gutchewsky asked Officer Kelly to search the Buick. Kelly found the 357 magnum with one shell in the cylinder and five cartridges in a handkerchief. All these items were on top of the glove compartment underneath the dashboard of the automobile. The items were not secured in that position in any way. No search warrant had been obtained.

The questions to be answered are: (1) Was the stop for interrogation lawful? (2) Was there probable cause for arrest? (3) Was the search valid? We answer all three questions in the affirmative.

The stop of Brewer for interrogation was, in our judgment, justified under the standards announced by the Supreme Court of the United States in Adams v. Williams, 407 U. S. 143, 92 S. Ct. 1921, 32 L. Ed. 2d 612; and under the provisions of section 29-829, R. S. Supp., 1972. In Adams v. Williams, *supra,* the court said: ". . . we reject respondent's argument that reasonable cause for a stop and frisk can only be based on the officer's personal observation, rather than on information supplied by another person. Informants' tips, like all other clues and evidence coming to a policeman on the scene, may vary greatly in their value and reliability. One simple rule will not cover every situation. Some tips, completely lacking in indicia of reliability, would either warrant no police response or require further investigation before a forcible stop of a suspect would be authorized. But in some situations—for example, when the victim of a street crime seeks immediate police aid and gives a description of his assailant, or when a credible informant warns of a specific impending crime—the subtleties of the hearsay rule should not thwart an appropriate police response." The court there also said: "A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more

information, may be most reasonable in light of the facts known to the officer at the time." It cited Terry v. Ohio, 392 U. S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889. A police officer may in appropriate circumstances and in an appropriate manner approach a person for the purpose of investigating possible criminal behavior even though there is no probable cause to make an arrest. Adams v. Williams, *supra*. Section 29-829, R. S. Supp., 1972, says in part as follows: "A peace officer may stop any person in a public place whom he reasonably suspects of committing, who has committed, or who is about to commit a crime and may demand of him his name, address and an explanation of his actions."

In this case, the arresting officers had, based upon information relayed to them by their superiors and which we have earlier set forth in this opinion, reasonable grounds to stop and interrogate the driver of the bronze Buick. When they did so and Brewer gave a false identity, stated he had no identification on him, and his explanation of his business was evasive and equivocal, further action was required. The information which they had been furnished earlier by Swanson had become even more pertinent and relevant. At this point, wholly apart from the matter of the false identity, the officers had probable cause to believe that Brewer might have concealed on his person or in the car which was under his immediate control one of the weapons which had been described to them. Thus they then had reasonable grounds to believe that: (1) Brewer had probably conspired to commit a felony; (2) he had a concealed weapon on his person or in the car under his immediate control; and they knew (3) he had given a false identity for the probable purpose of impeding their investigation. This last item was also a crime. See § 28-744, R. S. Supp., 1972.

In Adams v. Williams, *supra*, the court said: "Probable cause does not require the same type of specific evidence of each element of the offense as would be

needed to support a conviction," citing Draper v. United States, 358 U. S. 307, 79 S. Ct. 329, 3 L. Ed. 2d 327.

We find that when defendant was placed under arrest, probable cause existed within the meaning of the foregoing rules.

We find that the search of the automobile was justified on two grounds: (1) A search incident to and contemporaneous with the arrest, Preston v. United States, 376 U. S. 364, 84 S. Ct. 881, 11 L. Ed. 2d 777; Carroll v. United States, 267 U. S. 132, 45 S. Ct. 280, 69 L. Ed. 543, 39 A. L. R. 790; Brinegar v. United States, 338 U. S. 160, 69 S. Ct. 1302, 93 L. Ed. 1879; Chimel v. California, 395 U. S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685; and (2) probable cause to search the automobile, Carroll v. United States, *supra;* Chambers v. Maroney, 399 U. S. 42, 90 S. Ct. 1975, 26 L. Ed. 2d 419.

Here there was an immediate need to search the automobile to prevent the possible loss of evidence of crime. This needed to be done while the automobile was still available to the officers. The fact that the automobile was registered to Clarence Brewer, who it developed was David Brewer's blood nephew and adopted brother, made this need more urgent as Clarence could at any time have appeared and claimed his car. In Carroll v. United States, *supra,* the court for the first time justified the search of an automobile without a warrant where the search was made on probable cause and upon a belief reasonably arising out of the circumstances known to the officer that the vehicle contained evidence of crime. The principles of that case are applicable here. See, also, Brinegar v. United States, *supra,* where it was said that probable cause exists where the facts and circumstances, within the officers' knowledge and of which they have reasonably trustworthy information, are sufficient in themselves to warrant a belief by a man of reasonable caution that a crime is being committed.

The automobile at the time of the defendant's arrest

was an area within his immediate control within the meaning of Chimel v. California, *supra*. As long as the defendant was near the automobile the possibility existed that he might obtain therefrom a weapon, if one were there concealed, as turned out to be the fact. This constituted under the circumstances of this case a justification of the search incident to the arrest. Further search was directed to the obtaining of evidence related to one of the reasons for which the defendant had been arrested.

The justification for search without warrant grows out of the inherent necessities of the situation at the time of the arrest. Chimel v. California, *supra*, citing Trupiano v. United States, 334 U. S. 699, 68 S. Ct. 1229, 92 L. Ed. 1663. See, also, Chambers v. Maroney, *supra*, where the Supreme Court of the United States upheld the warrantless search of an automobile upon probable cause even after its removal from the scene of the arrest to the police station. Cf. Coolidge v. New Hampshire, 403 U. S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564. We deem the fact that the officers sought to justify the search as an inventory search alone is immaterial. An inventory search would not normally reach the area where the gun was found.

We now examine the matter of the vacation of the original sentence and the imposition of the 10 to 15-year sentence. The record clearly discloses that immediately after the 20-month to 5-year sentence was imposed the court overruled a motion for a new trial. There can be no doubt that sentence was imposed and that the proceeding which took place at 9:30 a.m., on August 31, 1972, was not merely an announcement of a possible sentence to be imposed in the future. Neither is this a case where there was some ambiguity in the sentence or inadvertent misstatement in pronouncing it.

It is the majority rule long followed in this state that when a valid sentence has been put into execution the trial court cannot modify, amend, or revise it in any

way, either during or after the term or session of court at which the sentence was imposed. Any attempt to do so is of no effect and the original sentence remains in force. In re Jones, 35 Neb. 499, 53 N. W. 468; Hickman v. Fenton, 120 Neb. 66, 231 N. W. 510, 70 A. L. R. 819; Myers v. Fenton, 121 Neb. 56, 236 N. W. 143; Moore v. State, 125 Neb. 565, 251 N. W. 117; State v. Keyser, *ante* p. 445, 209 N. W. 2d 187; State v. Carpenter, 186 Neb. 605, 185 N. W. 2d 663; Housand v. Sigler, 186 Neb. 414, 183 N. W. 2d 493; State v. Huffman, 186 Neb. 809, 186 N. W. 2d 715; State v. Smith, *ante* p. 623, 211 N. W. 2d 415.

Section 29-2221, R. S. Supp., 1972, provides the circumstances and the procedure under which an individual may be punished as a habitual criminal. Procedurally the effect of the statute is to provide for a bifurcated trial. The statute says in part: "If the accused is convicted of a felony and before sentence is imposed, a hearing shall be had before the court alone as to whether such person has been previously convicted of prior felonies. The court shall fix a time for the hearing and notice thereof shall be given to the accused at least three days prior thereto. At the hearing, if the court shall find from the evidence submitted that the accused has been convicted two or more times of felonies and sentences imposed therefor by the courts of this or any other state, or by the United States, the court shall sentence such person so convicted as an habitual criminal."

As this court has frequently noted, the count of an information charging facts making the defendant punishable as a habitual criminal does not constitute a separate offense. Only one sentence may be imposed. State v. Huffman, *supra;* State v. Tyndall, 187 Neb. 48, 187 N. W. 2d 298.

In this case the sentence first imposed was a valid one for the crime of which the defendant was convicted.

The trial court under the circumstances shown by the

record was without power to vacate the sentence it had imposed on August 31, 1972. Accordingly we need not examine or rule on the defendant's contention that he has been twice placed in jeopardy.

The sentence of 10 to 15 years is set aside and the sentence of 20 months to 5 years is affirmed.

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

EMIL C. WEBBER, APPELLANT, V. CITY OF OMAHA, APPELLEE.
211 N. W. 2d 911

Filed November 9, 1973. No. 38898.

1. **Trial: Instructions.** The failure to object to instructions after they have been submitted to counsel for review will preclude raising an objection on appeal.
2. **Trial: Negligence: Intoxicating Liquors.** The fact that a person was intoxicated is a circumstance which may be considered in determining whether he exercised the degree of care for his own safety which a prudent sober person would exercise under the same or similar circumstances. The mere fact that he was intoxicated at the time he was injured does not of itself constitute contributory negligence.
2. ———: ———: ———. The care required of a person who has voluntarily become intoxicated is the same as that required of one who is sober. If he fails to exercise that degree of care for his own safety which an ordinarily prudent sober person would exercise under the same or similar circumstances, and such failure contributes as a proximate cause to the injury of which he complains, he is guilty of contributory negligence.

Appeal from the District Court for Douglas County: DONALD BRODKEY, Judge. Reversed and remanded.

John T. Carpenter of Matthews, Kelley, Cannon & Carpenter, for appellant.

Herbert M. Fitle and James E. Fellows, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SPENCER, J.

Plaintiff appeals from a verdict for the city of Omaha in his action for damages for injuries sustained while confined in the Omaha city jail. He sustained the loss of his left eye when he was assaulted by other inmates of the cell in which he was placed. Plaintiff lists 10 assignments of error. We reverse.

This action was originally filed against the City of Omaha and other defendants. The City raised the defense of governmental immunity. See Webber v. Andersen (1971), 187 Neb. 9, 187 N. W. 2d 290. That case was returned to the District Court for trial against the city on plaintiff's allegations of negligence in his third cause of action of his amended petition.

Plaintiff in his petition alleges that prior to his injuries he was a healthy, active, married man 51 years of age, duly licensed to practice his profession of mechanical engineering. He testified that in the early evening of June 4, 1968, at approximately 7:30 p.m., he entered a bar in Omaha and remained there until approximately 12 a.m. During that period he consumed five or six whiskey and water drinks. He left the bar on foot and was arrested by members of the Omaha police department.

Plaintiff was taken to the police station and booked for intoxication. He objected to being placed in cell No. 2 because the three inmates already occupying that cell were awake and looked disheveled. He told the jailors, " 'I am afraid to go in there.' " He was pushed into the cell and the door was closed. The jailors returned to their office a few feet away and closed a solid steel door between their office and the cell. He yelled for a period of 10 to 15 minutes to draw the attention of the jailors and requesting removal from the cell, but to no avail. Plaintiff was attacked by the inmates and rendered unconscious. As a result of his confinement and the alleged negligence of the city's employees, he sustained serious and severe injuries,

necessitating the removal of his left eye.

Defendant's amended answer alleges that the direct and proximate cause of plaintiff's injury was his own contributory negligence in becoming intoxicated and in pursuing a course of conduct with wanton disregard to the nature and consequences of surrounding conditions.

Defendant's evidence would indicate that plaintiff was arrested on Seventeenth Street between Dodge and Douglas Streets when he was observed staggering and trying to stop cars. He was also "using obscenity." The witness, the police officer who observed plaintiff, was cautioned at the trial not to use plaintiff's exact wording because of the nature of the profanity. When plaintiff was taken to the police station he was placed in cell No. 2. He then started cursing and banging his shoe on the bars of his cell.

In several of his assignments of error plaintiff objects to the giving of certain instructions. These are instructions Nos. 3, 6, 7, 8, 9, 10, 13, 21, 22, 23, and 25. Instructions Nos. 3 and 7, taken together, are prejudicially erroneous and will be discussed later.

At the instructions conference plaintiff told the trial court that he had no objection to instructions Nos. 10, 13, 21, 23, and 25. He is now barred from contending that their submission was erroneous. The failure to object to instructions after they have been submitted to counsel for review will preclude raising an objection on appeal. Libbey-Owens Ford Glass Co. v. L & M Paper Co. (1973), 189 Neb. 792, 205 N. W. 2d 523.

Instructions Nos. 6, 7, 8, and 9 were instructions on contributory negligence. Plaintiff's objection is premised on his contention that contributory negligence should not have been submitted. We are satisfied from the record that contributory negligence was a proper issue to be submitted to the jury.

Instruction No. 22 reads as follows: "The care required of a person who has become intoxicated volun-

tarily is the same as that required of a person who is sober." This instruction was taken verbatim from Remmenga v. Selk (1948), 150 Neb. 401, 34 N. W. 2d 757. It correctly states the law in this jurisdiction.

This leaves instructions Nos. 3 and 7. So far as material herein, instruction No. 3 reads as follows: "The defendant, City of Omaha, has filed an amended answer to the Third Amended Petition of the plaintiff, as amended, in which said defendant denies each and every allegation contained in plaintiff's petition; and further answering the said Defendant alleges that the direct and proximate cause of Plaintiff's injury was the contributory negligence of the Plaintiff in the following:

"(1) Becoming intoxicated;

"(2) In pursuing a course of conduct with wanton disregard to the nature and consequence of surrounding conditions."

Instruction No. 7, so far as material, reads: "To establish this defense (contributory negligence), the burden is on the defendant to prove by a preponderance of the evidence that the plaintiff was negligent in *one* or more of the particulars alleged in instruction No. 3 * * *." (Emphasis supplied.)

By these instructions the trial court told the jury that plaintiff would be guilty of contributory negligence if he became intoxicated. This was equivalent to directing a verdict for the defendant because the parties stipulated that at the time of plaintiff's arrest he was intoxicated.

These instructions, taken together, were prejudicially erroneous. The fact that a person was intoxicated is a circumstance which may be considered in determining whether he exercised the degree of care for his own safety which a prudent sober person would exercise under the same or similar circumstances. The mere fact that he was intoxicated at the time he was injured does not of itself constitute contributory negligence. See Remmenga v. Selk (1948), 150 Neb. 401, 34 N. W. 2d 757.

In that same case we held: "The care required of a person who has voluntarily become intoxicated is the same as that required of one who is sober. If he fails to exercise that degree of care for his own safety which an ordinarily prudent sober person would exercise under the same or similar circumstances, and such failure contributes as a proximate cause to the injury of which he complains, he is guilty of contributory negligence."

Plaintiff's assignment of error No. 3 complains of certain rulings on objections relative to plaintiff's excessive use of alcohol. Plaintiff stipulated that at the time of his arrest he was intoxicated. On the retrial herein the fact that his first marriage was dissolved because of his alleged excessive use of alcohol, or that he was arrested for drunken driving, would be immaterial in light of his admission.

Plaintiff's assignment of error No. 4 is directed to the admission in evidence of two criminal jackets on chronic drunks having no connection with this case. The admission of this evidence was improper, and should not occur on a retrial.

The judgment herein is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

SYSTEM MEAT COMPANY, A WYOMING CORPORATION, APPELLEE, V. B. M. STEWART ET AL., APPELLEES, RICHARD KEKEISEN ET AL., INTERVENERS-APPELLANTS.
211 N. W. 2d 902

Filed November 9, 1973. No. 38924.

1. **Appeal and Error: Trial.** The decision of questions presented to this court in reviewing the proceedings of the District Court becomes the law of the case and for purpose of litigation settles conclusively the matters adjudicated expressly or by necessary implication.
2. **Appeal and Error: Trial: Evidence.** The rule that the trial court, as well as this court, is bound by a legal principle once

determined in a case does not apply to decisions rendered on questions of fact. Sufficiency of testimony on a particular feature of the case as disclosed by the record on the former trial is not binding in a subsequent trial where the testimony is or may be presumed to be materially different.

Appeal from the District Court for Scotts Bluff County: JOHN H. KUNS, Judge. Affirmed.

Malcolm D. Young, for interveners-appellants.

Wright & Simmons, John F. Wright and John F. Simmons, for appellee System Meat Co.

Young, Kuhn, Person & Liakos, for appellees Stewart et al.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

MCCOWN, J.

This is the third appearance of this case in this court. The District Court sustained a motion to dismiss the petitions of the plaintiff and of the interveners and dismissed the action for want of evidence. The interveners have appealed. We affirm the action of the District Court.

This action originally commenced in February 1961. The plaintiff, System Meat Company, a Wyoming corporation, filed its petition against the defendants praying for equitable relief. Plaintiff sought to recover $103,144.31 for cattle purchased by the president of the plaintiff with funds of the plaintiff and transferred by bill of sale to the defendants, allegedly without consideration. The interveners, appellants here, as stockholders of the plaintiff corporation, filed a petition of intervention in May 1961, alleging fraud based on allegations that a new board of directors and officers of the plaintiff corporation under the dominion of the defendant, B. M. Stewart, had directed dismissal of the case.

On October 16, 1961, the plaintiff corporation and the

defendants entered into a stipulation to settle their controversy, subject to approval of the court. The settlement agreement provided that the claim of plaintiff for $103,144.31 was to be allowed in full and that items of setoff of the defendants in the amount of $47,308.57 were likewise to be allowed in full with plaintiff to take judgment for $55,835.74, plus $3,948 interest. Upon 24 hours notice to the interveners, the District Court approved the settlement, refused to grant interveners a continuance, and dismissed their petition in intervention.

The interveners appealed without superseding the judgment. The settlement meanwhile was fully consummated and paid. On appeal, this court held that the interveners should have been given an opportunity to be heard, and that there was an abuse of discretion in refusing a continuance to permit interveners "to satisfy themselves as to the fairness of the proposed settlement or to obtain the evidence to indicate otherwise." The judgment of the District Court was reversed and the cause was remanded for further proceedings. System Meat Co. v. Stewart, 175 Neb. 387, 122 N. W. 2d 1.

Upon remand to the District Court, it was agreed by counsel on pretrial conference, and entered on the journal record, that the only issue involved would be the matter of whether or not the proposed settlement between plaintiff and defendants was fair. The plaintiff corporation apparently did not participate in the proceedings on remand. The court placed the burden on the interveners to show fraud or unfairness. After trial, the District Court found that the interveners had failed to prove that the proposed settlement was fraudulent or unfair, and the court found that the proposed settlement was fair and entered into between the parties in good faith. The District Court again approved the settlement between plaintiff and defendants and dismissed the petition of the interveners.

Again the interveners appealed. This court held that

the general standard relating to court approval of a proposed settlement by a corporation was fairness in the best interests of the corporation, and set out the elements to be considered in determining that issue. This court held that the settlement agreement was unfair. We stated: "No room existed for controversy over fairness of the amount claimed by plaintiff." We also found difficulties with many items among the set-off claims which were allowed to the defendants by the settlement agreement. The dispositive portion of our opinion stated: "The judgment is reversed and the cause remanded with directions to dismiss the application for approval of the settlement agreement." System Meat Co. v. Stewart, 183 Neb. 698, 163 N. W. 2d 789.

Upon the second remand, the opinion and mandate of this court were spread on the journal of the trial court. The interveners' motion for summary judgment was overruled. Thereafter, the defendants filed their answers to the original petition of the plaintiff and to the petition in intervention of the interveners, both of which had been filed in 1961. Interveners thereafter replied to defendants' answer and denied the allegations of defendants' counterclaims. A pretrial conference was held on the issues raised by the pleadings and a pretrial order was entered by the District Court on September 10, 1971. The pretrial order, among other things, stated: "The following issues appear to be presented by the pleadings:

"1) Whether the transfer to Stewart, of the cattle, was without consideration and without authority.

"2) Whether such transaction was a misuse of the plaintiff's funds, and if so, Stewart's knowledge thereof.

"3) Whether plaintiff had an adequate remedy at law and whether a resort to equity is proper.

"4) Whether an estoppel exists, as pleaded in Paragraphs 5 and 6 of the answer.

"5) Whether the defense of laches is established."

The remaining issues set out dealt with defendants'

counterclaims. The pretrial order also shows that the parties stipulated, among other things, that the bill of sale for the cattle was made as alleged; that the mixing and branding of the cattle as alleged was admitted; and that the amount of $103,144.31 was expended for the purchase of cattle. It was also stipulated and agreed that the parties would supply for examination by the opposite side all intended exhibits at least 20 days prior to date of trial. The pretrial order provided that it should become final unless either party excepted or withdrew from it within 20 days after September 8, 1971.

On September 28, 1972, the court set the case for trial on October 5, 1972. On October 3, 1972, the interveners moved to set aside the pretrial order claiming that they had never received a copy of the order and that issues which by its terms were made final and binding had already been determined by the Supreme Court and constituted the law of the case. On October 5, 1972, the case came on for trial. The motion to set aside the pretrial order was submitted to the court and overruled. The interveners introduced evidence and the testimony of one witness. In general, that evidence established foundational facts and introduced documents and admissions which had been basically stipulated or admitted. The interveners then attempted to offer in evidence the bill of exceptions from the former trial. The defendants objected. The court ascertained that the proposed exhibits had not been supplied for examination in accordance with the pretrial order; stated that the bill of exceptions in the former case related to testimony that was taken before the issues were made up in the current case; and rejected the offered exhibits. The interveners thereupon rested. The defendants moved to dismiss on the ground that the evidence failed to prove the issues in the case. That motion was sustained and the District Court dismissed the action.

The interveners assert that in the prior appeal of their stockholders' derivative petition to set aside the

settlement between plaintiff and defendants, this court determined and established the defendants' liability to the plaintiff corporation in the sum of $103,144.31. They assert that all issues on plaintiff's claims and defendants' liability were adjudicated by this court in that appeal and that our opinion became the law of the case and was a final determination of the amount of defendants' liability to the plaintiff in the underlying litigation.

The defendants assert that the issues in the current trial had not even been formulated at the time of the prior appeal and that the defendants had not even had an answer on file. The only issue adjudicated by this court in the former appeal, the defendants insist, was the fairness of the settlement agreement which this court set aside. The issues in the current case, they contend, were set by the pretrial order and there was a failure of proof.

"The decision of questions presented to this court in reviewing the proceedings of the district court becomes the law of the case and for purpose of litigation settles conclusively the matters adjudicated expressly or by necessary implication." Barker v. The Wardens & Vestrymen of St. Barnabas Church, 176 Neb. 327, 126 N. W. 2d 170.

An analysis of the issues here demonstrates that the defendants' liability to the plaintiff corporation on the basic matters in issue was not presented directly to this court nor decided by necessary implication. The pretrial order in the former appeal specifically provided that the only issue involved would be the matter of whether or not the proposed settlement between the plaintiff and defendants was fair. This court's opinion held only that that settlement agreement was unfair. Defendants' answers in the current case, which allege consideration arising from other transactions, as well as separate and distinct counterclaims, had not even been filed at the time of the former appeal. This court on the second appeal also noted: "The nonparticipation

of plaintiff in proceedings on remand may have affected control." System Meat Co. v. Stewart, 183 Neb. 698, 163 N. W. 2d 789.

The language cited by the interveners as the "law of the case" rests on factual conclusions. The rule that the trial court, as well as this court, is bound by a legal principle once determined in a case does not apply to decisions rendered on questions of fact. Sufficiency of testimony on a particular feature of the case as disclosed by the record on the former trial is not binding in a subsequent trial where the testimony is or may be presumed to be materially different. In re Estate of Wecker, 123 Neb. 504, 243 N. W. 642. It is a fully supportable presumption that the evidence may well be different where the issues and even the pleadings are different and where parties are nonparticipating or acting in different capacities in the two separate trials.

The original settlement agreement was clearly insufficient to establish the liability of the defendants and was incompetent as evidence at any subsequent trial. § 25-901, R. R. S. 1943. The issues were clearly set out in the pretrial order and the interveners chose to disregard that order. They are now in no position to complain.

The holding of this court on the prior appeal was not a final adjudication of the underlying issues of liability between plaintiff and defendants. The evidence introduced on behalf of the interveners, who now stand in place of the plaintiff, was insufficient to sustain the burden of proof, and the trial court properly sustained the motion to dismiss.

The judgment is affirmed.

AFFIRMED.

SPENCER, J., dissenting.

I respectfully dissent from the majority opinion herein. We have permitted the appellees to carry out the settlement we found in 183 Neb. 698 to be unfair. We there said: "No room existed for controversy over fairness

of the amount claimed by plaintiff. Smith had purchased 729 head of cattle for $103,144.31 with company funds. He fraudulently executed and delivered to Stewart a bill of sale for the animals under date of December 2, 1960." The settlement agreement provided for items of setoff of $47,308.57. In 183 Neb. 698 we specifically found that an item of $5,700 in the setoff was improper. We also questioned an item of setoff of $19,500; two items totaling $7,801.08 which clearly appear to be improper; and other charges in the amounts of $11,000 and $2,500.

Obviously, the prior trial included testimony on the items claimed in the setoff. To me it is apparent that the appellees should be bound by that testimony and they should not be permitted to frame new issues in an attempt to avoid it. The appellants should have been permitted to introduce the record of the previous case. The effect of the present holding is to suggest fraudulent transactions kept in litigation long enough can eventually secure approval.

STATE OF NEBRASKA, APPELLEE, V. DUANE POPE, APPELLANT.
211 N. W. 2d 923

Filed November 9, 1973. No. 38945.

1. **Criminal Law: Constitutional Law: Double Jeopardy.** The double jeopardy clauses of the United States and Nebraska Constitutions do not preclude successive prosecutions by federal and Nebraska governments in the exercise of concurrent jurisdiction over substantially the same offense.
2. ———: ———: ———. The double jeopardy clauses do not prevent Nebraska fixing higher standards by statute or, in the absence of statute, by judicial decision.
3. ———: ———: ———. At common law, where there is concurrent jurisdiction over substantially the same offense, the determination of whether a federal conviction bars prosecution by Nebraska depends upon vindication of the public policy of the State.
4. **Criminal Law: Constitutional Law: Double Jeopardy: Sentences.**

Where there is concurrent jurisdiction over substantially the same offense and the public policy of the State requires vindication, then in order to make federal punishment for the act a satisfaction and bar to state trial and sentence, it is necessary that the federal sentence should be complete and should have been executed to its full extent.

Appeal from the District Court for Deuel County: JOHN H. KUNS, Judge. Affirmed.

Wallace M. Rudolph and Robert B. Crosby, for appellant.

Clarence A. H. Meyer, Attorney General, and Chauncey C. Sheldon, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

PER CURIAM.

This is the second appearance of this case in this court. On the former appeal, this court affirmed the conviction of the defendant, Duane Pope, on three counts of murder in the first degree, on which the death penalty was imposed. See State v. Pope, 186 Neb. 489, 184 N. W. 2d 395. The current appeal follows the resentencing of the defendant Pope following the vacation of the state death sentence by the United States Supreme Court. See Pope v. Nebraska, 408 U. S. 933, 92 S. Ct. 2870, 33 L. Ed. 2d 745.

The three murder counts in this state prosecution, each naming a different victim, arose from the same conduct which had led to a federal indictment and conviction of Pope. The three corresponding federal counts charged that: (1) On June 4, 1965, Pope shot and killed the three victims, and (2) at the time he was robbing Farmers State Bank, a federally insured bank at Big Springs, Nebraska. Pope was found guilty by a federal jury and the United States District Court imposed a death sentence on each of the three counts. Following appeal to the United States Supreme Court, the death

sentence was vacated and the cause remanded to the United States District Court for resentencing. On remand, that court resentenced Pope to life imprisonment on two of the three counts and to 99 years on the other, the sentences to run concurrently. The judgment was affirmed. Pope v. United States, 434 F. 2d 325 (8th Cir., 1970). Pope is now in the custody of the United States serving those federal sentences.

Meanwhile, in 1969, the Nebraska state prosecution of Pope was commenced in the District Court for Deuel County. Jury trial was waived and trial was had to the court on November 5, 1969, under a stipulation that "the testimony, evidence and exhibits to be offered by the prosecution and the defense shall be the same testimony, evidence and exhibits that were offered and received at the trial of this defendant in the United States District Court."

On January 29, 1970, the District Court found Pope guilty on all counts and sentenced him to death on each of the three murder counts. On appeal to this court, the judgment of the District Court was affirmed. See State v. Pope, *supra*. On appeal to the United States Supreme Court, that court vacated the sentences "insofar as it leaves undisturbed the death penalty imposed" and remanded the cause for further proceedings. Pope v. Nebraska, 408 U. S. 933, 92 S. Ct. 2870, 33 L. Ed. 2d 745.

Upon remand, the District Court for Deuel County resentenced Pope to three life sentences on the three murder counts, the sentences to run consecutively, and all sentences to begin after the federal sentences are served.

Although the defendant has reargued the double jeopardy issues under the provisions of the United States and Nebraska Constitutions, this court specifically held in its former opinion that the double jeopardy clauses of the United States and Nebraska Constitutions do not prohibit successive prosecutions by federal and Nebraska governments in the exercise of concurrent jurisdic-

tion over substantially the same offense. We also held that the constitutional double jeopardy provisions set minimum limits. They do not prevent Nebraska from fixing higher standards by statute or, in the absence of statute, by judicial decision. This court adheres to those determinations.

This court also held that at common law, where there is concurrent jurisdiction over substantially the same offense, the determination of whether a federal conviction bars prosecution by Nebraska depends upon vindication of the public policy of the State. We held that the disparity between a life sentence and a death sentence was sufficiently great that the conviction and sentencing of Pope under the federal statute did not vindicate the public policy of Nebraska.

The thrust of defendant's argument on this appeal is that since the Nebraska death penalty was vacated by the United States Supreme Court, and only life sentences as a maximum are now available for either the federal or state prosecutions, there is no longer any reason or public policy to vindicate the action of Nebraska in imposing a second punishment for the same conduct. The basis for defendant's argument on this issue rests on the common law as opposed to the constitutional double jeopardy guaranties. Defendant contends that this state has adopted the common law doctrine which prohibited a second punishment for the same offense and that section 83-1,106, R. R. S. 1943, indicates clearly the policy of the state not to punish persons twice for the same conduct. That section provides in part: "(1) Credit against the maximum term and any minimum term may be given * * * to an offender for time spent in custody as a result of the conduct on which such a charge is based.

"(2) Credit against the maximum term and any minimum term may be given to an offender for time spent in custody under a prior sentence if he is later reprosecuted and resentenced for the same offense or for an-

other offense based on the same conduct. In the case of such a reprosecution, this may include credit in accordance with subsection (1) of this section for time spent in custody as a result of both the original charge and any subsequent charge for the same offense or for another offense based on the same conduct."

This statute clearly does not prohibit a second trial for offenses arising out of the same conduct. Neither does it specifically indicate any direct federal-state application. Nevertheless, it does clearly articulate a policy that persons should only be punished once for any particular illegal conduct. The policy reflected by the statute, while not mandatory, is simply the more specific articulation of the common law principles expressed in 1877 in Marshall v. State, 6 Neb. 120. That case was cited three times in our prior opinion. In 1877, this court said in Marshall: "And if a man offends against two governmental powers, which equally bind him, it is not easy to see why 'his paying the penalty of the law to one power should relieve him from liability to pay the penalty of the law to the other power. Still, though the strict rule of the law would be so, yet as a sort of merciful dispensation the courts would undoubtedly consider favorably to the defendant the fact, if it existed, that he had been punished for the same act in a foreign country.' But it seems that in order to make such punishment for the act in a foreign country a satisfaction and a bar to a future trial, upon the ground above stated, it is necessary that 'it should be complete and should have been executed to its full extent.'"

Where there is concurrent jurisdiction over substantially the same offense and the public policy of the State requires vindication, then in order to make federal punishment for the act a satisfaction and bar to state trial and sentence, it is necessary that the federal sentence should be complete and should have been executed to its full extent.

The public policy of Nebraska in this case transparently reflects the intent to inflict the maximum penalty allowed by law, life imprisonment, and to have that penalty executed to its full extent. Here it demands that Pope be imprisoned for all his natural life. If the federal sentences were executed to their full extent, that policy of Nebraska would be vindicated. If the federal sentences were not fully executed, vindication of that policy would require the return of the defendant to state custody to fully execute the Nebraska sentences. The sentences are affirmed.

AFFIRMED.

McCOWN, J., dissenting.

I emphatically reaffirm my dissent as expressed in the former appeal in this case. State v. Pope, 186 Neb. 489, at p. 492, 184 N. W. 2d 395, at p. 397. Its validity is reinforced by the current decision.

The majority opinion now holds in effect that there is no such thing as constitutionally prohibited double jeopardy where the two prosecutions are by the United States on the one hand and a "sovereign" state on the other. Not only does the opinion deny the application of the constitutional doctrine of both federal and state constitutions, but it also denies the application of the correlative common law doctrine.

The justification is rested upon a vindication of the public policy of the State of Nebraska. Although phrased in other terms, the obvious state policy now to be vindicated is to retain the right to decide whether the punishment inflicted by the United States is sufficient to satisfy the state. Not only does state public policy apparently require vindication where there is a disparity between maximum punishments prescribed by the United States and Nebraska for an offense but it now requires vindication even though the maximum punishments prescribed and actually inflicted are identical and multiple. The state's sovereignty now extends even to insuring that the federal sentences are executed and en-

forced in the fashion the state deems appropriate.

The position expressed in the majority opinion not only nullifies the constitutional and common law doctrines of double jeopardy and double punishment; it also puts the United States and Nebraska in the position of competing with each other to establish their respective sovereignties. Each "sovereign" determines whether the punishment meted out by the other "sovereign" should be deemed sufficient, and whether the protections against double jeopardy and double punishment shall be granted or withheld. That determination rests upon the sole discretion of a prosecutor, and not upon fundamental and traditional concepts of due process and equal protection of the law. The protection of constitutional and common law guaranties against double jeopardy and double punishment "ought not to be ignored to justify and preserve a competitive policy of retribution and punishment under our unique form of federal democracy."

SMITH, J., dissenting in part.

The life sentences under review preserve the right of the State of Nebraska to determine whether Duane Pope will ever become eligible for parole. That interest of the state would also be protected by a modification of the sentences as follows: We would credit Pope for time served under the federal sentences, and the state sentences would run concurrently.

The majority opinion may go too far in choking the spirit, if not the letter of constitutional, legislative, and administrative policies of parole. See, Art. IV. sec. 13, Constitution of Nebraska (1972); § 83-192(1), R. R. S. 1943; § 83-1,110, R. S. Supp., 1973. It is enough for me that modification of the sentences in the above respects would vindicate the public interest of the state. I therefore dissent.

SPENCER, J., dissenting in part.

I join the partial dissent of Judge Smith. I agree that the life sentences under review preserve the right of the State of Nebraska to determine whether Duane Pope

will ever become eligible for parole. I, therefore, disagree with the dissent of Judge McCown that double jeopardy or the correlative common law doctrine are violated. In State v. Pope, 186 Neb. 489, 184 N. W. 2d 395, we passed on the validity of the Nebraska prosecution. The sole issue presented for our determination herein is whether Pope can be resentenced. I emphatically concur with the majority determination concerning that issue.

I would credit Pope for the time served under the federal sentences, and provide that the state sentences would run concurrently. I cannot believe that any future parole board would consider parole herein without fully reviewing the planned elimination of all possible witnesses. If ever a case required the death penalty, this one is it.

GERALD POLAND ET AL., APPELLEES, V. ROBERT E. GIBSON ET AL., APPELLANTS.
211 N. W. 2d 900

Filed November 9, 1973. No. 38964.

1. **Payment: Pleading: Evidence: Trial.** The defense of payment is an affirmative one which must be pleaded and the burden of proof on the issue is on the party asserting it.
2. **Bills and Notes: Pleading: Evidence: Trial: Alteration of Instruments.** In an action upon a written instrument the defense of material alteration must be affirmatively pleaded and evidence that the instrument has been materially altered is inadmissible under a general denial.
3. **Bills and Notes: Agency: Alteration of Instruments.** The filling of blanks in a written instrument is not, strictly speaking, an alteration of the instrument. Where a blank is filled in after the execution and delivery of a written instrument, it is a question of authority to do so. The right to fill blanks in a written instrument after execution and delivery is based upon an assumption of consent, in the absence of specific instructions, and the leaving of such blanks is considered to imply authority to fill them, and creates an agency in the receiver to

do so in the way contemplated by the maker.

4. **Trial: Verdicts.** A verdict should be directed where the evidence is not sufficient to reasonably satisfy a jury that the fact sought to be proved is established.

Appeal from the District Court for Custer County: WILLIAM F. MANASIL, Judge. Affirmed.

Padley & Dudden, for appellants.

James R. Kelly, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

CLINTON, J.

The plaintiffs recovered in the court below, by virtue of a verdict directed in their favor, judgment against the defendants for $5,800, the unpaid balance of a promissory note dated November 19, 1964, and for $2,873.75, the price of cattle purchased by the defendants from the plaintiffs. The defendants appealed and assign as error: (1) The court's refusal to receive evidence that the obligation in question had been paid in whole or in part by labor performed for the plaintiffs by the defendant Robert E. Gibson; and (2) that the court should have submitted to the jury the question of alteration of the note by completion thereof.

A brief statement with reference to the pleadings in the case and the court's action with reference thereto is essential to a proper understanding of the trial court's action. The defendants, in their answer to the cause of action on the promissory note, pled nonexecution. Their answer to the second cause of action, insofar as it is material under the errors assigned and argued, was a general denial. The answer of the defendants included a cross-petition for work and labor performed by the defendant Robert E. Gibson for the plaintiffs during the period April 1, 1963, to June 20, 1966, as well as a claim for other items allegedly growing out of transactions during the same period of time. On

motions by the respective parties for summary judgment the court struck from the pleadings the cross-petition of the defendants and from the petition of the plaintiffs a third cause of action, all on the grounds that the pleadings showed upon their face that the causes were barred by the statute of limitations.

Upon the trial of the case the uncontradicted evidence showed the execution and delivery of the promissory note by the defendants to the plaintiffs; that the $5,800 balance was for money loaned to Robert E. Gibson at an earlier date as a downpayment on a farm which he had purchased; that the loan had not been repaid; and that the defendant Gibson had purchased from the Polands 20 stock cows for the price of $2,873.75 which had not been paid. The defendants sought to prove that the obligations had been paid for by farm labor furnished by Robert E. Gibson to the Polands. The labor in question was the same labor for which the defendants had sought recovery in their cross-petition which had been stricken. The trial court refused the offer of proof and excluded the evidence.

The issue made by the pleadings insofar as the action on the note is concerned was execution, which under our law includes execution and delivery. In re Estate of Tynan, 142 Neb. 671, 7 N. W. 2d 628. All other allegations of the petition were admitted by failure to deny. On the cause of action for cattle sold and delivered the answer was a general denial. On both causes the defendants sought to prove payment in the manner hereinbefore indicated. In the case of the promissory note they presented evidence that the note had been signed and delivered in blank. This was disputed by the plaintiffs' testimony, but in any event there was no evidence that the note was completed in a manner not authorized.

The following principles govern the disposition of this case. The defense of payment is an affirmative one which must be pleaded and the burden of proof on the issue is on the party asserting it. Ashland Land &

Live-Stock Co. v. May, 51 Neb. 474, 71 N. W. 67; Mains v. Mains, 1 Neb. Unoff. 679, 95 N. W. 776; Department of Banking v. Lawhead, 181 Neb. 722, 150 N. W. 2d 734. Evidence that an instrument sued on has been materially altered is inadmissible under a general denial. Gandy v. Estate of Bissell, 72 Neb. 356, 100 N. W. 803. The filling of blanks in a written instrument is not, strictly speaking, an alteration of the instrument. Where a blank is filled in after the execution and delivery of a written instrument, it is a question of authority to do so. The right to fill blanks in a written instrument after execution and delivery is based upon an assumption of consent, in the absence of specific instructions, and the leaving of such blanks is considered to imply authority to fill them, and creates an agency in the receiver to do so in the way contemplated by the maker. Musser v. Zurcher, 180 Neb. 882, 146 N. W. 2d 559. A verdict should be directed where the evidence is not sufficient to reasonably satisfy a jury that the fact sought to be proved is established. Dodge County Bank v. Courtney & Co., 94 Neb. 561, 143 N. W. 806; Department of Banking v. Lawhead, *supra*.

AFFIRMED.

LARRY G. FISHER, APPELLANT, V. GATE CITY STEEL CORPORATION ET AL., APPELLEES.
211 N. W. 2d 914

Filed November 9, 1973. No. 38966.

1. **Trial: Instructions.** Instructions must be considered and construed together, and if they are not sufficiently specific in some respects, it is the duty of counsel to offer requests for instructions that will supply the omission, and, unless this is done, the judgment will not ordinarily be reversed for such defects.
2. ———: ———. Where instructions correctly state the law, it is not error for the court, in the absence of a request for a more specific instruction, to fail to give a more elaborate one.

3. **Trial: Negligence: Pleadings.** Where it is claimed that the conduct of another, not a party to the suit, was the sole proximate cause of the accident, such defense is not an affirmative plea in avoidance of plaintiff's cause of action and imposes no burden of proof upon defendant with relation thereto but is one entirely consistent with and provable under the general issue.

Appeal from the District Court for Douglas County: PATRICK W. LYNCH, Judge. Affirmed.

Sidner, Svoboda, Schilke & Wiseman, for appellant.

William M. Lamson, Jr., of Kennedy, Holland, DeLacy & Svoboda, and Cassem, Tierney, Adams & Henatsch, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

MCCOWN, J.

This is an action for damages for personal injuries to the plaintiff which resulted when a piece of construction equipment supported by a tower and outriggers tipped or fell and struck the plaintiff. The jury returned a verdict for the defendant and the plaintiff has appealed.

The plaintiff, Larry G. Fisher, an employee of Peter Kiewit Sons' Co., was working on a construction job involving the pouring of cement into elevated concrete forms. He was struck on the head by a falling belt-crete swinger, a belt-type conveyor used to transport concrete from mixer to pour site. The belt-crete swinger was supported by outriggers and a tower which broke because of the failure of a weld on one of the outriggers. The plans and specifications for the tower and outriggers were drawn by Peter Kiewit Sons' Co. and plaintiff alleged that the defective outriggers and tower were especially constructed and fabricated by the defendant Gate City Steel Corporation according to the plans and specifications. Plaintiff was compensated for

his injuries by the workmen's compensation carrier of Kiewit and that carrier is subrogated to the extent of compensation.

The issue at trial was whether the defendant was responsible for the equipment failure, either by reason of its negligence in applying the weld, or as a manufacturer; or whether the failure was the proximate result of defective plans and specifications drawn by Peter Kiewit Sons' Co., which is not a party to this action.

The plaintiff asserted liability against the defendant on three theories: (1) Negligence; (2) breach of implied warranty; and (3) strict liability of a manufacturer. The District Court found that plaintiff had failed to establish implied warranty as a matter of law, and withdrew that theory of liability from consideration by the jury. The court submitted the case to the jury on the basis of negligence and also on the basis of strict liability and instructed the jury on both theories. The jury returned its verdict for the defendant.

The plaintiff's assignments of error are principally directed at the instructions. The initial and primary assignment of error is that the court failed to give a requested instruction to the effect that no negligence, if any, of Peter Kiewit Sons' Co. should be imputed to the plaintiff.

In this case, contributory negligence of the plaintiff in any aspect was not at issue. There is neither pleading nor proof of any contributory negligence on the part of the plaintiff. The court specifically instructed that: "Before the plaintiff can recover on the basis of negligence, the burden is upon the plaintiff to prove, * * * 1. That the defendant was negligent in one or more of the elements or particulars numbered and stated * * * 2. That said negligence, if any, of the defendant was the proximate cause, or a proximately contributing cause, of the accident." To require the jury to be instructed that no negligence of a third party could be imputed to the plaintiff would require instructions on an issue

which was not presented by the pleadings or evidence. It would have been a negative instruction on a nonexistent issue.

It is inferentially argued that some more specific or elaborate instruction should have been given as to the effect of negligence on the part of both Peter Kiewit Sons' Co. and the defendant. The answer is simply that the plaintiff requested no such specific instruction. " 'Instructions must be considered and construed together, and if they are not sufficiently specific in some respects, it is the duty of counsel to offer requests for instructions that will supply the omission, and, unless this is done, the judgment will not ordinarily be reversed for such defects.' " McKinney v. County of Cass, 180 Neb. 685, 144 N. W. 2d 416.

The instruction on the liability of the defendant to the plaintiff on the theory of negligence presented the issue to the jury and correctly reflected the law on the issue. Where instructions correctly state the law, it is not error for the court, in the absence of a request for a more specific instruction, to fail to give a more elaborate one. Younker v. Peter Kiewit Sons Co., 180 Neb. 835, 146 N. W. 2d 202.

Plaintiff also contends that the court erred in instructing the jury that if the plaintiff established all the propositions required to be established, either under the theory of negligence or that of strict liability, then the jury must consider the defendant's defenses. Plaintiff contends that this was erroneous because the defendant raised no affirmative defenses but pleaded only a general denial, and the instruction improperly emphasized the evidence of the negligence of a third party. A similar contention has been answered before. " 'Where it is claimed that the conduct of another, not a party to the suit, was the sole proximate cause of the accident, such defense is not an affirmative plea in avoidance of plaintiff's cause of action and imposes no burden of proof upon defendant with relation there-

to but is one entirely consistent with and provable under the general issue.' " Schmidt v. Johnson, 184 Neb. 643, 171 N. W. 2d 64. See, also, NJI 2.01A, Comment.

Plaintiff also assigns as error the court's failure to instruct the jury on the theory of implied warranty, and also in withdrawing that issue from the jury. There can be no real doubt that plaintiff failed to establish a prima facie case on implied warranty. Even if there were some doubt as to that issue, there is little question but that the strict liability theory is essentially the liability of implied warranty divested of the contract doctrines of privity, disclaimer, and notice. Even if the possibility of error were conceded, it could scarcely have been prejudicial to the plaintiff. See Hawkins Constr. Co. v. Matthews Co., Inc., *ante* p. 546, 209 N. W. 2d 643.

Plaintiff's remaining assignments of error deal with exclusion of evidence which was largely cumulative and the refusal or the giving of other instructions. These remaining assignments of error are without merit.

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

AFFIRMED.

JOAN WHITE, APPELLEE, V. COLLEEN LONGO, APPELLANT.
212 N. W. 2d 84

Filed November 9, 1973. No. 38983.

1. **Telecommunications: Wiretaps.** Evidence of telephone conversations obtained by wiretaps in violation of the provisions of sections 86-701 to 86-707, R. R. S. 1943, are inadmissible in evidence if timely objection is made.
2. **Trial: Instructions.** Where a general instruction on an issue is correct, if a party desires a fuller or more specific instruction on the subject matter it must be asked for.
3. **Trial: Instructions: Damages.** Where the law provides a definite measure of damages, the court should instruct the jury specifically how the damages should be assessed. Where there

is no such definite measure of damages, then the general instruction on compensatory damage is sufficient.

4. **Trial: Instructions: Damages: Criminal Conversation.** In the absence of evidence of some special element of damage for which the law provides a specific means of measurement, it is the general rule that in an action for criminal conversation damages are incapable of precise measurement and there is no fixed rule for determining the amount thereof.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Reversed and remanded for new trial.

David S. Lathrop of Lathrop, Albracht & Dolan, for appellant.

Alfred A. Fiedler of Fiedler & Fiedler, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

CLINTON, J.

This action was brought by Joan White, wife of Duane White, against Colleen Longo and stated two causes of action, one for alleged alienation of affections of Duane White and the second for criminal conversation or having committed adultery with Duane White on one or more occasions. The trial court submitted to the jury issues of both liability and damages on the first cause of action and the jury found for the defendant. The trial court directed a verdict against the defendant on the issue of liability on the second cause of action and submitted to the jury only the question of damages, and on that issue it returned a verdict in the amount of $12,500.

The defendant appeals from the verdict and judgment and denial of motion for new trial on the second cause. There is no cross-appeal on the first cause and the verdict and judgment thereon have become final.

Defendant assigns as error: (1) The admission into evidence over objection of tape recordings obtained by unlawful wiretaps of telephone conversations between

defendant and Duane White. (2) The direction of the verdict against the defendant on the criminal conversation cause of action. (3) Failure of the court to instruct on the law applicable to the issue of damages for criminal conversation.

I

During the direct examination of the plaintiff she testified to overhearing on the extension telephone of the White residence an incriminating conversation between defendant and Duane White. It could be inferred from some of her answers to further interrogation that she had more information than was disclosed by overhearing this one telephone conversation. On cross-examination she was asked by the defendant's counsel if she had ever recorded any of these conversations. She acknowledged she had and that the recordings existed. On redirect examination more information was developed concerning the number of conversations recorded. Later the plaintiff was recalled on her own behalf and her counsel began to lay foundation for the introduction of the recordings. Counsel for the defendant asked leave to cross-examine as to the foundation and it was then brought out clearly for the first time that the recordings had been made by means of a wiretap with equipment furnished by a private investigator and installed by the plaintiff in accordance with instructions received from the investigator. It was further developed that neither Duane White nor the defendant had ever been informed of the existence of the wiretap.

The recordings were offered by the plaintiff. The defendant objected upon the grounds that the records had been made in violation of section 605 of the Federal Communications Act and were for that reason inadmissible. The objection was overruled, the recordings were received, and relevant portions were heard by the jury.

Section 605 of 47 U. S. C. A., provides in part as fol-

lows: "No person not being authorized by the sender shall intercept any communication and divulge . . . the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person." The quoted provisions of the statute have been construed to pertain to intrastate as well as interstate communications. Weiss v. United States, 308 U. S. 321, 60 S. Ct. 269, 84 L. Ed. 298. Sections 86-701 to 86-707, R. R. S. 1943, likewise make it unlawful, among other things and with certain exceptions, to intercept by means of a wiretap any telephone communication and to disclose the contents of the intercepted communication. Both the federal and state statutes prescribe criminal penalties for violation and each constitutes a rule of evidence; the federal statute by virtue of court interpretation and the Nebraska statute by virtue of its own specific terms.

The United States Supreme Court in Lee v. Florida, 392 U. S. 378, 88 S. Ct. 2096, 20 L. Ed. 2d 1166, held that section 605, 47 U. S. C. A., was applicable to state proceedings and overruled the earlier case of Schwartz v. Texas, 344 U. S. 199, 73 S. Ct. 232, 97 L. Ed. 231, which had decided that the section did not forbid the use of such illegally obtained evidence in state court criminal trials. In Lee v. Florida, *supra,* the court said: "Section 605 was enacted as part of the Federal Communications Act of 1934, 48 Stat. 1103, six years after the Court had said in Olmstead v. United States, 277 U. S. 438, 465, that 'Congress may of course [legislate to] protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence. . . .' In Nardone v. United States, 302 U. S. 379, the Court was first called upon to decide whether § 605 had indeed served to render evidence of intercepted communications inadmissible in a federal trial. In that case the Government urged that 'a construction be given the section which would exclude federal agents since it is improbable Congress intended to hamper and impede the activities of the government in the detection and pun-

ishment of crime.' 302 U. S., at 383. In reversing the judgment of conviction, the Court's answer to that argument was unequivocal:

" '[T]he plain words of § 605 forbid anyone, unless authorized by the sender, to intercept a telephone message, and direct in equally clear language that "no person" shall divulge or publish the message or its substance to "any person." To recite the contents of the message in testimony before a court is to divulge the message. The conclusion that the act forbids such testimony seems to us unshaken by the government's arguments. . . .

" 'Congress may have thought it less important that some offenders should go unwhipped of justice than that officers should resort to methods deemed inconsistent with ethical standards and destructive of personal liberty. The same considerations may well have moved the Congress to adopt § 605 as evoked the guaranty against practices and procedures violative of privacy, embodied in the Fourth and Fifth Amendments of the Constitution.' 302 U. S., at 382, 383."

The court further said: "[Our decision] is buttressed as well by the 'imperative of judicial integrity.' Elkins v. United States, 364 U. S. 206, 222. Under our Constitution no court, state or federal, may serve as an accomplice in the willful transgression of 'the Laws of the United States,' laws by which 'the Judges in every State [are] bound. . . .'

"Finally, our decision today is counseled by experience. The hope was expressed in Schwartz v. Texas that '[e]nforcement of the statutory prohibition in § 605 can be achieved under the penal provisions' of the Communications Act. 344 U. S., at 201. That has proved to be a vain hope. Research has failed to uncover a single reported prosecution of a law enforcement officer for violation of § 605 since the statute was enacted. We conclude, as we concluded in Elkins and in Mapp, that nothing short of mandatory exclusion of the illegal evi-

dence will compel respect for the federal law 'in the only effectively available way—by removing the incentive to disregard it.' Elkins v. United States, 364 U. S., at 217."

The Nebraska statute, in addition to its prohibitions provides for court authorized interception of messages upon application of the Attorney General or a county attorney and makes two general exceptions to the prohibitions. Section 86-702(2), R. R. S. 1943, in part provides: "(b) It shall not be unlawful under sections 86-701 to 86-707 for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

"(c) It shall not be unlawful under sections 86-701 to 86-707 for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any state or for the purpose of committing any other injurious act."

It is clear that the plaintiff in this case does not come within either of these exceptions. She was not a person "acting under color of law" with the "prior consent" of one of the parties to the communication under subsection (2)(b), nor was she a party to the communication, nor did she have the consent of a party to the communication under subsection (2)(c), of section 86-702, R. R. S. 1943.

Section 86-705, R. R. S. 1943, makes it clear that the statute prescribes a rule of evidence applicable to civil as well as criminal proceedings for the courts of this state. It says in part: "(8) The contents of any intercepted wire or oral communication or evidence derived

therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a federal or state court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

"(9) *Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of this state, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that the communication was unlawfully intercepted,* the order of authorization or approval under which it was intercepted is insufficient on its face, or the interception was not made in conformity with the order of authorization or approval. Such motion shall be made before the trial, hearing, or proceeding *unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion.* If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of sections 86-701 to 86-707. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice." (Emphasis supplied.)

The fact that the plaintiff tapped her own telephone is immaterial as she was not a party to the communica-

tion and it is the parties to the communication who are protected by the statute.

In Markham v. Markham, 272 So. 2d 813 (Fla., 1973), the Supreme Court of Florida so construed a state statute similar to ours.

We believe the mandate of our Legislature is clear. The public policy of this state is to exclude the results of such unlawful wiretaps and this leads us to the conclusion that the objection on the basis of the federal statute was sufficiently specific. Our determination of the question on the basis of the Nebraska statutes makes it unnecessary for us to consider whether the federal statute has application only to criminal prosecutions. The tapes therefore having been unlawfully obtained were not admissible as evidence. The content of the tapes was damaging and the error was clearly prejudicial, and requires reversal and a new trial in this case. Upon retrial neither party shall be permitted on either direct or cross-examination to refer to the wiretaps, the recordings, or their contents.

II

Since the evidence on retrial will, because of our determination of the evidentiary question, be different than that previously before the trial court, we find it unnecessary to determine whether the trial court erred in directing the verdict on liability. That matter will, if appropriate motions are made on retrial, have first to be decided by the trial court on the basis of the evidence before it at that time.

III

The third assignment of error is that the court erred in failing to instruct the jury upon the law applicable to the determination of damages for criminal conversation. It is evident from the argument that this assignment is directed both to a claimed failure of the court to define the elements of damage, as well as to prescribe criteria for measuring their monetary value. The defendant did not request any instruction defining either

the elements of damage which may be considered, or one suggesting any method of measuring such damage. Was the court required to do so in the absence of a request for a specific instruction?

Accordingly we must examine the instructions given to determine whether or not they were sufficient to comply with the obligation of the trial court to instruct on the issues irrespective of any request.

In a portion of instruction No. 2, the court properly defined the cause of action for criminal conversation in the following language: "In her second cause of action Plaintiff alleges that the defendant had sexual intercourse with Plaintiff's husband; that by reason of such intercourse Plaintiff has been damaged in her right and entitlement to be the exclusive recipient and companion in sexual activities with her husband, for which she seeks judgment against the defendant." In instruction No. 6, after directing the verdict on that cause of action, the court told the jury: "Your verdict will award her a sum of money as you find she has proved by a preponderance of the evidence that will fairly and reasonably, but not excessively, compensate her for the harm caused to her by the wrongful conduct of the defendant."

Our examination of the evidence in this case leads us to the conclusion that the quoted portion of instruction No. 6 is correct as far as it goes, and when taken together with the quoted portion of instruction No. 2 is a correct statement of the rules as to damages insofar as they relate to the pleadings and the evidence pertaining to the cause of action for criminal conversation. The plaintiff alleged in her petition that: "Plaintiff has been damaged in her desire, right and entitlement to be the exclusive recipient and companion in sexual activities of Duane White and has thereby been damaged."

The instruction relative to damages which may be appropriate or proper in any particular case will neces-

sarily depend upon the evidence presented on the issue. In this case the evidence of damages would have permitted, although it did not require the jury to conclude, that sexual relations between the plaintiff and her husband ceased because he was finding his satisfaction with the defendant, and thus the plaintiff was deprived of her right to be the exclusive sexual companion of her husband and thus suffered emotional distress and deprivation. There was, on the other hand, evidence that the element of exclusiveness in this case was not worth much. Duane White testified that he was and always had been an open advocate of free love unrestricted by marital ties and even before the defendant entered the picture never felt constrained to nor did he confine his sexual activities to the marital bed and that the plaintiff had been aware of this. The plaintiff herself described him as a Svengali. These later considerations, if true, were for consideration in mitigation of damages.

The instructions in question were adequate to describe the element of damage and to limit them to that pled and to the evidence and were not prejudicially erroneous, at least in the absence of a request for an appropriate, more specific instruction. If the defendant desired a specific instruction limiting the element of damage which could be considered then she should have submitted one for the court to consider.

Where a general instruction on an issue is correct, if a party desires a fuller or more specific instruction on the subject matter, it must be asked for. Kasparek v. May, 182 Neb. 582, 156 N. W. 2d 144; Carter v. Chicago, B. & Q. R. R. Co., 175 Neb. 188, 121 N. W. 2d 44.

There was no evidence introduced pertaining to any element of monetary damage caused by the adulterous acts as to which some specific rule of measurement applies. There was, therefore, no occasion for the court to give an instruction on the measure of damages beyond that which was given. It is only where the law provides a specific measure of damages that the court is

required to instruct thereon. Hickman-Williams Agency v. Haney, 152 Neb. 219, 40 N. W. 2d 813. The general rule as to the measurement of damages in an action for criminal conversation is stated in a leading text as: The damages in an action for criminal conversation are incapable of precise measurement and there is no fixed rule for determining the amount thereof. 42 C. J. S., Husband and Wife, § 706, p. 361. The instruction of the court on the general measure of compensatory damages was therefore correct.

REVERSED AND REMANDED FOR NEW TRIAL.

STATE OF NEBRASKA, APPELLEE, V. GEORGE TRIPPLE, APPELLANT.
211 N. W. 2d 920

Filed November 9, 1973. No. 38986.

1. **Criminal Law: Trial: Evidence.** In determining the sufficiency of the evidence to sustain a conviction in a criminal prosecution, it is not the province of the court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence.
2. **Criminal Law: Trial: Instructions.** Where the general charge fairly presents the case to the jury, a party who desires an instruction on some particular question should request it, and cannot base error on the omission otherwise.

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

Paul G. Matt, III, John F. Wright, and James R. Ryan, for appellant.

Clarence A. H. Meyer, Attorney General, and Ralph H. Gillan, for appellee.

Heard before SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

CLINTON, J.

The appellant was charged under the provisions of

section 39-727, R. S. Supp., 1972, with driving a motor vehicle while under the influence of intoxicating liquor and while having ten-hundredths of one percent by weight of alcohol in his body fluid. The charge was made in two separate counts and was in that form submitted to the jury. He was found guilty on both counts. A fine of $100 was imposed and his operator's license was revoked for 6 months. He appeals. We affirm.

The errors assigned are: (1) Insufficiency of the evidence to sustain the conviction beyond a reasonable doubt, and (2) instruction No. 5 given by the court was erroneous and prejudicial.

We have carefully examined the evidence. It includes a body fluid analysis which showed thirty-five-hundredths of one percent by weight of alcohol. The evidence is legally sufficient if believed by the jury to sustain the conviction. In determining the sufficiency of the evidence to sustain a conviction in a criminal prosecution, it is not the province of the court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence. State v. Rose, 188 Neb. 84, 195 N. W. 2d 215.

Instruction No. 5 set forth clearly and correctly the elements of driving while under the influence of alcoholic liquor. Instruction No. 6 set forth clearly and correctly the alternative of driving while having ten-hundredths of one percent by weight of alcohol in the body fluid.

The appellant's attack upon instruction No. 5 may be summarized by these words from the brief: "Without instruction from the Court, it is unreasonable to feel that the average juror would be able to distinguish the difference between driving while under the influence of alcoholic liquor and driving with more than ten-hundredths of one per cent or more by weight of alcohol in a person's body as shown by chemical analysis of his blood, breath, or urine," and ". . . the trial court made no attempt in instruction number five to inform the

jury that the blood test only constituted a rebuttal presumption and should be merely viewed as part of the overall evidence."

The appellant requested no clarifying or amplifying instruction and he suggests none here. The trial court in instruction No. 11, properly defined in the language which follows what is meant by the term "under the influence of intoxicating liquor": "A person is under the influence of alcoholic liquor when the influence exists to the extent that a person has lost to an appreciable degree the normal control of his body or mental faculties to the extent that there is an impairment of the capacity to think and act correctly and efficiently."

The court did not instruct that the results of the body fluid test carried with it any presumption. This for the obvious reason that the statute creating such presumptions has been repealed. The appellant's argument concerning rebuttable presumptions is therefore off the mark. It was for the jurors to draw from the test results and the other evidence of intoxication such inferences as they in their collective judgment deemed proper. There were no errors in the instructions. Where the general charge fairly presents the case to the jury, a party who desires an instruction on some particular question should request it, and cannot base error on the omission otherwise. Goldsberry v. State, 92 Neb. 211, 137 N. W. 1116. The above principle clearly governs here. This is not to suggest, however, that even if a special instruction had been requested that it should have been given. We are unable to perceive what this special instruction should have been.

AFFIRMED.

DARLENE M. ADAMSON, APPELLANT, V. LEONARD M. ADAMSON, APPELLEE, CHARLES M. ADAMSON ET AL., INTERVENERS-APPELLEES.
211 N. W. 2d 895

Filed November 9, 1973. No. 38992.

1. **Divorce: Infants: Parent and Child.** In awarding or changing custody the welfare of the minor child is the question of primary importance.
2. **Divorce: Infants: Parent and Child: Time.** An application for modification of a divorce decree with respect to the care, custody, and maintenance of minor children must be founded upon new facts and circumstances which have arisen since the entry of the decree.
3. ———: ———: ———: ———. A parent found unfit for custody should not, by the mere passage of time without further misconduct, be able to change child custody provisions in a divorce decree in the absence of clear and convincing evidence that the best interests and welfare of the child require it.
4. **Divorce: Infants: Parent and Child: Appeal and Error.** The discretion of the trial court with respect to changing the custody of minor children is subject to review, but the determination of the court will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence.

Appeal from the District Court for Box Butte County: ROBERT R. MORAN, Judge. Affirmed.

Fisher & Fisher, for appellant.

Paul D. Empson, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, McCOWN, NEWTON, and CLINTON, JJ.

SPENCER, J.

Plaintiff-appellant appeals from the denial of her petition to modify a divorce decree which found her unfit to have custody and control of her minor children. She sought a modification solely to obtain custody and control of Michael John Adamson. The court placed Michael in the exclusive custody and control of his paternal uncle and aunt. We affirm.

On April 7, 1967, plaintiff was granted an absolute divorce on the grounds of extreme cruelty. While plaintiff was granted the divorce the court specifically found that she was not a fit, proper, or suitable person to have custody of the couple's minor children. The court found it did not have jurisdiction of the oldest child, but gave the custody and control of the three other children to the husband, Leonard M. Adamson, who is now deceased.

The present action concerns only the youngest child, Michael John Adamson, who has been cared for at various times prior to and since his father's death by his paternal uncle and aunt, Charles M. and Vallara V. Adamson.

In this action plaintiff attempts to attack the finding of unfitness in the divorce decree. The record imports verity. Plaintiff argues that the divorce decree was ex parte and that she had no knowledge of the finding of unfitness. This contention borders on the absurd. Her husband's answer alleged her unfitness. She was represented in court by counsel at the time of the final hearing and the present action was tried by the judge who heard the divorce.

"In awarding or changing custody, the welfare of the minor child is the question of primary importance." Hossack v. Hossack (1964), 176 Neb. 368, 126 N. W. 2d 166.

"Application for modification of a divorce decree with respect to the care, custody, and maintenance of minor children must be founded upon new facts and circumstances which have arisen since the entry of the decree." Hossack v. Hossack, *supra.*

Children are not chattels. A parent found unfit for custody should not, by the mere passage of time without further misconduct, be able to change child custody provisions in a divorce decree in the absence of clear and convincing evidence that the best interests and welfare of the child require it. See Goodman v. Goodman (1966), 180 Neb. 83, 141 N. W. 2d 445.

There is no question the controlling rule in custody cases is the best interests or welfare of the child. Michael, who is now nearly 8 years old, has been separated from his natural mother for the last 6 years. He and a 17-year-old brother have been and are now living with their paternal aunt and uncle. He has really known no mother other than his paternal aunt.

Plaintiff produced several affidavits to prove that there has been a change in circumstances. Plaintiff has been living in California and Iowa since the divorce. It is undisputed that plaintiff's present husband seduced one of her teenage daughters who joined her in California. In spite of the affidavits produced by the plaintiff, there is a serious question as to whether the plaintiff's home would be a proper place to raise Michael. It does not seem likely that the best interests of this child would be served by taking him from the only environment he has ever known and moving him to another state where he would be away from his brother and with strangers.

The discretion of the trial court with respect to changing the custody of minor children is subject to review, but the determination of the court will not ordinarily be disturbed unless there is clear abuse of discretion or it is clearly against the weight of the evidence. Flesher v. Flesher (1973), *ante* p. 359, 208 N. W. 2d 677.

We accept the findings of the trial judge. There has been no abuse of discretion herein. The judgment of the trial court is fully supported by the evidence. It is in the best interest of the child, and should be and is affirmed.

AFFIRMED.

HAROLD JACK FYNBU, AS FATHER AND NEXT FRIEND OF JEFFREY H. L. FYNBU, A MINOR, APPELLANT, V. ALBERT E. STRAIN, DOING BUSINESS AS MIDGET AMUSEMENTS, APPELLEE.

211 N. W. 2d 917

Filed November 9, 1973. No. 38993.

1. **Negligence: Trial: Evidence.** Where a thing which causes the injury is under the control and management of the defendant and the accident is such as in the ordinary course of things does not happen if those who have its management or control use proper care, it affords reasonable evidence, in the absence of an explanation by the defendant, that the accident arose from want of proper care.
2. ——: ——: ——. The applicability of the doctrine of res ipsa loquitur depends upon the facts and circumstances in each case.
3. ——: ——: ——. The doctrine of res ipsa loquitur is applicable only where the evidence shows the accident or injury was caused by the instrumentality or thing under the control of the defendant.

Appeal from the District Court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed.

Nelson, Harding, Marchetti, Leonard & Tate and Richard P. Nelson, for appellant.

Baylor, Evnen, Baylor, Curtiss & Grimit, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

BOSLAUGH, J.

This is an action by the father and next friend of Jeffrey H. L. Fynbu who was injured while riding on a small ferris wheel owned and operated by the defendant. The action was dismissed at the close of the plaintiff's evidence. The issue presented by the appeal is whether the plaintiff's evidence raised a question for the jury.

The accident happened on June 1, 1970, when Jeffrey was about 4½ years old. He had gone to a shopping

center with his grandmother; brothers; Eddie Drews, a neighbor boy; and Jacob Bauer, a friend of his grandmother. After arriving at the shopping center, Jeffrey, his brother John, and Eddie rode several children's rides that were in operation. The accident occurred during Jeffrey's second ride on the ferris wheel.

The ferris wheel was equipped with six cars or enclosures designed to carry children 12 years of age or less. Each car contained two seats which were enclosed by expanded wire mesh on the sides. Jeffrey, John, and Eddie were riding together in one car when Jeffrey was injured. The top of the car was open and Jeffrey had been looking over the side to see the number on the car. Jeffrey testified that "A bump hit my head" and he started to scream because his ear hurt. When the car reached the ground, the ferris wheel was stopped and Jeffrey was removed from the car. He was found to have severe lacerations to his left ear and the area immediately above and below the ear. There was some cartilage damage to the ear. The surgeon who treated Jeffrey testified that "most" of the lacerations appeared to have been of a mashing or crushing type that is caused by something dull as distinguished from a sharp object.

John Fynbu testified that Jeffrey started to scream while his head was sticking out at the top; that Jeffrey tried to get down but his head was stuck; that "The neighbor was trying to pull him down and he couldn't get his head out"; and that Jeffrey did not get his head loose before the ferris wheel stopped.

The plaintiff relies upon the doctrine of res ipsa loquitur. Where the thing which causes the injury is under the control and management of the defendant and the accident is such as in the ordinary course of things does not happen if those who have its management or control use proper care, it affords reasonable evidence, in absence of an explanation by the defendant, that the accident arose from want of proper care. Nownes v. Hill-

side Lounge, Inc., 179 Neb. 157, 137 N. W. 2d 361.

The applicability of the doctrine, which is a qualification of the general rule that negligence is not presumed but must be proved, depends upon the facts and circumstances in each case. Security Ins. Co. v. Omaha Coca-Cola Bottling Co., 157 Neb. 923, 62 N. W. 2d 127. It is applicable only where the evidence shows the accident or injury was caused by the instrumentality or thing under the control of the defendant. This is sometimes referred to as the "foundation fact." See 58 Am. Jur. 2d, Negligence, § 480, p. 55. Proof that an accident happened and the plaintiff was injured is not enough unless the standard of liability to be applied to the defendant is that of an insurer. See Sipprell v. Merner Motors, 164 Neb. 447, 82 N. W. 2d 648.

The problem in this case is the record does not show affirmatively that it was the ferris wheel that injured Jeffrey. The plaintiff cites and relies upon a number of cases in which res ipsa loquitur was applied and recovery was allowed where the plaintiff had been injured while riding on an amusement device. In these cases there was evidence of some defect or malfunction in the device or its operation that caused the injury. There was no evidence here of what caused the injury. We conclude the evidence was not sufficient for the doctrine of res ipsa loquitur to be applicable and did not present a question for the jury.

The judgment of the District Court is affirmed.

AFFIRMED.

SMITH, J., dissenting.

The facts of the injury to plaintiff permit, but do not compel, an inference of causative negligence on the part of defendant. The situation is a type that may be subject to the doctrine of res ipsa loquitur, and plaintiff established the requisite elements. Contrast Sipprell v. Merner Motors, 164 Neb. 447, 82 N. W. 2d 648 (1957).

The doctrine does not denominate a defendant an insurer, for it is simply an evidentiary rule that carries

the claim to the trier of fact. See, McCall v. St. Joseph's Hospital, 184 Neb. 1, 165 N. W. 2d 85 (1969); Benedict v. Eppley Hotel Co., 159 Neb. 23, 65 N. W. 2d 224 (1954).

I respectfully dissent.

STATE OF NEBRASKA, APPELLEE, V. LARRY E. SMITH, APPELLANT.
211 N. W. 2d 922

Filed November 9, 1973. No. 38994.

1. **Criminal Law: Insane Persons: Trial.** The test of responsibility for crime is the defendant's capacity to understand the nature of the act alleged to be criminal and the ability to distinguish between right and wrong with respect to the act.
2. **Criminal Law: Insane Persons: Trial: Evidence: Instructions.** Where there is no competent evidence tending to prove insanity no instruction on the burden of proof as to insanity is required.

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

T. Clement Gaughan and Richard L. Goos, for appellant.

Clarence A. H. Meyer, Attorney General, and Harold Mosher, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

WHITE, C. J.

The defendant was jury convicted and sentenced to a consecutive term for escaping from the custody of the Nebraska Penal and Correctional Complex. He appeals, claiming the trial court was in error in not instructing on and submitting the issue of his insanity to the jury. We affirm the judgment and sentence of the District Court.

The defendant was an inmate of the Nebraska Penal and Correctional Complex on October 8, 1972, under a

sentence of 2 to 4 years for the commission of a felony. The defendant was assigned to a work detail at the Penal Complex, and the evidence is conclusive that he left the premises at the Penal Complex without permission or without a furlough and was picked up in Omaha 2 days after his escape, on October 10, 1972, and returned to the Penal Complex.

The defendant contends that the District Court was in error in not submitting the issue of his insanity to the jury and giving his requested instruction to that effect. The test of responsibility for crime is the defendant's capacity to understand the nature of the act alleged to be criminal and the ability to distinguish between right and wrong with respect to the act. State v. Jacobs, *ante* p. 4, 205 N. W. 2d 662. An examination of the record in this case reveals that there is absolutely no medical, psychiatric, or other evidence that would support or indicate the necessity of giving the defendant's requested instruction. The simple nature of the defendant's act constituting the offense speaks for itself. Giving maximum import to the defendant's testimony, it is to the effect that he was taking tranquilizers and drugs prior to the time he was incarcerated. He testified: "They calm me down to where I just recognize getting a little tired, and take a little will power, or whatever you want to call it, to where I have a little more time—oh, slow down, and have a little time to do a little more thinking before I do my act." The defendant himself testified that he was a "sane person of mind." And in response to several questions as to whether he considered himself "insane" he testified that he was not a medical doctor and that he could not answer that question "Yes" or "No." We belabor the contention no further. There is no evidence to sustain the giving of such an instruction. If there is no competent evidence tending to prove insanity no instruction as to the burden of proof as to insanity is required. Torske v. State, 123 Neb. 161, 242 N. W. 408.

The judgment and sentence of the District Court are correct and are affirmed.

AFFIRMED.

TERRY L. WISEMAN, APPELLANT, V. JOHN L. SULLIVAN, DIRECTOR OF THE DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF NEBRASKA, APPELLEE.
211 N. W. 2d 906

Filed November 9, 1973. No. 38998.

1. **Appeal and Error: Implied Consent Law.** On appeal from a revocation of a motor vehicle operator's license under the implied consent statute this court reviews the finding of the trial court de novo.
2. **Intoxicating Liquors: Implied Consent Law: Motor Vehicles.** A conditional or qualified refusal to take one of the authorized tests to determine the alcoholic content of body fluids under the implied consent law is not sanctioned by the act and such a refusal is a refusal to submit to the test within the meaning of the act.
3. **Intoxicating Liquors: Implied Consent Law: Motor Vehicles: Right to Counsel.** A driver who has been arrested for operating a motor vehicle upon a public street or highway while under the influence of intoxicating liquor is not entitled either under the Constitution or the implied consent statute to consult with a lawyer previous to giving a sample of blood, breath, or urine, or to have a lawyer present during the giving of the sample.
4. **Intoxicating Liquors: Implied Consent Law: Motor Vehicles: Time: Right to Counsel.** The taking of a sample of blood, breath, or urine for chemical analysis on the request of the arresting officer, as authorized by the implied consent law, is not required to be delayed by a request of the arrested motorist that he be permitted to contact a lawyer.
5. **Intoxicating Liquors: Implied Consent Law: Constitutional Law.** The compulsory giving of a blood, breath, or urine sample under the provisions of the implied consent law does not violate the constitutional right against self-incrimination under the Fifth Amendment to the Constitution of the United States.
6. **Intoxicating Liquors: Implied Consent Law: Time: Constitutional Law.** A driver who is requested to give a blood, breath, or urine sample under the implied consent statute is not entitled prior to being asked to give such sample to be warned of his right not to incriminate himself.

7. **Intoxicating Liquors: Implied Consent Law: Time: Right to Counsel.** The statement in Pickard v. Director of Motor Vehicles, 184 Neb. 13, 165 N. W. 2d 96, suggesting that in some undefined circumstances a delay may be appropriate to give a driver an opportunity to consult a lawyer before giving a sample under the implied consent statute is disapproved.
8. **Intoxicating Liquors: Implied Consent Law: Motor Vehicles.** The right to a Miranda type warning applies only to in-custody interrogation and has no application to a proper request to a motor vehicle driver to give a specimen under the implied consent statute.
9. **Intoxicating Liquors: Implied Consent Law: Motor Vehicles: Arrest: Right to Counsel: Constitutional Law.** If a Miranda type warning is given in connection with information concerning the implied consent statute, it is incumbent upon the arresting officer to explicitly inform the arrested person that the constitutional rights to counsel and against self-incrimination which may have been previously explained are not applicable to the decision the driver must make concerning the giving of samples, that he has no right to consult with an attorney before making that decision, and that the right against self-incrimination does not permit the driver to refuse to either comply with or answer the request for such samples.
10. **Intoxicating Liquors: Implied Consent Law: Right to Counsel.** Where it appears from the evidence that a request to see an attorney before giving a sample under the implied consent law was induced by confusion resulting from the commingling of Miranda type warnings with information concerning the demands of the implied consent statute, such request for an attorney does not constitute a refusal under the implied consent statute.

Appeal from the District Court for Hall County: DONALD H. WEAVER, Judge. Reversed and remanded.

George H. Moyer, Jr., and Moyer & Moyer, for appellant.

Clarence A. H. Meyer, Attorney General, and James J. Duggan, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, McCOWN, NEWTON, and CLINTON, JJ.

CLINTON, J.

This is an appeal from an order of the Director of the

Department of Motor Vehicles made under the provisions of section 39-727.16 et seq., R. S. Supp., 1972, revoking the motor vehicle operator's license of the plaintiff for an alleged refusal of the plaintiff to take a chemical test of his breath under the provisions of section 39-727.03(4), R. S. Supp., 1972. The District Court on appeal upheld the order and the plaintiff appealed to this court. We reverse.

The question here is whether the evidence supports the conclusion that there was a refusal, and if there was, the reasonableness or unreasonableness of the refusal. § 39-727.17, R. S. Supp., 1972. On appeal from an order of revocation of a motor vehicle operator's license under the implied consent law, we review the findings of the trial court de novo as in equity. § 39-727.19, R. S. Supp., 1972; § 60-420, R. R. S. 1943; Zadina v. Weedlun, 187 Neb. 361, 190 N. W. 2d 857.

There is no significant conflict in the evidence. On September 8, 1972, at about 1:20 a.m., the plaintiff was arrested by an officer of the Grand Island police department for operating a motor vehicle on a public street while under the influence of intoxicating liquor. A few minutes later at the police station the officer asked plaintiff if he would submit to a test of his breath upon a device termed a breathalyzer and further advised the plaintiff that if he refused to take the test he would lose his driver's license for 1 year. The plaintiff immediately consented to take the test. He was then permitted to make three telephone calls; two in unsuccessful attempts to secure legal counsel and one in an attempt to arrange bond. All were unsuccessful. This consumed 30 to 45 minutes. The officer then read to the plaintiff certain "warnings" which were embodied in a written instrument, a copy of which was received in evidence in the District Court. This document had been prepared by the legal staff of the city of Grand Island. These warnings included a statement of the reason why the plaintiff was under arrest. Then fol-

lowed Miranda type warnings which included the following: "You have the right to consult with or obtain an attorney and have him present with you during the questioning or *any part of my investigation.* Do you understand that? Do you willingly waive your right to remain silent and your right to have an attorney present with you, or the right to consult with an attorney at this time?" (Emphasis supplied.)

Following the warnings the instrument gives accurate information concerning the implied consent statute which included an accurate statement concerning the consequences of refusal to give the specimen and concluded with the following: "Is there an attorney or attorneys whom you wish to contact at this time? . . . Having been advised of your rights, and knowing the same, do you willingly and voluntarily, and without any threat or promise, consent to giving a test at my direction?"

The plaintiff was then taken to the breathalyzer room where he refused to take a test, stating that he wanted to consult with an attorney. The test was not made and the plaintiff was placed in a cell. At this time the plaintiff had been at the station approximately 1 hour. At that point he talked to a companion who had been in the automobile with him at the time of his arrest. The companion then left, made a telephone call, and returned in about 15 minutes at which time the plaintiff informed the police that he wished to give the sample. His offer was refused because too much time had elapsed.

The inherent contradictions between the questions contained in the warnings and the legal obligation of the plaintiff under the rules applicable to the implied consent statute are evident. However, at no place in the "warnings" is it made clear that the right to counsel and the right against self-incrimination have no application whatever under the implied consent statute. Neither is there any requirement under our decided cases that Miranda type warnings be given before a sample is requested. Neither is there any requirement

that consent to the test be given voluntarily or understandingly. The loss of the operator's license is itself a statutorily authorized and constitutional threat or inducement to give the requested specimen. The statute does, of course, direct that if there is a refusal the test not be given, but this simply forestalls a forcible taking of the specimen. § 39-727.16, R. S. Supp., 1972.

Wiseman affirmatively testified that his interim refusal to take the test was brought about by his understanding from the warnings that he had a right to have a lawyer present and to consult with him before he was required to give the sample. From an examination of these warnings we conclude that only a person trained in the law and one familiar with the Miranda doctrine and with the implied consent statute could reasonably understand from the "warnings" that he had no right to consult with counsel concerning the tests. At the very best, the commingling of the Miranda warnings and the implied consent statute resulted in a high degree of ambiguity. This is especially evident when we consider the advice, much broader than Miranda requires, that plaintiff had a right to counsel "during any part of my investigation." Any person might properly interpret this as including the taking of specimens. He might even properly interpret the admonition on the right to remain silent as giving him the right to refuse to respond to the request for a specimen. Such a refusal would itself subject him to the penalties of the statute.

We have stated many times that a driver who has been arrested for operating a motor vehicle upon a public street or highway while under the influence of intoxicating liquor is not entitled under either the federal or state Constitutions or the implied consent statute to consult with a lawyer previous to giving a sample of blood, breath, or urine under the implied consent act, or to have a lawyer present during the giving of the sample. Rusho v. Johns, 186 Neb. 131, 181 N. W. 2d 448; Metschke v. Department of Motor Vehicles, 186 Neb. 197, 181 N.

W. 2d 843; Doran v. Johns, 186 Neb. 321, 182 N. W. 2d 900. Neither is the right against self-incrimination involved. State v. Manley, 189 Neb. 415, 202 N. W. 2d 831.

We have also said that a conditional or qualified refusal to take one of the authorized tests to determine the alcoholic content of body fluids under the implied consent law is not sanctioned by the act and such a refusal is a refusal to submit to the test within the meaning of the act. Preston v. Johns, 186 Neb. 14, 180 N. W. 2d 135; Rusho v. Johns, *supra.*

In this case, however, it clearly appears and we find that the conditional refusal which occurred between the first and subsequent unqualified consents to take the test was induced by the ambiguous warnings given. In accordance with a holding of the Supreme Court of Minnesota in State, Department of Highways v. Beckey, 291 Minn. 483, 192 N. W. 2d 441,* in a substantially similar situation, we hold: If a Miranda type warning is given in connection with information concerning the implied consent statute, it is incumbent upon the arresting officer to explicitly inform the arrested person that the constitutional rights to counsel and against self-incrimination which may have been previously explained are not applicable to the decision the driver must make concerning the giving of samples, that he has no right to consult with an attorney before making that decision, and that the right against self-incrimination does not permit the driver to refuse to make an answer to the request for such samples.

Where, as here, it appears from the evidence that a request to see an attorney before giving a sample under

* See, also, Goodman v. Orr, 19 Cal. App. 3d 845, 97 Cal. Rptr. 226; Rees v. Department of Motor Vehicles, 8 Cal. App. 3d 746, 87 Cal. Rptr. 456; Maxsted v. Department of Motor Vehicles, 14 Cal. App. 3d 982, 92 Cal. Rptr. 579; Thomas v. Schaffner (Mo. App.), 448 S. W. 2d 319.

the implied consent law was induced by confusion resulting from the commingling of the Miranda type warnings with information concerning the demands of the implied consent statute, such request for an attorney does not constitute a refusal under the implied consent statute. Since the questions which are raised might arise under varying circumstances not as clear-cut as the present instance, we suggest that the Director and trial courts reviewing the action of the Director hereafter make specific findings as to whether such qualified refusals were the result of or were induced by ambiguous procedures such as were here involved.

It is possible that a passing statement made by this court in Pickard v. Director of Motor Vehicles, 184 Neb. 13, 165 N. W. 2d 96, may have or will engender confusion. The statement in that case countenancing a delay in some undefined circumstances to give a driver an opportunity to consult with a lawyer before giving a sample under the implied consent statute is disapproved.

What is said in this opinion should not be taken to suggest that the police may in any way interfere with a suspect's right to counsel in connection with any charge of crime which may be related to the driving while intoxicated investigation as, for example, to drunk driving itself or motor vehicle homicide. As to these, of course, the ordinary rules pertaining to right to counsel apply. We simply say such right does not apply to the taking of samples under the implied consent statute.

The judgment of the trial court and the order of the Director of the Department of Motor Vehicles are reversed and the cause remanded for further action not inconsistent with this opinion.

REVERSED AND REMANDED.

ROBERT KROEGER, APPELLEE, V. FRANCHISE EQUITIES INCORPORATED, APPELLANT.
212 N. W. 2d 348

Filed November 23, 1973. No. 38905.

Contracts: Damages: Evidence. Damages for breach of contract that are susceptible of definite proof are recoverable only to the extent the evidence affords a basis of ascertaining their amount in money with reasonable certainty.

Appeal from the District Court for Douglas County: THEODORE L. RICHLING, Judge. Reversed and remanded.

Wall & Wintroub, for appellant.

Norman H. Denenberg, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

BOSLAUGH, J.

This was an action for damages for breach of contract. The defendant appeals from a judgment for the plaintiff in the amount of $4,000.

On November 9, 1970, the plaintiff entered into a subcontract with the defendant whereby the plaintiff agreed to furnish labor, materials, and equipment and perform all carpentry work required to construct a service station and restaurant in Omaha, Nebraska. The contract provided the plaintiff would begin and terminate his work according to a "Critical Path Schedule" which was a detailed construction schedule set out in the contract. It provided the carpentry work would be performed between December 3, 1970, and January 28, 1971.

The plaintiff commenced work on November 20, 1970. In December the plaintiff received a telephone call from the defendant's job superintendent, Burt Smith, who said he "was shutting the job down." The plaintiff heard nothing further from the defendant until April 1971. The plaintiff then did 8 hours additional work

on the job but refused to complete the contract because carpenters' wages were about to increase and the job had been figured originally on the basis of being winter work.

The entire evidence at the trial consisted of the written contract and the plaintiff's testimony. The defendant's answer alleged the plaintiff had agreed to the closing down of the job because of the weather. The evidence was to the contrary. The plaintiff testified he did not agree to closing down the job; that there was temporary shielding and a portable heating unit on the job; and the weather did not prevent construction from proceeding.

The defendant also claimed it had a right to reschedule the work under the contract. The contract provided that if the critical path schedule was revised, the plaintiff would receive 3 days' notice when the job was to be ready for him and claims for damage for delays were to be made promptly. We believe that a delay in all construction from December to April was not a "revision" of the critical path schedule within the meaning of the contract and the contemplation of the parties.

The petition alleged the plaintiff had performed work and services in the amount of $800 and was further damaged in the amount of $3,500. The plaintiff testified he and his employees had spent 139 ½ hours on the job; the job had been estimated on the basis of 1,000 hours work at $8 per hour plus 15 percent profit; and he had been paid $241 by the defendant.

The plaintiff was entitled to recover the value of the work performed plus the profit he would have received if he had been allowed to complete the job within the time provided in the contract. Hale v. Hess, 30 Neb. 42, 46 N. W. 261; Von Dorn v. Mengedoht, 41 Neb. 525, 59 N. W. 800; Roberts v. Drehmer, 41 Neb. 306, 59 N. W. 911. The plaintiff was required to furnish appropriate data to enable the trier of fact to find the damages with reasonable certainty. Masten v. Campbell

Manuf. Co., 188 Neb. 646, 198 N. W. 2d 326. Damages for breach of contract that are susceptible of definite proof are recoverable only to the extent the evidence affords a basis of ascertaining their amount in money with reasonable certainty. Ridenouer v. Kuker Industries, Inc., 185 Neb. 321, 175 N. W. 2d 287.

There was no satisfactory evidence of the reasonable value of the work performed and no evidence as to the profit the plaintiff would have realized if he had been permitted to finish the job as the contract originally provided. The contract required the plaintiff to furnish both labor and materials for "Carpentry per plans and specifications" but there was no evidence concerning the plans and specifications and no evidence concerning the labor cost to plaintiff and his overhead expenses.

The evidence was not sufficient to sustain the finding that the plaintiff was damaged in the amount of $4,000. The judgment is reversed and the cause remanded for a new trial on the issue of damages only.

REVERSED AND REMANDED.

PHILIP J. STEC ET AL., APPELLEES, V. COUNTRYSIDE OF HASTINGS, INC., A NEBRASKA CORPORATION, ET AL., APPELLANTS.

212 N. W. 2d 561

Filed November 23, 1973. No. 38938.

Zoning: Municipal Corporations: Statutes. In the law of land use the approval of a conditional use permit in the nature of a special exception use by the legislative body of a political subdivision is ordinarily subject to a statutory provision that requires a favorable three-fourths majority vote in event of requisite protests against a change or supplement of regulations or restrictions.

Appeal from the District Court for Adams County: FREDRIC R. IRONS, Judge. Affirmed.

Gerald T. Whelan and Duane L. Stromer, for appellants.

Ronald R. Fitzke, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SMITH, J.

In question is the meaning of a statutory requirement for amendment of a municipal regulation of zoning. In a declaratory judgment action, the District Court adjudged that the requirement governed a municipal grant of a special use permit for a mobile home park. The applicant for the permit and the city appeal.

The applicant, Countryside of Hastings, Inc., sought the permit for a tract of approximately 25 acres located within the extraterritorial zoning jurisdiction of Hastings, a city of the first class. Objections were signed by almost all the adjacent resident-landowners, but the signatures were not acknowledged. Representatives of the protesters presented the petition to the city council of Hastings. The council heard the matter, but did not learn that the protesters represented approximately 100 percent of the adjacent owners. The application was approved by the council on a roll call vote of 5 ayes and 3 nays, less than a three-fourths majority.

The statutory provision in question reads in part as follows: "Such regulations, restrictions, and boundaries may . . . be amended, supplemented, changed, modified, or repealed. In case of a protest against such change, signed by the owners of twenty percent or more . . . of the lots . . . immediately adjacent . . ., such amendment shall not become effective except by the favorable vote of three-fourths of all the members of the legislative body of such municipality. The provisions of section 19-904 relative to public hearings and official notice shall apply equally to all changes or amendments." § 19-905, R. R. S. 1943. The substance

of the provision has been in effect since adoption of the zoning statute in 1927. See Laws 1927, c. 43, § 5, p. 183.

The record contains two sections of the Hastings code. Section 4-331 requires the protest to be "duly signed and acknowledged." Section 4-318 provides for special use permits: "Any of the following uses may be located in any district by special Use Permit of the City Council . . . under such conditions as to operation, site development, parking, signs, and time limit as may be deemed necessary in order that such use will not seriously injure the appropriate use of neighboring property, and will conform to the general intent and purpose of this Ordinance. Such uses shall comply with the height and area regulations of the district in which they may be located, except that radio, television and microwave towers and drive-in theatre screens may exceed said height regulations." The section enumerates over 20 uses, some with restrictions. The important one here reads:

"21. . . . trailer or mobile homes, subject to the following: a. The number of trailers . . . shall not exceed the number obtained by dividing the total square foot area of the site by 1,200. b. A distance of at least . . . (10) feet . . . be maintained between . . . trailers . . . . d. Each trailer camp shall provide sanitary facilities and water supply in accordance with . . . (municipal) standards . . . . No special use permit (or certificate of occupancy) for a trailer camp shall be granted until the plans have been approved by the City Health Officer, City Engineer, Gas, Plumbing, and Electrical Inspector. . . . All special use permits for trailer camps shall be temporary and shall be valid only during the period that the camp complies with the (above) requirements."

The two sections of the Hastings code do not differentiate between mobile homes and travel trailers. The Uniform Standard Code, on the other hand, does

so. See § 71-4603 (1) and (2), R. R. S. 1943.

Some statutory language refers generally to structures, use of land, formation of districts, and uniformity in language similar to that of the act of 1927. It also provides for a comprehensive development plan. See §§ 19-901 through 19-903, R. R. S. 1943.

A statutory section central to the problem reads: "The (municipal) legislative body . . . shall provide for the manner in which such regulations and restrictions, and the boundaries of such districts, shall be determined, established, and enforced, and . . . amended, supplemented, or changed. . . . (They shall not) become effective until after a public hearing (and notification) . . . ." § 19-904, R. R. S. 1943. At the periphery of the problem lies the Uniform Standard Code for Mobile Homes and Travel Trailers. §§ 71-4601 through 71-4609, R. R. S. 1943.

Countryside and the city argue that the municipal code requirement for acknowledgments of signatures by protesters was valid and applicable. They assert that the code requirement is stricter than is the statutory demand of a three-fourths majority vote and that the lack of the acknowledgment necessitates reversal of the District Court judgment.

The argument has a semblance of support from a writer critical of rezoning provisions restricted by the necessity of frontage consents. See Comments, 20 Univ. Kan. Law Rev. 109 (1971). The decisions in jurisdictions other than Nebraska are not uniform. See Van Iden, Zoning Restrictions Applied to Mobile Homes, 20 Cleve. Law Rev. 196 at 200 (1971).

There are two arguments the other way. First, whether the Hastings or the statutory provision is stricter depends upon one's vantage point. Second, if the statutory procedure is detailed the municipality must follow it. See Carter, "Problems in the Regulation and Taxation of Mobile Homes," 48 Iowa Law Rev., 16 at 21 (1962).

In our opinion the acknowledgement requirement in the Hastings code was unenforceable because of the statutory provision for a three-fourths majority. In respect to land use, councils of political subdivisions in the United States possess a variety of means of regulation. One has been the conditional use permit in the sense of a special exception use. It exists under circumstances already set forth in an ordinance or regulation. See, Antieau, Cases and Problems on the Law of Municipal Corporations, 78 (4th Ed., 1964); 3 Anderson, American Law of Zoning, § 15.01, pp. 83 to 86 (1968); Bair and Bartley, The Text of A Model Zoning Ordinance, 55 (3d Ed., 1966); Bartke and Gage, "Mobile Homes: Zoning and Taxation," 55 Cornell Law Rev., 491 at 496 to 514; Mandelker, The Zoning Dilemma, 65 (1971); 1 Metzenbaum, Law of Zoning, 813, 814 (2d Ed., 1955); 23 Nimlo Municipal Law Rev., 442 (1960); 1 Rathkopf, The Law of Zoning and Planning, 17-9 through 17-15 (1969); 2 Rathkopf, op. cit., 54-1 (1972); Roberts, Land Use Planning, 6-81 through 6-85 (1971). Countryside applied for such a conditional use permit. Mobile home parks have been the subject of conditional use permits which have received approval from commentators. See, 3 Anderson, op. cit., § 15.01, pp. 85, 86 (by implication); Raymond, Mobile Homes and Community Planning, Current Municipal Problems, 349 (1969). See, also, Hagman, Urban Planning and Land Development Control Law (1971); but see Lakin, "A Municipal Dilemma: The Not So Mobile Home," Current Municipal Problems, 46 at 49 (1972).

The sweep of the three-fourths majority requirement is a difficult question. Although the referent is broad in the use of such words as "amended, supplemented, changed, modified, or repealed," it does not specify implementation. See § 19-905, R. R. S. 1943. When the Hastings council approved the application of Countryside, it in form implemented its ordinance. We conclude, however, that the approval was tantamount to

the supplementing of a regulation within the meaning of the statutory provision in question. Therefore, the approval of a conditional use permit in the nature of a special exception use by the legislative body of a political subdivision is ordinarily subject to a statutory provision that requires a favorable three-fourths majority vote in event of requisite protests against a change or supplement of regulations.

Semantic skills can justify affirmance or reversal. It is our view that the statutory language does not mean that the voting requirement is moribund in respect to conditional use permits. This interpretation also aligns the statutory provision with requirements of notification and hearing.

The judgment is affirmed.

AFFIRMED.

BOSLAUGH, J., dissenting.

The reference in section 19-905, R. R. S. 1943, to changes in zoning regulations, restrictions, and boundaries means changes in *zoning* of the land. It has no application to uses *permitted* under existing zoning subject only to the issuance of a special use permit.

Much can be said in favor of a policy that would apply the same requirements to special use permits that are applicable to changes in zoning. That, however, is a legislative matter which in this case was controlled by the zoning ordinance.

WHITE, C. J., joins in this dissent.

RICHARD B. ATKINSON, APPELLANT, V. LITTLE AUDREY'S TRANSFER CO., INC., APPELLEE.
212 N. W. 2d 350

Filed November 23, 1973. No. 38940.

1. **Workmen's Compensation: Appeal and Error.** Upon appellate review of a workmen's compensation case in the Supreme Court, the cause will be considered de novo only where the

findings of fact are not supported by the evidence as disclosed by the record.

2. **Workmen's Compensation: Trial: Evidence.** Where the claimant in a workmen's compensation case fails to show with reasonable certainty that the disability of which he complains arose out of and in the course of his employment, the proceeding will be dismissed.

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

Robert P. Miller, for appellant.

Joseph H. McGroarty and McGroarty, Welch & Langdon, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SPENCER, J.

Richard B. Atkinson, plaintiff-appellant, prosecutes this appeal from an order of the District Court for Douglas County, sustaining the order of dismissal of the Nebraska Workmen's Compensation Court. The cause was dismissed by a one-judge court, and on rehearing this finding was reaffirmed by the Nebraska Workmen's Compensation Court en banc. We affirm.

Plaintiff by vocation is an over-the-road truck driver. This action is predicated on his claim of a preinfarction angina on May 31, 1968, leading to a more severe myocardial infarction on June 3, 1968. He claims his heart condition arose out of and in the course of his employment with the defendant. Plaintiff's acute myocardial infarct occurred on June 3, 1968, while he was on a cross-country journey from Fremont, Nebraska, to the west coast. The basis of the present action, however, is plaintiff's contention that he sustained a preinfarction angina on the previous trip, which originated at Fremont, May 25, 1968, and terminated on May 31, 1968, at Fargo, North Dakota.

On the trip in question plaintiff was working on a

refrigerated unit with a cargo consisting of lettuce, carrots, oranges, and celery which had been picked up in California. The separate items of produce were segregated in the truck and were packed in cartons and crates which varied in weight between 35 and 70 pounds. At Bismarck, North Dakota, one-half of the load, or 20,000 pounds, was unloaded onto skids furnished by the consignee. The unloading of the trailer was done by the plaintiff and the driver, individually picking up cartons of produce and placing them on the skids. The skids were then taken into the consignee's place of business by his own employees. Work commenced at the end of the trailer. As the trailer was unloaded the plaintiff and the driver worked their way into the interior. To unload this 20,000 pounds required 2½ hours of work inside the refrigerated trailer. This same process was repeated with the balance of 20,000 pounds of produce at Fargo, North Dakota. Plaintiff worked another 2½ hours in the trailer at that point.

Plaintiff testified that while unloading at Bismarck he had a shortness of breath and a feeling like he had drawn in too much cold air. He then experienced pain in his chest. These symptoms first appeared when he was inside the refrigerated trailer unloading produce. When plaintiff was unloading at Fargo, North Dakota, the pain increased. He didn't know what caused the pain and thought it was just cold air in his lungs. Two symptoms persisted, shortness of breath and the pain across his chest on both sides. This pain continued after he had unloaded the cargo at Fargo and when he arrived at Pipestone, Minnesota, where he left the truck. It continued during his return home to Valley, Nebraska, and was still present the next day, Saturday morning. It is plaintiff's contention that he was under unusual strain in temperature and work and that these conditions combined to produce the myocardial infarction.

On cross-examination the plaintiff admitted that he did not have any pain in his chest while he was in

Bismarck. He did, however, have shortness of breath and thought he had sucked in too much air.

The testimony of the driver of the unit on which plaintiff was working does not support his position. He testified that the plaintiff made no complaints to him of chest pains. If he had made such complaints the driver would have remembered them because he liked the plaintiff.

The testimony of plaintiff's doctors tended to support his contention that there was a causal connection between his employment activities and his subsequent heart attack. Defendant's medical witness, however, testified that during the period in question the plaintiff had been engaged in ordinary work to which he was accustomed and there was no direct relationship between the work he had performed on May 31 and his subsequent heart attack on June 3.

It would serve no useful purpose to further detail the evidence herein. It is apparent that the evidence is irreconcilable and in direct conflict. A review of the record convinces us that we cannot say that the findings of fact are not supported by the evidence. This case therefore is controlled by Gifford v. Ag Lime, Sand & Gravel Co. (1971), 187 Neb. 57, 187 N. W. 2d 285, in which we said: "Upon appellate review of a workmen's compensation case in the Supreme Court, the cause will be considered de novo only where the findings of fact are not supported by the evidence as disclosed by the record."

Here, the triers of fact in each instance found against the plaintiff. The Workmen's Compensation Court en banc said in part: "* * * plaintiff failed to prove a causal connection between the work he did on May 31, 1968, and his subsequent heart attack which he suffered on June 3, 1968; * * *." The burden was on the plaintiff to prove this causal connection.

We said in McPhillips v. Knox Constr. Co., Inc. (1973), *ante* p. 306, 208 N. W. 2d 261: "Where the claimant in

a workmen's compensation case fails to show with reasonable certainty that the disability of which he complains arose out of and in the course of his employment, the proceeding will be dismissed."

We agree that the plaintiff has not maintained his burden herein. The judgment of the District Court sustaining the order of dismissal is affirmed.

AFFIRMED.

SMITH, J., concurring in the result.

I concur with the majority opinion, except its reference to the question whether the evidence supports the findings of fact. Asserting no affirmative defense, defendant prevailed in the Nebraska Workmen's Compensation Court en banc. In this situation we ought to rely on McPhillips v. Knox Constr. Co., Inc., *ante* p. 306, 208 N. W. 2d 261 (1973), not on Gifford v. Ag Lime, Sand & Gravel Co., 187 Neb. 57, 187 N. W. 2d 285 (1971), in which plaintiff prevailed in the trial court - the District Court on direct appeal from the one-judge compensation court. To me the reference in the majority opinion is erroneous, confusing, and incapable of rational application.

STATE OF NEBRASKA, APPELLEE, V. RON FISHER, APPELLANT.
212 N. W. 2d 568

Filed November 23, 1973. No. 38967.

Criminal Law: Rape: Witnesses: Evidence. As a matter of law the testimony of the prosecutrix alone, uncorroborated by any other evidence, is not sufficient to sustain a conviction for rape, or assault with intent to commit rape.

Appeal from the District Court for Sheridan County: ROBERT R. MORAN, Judge. Reversed and remanded.

Charles Plantz, for appellant.

Clarence A. H. Meyer, Attorney General, and James J. Duggan, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

MCCOWN, J.

The defendant, after trial to the court without a jury, was found guilty of assault with intent to commit rape and sentenced to the statutory minimum of 2 years in prison. The only evidence in the case was the testimony of the prosecutrix. The sole issue on this appeal is whether the evidence is sufficient to sustain the conviction where the evidence consists solely of the uncorroborated testimony of the prosecutrix.

The prosecutrix was 18 years old and employed. The incident occurred in a house in Gordon, Nebraska, where the prosecutrix had a rented room. She testified that she was alone in the house and asleep in her bedroom. The house was unlocked and so was the bedroom. She testified that the defendant first appeared in her bedroom at about 1:30 a.m. on a Sunday morning and asked the prosecutrix where his wife was. She told him that his wife was at her mother's house. The prosecutrix had known the defendant for some years, had dated him occasionally in junior high school, and was a good friend of the defendant's wife. The prosecutrix and defendant visited for a few minutes in the prosecutrix' bedroom and the defendant, who was somewhat intoxicated, then left the house. The prosecutrix testified that some 15 or 20 minutes later the defendant returned to the house and again came to her bedroom and sat down on the bed. They visited for a few minutes. The defendant then put his arm around her waist and said that he was going to rape her. After a struggle on the bed of some 5 minutes, she escaped and ran to the living room trying to reach the telephone. The defendant grabbed her legs and attempted to pull her panties down. After another brief struggle, she managed to escape again. She left the house, and ran to a nearby house where she had visited earlier in the evening. This is the sum total

of the prosecutrix' testimony as to the assault, and that testimony was the only evidence in the case. The prosecutrix did not testify that she made a timely complaint or, in fact, any complaint to anyone.

At common law, the testimony of the prosecutrix in the trial of all offenses against the chastity of women was alone sufficient to support a conviction and no corroborating evidence or circumstances were necessary. That rule was adhered to in Nebraska at least as late as 1877. In Garrison v. People, 6 Neb. 274, this court held that it was not error to refuse to instruct the jurors that they could not convict the defendant upon the unsupported testimony of the prosecutrix, and that if the jurors were satisfied beyond a reasonable doubt from the testimony of the prosecutrix alone of the guilt of the accused, they would be justified in returning a verdict of guilty.

That rule was changed in 1886 in the case of Mathews v. State, 19 Neb. 330, 27 N. W. 234. After quoting Sir Matthew Hale's statements that rape "is an accusation easy to be made and hard to be proved, and harder to be defended by the party accused, * * *" this court adopted a rule as to corroborating proof in rape cases. The rule stated was that "where his (the defendant's) testimony expressly denies that of the prosecutrix she must be corroborated to authorize a conviction." That case was the genesis of the judicial rule in Nebraska requiring corroboration in rape cases.

The corroboration rule has been followed in this State since 1886. It has been expressed many times in varying language. The language in some cases, as in Mathews, might be interpreted as limiting the rule to a situation in which the accused testifies and denies the accusation. The latest of those cases is State v. Gero, 184 Neb. 107, 165 N. W. 2d 371. There this court said: "In a prosecution for rape, if the prosecutrix testifies to the facts constituting the crime and the accused unequivocally denies the commission of the offense, the

testimony of the prosecutrix must be corroborated on material points by other evidence to justify or sustain a conviction of the accused."

The corroboration rule in Nebraska has also many times been stated to be: "Under the law of this state an accused charged with rape cannot be convicted solely on the uncorroborated testimony of the prosecutrix." See, Stapleman v. State, 150 Neb. 460, 34 N. W. 2d 907 (1948); Sherrick v. State, 157 Neb. 623, 61 N. W. 2d 358 (1953). That statement of the rule was reiterated once more in 1972. See State v. Ferguson, 188 Neb. 330, 196 N. W. 2d 374. In none of these cases is there any intimation that the rule is limited to cases where the defendant testifies and denies the charge.

In 1906, the corroboration rule in rape cases was extended to charges of assault with intent to commit rape. In McConnell v. State, 77 Neb. 773, 110 N. W. 666, this court said: "We are fully committed to the rule that in cases of rape and seduction the prosecutrix must be corroborated, or, in other words, the uncorroborated evidence of the prosecutrix is not sufficient to sustain a conviction, and we see no good reason, nor is any suggested, why the same rule should not prevail where the charge is assault with intent to commit rape." In disapproving an instruction given to the jury, the court said: "The vice of this instruction seems to be that too much emphasis was given to the idea or thought that the prosecutrix need not be corroborated by the evidence of any other witness, and thereby the necessity of the corroboration was, in effect, lost sight of."

The latest case of assault with intent to commit rape in which the rule has been thus expressed is Miller v. State, 169 Neb. 737, 100 N. W. 2d 876. That case held: "A person may not be convicted of the crime of assault with intent to commit rape on the testimony of the prosecutrix alone. Her testimony must be corroborated by other competent evidence." Neither McConnell nor Miller intimates any limitation on the rule.

The State contends that the corroboration rule in cases of rape and assault with intent to commit rape is to be applied only where there is an unequivocal denial by the accused, and that it cannot apply where the accused does not testify. It is quite obvious that the application of the corroboration rule cannot be made to depend on whether or not the defendant denies the prosecutrix' testimony. The defendant is entitled to the presumption of innocence. Garrison v. People, 6 Neb. 274. His neglect or refusal to testify may not create any presumption against him. § 29-2011, R. R. S. 1943. No person shall be compelled in any criminal case to give evidence against himself. Article I, section 12, Constitution of Nebraska. Even if we accepted the argument of the State that Nebraska's corroboration rule is limited to cases where there is a denial of the prosecutrix' testimony by the defendant, the defendant's plea of not guilty must be accepted as the equal of an unequivocal denial.

Nebraska is in a small minority of states which have adopted an unqualified corroboration rule by judicial decision. Some others have done so by statute. The majority of states follow the old common law rule but not without qualification. "Thus it is often said, depending on the jurisdiction, that the uncorroborated testimony of the prosecutrix should be received with caution; or that it should be clear and convincing; or that it will not be sufficient where it is incredible, improbable, discredited, or contradictory, or where the defendant denies the charge, or where the prosecutrix does not make prompt complaint, or where the testimony is not consistent with the surrounding circumstances, or where the state's case is weak and the prosecutrix is a mature woman, or where several of such factors are present." Underhill, Criminal Evidence (5th Ed.), § 762, p. 1753.

We hold that as a matter of law the testimony of the prosecutrix alone and uncorroborated by any other evi-

dence is not sufficient to sustain a conviction for rape, or assault with intent to commit rape. That rule is applicable whether the defendant does or does not testify.

A charge of assault with intent to commit rape necessarily includes a charge of simple assault. See McConnell v. State, *supra*. The evidence here was sufficient to find the defendant guilty of assault under section 28-411, R. S. Supp., 1972. It was insufficient to sustain the conviction for assault with intent to commit rape.

The judgment is reversed and the cause is remanded.

REVERSED AND REMANDED.

BOSLAUGH, J., dissenting.

I would affirm the judgment. The corroboration rule, adopted by this court in 1886, requires corroboration only where the defendant testifies and expressly denies the act, or there are circumstances or other evidence which tend to dispute the testimony of the complaining witness. Mathews v. State, 19 Neb. 330, 27 N. W. 234.

The rule relates to the quantum of proof necessary to convict. It is not unlike many other rules which specify the amount of evidence required to make a jury question in a particular type of case.

So far as I have been able to determine, the question presented in this case was not involved in any of the other cases cited as supporting the conclusion of the majority opinion.

WHITE, C. J., and SPENCER, J., join in this dissent.

ASSOCIATES FINANCE COMPANY OF NEBRASKA, A CORPORATION, APPELLANT, V. PETER TESKE ET AL., APPELLEES.
212 N. W. 2d 572

Filed November 23, 1973. No. 38973.

1. **Sales: Trial: Evidence: Security Interest.** Under the Uniform Commercial Code, the adequacy or insufficiency of the price for which collateral is sold at a private sale after default and re-

possession is one of the "terms" of sale, and is relevant along with other issues, in determining whether the sale was commercially reasonable.

2. **Pleadings: Trial: Evidence.** A general denial is available to a defendant to challenge one or more elements essential to a recovery by the plaintiff and the effect of the denial is to put the burden on the plaintiff to establish by evidence the matter denied.
3. **Appeal and Error: Trial: Evidence.** Where the evidence is irreconcilable and in direct conflict, this court will consider the trial court's observation of the witnesses and their manner of testifying and that the court must have accepted one version of the evidence rather than the opposite.

Appeal from the District Court for Hall County: DONALD H. WEAVER, Judge. Affirmed.

Luebs, Tracy, Huebner, Dowding & Beltzer and D. Steven Leininger, for appellant.

No appearance for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SPENCER, J.

Plaintiff-appellant appeals from the dismissal of its petition seeking a money judgment for the unpaid balance of a promissory note. Plaintiff repossessed and sold the secured collateral, a 1966 Lincoln Continental automobile; deducted the proceeds from the debt; and brought this action for the balance. The trial court found that the private sale of the collateral for $260 was not commercially reasonable under the Uniform Commercial Code and dismissed plaintiff's petition. We affirm.

On June 17, 1970, defendants executed a promissory note in favor of the plaintiff, along with a security agreement covering the 1966 Lincoln Continental automobile. The amount loaned was $1,625.43. The amount of the note, which included finance charges, was $2,016. Defendants defaulted in their payments. On December 30, 1970, using a key made the week before, plaintiff

took possession of the automobile which it found on a Grand Island street. Defendants were residents of Grand Island. The automobile was stored in the open in Grand Island until about the end of January 1971. It was then either driven or towed to Hastings. Plaintiff's manager testified both ways. There it was stored on a used car lot until March 15, 1971, when it was sold.

Plaintiff sent defendants a notice of sale, dated January 7, 1971, advising them that the automobile would be offered for private sale in Hastings after 5 p.m., on the 14th day of January, and from day to day thereafter until sold. The car was then in Grand Island. Plaintiff was aware that defendants did not receive this notice because it was returned unclaimed.

The certificates of publication from The Hastings Daily Tribune do not in any manner identify the automobile herein. Although there are three such certificates, plaintiff did not produce copies of the published notices to which they refer. Two of the certificates show a classified ad of three lines, without further identification, inserted in the issues of February 9, 13, 15, 16, and 17, 1971, by Associates Finance Company, Hastings, Nebraska. The third certificate is in similar form except that it lists the space at five lines and covers the issues of January 30, and February 1 and 2, 1971. The trial court found there was no proof plaintiff actually advertised the car in question. The court further held that even if the published notices covered this vehicle, a commercial ad of three lines was not adequate advertising for a 1966 Lincoln Continental automobile.

The car was sold privately to an automobile repairman for $260. The trial court found that the plaintiff failed to offer the car to any recognized dealerships, and specifically did not contact any dealer handling that type of automobile.

Plaintiff in its brief states: "The substantive issues relate to the interpretation of the U. C. C. The issues

in this regard are one of first impression in Nebraska and will require some very important policy considerations. Accordingly, there is a lack of cited case law in the brief. Rather, the plaintiff relies on the clear language of the U. C. C. in support of its case. The general issues presented concern the sale of repossessed collateral in compliance with 9-504 and 9-507 of the U. C. C." Plaintiff in this statement ignores the case of First Nat. Bank of Bellevue v. Rose (1972), 188 Neb. 362, 196 N. W. 2d 507, which interprets the U. C. C. provisions involved herein contrary to plaintiff's position.

In First Nat. Bank of Bellevue v. Rose, *supra,* we held: "Under the Uniform Commercial Code, the adequacy or insufficiency of the price for which collateral is sold at a private sale after default and repossession is one of the 'terms' of sale, and is relevant along with other issues in determining whether the sale was commercially reasonable." Defendants' answer alleged that the value of the secured collateral was equal to or exceeded the amount of plaintiff's claim. This pleading put the burden on the secured party to establish that the disposition of the collateral was accomplished in a commercially reasonable manner.

First Nat. Bank of Bellevue v. Rose, *supra,* also held: "A general denial is available to a defendant to challenge one or more elements essential to a recovery by the plaintiff and the effect of the denial is to put the burden on the plaintiff to establish by evidence the matter denied." It further held: "Where an answer to a petition consists of a general denial, defendant may introduce such testimony as will tend to disprove testimony of plaintiff in support of his petition. For such purposes, no other allegations in the answer are necessary." Defendants, in their answer, denied that they were indebted to plaintiff.

The evidence as to the value of the car on March 15, 1971, is in irreconcilable conflict. Plaintiff's top value

was $275. Defendants' evidence places the value between $1,800 and $2,000. In a preliminary proceeding included in the record herein plaintiff's manager testified that he had obtained an estimate of the costs of repairing the automobile so that it could pass state inspection. That estimate was $175. While we are satisfied that the price obtained at the sale was inadequate, we need not make that finding. As we have said many times, where the evidence is irreconcilable and in direct conflict, this court will consider the trial court's observation of the witnesses and their manner of testifying and that the court must have accepted one version of the evidence rather than the opposite. See Krajeski v. Beem (1953), 157 Neb. 586, 60 N. W. 2d 651.

We are satisfied that the plaintiff did not sustain its burden of proof to establish that the sale of the secured collateral was commercially reasonable. As we said in First Nat. Bank of Bellevue v. Rose, *supra,* this was essential to plaintiff's case. The judgment of dismissal was correct and is affirmed.

AFFIRMED.

SMITH, J., concurring.

The direct effect of a sale that is not commercially reasonable under section 9-504, U. C. C., is to alter the measure of the deficiency. In such case the fair and reasonable value of the collateral as of the time of the sale is offset against the balance due on the security agreement. Cornett v. White Motor Corp., *ante* p. 496, 209 N. W. 2d 341 (1973).

The District Court simply found generally against plaintiff on its petition, and the evidence under the foregoing rule did not compel a finding for plaintiff.

CLINTON, J., joins in this concurrence.

JOSEPH L. BARTA, APPELLANT, V. GEORGE BETZER, APPELLEE.
212 N. W. 2d 352

Filed November 23, 1973. No. 38982.

1. **Trial: Instructions: Waiver: Appeal and Error.** Failure of counsel to object to proposed jury instructions after their submission to him by the court for review precludes objection on appeal.
2. **Trial: Instructions: Appeal and Error.** Noncompliance with the requirement that counsel is under a duty to object to proposed jury instructions submitted to him for review, does not bar this court from opting to consider plain errors in a record indicative of a probable miscarriage of justice.
3. **Instructions.** The last sentence of NJI No. 2.01A (1969), is erroneous and should not be given.

Appeal from the District Court for Jefferson County: WILLIAM B. RIST, Judge. Reversed and remanded.

Nelson, Harding, Marchetti, Leonard & Tate, Kenneth Cobb, and Richard L. Williams, for appellant.

Baylor, Evnen, Baylor, Curtiss & Grimit and Roger M. Beverage, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SMITH, J.

In a personal injury action arising out of two automobile collisions a jury returned a verdict for defendant George Betzer. Plaintiff, Joseph Barta, appeals. He asserts that the trial court erred (1) in failing to give the jury a peremptory instruction in his favor on the issue of liability and (2) in instructing on Betzer's specifications of negligence against a third person, Delbert Korte. The ground of objection to the latter is insufficiency of the evidence.

The collisions occurred at approximately 9:27 p.m., June 7, 1969, in the intersection of Highways Nos. 136 and 15 in the City of Fairbury. A 1969 Chevrolet Impala 4-door sedan operated by Barta had approached

the intersection and stopped in a left-turn lane governed by a stop sign. Delbert Korte, operating a 1962 Dodge Polara 2-door hardtop automobile, had stopped within 3 or 4 feet behind the Chevrolet in the left-turn lane. After a lapse of approximately 30 seconds, a 1966 Buick Electra automobile operated by Betzer, also in the left-turn lane, struck the rear of the 1962 Dodge Polara. As a result of the first collision, the Dodge struck the rear of the Chevrolet.

A further summary of the evidence would be fruitless. The trial court was correct in denying the request of Barta for a peremptory instruction on the issue of liability of Betzer. Respecting the specifications of negligence against Korte, the evidence was also sufficient. The question remains, however, whether we should review other features of the instructions.

At the outset we summarize part of the trial. At a jury-instruction conference the court stated that it had submitted to counsel its intended jury instructions, and specifically inquired whether counsel for Barta objected to any of them. The latter objected to No. 2 relating to each specification of negligence against Korte "for the reason that there is no evidence to support such a finding . . . . Further, object generally to the submission of the issue of negligence of . . . Korte for the reason that it's not proper under the evidence and that there is no evidence to support the same." He also objected to four other instructions which did not include No. 4 and are not the subject of complaint on appeal.

The court stated the case in instruction No. 2 as follows:

"Plaintiff's Claims
"A. ISSUES

". . .

(Defendant's Claims)

". . . (Betzer) further alleges that the sole proximate cause of the accident was the negligence of . . . Korte in one or more of the following respects: . . . proper

lookouts; . . . reasonable control; . . . speed . . .; . . . appropriate (turn) signal . . . .

"B. BURDEN OF PROOF

". . . the burden is upon plaintiff to prove by a preponderance of the evidence each and all of the following propositions . . . .

"C. EFFECT OF FINDINGS"

Sections B and C of instruction No. 2 are in common form and do not mention Korte. Instruction No. 5 on concurring cause tracks NJI No. 3.42 (1969), including the sentence in parentheses.

Instruction No. 4 reads: "One of the issues in this case is whether the accident was caused by the conduct of Delbert Korte. If you find the sole proximate cause of the accident was the conduct of Delbert Korte, then your verdict should be for the defendant. The burden of proof on this issue is on the plaintiff." See NJI No. 2.01A (1969).

Failure of counsel to object to proposed jury instructions after submission of them to him by the court for review precludes objection on appeal. Haumont v. Alexander, *ante* p. 637, 210 N. W. 2d 119 (1973); See, generally, Comment, 48 Neb. Law Rev. 985 at 994 (1969). Noncompliance by counsel with the requirement however, does not bar this court from opting to consider plain errors in a record indicative of a probable miscarriage of justice. See our Rule 8a 2 (3) (1971); cf. 5A Moore's Federal Practice (2d Ed.), par. 51.04, pp. 2507 to 2515 (1971); 9 Wright & Miller, Federal Practice and Procedure, § 2558, pp. 671 to 675 (1971).

Instruction No. 4 in the present case has been approved by us. See NJI No. 2.01A and p. IX (1969). Counsel for Barta ought not to be faulted for lack of objection to it. Furthermore, the questions raised by Barta were close, and the issues sent to the jury were intricate.

Under the circumstances we opt to consider the last sentence of instruction No. 4. Fairly interpreted, it

means that Barta possessed the burden of proof that the "sole proximate cause . . . was the conduct of . . . Korte . . . ." It was erroneous and should not have been given. Under some circumstances it may be harmless error. Cf. Albrecht v. Morris, 91 Neb. 442, 136 N. W. 48 (1912); Ecklund v. Willis, 44 Neb. 129, 62 N. W. 493 (1895). Here it was prejudicial.

The judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. NORMAN WESLEY NUSS, APPELLANT.
212 N. W. 2d 565

Filed November 23, 1973. No. 38985.

1. **Criminal Law: Probation: Sentences.** In the absence of statute the court has no power to impose a period of imprisonment as a condition of probation.
2. ———: ———: ———. Where a sentence of imprisonment, imposed as a condition of probation, constitutes an authorized legal sentence for the crime for which the defendant stands convicted, and such sentence of imprisonment has been fully executed, the defendant is entitled to be discharged and may not be resentenced to a new term of imprisonment for that crime.

Appeal from the District Court for Box Butte County: ROBERT R. MORAN, Judge. Reversed and remanded with directions.

Leo M. Bayer, for appellant.

Clarence A. H. Meyer, Attorney General, and Betsy G. Berger, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

MCCOWN, J.

The defendant pleaded guilty to a charge of burglary

and was placed on probation for a period of 3 years. One of the conditions of probation required that he serve 14 days in the county jail. Another condition was that he should not possess any firearm. He served the jail term. Some 4 months later he was charged with violation of his probation for possession of a firearm. He pleaded guilty to that violation. The order of probation was thereupon set aside and the defendant was sentenced to the Division of Corrections for a period of not less than 1 year nor more than 3 years, with credit allowed for the 14 days served in jail. The defendant has appealed challenging the imposition of a jail sentence as a condition of probation.

The 18-year-old defendant was a high school graduate. The burglary here was his first felony offense. He was placed on probation on August 25, 1972, following a conviction under section 28-532, R. R. S. 1943. Conviction for this offense "shall be punished by imprisonment in the Nebraska Penal and Correctional Complex not more than ten years nor less than one year, or by a fine not exceeding five hundred dollars, or imprisonment in the jail of the county not exceeding six months." § 28-532, R. R. S. 1943.

The defendant contends that although a 14-day jail sentence can be lawfully imposed for the offense of burglary under section 28-532, R. R. S. 1943, the court cannot impose a jail sentence as a condition of probation. The State contends that a jail sentence as a condition of probation is authorized under the provisions of section 29-2262, R. S. Supp., 1972.

That statute provides:

"(1) When a court sentences an offender to probation, it shall attach such reasonable conditions as it deems necessary or likely to insure that the offender will lead a law-abiding life.

"(2) The court, as a condition of its sentence, may require the offender:

"(a) To refrain from unlawful conduct;

"(b) To meet his family responsibilities;

"(c) To devote himself to a specific employment or occupation;

"(d) To undergo medical or psychiatric treatment and to enter and remain in a specified institution for that purpose;

"(e) To pursue a prescribed secular course of study or vocational training;

"(f) To attend or reside in a facility established for the instruction, recreation or residence of persons on probation;

"(g) To refrain from frequenting unlawful or disreputable places or consorting with disreputable persons;

"(h) To have in his possession no firearm or other dangerous weapon unless granted written permission;

"(i) To make restitution of the fruits of his crime or to make such reparation as the court determines to be appropriate for the loss or damage caused thereby;

"(j) To remain within the jurisdiction of the court and to notify the court or the probation officer of any change in his address or his employment;

"(k) To report as directed to the court or a probation officer and to permit the officer to visit his home;

"(l) To pay a fine in one or more payments, as ordered; or

"(m) To satisfy any other conditions reasonably related to the rehabilitation of the offender." § 29-2262, R. S. Supp., 1972.

In the case before us, six of the specified conditions of probation stem directly from six of the twelve specific conditions authorized by the statute. The State contends that imprisonment is authorized under subsection (2) (m) as one of the "other conditions reasonably related to the rehabilitation of the offender."

The court sentenced the defendant to probation upon eight conditions, the second of which was: "(Y)ou shall serve a jail sentence of 14 days in the county jail of Box Butte County, Nebraska." The trial court indicated

his concern that the defendant did not recognize the seriousness of what he had done and explained that the reason he was sentencing the defendant to a term of imprisonment as a condition of his probation was that he wanted the defendant to get a pretty good idea of what imprisonment was like; how frustrating, useless, and degrading it is; and to reflect upon what a 3 or 5 or 10-year sentence would mean. Although the trial court's motivation was admirable, imprisonment as a condition of probation must rest on statutory authority.

Traditionally probation has been an alternative to imprisonment and the two sentencing alternatives have been treated as mutually exclusive in the absence of statute. An examination of the Nebraska statutes demonstrates that although the Legislature has now provided some conditions of probation which offer alternatives other than imprisonment or traditional probation, it has not authorized combining imprisonment and probation in the same sentence. That conclusion is reinforced on several grounds.

The Legislature authorized, as a condition of probation, that the defendant may be required to "attend or reside in a facility established for the instruction, recreation or residence of persons on probation." It did not extend the authorization to imprisonment. It is difficult to conceive of imprisonment as being a condition "reasonably related to rehabilitation," under subsection (2) (m) of section 29-2262, R. S. Supp., 1972. It is even more difficult to assume that the Legislature so considered it. The legislative intent to retain imprisonment on the one hand and probation on the other as mutually exclusive sentencing alternatives is obvious under the provisions of section 29-2260, R. S. Supp., 1972. Subsection (2) of that section directs that whenever a court considers sentence for an offender convicted of either a misdemeanor or a felony, the court may withhold sentence of imprisonment unless the court finds that imprisonment of the offender is necessary for protection

of the public for specified reasons. Subsection (3) provides that a number of enumerated grounds, while not controlling the discretion of the court, shall be accorded weight in favor of withholding sentence of imprisonment. Subsection (4) of the section then demonstrates the legislative intent to maintain the separate sentencing alternatives by providing: "(4) When an offender who has been convicted of a crime is not sentenced to imprisonment, the court may sentence him to probation."

The two most common forms of punishment for a crime in this country have been the payment of a fine or the imposition of a period of imprisonment. Section 29-2262, R. S. Supp., 1972, specifically authorizes the court to require payment of a fine as a condition of probation, but makes no such provision with respect to imprisonment.

Prior to 1958, United States statutes expressly provided for a fine and probation but not for imprisonment and probation as an alternative to execution of a sentence. 18 U. S. C. § 3651, formerly § 724. Federal courts then held that courts could not impose a jail sentence as a condition of probation. As one federal court said: "The grant of express power to impose the lesser punishment, namely, the payment of a fine, excludes the power to impose the greater punishment, namely, the serving of a period of imprisonment, as a condition of probation." White v. Burke, 43 F. 2d 329 (10th Cir., 1930).

Section 2.4, A. B. A. Standards Relating to Sentencing Alternatives and Procedures, recommends that attention should be directed to the development of a range of sentencing alternatives providing intermediate sanctions between probation on the one hand and commitment to a total custody institution on the other, and recommends, as one of the general principles which should apply to such sentences, that neither supervision, the power to revoke, nor the maximum length of time during which the offender should be subject to such a

sentence should be permitted to extend beyond a *legislatively fixed time.* The commentary to the standard, at page 79, states: "There is considerable controversy over the subject of whether jail should ever be part of a program designed to concentrate mainly on probation. Some statutes specifically contemplate the possibility that jail may be desirable in such a context. * * * Opposition to such a provision comes from many quarters."

Statutes of the United States and many states have granted specific authority for imposing various combinations of imprisonment and probation. See, 18 U. S. C. § 3651; for representative state citations, see, A. B. A. Standards Relating to Sentencing Alternatives and Procedures, pp. 75 to 79. Most of these are specific as to the type of cases in which such sanctions are authorized, as well as in placing limitations upon the nature and extent of the imprisonment authorized. The nature and scope of such sanctions are for determination by the Legislature. We hold that in the absence of statute the court has no power to impose a period of imprisonment as a condition of probation.

We also hold that where a sentence of imprisonment, imposed as a condition of probation, constitutes an authorized legal sentence for the crime for which the defendant stands convicted, and such sentence of imprisonment has been fully executed, the defendant is entitled to be discharged and may not be resentenced to a new term of imprisonment for that crime. See, McCormick v. State, 71 Neb. 505, 99 N. W. 237; Hickman v. Fenton, 120 Neb. 66, 231 N. W. 510.

Under section 28-532, R. R. S. 1943, a 14-day jail sentence is an authorized legal sentence for the crime for which the defendant was convicted. The sentence having been fully executed, the defendant is entitled to discharge. However, the defendant is now subject to prosecution for the commission of any crime or crimes which formed the basis for the charge of probation violation here.

The sentence of imprisonment to the Division of Corrections of the Department of Public Institutions pronounced on February 9, 1973, is vacated and set aside and the cause remanded to the District Court with directions to discharge the defendant.

REVERSED AND REMANDED WITH DIRECTIONS.

THE 20'S, INC., A NEBRASKA CORPORATION, APPELLANT, V. NEBRASKA LIQUOR CONTROL COMMISSION, APPELLEE.
212 N. W. 2d 344

Filed November 23, 1973. No. 38990.

Administrative Law: Appeal and Error: Intoxicating Liquors. In an appeal to this court from an order of the Nebraska Liquor Control Commission suspending a liquor license, under the provisions of section 84-918, R. R. S. 1943, we determine only whether its findings are supported by substantial evidence under section 84-917(6)(e), R. R. S. 1943, and whether the District Court has applied the proper statutory criteria in its review of the commission's decision.

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

Robak & Geshell, for appellant.

Clarence A. H. Meyer, Attorney General, and Robert R. Camp, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

CLINTON, J.

This is an appeal from a judgment of the District Court for Lancaster County affirming an order of the Nebraska Liquor Control Commission suspending for a period of 21 days the class C liquor license of the plaintiff for the offense of selling liquor to a minor. On appeal the plaintiff assigns as error: (1) The evidence is insufficient to support the findings of the commission;

(2) the findings are arbitrary and capricious; (3) the court and the commission erred in not finding as a matter of law that the plaintiff was trapped into a violation because law enforcement officials had furnished the minor with a false identity card; and (4) the court and the commission erred in not finding that the plaintiff had used due diligence in attempting to discover the age of the violator. We affirm.

The argument of the plaintiff indicates that the several assignments blend into one central issue, namely, that this court hears the case de novo under the provisions of section 84-918, R. R. S. 1943, and ought to find as a matter of law that the defense of entrapment existed.

A brief summary of the evidence before the commission is necessary. The plaintiff operates a liquor by the drink establishment in the city of Columbus. One Philip Dreyer, a minor of the age of 17 and a resident of South Dakota, had, along with Allen Aden, aged 22 and also a resident of South Dakota, been hired by law enforcement officials as undercover agents in an investigation of drug law violations in the city of Columbus. On June 17 and 18, 1971, both agents entered the plaintiff's establishment and on each occasion the plaintiff dispensed beer to Dreyer. Dreyer and Aden both testified that the plaintiff's employees made no inquiry concerning Dreyer's age nor did they ask for identification and proof of age. Dreyer and Aden described the waitress who served them.

Witnesses for the plaintiff were Alford Cluver, the sole stockholder of the plaintiff, and his daughter, Gerry, aged 18. Gerry's job was to check identifications. Cluver apparently was not present in the establishment on June 17 and 18 at the pertinent times. Gerry was present. Both testified the business employed no waitress meeting the description given by Dreyer and Aden. Dreyer and Aden described the waitress as being heavyset, about 5 feet 10 inches in height, and about 38 to

45 years of age. Cluver and his daughter described the waitress on duty at the time as about 5 feet 2 inches to 5 feet 4 inches tall, heavy-set, and about 28 years of age. They both testified that it was the practice to check identification of age of all persons who appeared to be under age, but that on occasion when they were busy some persons might be missed. Dreyer and Aden testified that when they entered the establishment there was a person who appeared to be checking identifications at one of the booths, but that no inquiry was made of them.

The waitress who was actually on duty at the time was not called by either party as a witness, nor was another employee of the plaintiff who was described as a manager of waitresses.

There was no direct contradiction of the testimony of Dreyer and Aden that Dreyer was served and that no inquiry of age was made. Dreyer acknowledged that on June 17 and 18, 1971, he had on his person an identity card furnished by law enforcement officials which falsely showed that he was of legal age. He testified that on June 17 and 18, 1971, he never exhibited the false identity card and was not asked to. Neither party adduced any evidence to show for what purpose Dreyer entered the establishment; whether as part of his duties as an investigator of drug offenses, a purely personal entry to obtain a beer, or to induce a liquor law violation.

It seems clear from the foregoing recital that a finder of fact could accept the testimony of Aden and Dreyer that in fact no inquiry was made to determine Dreyer's age and that there had been no reliance by the plaintiff upon the false identification furnished to Dreyer.

We first examine plaintiff's contention in connection with section 84-918, R. R. S. 1943. That statute provides: "An aggrieved party may secure a review of any final judgment of the district court under sections 84-917 to 84-919 by appeal to the Supreme Court. Such appeal shall be taken in the manner provided by law for appeals to the Supreme Court in civil cases and

shall be heard de novo on the record." Section 84-917, R. R. S. 1943, is a part of the same act pertaining to administrative procedure and this particular section lays down rules for appeals to the District Court from the order of the administrative agency. We have held that it is applicable to appeals by the licensee from order of the Nebraska Liquor Control Commission suspending a license. Happy Hour, Inc. v. Nebraska Liquor Control Commission, 186 Neb. 533, 184 N. W. 2d 630.

Section 84-917, R. R. S. 1943, provides that a person aggrieved by final decision in a contested case is entitled to judicial review. It provides for the initial review in the District Court without a jury and on the record before the agency. It provides in part: "(6) The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioner may have been prejudiced because the agency decision is:

"(a) In violation of constitutional provisions;

"(b) In excess of the statutory authority or jurisdiction of the agency;

"(c) Made upon unlawful procedure;

"(d) Affected by other error of law;

"(e) Unsupported by competent, material, and substantial evidence in view of the entire record as made on review; or

"(f) Arbitrary or capricious."

The plaintiff contends that the provisions of section 84-918, R. R. S. 1943, providing for de novo review in this court, mean that we examine the record and reach an independent conclusion without reference to the findings of the commission or those of the District Court. The commission contends that our review of its decision is governed by the criteria of section 84-917(6), R. R. S. 1943, as is the review by the District Court.

The statute does not make clear which meaning is intended. We believe the commission's contention is

essentially correct. If, for example, under criteria (6) (e) there is before the commission substantial evidence which would support a finding either way, neither the District Court nor this court should disturb the commission's finding. In such a case and where fact findings under criteria (6) (e) are involved, we review the decision of the District Court only to determine that it and the commission have applied the proper criteria, and it is in this sense that we review de novo.

That much, it seems to us, is quite clear where the questions being reviewed are findings of fact. Applying the foregoing principle to this case it is clear that the evidence does not require a finding of entrapment in fact. We point out that whether the legal defense of entrapment exists might depend upon findings of fact upon disputed evidence or evidence from which different inferences might be drawn. That is the case here. On the other hand, where the evidence is undisputed or where only one inference can reasonably be drawn, the question whether the legal defense of entrapment exists may be a question of law. In the latter instance it would be for the District Court in the first instance and this court on appeal here to say whether as a matter of law such facts give rise to the legal defense of entrapment. In this sense too the court is hearing the matter de novo. For example, if it were undisputed that Dreyer was asked for proof of age and then exhibited the false identity card furnished him by the authorities and thus induced the illegal sale, it would seem clear that the defense of entrapment existed as a matter of law. Cf. Sorrells v. United States, 287 U. S. 435, 53 S. Ct. 210, 77 L. Ed. 413, 86 A. L. R. 249. On the other hand, if the evidence as to whether Dreyer had been asked for identification and then exhibited the false identity card was disputed, then the determination made by the commission would be respected as long as substantial evidence supported that determination.

It would seem that under criteria (6) (a), (b), (c),

and (d) questions of law including constitutional and statutory construction are presented and we review de novo just as we do in any other case where we are bound by the Constitution and the statutes of this state to make the final determination of what the law is.

We recognize that all cases are not as clear-cut as this one, nor as the examples we have posited, and that it is not always easy to determine whether a given situation presents a question of fact or of law, or one that is mixed.

Where there is substantial evidence supporting the agency's determination it does not appear that the independent determination of the facts by us upon the agency's record would serve any practical purpose. Under the statutory scheme outlined if this court were required to make an independent factual determination on the record then there would be no rational purpose for the limitation which the statute places upon the District Court's review.

We therefore hold that where substantial evidence supports the finding of the Nebraska Liquor Control Commission we do not, under the provisions of subsection (6) (e) of section 84-917, and section 84-918, R. R. S. 1943, make independent findings of fact without regard to the finding of the commission and the District Court, but only determine whether the District Court has applied the proper criteria.

The interpretation which we here place upon the statute conforms to the most generally accepted standards of judicial review of administrative decisions. See, Administrative Law and Process in a Nutshell, Gellhorn, C. XII, p. 262.

We note that the Legislature has not provided a single mode and standard for review of all administrative decisions. We must therefore consider in the review of a decision of any particular administrative body any special rules which the Legislature has laid down especially for examination of a particular agency's rul-

ings. See, e.g., § 81-884.02, R. R. S. 1943; Gillespie v. State Real Estate Commission, 172 Neb. 308, 109 N. W. 2d 305. The statutory pattern for judicial review varies even for different types of decisions of the same agency. See, § 53-1,116(8), R. R. S. 1943; The Flamingo, Inc. v. Nebraska Liquor Control Commission, 185 Neb. 22, 173 N. W. 2d 369 (revocation of license); C & L Co. v. Nebraska Liquor Control Commission, *ante* p. 91, 206 N. W. 2d 49 (denying license).

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. RODNEY BORN, APPELLEE.
212 N. W. 2d 581

Filed November 23, 1973. No. 39003.

1. **Criminal Law: Trial: Time: Statutes.** Under the provisions of section 29-1207, R. S. Supp., 1972, where a felony offense is involved, the 6-month period commences to run from the date the indictment is returned or the information filed and not from the time the complaint is filed.
2. **Criminal Law: Trial: Time: Constitutional Law.** Any unreasonable delay occurring in the prosecution of any felony offense prior to the filing of an information or the return of an indictment will be considered by the court, in conjunction with statutory requirements, in determining whether or not a defendant has been denied the constitutional right to a speedy trial.

Appeal from the District Court for Buffalo County: S. S. SIDNER, Judge. Reversed and remanded for further proceedings.

Andrew J. McMullen and Gerald B. Buechler, for appellant.

Jeffrey L. Orr and Jeffrey H. Jacobsen, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

McCOWN, J.

This is an error proceeding brought by the county attorney of Buffalo County after leave to docket had been granted by this court under the provisions of section 29-2315.01, R. R. S. 1943. The District Court sustained a motion to dismiss the proceedings in a felony prosecution against the defendant. The grounds for the motion were that the defendant had been deprived of his right to a speedy trial.

On August 4, 1972, a complaint was filed in the county court of Buffalo County, Nebraska, charging the defendant with possession of a controlled substance, a felony offense under section 28-4,125, R. S. Supp., 1972. The defendant was in custody on the same day and appeared in the county court for setting of bond and appointment of counsel. The county court set the preliminary hearing for January 30, 1973. Defendant requested and received a 1-day continuance to January 31, 1973, when preliminary hearing was held and the county court took the matter under advisement. On February 1, 1973, the county court found probable cause and bound the defendant over to the District Court for trial. Transcript of the county court proceedings was filed in the District Court on February 5, 1973, and the defendant's arraignment set for February 7, 1973. On February 6, 1973, the defendant filed the motion to dismiss and on the same day an information charging defendant with the felony was filed in the District Court. On February 7, 1973, after hearing, the District Court found that section 29-1207, R. S. Supp., 1972, applied to this felony case and that the 6-month period began to run on the date the complaint was filed in the county court, rather than from the filing of the information. The District Court relied upon State v. Stevens, 189 Neb. 487, 203 N. W. 2d 499, in making that ruling, and dismissed the action.

Section 29-1207, R. S. Supp., 1972, limits the time for trial or retrial of a criminal offense to a 6-month period,

with exclusions of time for various periods of delay which are extensively spelled out in the statute. The 6-month period for trial commences to run "from the date the indictment is returned or the information filed."

State v. Stevens, *supra,* has no application here. That case involved a misdemeanor. Under Nebraska procedure, informations are not used in a misdemeanor case but only complaints. The trial is had in the same court in which the complaint is filed, and that complaint serves the same purpose in a misdemeanor proceeding in the county or municipal court as the information serves in a felony proceeding in the District Court. In addition, the Stevens case involved a retrial in the District Court following an appeal. No information was filed, and the complaint remained the basis of the proceeding as provided by law. An appeal of a misdemeanor at that time consisted of a complete retrial in the District Court. The Stevens case quite properly applied the statute to misdemeanor proceedings as well as to the appellate misdemeanor retrial procedure in the District Court which was in effect in 1971.

Under the specific language of section 29-1207, R. S. Supp., 1972, where a felony offense is involved, the 6-month period commences to run from the date the indictment is returned or the information filed and not from the time the complaint is filed. See State v. Watkins, *ante* p. 450, 209 N. W. 2d 184. The Legislature did not specifically address the problem of setting statutory time limits for procedures in felony cases prior to the return of an indictment or the filing of an information. While it may be assumed the Legislature contemplated that proceedings prior to the filing of an information in felony cases would be carried out without unreasonable delay, the Legislature did not make the statute applicable to such proceedings.

Even though the statute does not apply to proceedings prior to the filing of an information in a felony

case, those proceedings are still a part of a criminal prosecution and subject to the constitutional guaranty of a speedy trial. The constitutional right to a speedy trial and the statutory implementation of that right under section 29-1207, R. S. Supp., 1972, exist independently of each other. The fact that the statute does not apply to proceedings or delay occurring prior to the filing of an information in a felony case in no way lessens the duty of the State to provide the defendant with a speedy trial as required by the Constitution. In considering the constitutional right to a speedy trial, the extent of any delay, the reason for the delay, and prejudice, if any, to the defendant, are all relevant factors to be considered by the court. Any unreasonable delay occurring in the prosecution of any felony offense prior to the filing of an information or the return of an indictment will be considered by the court, in conjunction with statutory requirements, in determining whether or not a defendant has been denied the constitutional right to a speedy trial.

The District Court erred in the application of section 29-1207, R. S. Supp., 1972, to the facts of this case. The judgment of the District Court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

BOSLAUGH, J., concurring.

In State v. Stevens, 189 Neb. 487, 203 N. W. 2d 499, we applied section 29-2315.01, R. R. S. 1943, to a misdemeanor complaint. In State v. Watkins, *ante* p. 450, 209 N. W. 2d 184, the statute was not applied to a felony complaint. Thus, the Watkins case established that the statute does not apply, literally, to all complaints but only to indictments, informations, and misdemeanor complaints. In my view it would be more accurate to say that the statute applies by analogy to misdemeanor complaints.

STATE OF NEBRASKA, APPELLEE, V. FRANCIS SCOTT MOORE, APPELLANT.
212 N. W. 2d 575

Filed November 23, 1973. No. 39106.

Appeal from the District Court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed.

T. Clement Gaughan and Richard L. Goos, for appellant.

Clarence A. H. Meyer, Attorney General, and Harold Mosher, for appellee.

Heard before SPENCER, SMITH, NEWTON, and CLINTON, JJ., and MURPHY, District Judge.

CLINTON, J.

Defendant was serving a sentence of 5 to 10 years for burglary. He was granted a 12-hour furlough. He did not return and was apprehended several months later. He was charged with escape, waived jury trial, and found guilty by the court. This is his sixth felony conviction. Sentence of 1 year to be served consecutive to the term of the burglary was imposed. He argues it is excessive. It isn't.

AFFIRMED.

JOHN LUKOWSKI ET AL., APPELLEES, V. LOUIS DELESKI ET AL., APPELLANTS, IMPLEADED WITH THOMAS W. DELESKI ET AL., APPELLEES.
212 N. W. 2d 577

Filed November 30, 1973. No. 38971.

1. **Property: Trusts: Deeds.** Where the owner of an interest in land transferred it inter vivos to another in trust for a third person, but no memorandum properly evidencing the intention to create a trust was signed, and the transferee refused to perform the trust, the transferee holds the interest upon a constructive trust for the third person if the transferee at the time of the

transfer was in a confidential relation to the transferor.

2. **Trusts: Evidence.** A constructive trust must be proved by evidence that is clear and convincing.

Appeal from the District Court for Saunders County: JOHN D. ZEILINGER, Judge. Affirmed.

Haessler, Sullivan & Inbody, for appellants.

Collins & Collins and James T. Gleason, for appellees Lukowski.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SMITH, J.

The District Court found for plaintiffs and impressed a constructive trust on record title of defendants to a farm. Defendants Louis and Tekla Deleski appeal. The issue is the existence of the oral agreement claimed by plaintiffs.

Tom Lukowski, now deceased, purchased the farm in 1944. In 1945 defendants, Louis Deleski and his wife, Tekla, daughter of Tom, moved on to the land to live and farm, remaining there until 1953. Tom and Louis had agreed that Tom would receive a landlord's share of the crops during the life of Tom. In 1953 Tom gained possession of the farm in accordance with a judgment for him in a suit against Louis.

Prior to 1953 Tom and Louis had been very close friends, and Louis had handled Tom's financial transactions. Louis denied the financial relationship, even knowledge of Tom's financial condition, at the time of the purchase, although he conceded the close friendship.

Tom had purchased the farm in 1944 for $24,500 at the request of Louis. The price was paid by $2,500 belonging to Tom, $7,000 which represented the proceeds of a mortgage loan from an insurance company to Tom, and a check drawn by Louis in the sum of $15,000. Louis delivered the check to Tom with a blank space for the name of the payee, someone other than

Louis filling in the space with the name of Tom. Louis did not attend the closing and did not know to whom the seller deeded the farm. According to him, his conversation with Tom prior to the purchase had been as follows: ". . . (H)e said if I wanted to buy the farm he would finish paying it out . . . ." Louis was unconcerned that Tom took title, for the latter promised to convey the farm to Louis subsequently.

In 1946 Tom conveyed the farm to Louis and Tekla in joint tenancy subject to a life estate in Tom. According to Tekla, the deed was unsolicited and the delivery was accompanied by this remark by Tom: "I have done what I told you I would do." On at least one subsequent occasion Tom said he had requested Louis to reconvey the farm to him.

Louis asserted that at no time had he borrowed money from Tom. Judge Howard Kanouff, a District Judge now, but counsel for Tom in the suit in 1953, testified: ". . . (Louis) testified (in 1953) that he had money of Tom Lukowski's for five or six years that came from some land owned by . . . (Tom) and sold . . . to a Henry Biel." The testimony referred to a transaction prior but close to the purchase of the farm in question.

Other impeachment consisted of a savings account book kept by the wife of plaintiff Leo for Tom. It shows a withdrawal of $500 in July 1945 with the red ink notation "Louie Borrowed." She delivered Louis the money in Tom's presence and knew that it represented a loan.

At family gatherings Tom frequently stated that at his death the farm was to be divided equally among the children. In 1953 he testified to such a division of the interest.

In June 1949 Tom executed an affidavit in connection with an application of Louis to a third party for a loan. He affirmed that the 1946 conveyance, subject to a mortgage and to a life estate retained by him, was in fact an absolute gift to Louis and Tekla.

In January 1969 a petition of Leo for letters of administration in his deceased father's estate alleged that Tom possessed no real estate. In September an amended inventory signed by Leo and filed in the estate proceeding set out a life estate of Tom in the farm and the remainder interest in Louis.

Louis admitted that in July 1970 he answered an inquiry by Leo about the farm by saying what Leo had testified to as follows: ". . . (H)e (Louis) told me (Leo) he didn't intend to do anything about the farm. I said, 'What do you mean? You know that farm don't belong to you.' He told me . . . 'I worked 25 years for that farm. . . . In fact you kids wasn't supposed to get any of that cash money that was left. . . . I knew about that farmland, I tried to get your dad to sign it over to one of you boys and he wouldn't do it. . . . I am not getting a pension like you and brother Frank. . . . I have to look after myself.' "

Some testimony has been pretermitted, but it is not important to our conclusion.

Where the owner of an interest in land transferred it inter vivos to another in trust for a third person, but no memorandum properly evidencing the intention to create a trust was signed and the transferee refused to perform the trust, the transferee holds the interest upon a constructive trust for the third person if the transferee at the time of the transfer was in a confidential relation to the transferor. The rule prevents unjust enrichment. See, Restatement, Trusts, § 45(1)(b), (1935); Restatement, Trusts 2d, § 45(1)(b), (1959), and generally, its Nebraska Annotations by Volkmer (1971); Foster, "Nebraska Trust Law and the Restatement of Trusts," 21 Neb. Law Rev. 144 (1942); Note, 20 Neb. Law Rev. 160 at 168 (1941).

A constructive trust must be proved by evidence that is clear and convincing. Zych v. Zych, 183 Neb. 708, 163 N. W. 2d 882 (1969).

Louis' testimony about the source of the $15,000 that

was applied toward the purchase price of the farm and about his financial transactions with Tom was impeached. The existence of a confidential relationship that extended to financial transactions is beyond reasonable dispute.

We allow for the opportunity of the trial court to observe the witnesses and conclude that the evidence is clear and convincing in support of the trust imposed by the District Court.

The judgment is affirmed.

AFFIRMED.

IN RE ESTATE OF LEROY TICHOTA, DECEASED.
HENRY NIEMEYER, APPELLEE, V. ESTATE OF LEROY TICHOTA, DECEASED, ET AL., APPELLANTS.
212 N. W. 2d 557

Filed November 30, 1973. No. 38995.

1. **Negligence: Words and Phrases.** The words "slight" and "gross" as employed in the comparative negligence act of this state are comparative terms. The negligence of the plaintiff or defendant is not to be evaluated as slight, gross, or otherwise, standing alone. The criterion by which the degree of negligence of plaintiff is to be measured is the extent thereof by comparison with the negligence of the defendant.
2. **Negligence: Trial.** The question of the existence of negligence or contributory negligence is for the trier of facts where different minds may reasonably draw different conclusions from the evidence.

Appeal from the District Court for Boone County: C. THOMAS WHITE, Judge. Affirmed.

Jewell, Otte & Gatz, for appellants.

Erickson, Sederstrom & Johnson, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, NEWTON, and CLINTON, JJ.

MCCOWN, J.

This is an action for damages for personal injuries

resulting from an automobile accident. The jury returned a verdict for the plaintiff in the sum of $170,000. The sole assignment of error is directed at the overruling of the defendant's motion for a directed verdict or dismissal, and in failing to sustain a motion for judgment notwithstanding the verdict. There is no issue as to the amount of the verdict. In the posture of this case, unless the defendant was entitled to a verdict as a matter of law, the judgment must be affirmed.

Henry Niemeyer, the 27-year-old plaintiff, spent the afternoon of February 1, 1970, in coyote hunting at a location southwest of Albion, Nebraska. There were approximately 15 vehicles occupied by hunters and engaged in the hunt. The weather was cold and dry, with a little snow along the fences. Plaintiff Niemeyer was driving a 1953 Chevrolet two-door automobile equipped with a two-way radio for communicating with other hunters on a citizen's band. Two other hunters were in his car with him.

Around 4 p.m., the plaintiff drove north along the eastern side of the section where the hunt was proceeding and then proceeded west on a graveled county road on the north side of the section. The road was hilly and the speed limit was 50 miles per hour. He drove over the crest of a hill and proceeded downhill to the west. At a point near the bottom of the hill, plaintiff passed the pickup truck of Dennis Sullivan, who was parked in the north ditch along the road waiting for the hunt to proceed. Plaintiff talked with Sullivan by radio. Sullivan told him that there were other vehicles ahead of him and there was no use going any further. Plaintiff then stopped and turned around at the bottom of the hill, some 50 to 60 feet beyond the Sullivan truck, and headed back up the hill to the east. The plaintiff was on his side of the road as he proceeded east. He shifted into second gear just before he reached the Sullivan truck, and waved as he passed.

Sullivan watched in his outside rearview mirror as

the plaintiff proceeded up the hill. Sullivan saw another car come over the crest of the hill from the east in the center of the road, followed by an extreme dust cloud. The car was later identified as that of the decedent Tichota. It was a 1967 Mercury. Sullivan estimated the Tichota car was going in excess of 65 miles per hour. Both cars were toward the center of the road but somewhat to the south of the center. He noticed that neither car was getting out of the road of the other and the accident occurred seconds after Sullivan first saw the Tichota car. As the cars collided "* * * the ends of both cars went up in the air and they seemed to come right down, just went up and down." Sullivan could not tell whether the Tichota car was skidding before the impact. He thought plaintiff was going approximately 35 miles per hour at the time of the collision. Sullivan observed the impact from a distance of approximately 80 feet.

The collision occurred approximately 140 feet west of the crest of the hill. The skid marks of the Tichota car began at the crest of the hill and continued to the point of the collision. At the commencement of the skid, the marks were exactly in the center of the road. There were no skid marks behind plaintiff's car.

The width of the traveled portion of the road varied. It was 21 feet at the crest of the hill where the skid marks began. It was 19 feet 6 inches immediately east of the impact area and 20 feet immediately west of the impact area. The width was not measured at the point of impact. The highway patrolman also made other measurements of the cars following the accident. From the right rear of the plaintiff's car to the south edge of the road was 3 feet 8 inches and from the left rear of the plaintiff's car to the north side of the road was 10 feet 6 inches. The right front tire of plaintiff's car was 6 feet from the south edge of the road. The left front tire of the Tichota car was 7 feet from the south

edge of the road, and the right front of the Tichota car was 8 feet 6 inches from the north edge of the road. At impact the rear tires slid 3 to 4 inches north, but not completely off the skid marks.

A mechanical engineer, qualified as an expert witness in accident reconstruction, performed various tests and calculations, based on stipulated weights of cars and degree of incline, and proceeded on the basic assumption that plaintiff Niemeyer's car was going 35 miles per hour at the time of the collision. In his opinion the speed of the Tichota car as it commenced to skid was 55.8 miles per hour, and at the time of collision the speed of the Tichota car was 31.6 miles per hour. The defendants' expert witness, also a mechanical engineer, testified that those calculations were not substantially different than his own. The expert witnesses agreed that under the formulas used, if plaintiff's speed was greater, the speed of the Tichota car would also be greater, and that if plaintiff's speed were less, the speed of the Tichota car would also be less.

As the result of the accident here, Tichota and the three passengers in his car died. Two passengers in plaintiff Niemeyer's car were also killed. The plaintiff himself sustained very severe injuries resulting in both mental and physical impairment. He was unable to testify. Thus, Dennis Sullivan, who saw the collision in the rearview mirror of his pickup truck, was the sole eyewitness.

There is no issue as to the amount of the verdict. The only issue on this appeal is whether the facts of this accident require a verdict for the defendant as a matter of law or whether the issues were properly submitted to the jury under the comparative negligence statute.

At common law, if the plaintiff was guilty of any negligence, however slight, which contributed to cause his injury, that contributory negligence barred his recovery. As a means of changing the harshness and

rigidity of the old common law rule, the doctrine of comparative negligence or of relative fault has developed. Nebraska adopted its statutory version of comparative negligence in 1913. Section 25-1151, R. R. S. 1943, provides: "In all actions brought to recover damages for injuries to a person or to his property caused by the negligence of another, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery when the contributory negligence of the plaintiff was slight and the negligence of the defendant was gross in comparison, but the contributory negligence of the plaintiff shall be considered by the jury in the mitigation of damages in proportion to the amount of contributory negligence attributable to the plaintiff; and all questions of negligence and contributory negligence shall be for the jury."

This court has consistently held that the test the statute provides is not based upon any absolute degree of negligence but rather upon a comparative test of the relative negligence of the parties. In Johnson v. Roueche, 188 Neb. 716, 199 N. W. 2d 1, this court held that the words "slight" and "gross" as employed in the comparative negligence act of this state are comparative terms. The negligence of the plaintiff or defendant is not to be evaluated as slight, gross, or otherwise, standing alone. The criterion by which the degree of negligence of plaintiff is to be measured is the extent thereof by comparison with the negligence of the defendant.

The defendant relies upon the case of Buick v. Stoehr, 172 Neb. 629, 111 N. W. 2d 391, in support of the contention that defendant is entitled to judgment as a matter of law. That case is readily distinguishable. The two cars involved there met at the crest of a hill on a country graveled road. There was also an intersection at that point. The cars of plaintiff and defendant approached at approximately the same speed, neither of them in excess of any speed limit. The car of the plain-

tiff was substantially on the wrong side of the road while the car of the defendant was substantially on its own side of the road. The defendant saw the plaintiff's car and applied his brakes while the plaintiff did not have time to apply his brakes after he saw the defendant. Under the circumstances of that case, the negligence of the plaintiff was at least equal to if not greater than the negligence of the defendant. This court determined that the plaintiff's negligence "was more than slight as compared to the negligence of the defendant, and that under the evidence presented no other reasonable conclusion could be reached by reasonable minds than that the plaintiff was guilty of contributory negligence more than slight as a matter of law."

While the accident in the Buick case and the accident here were both head-on collisions on a country graveled road, the similarity virtually ends at that point. The nature and extent and quality of the comparative negligence in the two cases is substantially different. In the case before us, the defendant's driver approached and drove over the crest of a hill in the middle of the road and at a speed substantially in excess of the speed limit. At the same moment, the plaintiff was proceeding up the other side of the same hill and some 200 feet from its crest at a speed of 35 miles per hour. At the moment of impact, the rear of plaintiff's car was entirely on his own side of the road while the front of his car was at most approximately a foot and a half over the imaginary centerline. Roughly three-fourths of the plaintiff's car was on his own side of the road and one-fourth on the wrong side of the road. The Tichota car conversely was three-fourths on the wrong side of the road and one-fourth on its own side of the road. The driver of the Tichota car put on his brakes and slid for 140 feet. Using the speed figures at the beginning and end of the skid, as computed by the expert witnesses, a simple mathematical computation demonstrates that it took a little over two seconds for

the Tichota car to skid that 140 feet. It might be said that when he drove over the crest of the hill in the middle of the road at the speed he did, it was already too late to avoid this accident. The plaintiff's apparent failure to see the Tichota car for two seconds was, of course, a failure to keep a proper lookout. Whether the plaintiff could or might have avoided the accident had he been looking ahead during that momentary two-second time interval is speculative. To say the least, it is a matter as to which reasonable minds might draw different conclusions from the evidence.

In making the comparisons required by the statute between the negligence of a plaintiff and of a defendant, there is no flat formula which is applicable. Neither is the comparison limited to an item by item comparison of the kind and degree of negligence involved in specific acts. It seems clear that the process of comparison should measure the disparity between the quantum of the total negligence of a defendant and the quantum of the total negligence of a plaintiff.

It should be noted here that the final provision of the comparative negligence statute requires that "all questions of negligence and contributory negligence shall be for the jury." While that language obviously does not affect the court's right to decide a case as a matter of law, it does emphasize the fact that the determination of questions of negligence and contributory negligence and the comparative measuring of them are basically factual issues which are generally for determination by the jury. As we said in Johnson v. Roueche, 188 Neb. 716, 199 N. W. 2d 1: "The question of the existence of negligence or contributory negligence is for the trier of the facts where different minds may reasonably draw different conclusions from the evidence."

Under the evidence here, reasonable minds might reasonably draw different conclusions from the evidence. We cannot say that the defendant was entitled to a

verdict as a matter of law. The determinations made by the trial court were correct in all respects and the judgment is affirmed.

AFFIRMED.

SMITH, J., participating on briefs.

SPENCER, J., dissenting.

I respectfully dissent from the majority opinion herein because I believe the negligence of the plaintiff was more than slight when compared with the negligence of defendant's driver and a verdict should have been directed for the defendant.

It is undisputed that the collision occurred 140 feet west of the crest of the hill. The undisputed evidence is that both cars were across the centerline at the time of impact. There were 140 feet of skid marks behind the Tichota car, but none behind the car of the plaintiff. Plaintiff and his group were hunting coyotes. It is apparent he was paying no attention to traffic and therefore did not see the skidding Tichota car as he approached the point of the impact. The absence of skid marks and the fact that his car was across the centerline conclusively indicates he was not keeping a proper lookout.

This case is not too different from Buick v. Stoehr (1961), 172 Neb. 629, 111 N. W. 2d 391, where both cars were over the center of the road. In that case we said: "In an action based on negligence to which the comparative negligence rule has application wherein the evidence shows beyond reasonable dispute that the plaintiff's negligence was more than slight in comparison with that of the defendant the action should be dismissed or a verdict directed."

A. W. SAUM, DOING BUSINESS AS A. W. SAUM & SONS, APPELLEE AND CROSS-APPELLEE, V. L. R. FOY CONSTRUCTION CO., INC., APPELLEE AND CROSS-APPELLANT, IMPLEADED WITH GENERAL WHOLESALE CO-OPERATIVE COMPANY, APPELLANT AND CROSS-APPELLEE.

212 N. W. 2d 648

Filed November 30, 1973. No. 39006.

1. **Mechanic's Liens: Judgments.** Possession of a statutory mechanic's lien alone is not enough to entitle a subcontractor to recover a personal judgment against the owner of the premises.
2. **Pleadings: Admissions.** A judicial admission in a pleading does not extend beyond the intendment of the admission as clearly disclosed by its context.
3. **Pleadings: Admissions: Evidence.** When a litigant files an amended pleading, the averments of which are inconsistent with the averments of his original pleading, the original is not a judicial admission but competent as an evidentiary admission by a party against his interest.
4. **Pleadings: Appeal and Error: Judgments.** A party on appeal ordinarily cannot successfully assert error in a judgment that granted him the relief demanded by his pleadings.
5. **Pleadings: Appeal and Error: Trial.** An appeal to this court in a civil action will be considered upon the theories presented by the parties at the trial, provided a liberal construction of the pleadings, as construed by the parties, will permit.

Appeal from the District Court for Madison County: MERRITT C. WARREN, Judge. Affirmed as modified.

Deutsch & Hagen and Thomas H. DeLay, for appellant.

Thomas E. Brogan of Brogan & Stafford, for appellee Saum.

Jewell, Otte & Gatz, for appellee L. R. Foy Constr. Co., Inc.

Heard before SPENCER, SMITH, and CLINTON, JJ., and BRODKEY and HASTINGS, District Judges.

SMITH, J.

In a suit for foreclosure of a mechanic's lien claimed by a subcontractor, A. W. Saum, in connection with con-

struction of an addition to a warehouse building, the District Court awarded: (1) Foreclosure; (2) personal judgments for Saum and against the contractor, L. R. Foy Construction Co., Inc., and the landowner, General Wholesale Co-Operative Company; and (3) personal judgments for Foy and against Saum and General Wholesale. The court also dismissed a cross-petition by General Wholesale against the other parties, and General Wholesale appeals. Foy cross-appeals.

General Wholesale assigns for error: (1) Award of the personal judgment for Saum and against it; (2) award of a lien in favor of Saum and in excess of the amount found due Saum from Foy; and (3) dismissal of its cross-petition. Its only contention is that judicial admissions and conclusions of law sustain the assignments.

Foy on cross-appeal assigns for error the absence of a finding that General Wholesale owed it $2,898.85 for extra work, the sum being in addition to the judgment Foy recovered against General Wholesale.

We summarize the decretal parts relevant to the controversy. Provisions for foreclosure of the lien are in common form. The personal judgments are listed in the following table:

CREDITOR	DEBTOR	AMOUNT
Saum	General Wholesale	$ 5,727.65
Saum	Foy	5,727.65
Foy	Saum	4,775.35
Foy	General Wholesale	16,413.37

They were subject to other decretal provisions. Saum and Foy possessing judgments against each other, the court adjudged that Saum recover the difference, $952.30, from Foy. Upon payment of the difference, or upon satisfaction of the Foy-General Wholesale judgment, from the proceeds of which Foy was to pay the $952.30, the lien was to be discharged. In the event of a foreclosure sale, Foy was to be paid $4,775.35 out of proceeds received by Saum. Then neither Foy nor Saum would

recover judgment against the other, and $10,685.17 would replace the $16,413.37 in the above table of the judgments. Provisions for prejudgment interest are not important, and they are excluded.

On December 3, 1968, Saum had filed his foreclosure petition in common form, alleging the following facts: Under the Saum-Foy contract, dated August 10, 1967, concrete floors on the warehouse addition were to be furnished and finished by Saum for $9,755.82. On October 17, 1967, performance was completed and accepted by Foy, Saum having received $4,000 in part payment from Foy. The balance, $5,755.82, was due and unpaid.

On January 6, 1969, Foy answered the petition and cross-petitioned against Saum. It alleged the following facts. The construction work under the prime contract was pursuant to architectural drawings and specifications. The latter provision controlled the Saum-Foy contract, and Saum was to perform in a workmanlike manner. The architect rejected the work for alleged failure of Saum to meet the plans and specifications, and for work not performed in a workmanlike manner. Foy therefore conformed the floors at a reasonable cost of $11,046.48, and it "may be reasonably required to expend" $15,000 in the future to complete the floors in conformance with the plans and specifications. Foy sustained damage of $30,046.48, and an accounting should be had.

On January 14, 1969, General Wholesale filed its answer to the petition of Saum and its "answer to the answer and cross-petition of Foy." It admitted the contracts and all allegations of Foy's pleading filed January 6, 1969, except "that . . . $15,000 . . . is insufficient to place the floors in the condition required by the plans and specifications." Meanwhile operation of the plant and warehouse would be curtailed. The additional performance by Foy because of the default by Saum secured only partial approval of the architect. The floor was so uneven that cases of groceries were shaken from fork

trucks used in the storing and handling of merchandise. The conditions which were unknown became evident only after the floor and certain steel racks were in place under the contracts. Correction of the defects would necessitate replacement of large sections of flooring and installation of temporary staging. General Wholesale would sustain further damage of $100,000.

On February 20, 1970. Foy in answer to the cross-petition of General Wholesale, realleged its original answer and cross-petition, denied all affirmative allegations of Wholesale to the contrary, and specifically denied liability for any damage alleged by Wholesale.

On October 12, 1971, Foy filed an amended pleading against Wholesale. All admissions in the forepart of the pleading were subject to the following allegations. Foy rendered the performance required of it under the prime contract and change orders pursuant to the contract. On January 11, 1968, the architect certified that there was due Foy $16,413.37 upon the prime contract "and authorized changes thereunder and requested . . . General Wholesale . . . to pay . . . $10,413.37, withholding . . . $6,000 until the dispute involving the labor and work on the floors was determined, and . . . General Wholesale . . . has never paid any of such sum and there is due and owing . . . (Foy) from . . . General Wholesale . . . $16,413.37 together with any additional sum . . . for extras authorized pursuant to . . . (the) contract and change orders therefor." Foy was under no responsibility or liability for any damage alleged by General Wholesale. An accounting among the three parties was necessary.

In open court at commencement of the trial on June 13, 1972, counsel for Foy clarified its position, stating: "Then for the record, we . . . at this time inform the Court that we are abandoning any claim that may be contained in the cross-petition to conform to the—I mean, we will have no proof that we may be required to expend additional sums to complete and correct the

floor because as it now appears from our cross-petition against G. W. we now contend that the floor is completed and met specifications at the time it was so completed. I do not believe it is necessary to withdraw or strike all of the those pleadings that refer to this allegation and we are simply informing everybody that we do not make this claim any longer, and of course it would be contrary to our cross-petition against . . . G. W." No one commented upon the statement, and the trial proceeded.

On the appeal by General Wholesale the first two assignments of error which relate to the Saum-General Wholesale personal judgment and the amount of the lien are considered together.

Possession of a statutory mechanic's lien alone is not enough to entitle a subcontractor to recover a personal judgment against the owner of the premises. Parsons Constr. Co. v. Gifford, 129 Neb. 617, 262 N. W. 508 (1935); cf. Paxton & Vierling Steel Co. v. Barmore, 187 Neb. 54, 187 N. W. 2d 590 (1971). Section 52-102, R. R. S. 1943, makes no requirement concerning a contract between a subcontractor and the contractor. If the contract and delivery, or furnishing under it, are sufficient to create an indebtedness or liability, it is sufficient to create a lien. Id.

The first assignment of error is good; award of the personal judgment was erroneous. The second one is not well taken, especially when the dispute between Saum and Foy did not waive the lien claim and did not prejudice General Wholesale. See § 25-853, R. R. S. 1943.

Our consideration of the third assignment, dismissal of the cross-petition of General Wholesale, is limited to the subject of judicial admission. The latter in a pleading does not extend beyond its intendment as clearly disclosed by its context. See Dunbier v. Stanton, 170 Neb. 541, 103 N. W. 2d 797 (1960). When a litigant files an amended pleading, the averments of which are inconsistent with the averments of his original plead-

ing, the original is not a judicial admission but competent as an evidentiary admission by a party against his interest. See Johnson v. Griepenstroh, 150 Neb. 126, 33 N. W. 2d 549 (1948).

The pleadings in question were insufficient to entitle General Wholesale to adjudication of liability of Saum or Foy as a matter of law. The allegations between Saum and Foy fell short of admitting liability to General Wholesale. Any doubt about the pleadings of Foy against General Wholesale was removed by counsel in his oral statement at commencement of the trial.

On cross-appeal Foy presents one assignment of error: "The court erred in failing to find that owner GW was indebted to contractor Foy for extra work in the additional sum of $2,898.85, over and above the $16,413.37 awarded contractor Foy." No brief answering the cross-appeal is on file.

Foy in its pleading filed October 12, 1971, alleged a right to recover against General Wholesale in accordance with the provisions of the prime contract alone. The subject of the cross-appeal was not expressly pleaded. The District Court found that the work in question was "above and beyond the contract and that . . . General Wholesale had no duty to pay for any portion of that work . . .."

Foy argues almost exclusively that evidence of performance of the extra work and its reasonable value was undisputed. The finding of the trial court indicates that the real issue was whether the extra work was performed under the contract that Foy alleged.

A party on appeal ordinarily cannot successfully assert error in a judgment that granted him the relief demanded by his pleadings. See Bragonier v. Stevenson, 104 Neb. 578, 178 N. W. 186 (1920). An appeal to this court in a civil action will be considered upon the theories presented by the parties at the trial, provided a liberal construction of the pleadings, as construed by the parties, will permit. Andrews Electric Co. v. Farm

Automation, Inc., 188 Neb. 669, 198 N. W. 2d 463 (1972). The cross-appeal of Foy is denied.

Without disturbing the mechanic's lien, we modify the decree by vacating the personal judgment for Saum and against General Wholesale. So modified, the judgments are affirmed, each party to pay own costs on appeal.

AFFIRMED AS MODIFIED.

FARMERS STATE BANK, AURORA, NEBRASKA, A CORPORATION, APPELLEE, V. EDISON NON-STOCK COOPERATIVE ASSOCIATION, A CORPORATION, APPELLANT, IMPLEADED WITH DICK J. NELSON, APPELLEE.

212 N. W. 2d 625

Filed November 30, 1973. No. 39013.

1. **Contracts: Security Interests: Sales.** Under the Uniform Commercial Code, a security interest continues in collateral notwithstanding sale, exchange or other disposition thereof by the debtor unless his action was authorized by the secured party in the security agreement or otherwise, and also continues in any identifiable proceeds including collections received by the debtor.
2. ———: ———: ———. Where a sale of farm products by a debtor engaged in farming operations is claimed to be authorized under the terms of a security agreement, the sale must ordinarily be made in compliance with the conditions and limitations of the authorization.
3. **Waiver: Estoppel.** Ordinarily to establish a waiver of legal right there must be a clear, unequivocal, and decisive act of a party showing such a purpose or acts amounting to an estoppel on his part.
4. **Waiver: Words and Phrases.** Ordinarily a waiver is a voluntary abandonment or surrender by a capable person of a right known by him to exist, with the intention that such right shall be surrendered.

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

William H. Sherwood of Sherwood & Poff, for appellant.

Adams & Carstenson and Knudsen, Berkheimer, Endacott & Beam, for appellee Farmers State Bank.

Heard before WHITE, C. J., BOSLAUGH, MCCOWN, and NEWTON, JJ., and RONIN, District Judge.

MCCOWN, J.

This is an action for conversion brought by the plaintiff creditor, Farmers State Bank, the holder of a security interest in farm crops, against the defendant elevator which purchased grain from the farmer debtor. At the conclusion of all the evidence, the District Court granted plaintiff's motion for judgment; entered judgment for the plaintiff in the sum of $11,728.65; and discharged the jury. The defendant elevator has appealed.

On June 16, 1969, Dick J. Nelson, as debtor, executed a financing statement and security agreement in favor of the plaintiff, Farmers State Bank. The agreement granted plaintiff bank a security interest in all the debtor's crops and livestock located on described real estate situated in both Gosper and Hamilton counties in Nebraska. The agreement provided: "If marked here ☒ the security interest shall attach to all product and proceeds of Collateral, but Secured Party does not hereby consent to the sale of the Collateral" and "If marked here ☒ Debtor shall, so long as no event of default has occurred, have the right in the regular course of business, to process and sell inventory and farm products only, but the security interest shall attach to all product and proceeds of all Collateral."

In large type above the signatures of the parties appeared the language: "DEBTOR AGREES THAT HE HAS READ THIS AGREEMENT AND THAT THIS AGREEMENT INCLUDES AND IS SUBJECT TO THE ADDITIONAL PROVISIONS SET FORTH BELOW AND ON THE REVERSE SIDE HEREOF, THE SAME

BEING INCORPORATED HEREIN BY REFERENCE."

In the first paragraph on the reverse side of the agreement, the debtor warrants and covenants: "(1) That except for the security interest granted hereby Debtor is, * * * the owner of the Collateral free from any adverse lien, security interest or encumbrance; * * *. (2) That no financing statement covering the Collateral or any proceeds thereof is on file in any public office * * *. (3) Not to sell, transfer or dispose of the Collateral, nor take the same or attempt to take the same from the county where kept as above stated, without the prior written consent of the Secured Party. * * * (5) Not to permit or allow any adverse lien, security interest or encumbrance whatsoever upon the Collateral, * * *."

The third paragraph on the reverse side of the agreement provides: "DEBTOR SHALL BE IN DEFAULT under this agreement upon the happening of any of the following events or conditions: (1) default in the payment of (sic) performance of any obligation, covenant or liability contained or referred to herein or in any note evidencing the same; (2) any warranty, representation or statement made or furnished to Secured Party by or on behalf of Debtor proves to have been false in any material respect when made or furnished; (3) any event which results in the acceleration of the maturity of the indebtedness of Debtor to others under any indenture, agreement or undertaking; (4) loss, theft, damage, destruction sale or encumbrance to or of any of the Collateral * * * (5) death, dissolution, termination of existence, insolvency, business failure, appointment of a receiver * * *."

On June 18, 1969, a separate financing statement signed by the parties was filed in Gosper County. It contained the name and address of the debtor and the secured party, described the collateral and the real estate on which the crops were to be grown, which included the land in Gosper County on which this grain

was grown. The financing statement as filed showed also that it covered proceeds.

On April 16, 1969, Dick J. Nelson had executed a security agreement and financing statement covering the same collateral to the Farmers and Merchants Bank at Edison, Furnas County, Nebraska. That financing statement was filed for record in Gosper County on April 17, 1969. On the date that Nelson executed the security agreement and financing statement to the plaintiff bank on June 16, 1969, he owed the Farmers and Merchants Bank at Edison the sum of $1,000. Thereafter the bank at Edison advanced additional sums. The maximum amount of indebtedness to the Edison bank at any one time was $4,610.

Beginning in November of 1969, Nelson sold 79 loads of grain to the defendant elevator at Edison, Furnas County, Nebraska. The elevator paid Nelson for the grain at various times and in various amounts, a total of approximately $20,000. Nelson made one payment on his debt to the plaintiff bank on January 19, 1970, by his personal check, in the sum of $3,584.48. He also paid approximately $5,000 to the Edison bank to apply on the prior lien. There is evidence that prior to the grain sales Mr. Armbruster, president of the plaintiff bank, had discussed the disposition of crops with the debtor Nelson during the growing season and that the bank understood that part of the crops would be fed and part of the crops would be sold, and that Nelson would sell them. The plaintiff bank had no actual knowledge of any sales made by Nelson until after all the sales had been made. There was also evidence that in the oral discussions Armbruster did not at any time waive any rights to the security, and that there was no authorization of any sale except a sale within the limits authorized by the written security agreement and financing statement. At the times the oral discussions were held, and at the times the grain was later sold by Nelson, the plaintiff bank had no actual knowledge

that Nelson had given a prior lien on the crops to the Edison bank nor that any other similar event of default had occurred. The plaintiff bank did not learn those facts until sometime in 1971.

The critical issue in this case is whether the sales of grain by Nelson to the defendant elevator were authorized by the plaintiff bank. The defendant elevator essentially contends that if a sale was authorized under any specified conditions, such a conditional authorization constitutes a waiver of the security interest in the collateral as to a purchaser for value, even though the actual sale made was not within conditions and limitations of the authorization.

The controlling section of the Uniform Commercial Code which governs this case is section 9-306(2), U. C. C.: "Except where this article otherwise provides, a security interest continues in collateral notwithstanding sale, exchange or other disposition thereof by the debtor unless his action was authorized by the secured party in the security agreement or otherwise, and also continues in any identifiable proceeds including collections received by the debtor."

Under the terms of the financing statement and security agreement here, the debtor Nelson was given the right to sell farm products in the regular course of business, but only so long as no event of default had occurred. At the time Nelson executed the agreement, he was violating at least three specific covenants and warranties which were events of default by the specific language of the agreement. Those defaults continued thereafter and additional events of default occurred. These defaults prevented the authorization clause from becoming effective for any sale. A secured party may refuse to authorize a sale or may authorize it under specific limitations and conditions. Where a sale of farm products by a debtor engaged in farming operations is claimed to be authorized under the terms of a security agreement, the sale must ordinarily be made

in compliance with the conditions and limitations of the authorization. Under the specific terms of the security agreement here, Nelson's sale of the grain was not authorized by the secured bank.

Under the specific terms of the security agreement the defaults of Nelson eliminated his right to sell unless the plaintiff bank gave prior written consent. Nelson covenanted "not to sell, transfer or dispose of the collateral, nor take the same or attempt to take the same from the county where kept as above stated, without the prior written consent of the secured party." All the grain sales here were made outside the county where the crops were raised and without the written consent of the plaintiff bank.

The defendant elevator attempts to rely upon the prior course of conduct of the parties and the fact that the plaintiff bank understood in advance that Nelson expected to sell the grain, and made no objection. The elevator asserts that such conduct impliedly constituted an authorization of sale and a waiver of the security interest in the collateral. Such assertions were answered by this court in Garden City Production Credit Assn. v. Lannan, 186 Neb. 668, 186 N. W. 2d 99. In that case we considered a similar provision prohibiting the removal or sale of the collateral without the written consent of the secured party. We held that ordinarily to establish a waiver of legal right there must be a clear, unequivocal, and decisive act of a party showing such a purpose or acts amounting to an estoppel on his part. We also held that ordinarily a waiver is a voluntary abandonment or surrender by a capable person of a right known by him to exist, with the intention that such right shall be surrendered.

Here, as in that case, we are dealing with a controversy between a lender who has duly perfected its security interest in collateral and a third party purchaser who had no actual knowledge of either the provisions of the security agreement or of the course of

dealing between the debtor and the lender. The acts of the lender here are not acts which indicate an unequivocal, voluntary, and intelligent waiver of its rights under a perfected security agreement against a purchaser charged with constructive notice of the agreement.

We point out also that section 1-205(4), U. C. C., provides: "The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable express terms control both course of dealing and usage of trade and course of dealing controls usage of trade."

In this case the financing statement containing all the required information was filed in strict compliance with the provisions of the Uniform Commercial Code and the security interest of the plaintiff bank had been duly perfected. The defendant elevator in purchasing farm products from a person engaged in farming operations was bound by the provisions of the code and must take the risk of a failure to check the lien records.

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

AFFIRMED.

KANSAS-NEBRASKA NATURAL GAS COMPANY, INC., A CORPORATION, APPELLEE, V. ROBERT K. WILES, APPELLANT.
212 N. W. 2d 633

Filed November 30, 1973. No. 39015.

1. **Appeal and Error: Courts.** It is not within the function of the Supreme Court to decide moot questions.
2. **Public Utilities: Municipal Corporations: Public Officers and Employees: Contracts.** A company engaged in the transmission and distribution of natural gas to the public on a regular basis is a public utility company within the meaning of section 70-624.04, R. R. S. 1943 providing that employees of such company may serve on a council or board of a municipal corpo-

ration with whom the utility company has contracts, without invalidating those contracts.

3. **Municipal Corporations: Public Officers and Employees.** Municipal corporations are legislative creations and it is within the exclusive province of the Legislature, subject to constitutional limitations, to provide for qualifications for office and grounds for removal of the members of the governing boards of such corporations.

Appeal from the District Court for Clay County: NORRIS CHADDERDON, Judge. Reversed and remanded with directions.

Robert E. O'Connor, for appellant.

James D. Conway, Elmer J. Jackson, Duane L. Stromer, and Robert A. Miller, Jr., for appellee.

Heard before SPENCER, BOSLAUGH, SMITH, and CLINTON, JJ., and C. THOMAS WHITE, District Judge.

C. THOMAS WHITE, District Judge.

Plaintiff, Kansas-Nebraska Natural Gas Company, a Kansas corporation, duly authorized to do business in the State of Nebraska, engaged in the business of transmission, distribution, and sale of natural gas in the State of Nebraska and in the City of Harvard, Nebraska, brought this action in the District Court for Clay County to enjoin its employee, the defendant Robert K. Wiles, from serving on the city council as a councilman of the City of Harvard, Nebraska.

There is no dispute as to the facts. The record shows that for some time prior to August 25, 1970, the plaintiff, hereinafter referred to as Kansas-Nebraska, was engaged in the transmission and distribution of gas in the City of Harvard and was the holder of a franchise awarded by the City of Harvard. On August 25, 1970, Robert K. Wiles, hereinafter referred to as Wiles, was appointed as a councilman of the City of Harvard and at all times since that date has served as said councilman except as prevented by the order of the District Court. Kansas-Nebraska in its petition alleges that

Wiles, as an employee and serviceman of Kansas-Nebraska, had interests which were adverse to and in conflict with his duties as a councilman and that his service as a member of the city council placed Kansas-Nebraska's franchise in violation of the then section 17-611, R. R. S. 1943. Kansas-Nebraska alleged that it had requested Wiles to resign, that he had refused to do so, and prayed the court for a temporary and permanent injunction prohibiting Wiles from serving as a member of the city council of Harvard, Nebraska. The trial court, after trial, entered an order permanently enjoining Wiles from serving as an officer of the city council of Harvard, Nebraska. Wiles appeals.

Significant legislative changes in the applicable statutes have taken place since this case was heard by the trial court.

Original section 17-611, R. R. S. 1943, provided in part that: "No officer of any city or village shall be interested, directly or indirectly, in any contract to which the corporation or anyone for its benefit is a party when the consideration for the same is in an amount in excess of two thousand dollars in any one year. . . ." The section was amended in 1971 to provide: "Except as provided in section 70-624.04, no officer of any city or village shall be interested, directly or indirectly, in any contract to which the corporation or anyone for its benefit is a party, when the consideration for the same is in an amount in excess of ten thousand dollars in any one year. . . ."

Section 70-624.04, R. R. S. 1943, passed in 1971, provided that: "Officers and employees of public power districts and public power and irrigation districts shall be permitted to serve as officers or employees of cities of the first class, cities of the second class . . . . No contracts of any such public power district or public power and irrigation district shall be void or voidable by reason of such service by its officers or employees."

This case was heard October 24, 1972. A decree was

filed on February 20, 1973. Motion for new trial was overruled on February 21, 1973.

L.B. 559, passed by the 1973 Legislature, amended section 70-624.04, R. R. S. 1943, to provide that: "Officers and employees of public power districts, public power and irrigation districts, and *public utility companies* shall be permitted to serve as officers or employees of cities of the first class, cities of the second class . . . . No contracts of any such public power district, public power and irrigation district, or public utility company shall be void or voidable by reason of such service by its officers or employees." (Emphasis supplied.) L.B. 559 became effective on September 2, 1973.

It now appears that the service by Wiles on the city council of Harvard, Nebraska, does not endanger any contract with Kansas-Nebraska, and that the matter is now moot, unless as urged by Kansas-Nebraska, L.B. 559 does not include natural gas distribution companies in the phrase "public utility companies," or that L.B. 559 is unconstitutional.

Kansas-Nebraska fits the classical description of a public utility company and was plainly intended to be covered by the provisions of L.B. 559. Kansas-Nebraska in its petition alleges that it is a public utility. A public utility has been defined as a business which regularly supplies the public with some commodity or service such as electricity, gas, water, transportation, or telephone or telegraph service. 73 C. J. S., Public Utilities, § 1, p. 990.

It is not within the province of the Supreme Court to determine moot questions. Banning v. Marsh, 124 Neb. 207, 245 N. W. 775.

Kansas-Nebraska's first contention is without merit.

It is obvious that the trial court has never had an opportunity to determine the question of the constitutionality of L.B. 559. This issue is raised for the first time in this court, and then only by passing reference in the brief of Kansas-Nebraska. We are urged in the

event that we determine, as we have, that L.B. 559 does not prohibit contracts with the City of Harvard, Nebraska, to remand the matter to the District Court for the determination of that issue. There are grave reasons why we cannot do so. These concern the nature of the action.

Counsel for the parties have not cited any case, nor has our research discovered any case, where an employer has been permitted to enjoin the service by one of its employees on the council or board of a municipal corporation on the ground that such service might invalidate the employer's contract with the municipal corporation.

It is to be observed that municipal corporations are legislative creations, and that the Legislature, within constitutional limitations, prescribes their boundaries, power, and the qualifications for office of their governing officers, as well as prescribe the methods and grounds for removal from office. Belgum v. City of Kimball, 163 Neb. 774, 81 N. W. 2d 205, 62 A. L. R. 2d 1295; Marsh v. Village of Trenton, 92 Neb. 63, 13 N. W. 981; Redell v. Moores, 63 Neb. 219, 88 N. W. 243.

It is the function of the judiciary to determine the factual questions raised when a proper petition for removal for violation of a specific statutory provision providing for removal is presented. It is not the function of the judicial branch to supply additional grounds for removal. Such authority properly rests with the Legislature.

The choice of the form of relief sought was the plaintiff's. Kansas-Nebraska is still free to avail itself of the provisions of the Uniform Declaratory Judgments Act.

The controversy between the parties being moot and the relief prayed for beyond the power of this court to grant, the judgment is reversed and the cause remanded with directions to dismiss the petition.

REVERSED AND REMANDED WITH DIRECTIONS.

ALFRED H. RASE, APPELLEE, V. SOUTHEAST NEBRASKA CONSOLIDATED SCHOOL DISTRICT, APPELLANT.
212 N. W. 2d 629

Filed November 30, 1973. No. 39019.

1. **Statutes.** In the interpretation or construction of statutes, ascertainment of the intention of the Legislature is the end or purpose to be accomplished.
2. ———. In construing a statute, the court must look to the object to be accomplished, the evils and mischief sought to be remedied, or the purpose to be subserved, and place on it a reasonable or liberal construction which will best effect its purposes rather than one which will defeat it.
3. **Statutes: Contracts: Schools and School Districts.** Under sections 79-488.06 and 79-328 (12), R. R. S. 1943, a school bus driver's contract is valid and enforceable if he complies with the statutory requirements before operating a bus, notwithstanding a failure to fully comply before the contract was entered into.
4. **Trial: Contracts: Pleadings.** Rescission of a contract is an affirmative defense which must be pleaded and cannot be asserted under a general denial.
5. **Trial: Damages: Employer and Employee.** In the mitigation of damages the burden is upon the employer to prove that the employee obtained other employment or, with reasonable diligence, might have obtained other employment.

Appeal from the District Court for Richardson County: WILLIAM F. COLWELL, Judge. Affirmed.

Richard L. Halbert of Wiltse & Halbert, for appellant.

Simon Lantzy, for appellee.

Heard before WHITE, C. J., BOSLAUGH, McCOWN, and NEWTON, JJ., and RONIN, District Judge.

NEWTON, J.

Plaintiff sued to recover damages from the defendant school district for violation of a school bus driver's contract. On trial to the court, judgment was entered for the plaintiff for the contract specified amount of remuneration. We affirm that judgment.

For answer to the plaintiff's petition defendant pleaded

a general denial and specifically denied that plaintiff was qualified to operate a school bus.

The facts are not in dispute. Plaintiff had been employed by defendant as a bus driver during the 1969-1970 school year. In April 1970, he received a contract for the 1970-1971 school year although he had not then received or displayed to defendant a bus driver's permit for that year and the expiration date of the one for the 1969-1970 year was June 15, 1970. It is conceded that in practice defendant never required, on issuance of school bus drivers' contracts in the spring, that permits for the ensuing year be displayed since such permits were not issued until the month of June.

In May 1970, plaintiff was denied the right to take a school bus driver's test because under a new regulation of the State Department of Education he was then over the age limit. In July 1970, this regulation was set aside and plaintiff thereafter acquired a permit. In the meantime defendant employed another driver and subsequently refused to employ plaintiff.

Defendant now contends that the contract executed in April 1970, was void for failure to comply with that portion of section 79-488.06, R. R. S. 1943, relating to school bus drivers' permits which provided: "No contract shall be entered into until such permit shall have been received and exhibited to the school board or board of education." This provision in the statute must be construed with reference to other pertinent provisions therein contained. It further provided: "Any person operating a school bus, *before the opening of a school term*, or *before operating a school bus* shall, each year, submit himself to (1) an examination, to be conducted by a driver's license examiner of the Department of Motor Vehicles, to determine his qualifications to operate such bus, and (2) an examination by a licensed physician to determine whether or not he meets the physical and mental standards established pursuant to subdivision (12) of section 79-328, and shall furnish to

the school board or board of education, and the Director of Motor Vehicles a written report of each such examination on standard forms prescribed by the State Department of Education, signed by the person conducting the same, showing he is qualified to operate a school bus and that he meets the physical and mental standards. If the Director of Motor Vehicles determines that he is so qualified and meets such standards, a special school bus operator's permit in such form as the director shall prescribe, shall be issued to him." (Emphasis supplied.) The statute obviously contemplates that bus drivers must comply with these requirements *before* opening of the school term or *before operating* a bus and are subject to the penalties provided in the statute in the event of a violation. The provision that a contract shall not be entered into until the permit is received and displayed appears to be aimed at the school board as a further guarantee of compliance on the part of bus drivers. The evidence shows that permits could not be obtained until the month of June and it was the practice to require that the permits be exhibited before the permittees started driving. Both parties treated the contract as valid but conditioned upon the plaintiff's obtaining and displaying the required permit.

Section 79-328 (12), R. R. S. 1943, provides for the adoption of reasonable standards relating to school buses and operators of the buses. It provides: "Similar standards are to be adopted for operators of such vehicles as to physical and mental qualities, driving skills and practices, and knowledge of traffic laws and regulations which relate to school bus transportation. Such rules and regulations shall by reference be made a part of any such contract with a school district. * * * Any person operating a school bus under contract with a school district who fails to comply with any of such regulations shall be guilty of breach of contract and such contract shall be canceled after notice and hearing by the responsible officers of such school district." This

section sanctions the issuance of school bus drivers' contracts subject to regulations adopted by the State Board of Education which become a part of the contract. On violation of the regulations, the contract may be canceled after notice and hearing. The pertinent provisions contained in section 79-488.06, R. R. S. 1943, have been adopted by the State Board of Education as regulations pursuant to section 79-328 (12), R. R. S. 1943, yet plaintiff did not receive notice of, nor have a hearing on, the subject of cancellation.

It is apparent that the legislative purpose in adopting section 79-488.06, R. R. S. 1943, was to safeguard school children when passengers on school buses and to this end sought to require competent drivers. This purpose was subserved by the practice adopted by defendant in requiring compliance with the statute by drivers before the school term commenced and before operating the school buses. To delay the execution of school bus drivers' contracts until after the annual issuance of bus drivers' permits and shortly before the school term commences does not further the fundamental legislative intent and, from a practical standpoint, presents difficulties. The school cannot be assured it has employed required drivers and drivers may not apply for and obtain the necessary permits without assurance of employment. Furthermore, section 79-328 (12), R. R. S. 1943, obviously contemplates that such contracts will be entered into prior to full compliance by the bus drivers. It provides for cancellation of the contracts if they fail to comply before actually operating a school bus. It sanctions the procedure here followed.

We do not believe that a narrow interpretation of the statute in regard to contracting is proper. "In the interpretation or construction of statutes, ascertainment of the intention of the Legislature is the end or purpose to be accomplished. * * *

"In construing a statute, the court must look to the object to be accomplished, the evils and mischief sought

to be remedied, or the purpose to be subserved, and place on it a reasonable or liberal construction which will best effect its purposes rather than one which will defeat it." Johnson v. School Dist. of Wakefield, 181 Neb. 372, 148 N. W. 2d 592.

"* * * The intention of the Legislature, when ascertained, will prevail over the literal sense of the words used and this is especially true when the strict letter of the law would lead to injustice or absurdity. * * *." Metropolitan Utilities Dist. v. City of Omaha, 171 Neb. 609, 107 N. W. 2d 397. A literal interpretation of the statute would work an injustice on plaintiff and make it difficult for schools to contract with bus drivers. We find that plaintiff had a valid contract subject to cancellation on failure to comply with the statutory requirements regarding a driver's permit.

Defendant now argues that the contract was rescinded. This defense was not pleaded. Rescission of a contract is an affirmative defense which must be pleaded and cannot be asserted under a general denial. See, Home Fire Ins. Co. of Omaha v. Berg & Story, 46 Neb. 600, 65 N. W. 780; Denney v. Stout, 59 Neb. 731, 82 N. W. 18; Heller v. Speier, 119 Neb. 787, 230 N. W. 835; 17A C. J. S., Contracts, § 551, p. 1073.

Defendant also asserts that plaintiff failed to mitigate his damages. "The burden is upon the employer to prove that the employee obtained other employment or, with reasonable diligence, might have obtained other employment." Sullivan v. David City Bank, 181 Neb. 395, 148 N. W. 2d 844. The defendant has failed to sustain this burden of proof.

The judgment of the District Court is affirmed.

AFFIRMED.

CONSTANCE R. SCOTT, APPELLANT, V. WILLIAM JOSEPH SCOTT, APPELLEE.
212 N. W. 2d 575

Filed November 30, 1973. No. 39057.

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

Paul E. Watts, J. Joseph McQuillan, Bill Campbell, Gerald E. Moran, and George R. Sornberger, for appellant.

Richard M. Fellman of Fellman & Stern, for appellee.

Heard before SPENCER, SMITH, and CLINTON, JJ., and KUNS and FLORY, District Judges.

KUNS, District Judge.

This is an appeal from an order by the District Court for Sarpy County, Nebraska, modifying an earlier order by which the court had taken custody of the children of the parties. Neither party had filed any pleading raising issues and no evidence was offered or taken. The order does refer to a report of an investigation by the county welfare department, which does not appear in the bill of exceptions.

The right of either party to raise appropriate issues and to present evidence still remains and is not prejudiced.

Affirmed. See Rule 20.

AFFIRMED.

JUDY ANN PETERSEN, APPELLANT, V. HERBERT L. PETERSEN, APPELLEE.
212 N. W. 2d 580

Filed November 30, 1973. No. 39137.

1. **Divorce: Parent and Child: Infants.** In determining the question of who should have the care and custody of minor children the paramount consideration is the best interests and welfare of the children.

2. **Divorce: Parent and Child: Infants: Appeal and Error.** The discretion of the trial judge with respect to changing custody of minor children is subject to review, but the determination of the court will not ordinarily be disturbed on appeal unless there is a clear abuse of discretion or it is clearly against the weight of the evidence.

Appeal from the District Court for Dawes County: ROBERT R. MORAN, Judge. Affirmed.

William L. Howland of Bump & Bump, for appellant.

Michael V. Smith of Smith & King, for appellee.

Heard before SPENCER, SMITH, NEWTON, and CLINTON, JJ., and MURPHY, District Judge.

MURPHY, District Judge.

This is an appeal from an order modifying the custody provision of a divorce decree. Two issues are presented for consideration. First, whether the trial court erred in ordering a change in custody in the absence of any finding that appellant's conduct had a detrimental effect on the child. Second, that it erred in finding a sufficient change in circumstances which would warrant the modification.

As to the first, the rule enunciated by the Supreme Court is clearly settled: That in determining the question of who should have the care and custody of minor children the paramount consideration is the best interests and welfare of the children. Bennett v. Bennett, 189 Neb. 654, 204 N. W. 2d 379. Appellant's contention, however, that the trial court erred by ordering the change in custody without a specific finding of harm to the child is untenable and if accepted would work to undermine the best interest rule. In Fisher v. Fisher, 185 Neb. 469, 176 N. W. 2d 667, a husband petitioned for a modification of custody based on the ex-wife's misconduct, and although denied, the Supreme Court stated that when deciding the issue of custody the trial court should consider, among other factors, "the *probable ef-*

fects of the offense as it relates to the future welfare of the children." (Emphasis supplied.) More recently in Gilman v. Riis, *ante* p. 409, 209 N. W. 2d 173, the court in commenting on the role of the trial court in custody cases, stated: "The discretion of a trial court in this situation is necessarily subjective and must be founded to a significant extent upon his observation of the parties and the review of all the minute details that affect the general welfare and the best interests of the children. It also must necessarily be *prospective in nature.*" (Emphasis supplied.) It can be discerned from these two decisions that the trial court's role in protecting the interests of a child is preventive as well as remedial; and when in a situation such as this, the trial court determines a child could suffer harm by remaining in his present home then it would be incumbent upon that court to order a change.

As to the second issue, the Supreme Court does not decide the issue of custody as an original matter. Gilman v. Riis, *supra.* The discretion of the trial judge with respect to changing custody of minor children is subject to review, but the determination of the court will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. Adamson v. Adamson, *ante* p. 716, 211 N. W. 2d 895. A thorough review of the record reveals that the evidence supports the trial court's finding of a change in circumstances. Suffice it to say that the appellant had conducted herself in her relationship with numerous men in a manner the trial court felt could threaten the welfare of the child. In contrast, the home of the father offered a more wholesome atmosphere, without the potential for disruption in the mother's household. Therefore it was, as previously mentioned, a proper exercise of its discretion to order a change in custody to serve the best interests of the child.

AFFIRMED.

MARY BIESECKER, APPELLEE, V. EDWIN ALLEN BIESECKER, APPELLANT.
212 N. W. 2d 576

Filed November 30, 1973. No. 39141.

Divorce: Parent and Child: Infants. The power of a court to reduce, suspend, or terminate its order for child support payments is a power that generally will only be exercised as a last resort or where it is apparent that to do so affords the only remedy that can reasonably be expected to fit the mischief.

Appeal from the District Court for Dodge County: ROBERT L. FLORY, Judge. Affirmed.

William G. Line of Kerrigan, Line & Martin, for appellant.

F. A. Gossett, III, for appellee.

Heard before SPENCER, SMITH, NEWTON, and CLINTON, JJ., and MURPHY, District Judge.

MURPHY, District Judge.

This is an action brought by the father-defendant to reduce child support payments for the stated reason that the mother-plaintiff has removed herself and the minor child of the parties to the State of Hawaii without the consent of the defendant or the court, and has thus destroyed defendant's visitation rights for all practical purposes.

The parties were divorced April 24, 1970, the plaintiff being granted custody of their son, Shane, with defendant being granted reasonable rights of visitation. In the spring of 1972 the plaintiff moved to Hawaii, taking Shane with her. She has never obtained the trial court's consent to that removal. No reason for her removal is alleged or shown. Both before and after the removal she had to resort to garnishments to secure payment of the child support allowed. Defendant filed his application in June 1972. A hearing was held, and the application denied February 28, 1973. De-

fendant did not visit his son from the date of the removal to the date of the hearing.

Whether or not the defendant ever requested or demanded that the plaintiff return Shane so that he could exercise his right of visitation does not appear, nor was any showing made that the boy is being secreted, is in need, or is being improperly cared for. Whether or not the defendant exercised his right of visitation before the boy's removal, or if he did so, the extent thereof is not shown. Plaintiff's statement, in her brief, that defendant did see his son between June 8 and August 28, 1973, when the boy was visiting his grandparents is neither supported nor refuted in the bill of exceptions, transcript, or supplemental transcript.

The power of a court to reduce, suspend, or terminate its order for child support payments in a situation such as this is a power that generally will only be exercised as a last resort or where it is apparent that to do so affords the only remedy that can reasonably be expected to fit the mischief. Usually, proof of the removal, without more, will not provide an adequate basis for the exercise of the power. All the material circumstances should be submitted for the trial court's consideration. In an appropriate situation, alternative remedies ought to be explored. McGee v. McGee, *ante* p. 415, 209 N. W. 2d 339.

In this case the trial court retains continuing jurisdiction over the person of both parties and their child. We have examined the record and have found no error.

The judgment and order of the District Court are correct and are affirmed. The application of the plaintiff for allowance of attorney's fees in this court is denied.

AFFIRMED.

JAMES BOWMAN, APPELLEE, V. AMERICAN HOME ASSURANCE COMPANY, A CORPORATION, APPELLANT.
213 N. W. 2d 446

Filed December 7, 1973. No. 38981.

1. **Security Interest: Insurance: Contracts.** Under the Uniform Commercial Code the seller retains an insurable interest in goods so long as title to or any security interest in the goods remains in him.
2. **Uniform Commercial Code: Time: Contracts: Sales.** Under the Uniform Commercial Code, unless otherwise explicitly agreed, title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods.

Appeal from the District Court for Dodge County: ROBERT L. FLORY, Judge. Affirmed.

Boland, Mullin & Walsh, Timothy J. Pugh, and Robert D. Mullin, Jr., for appellant.

Brower & Treadway and Larry D. Bird, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

WHITE, C. J.

This is an action on a contract of insurance. The insured, James Bowman, seeks to have his insurer pay for damage done to an airplane covered under a policy issued by the insurer, American Home Assurance Company. The insurer argues that the insured did not have title as defined under the Uniform Commercial Code at the time of the loss and therefore asserts that the insured had no insurable interest at the time of the loss and should be denied recovery. The insured had the verdict and judgment at trial. The insurer appeals. We affirm.

James Bowman, the appellee-insured, and Keith Moeller were engaged in a partnership doing business as Bowman Hydro-Vat in Fremont, Nebraska. The partnership purchased a twin-engine Cessna in 1969. Upon

purchasing the aircraft, Bowman applied for and obtained a policy of insurance issued by the appellant-insurer, American Home Assurance Company, insuring the aircraft during the period from December 23, 1969, through December 23, 1970. The named insured under the policy was James Bowman.

In December of 1970, Bowman and James Hemmer entered into negotiations for the sale of the plane to Hemmer. On December 12, 1970, Bowman and Hemmer agreed upon a price of $18,500 for the purchase of the aircraft and Hemmer paid $15,000 down. The remaining $3,500 was to be paid later in cash or through its equivalent in aircraft instrument instruction which Hemmer was to give to Bowman. Hemmer requested a bill of sale signed by both partners to protect himself, and to comply with the Federal Aviation Administration requirements for the transfer of an aircraft. Bowman testified that it was agreed that he was to remain the owner of the aircraft until "we were able to fill out the necessary paperwork." Hemmer, the buyer, testified numerous times that he was to be the owner when he received the bill of sale. This was to allow the buyer to comply with the Federal Aviation Administration requirements and make arrangements for insurance prior to the time he was to become the owner. Bowman also testified that he told Hemmer that he would leave his insurance in effect until it expired on December 23, 1970, only 11 days later. Bowman retained possession of the plane.

On December 15, 3 days later, Bowman contacted Hemmer and asked Hemmer if he wanted to go with him on a business trip to Kansas. The purpose of the flight was for Bowman to transact some business in Kansas. Upon their return to Fremont, Hemmer asked Bowman for permission to use the plane on the following Friday and Saturday. Bowman and Hemmer specifically examined Bowman's insurance policy to ascertain whether it would provide coverage while Hemmer flew the plane.

Bowman then gave Hemmer permission and Hemmer took the plane to Columbus. On December 16, Hemmer flew the plane from Columbus to Fremont to obtain the bill of sale, but it had not been signed so he returned to Columbus without it.

On December 18, Hemmer flew the plane to Mitchell, South Dakota, pursuant to the permission granted by Bowman. In attempting to take off from Mitchell, the tip of a wing caught in a snow bank causing extensive damage to the aircraft.

Hemmer testified that the Federal Aviation Administration regulations require that a registration certificate be in an aircraft before title to the plane can be transferred to a new owner, and that once the bill of sale is received, it is attached to a new registration application and sent to the Federal Aviation Administration. A pink copy of the new registration is placed in the aircraft to serve as a temporary registration. This paperwork had not been completed at the time of the loss because the bill of sale had not yet been received. The registration certificate in the aircraft at the time of the accident showed James Bowman as the owner.

The signature of Bowman's partner was obtained and the bill of sale was mailed to Hemmer on December 18, the day of the accident. Hemmer received the bill of sale on December 20. The bill of sale was in blank form and had not been filled out at the time Hemmer received it. It was understood that Hemmer was to fill out the necessary information on the bill of sale. Bowman filed an accident report after the accident and indicated he was the owner.

The controversy between the parties centers around two provisions of the Uniform Commercial Code. Section 2-501, U. C. C., provides in part:

"(2) The seller retains an insurable interest in goods so long as title to or any security interest in the goods remains in him * * *."

The case was tried to the jury on the theory that

the seller retained an insurable interest in the goods as long as title to the goods remained with the seller. Both parties agree this was the appropriate standard for submission of the case to the jury. Section 2-401, U. C. C., details the concept of passage of title:

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

As section 2-501, U. C. C., provides, the seller has an insurable interest until title passes to the buyer. Under section 2-401, U. C. C., title passes to the buyer (1) at the time and place where the seller completes his performance with reference to the physical delivery of the goods or (2) at any other time explicitly agreed to by the parties. As dictated by the Uniform Commercial Code, the trial court submitted two factual questions to the jury. First, whether the seller had completed physical delivery of the goods. Second, whether there was an explicit agreement between the buyer and the seller as to the time when title was to pass. A jury finding in favor of the insured upon either of these factual issues supports the verdict. Where reasonable minds might draw different inferences or conclusions from the evidence, it is within the province of the jury to decide the issues of fact and the jury verdict will not be set aside unless it is clearly wrong. Mustard v. St. Paul Fire & Marine Ins. Co., 183 Neb. 15, 157 N. W. 2d 865 (1968).

There was substantial evidence from which the jury could have inferred that the seller had not completed physical delivery of the goods. The evidence shows that the buyer was only given limited use of the plane to make the trip to South Dakota. The buyer even asked the seller for permission to use the plane for this one

trip. The seller had only granted a limited possession of the plane to the buyer, even though the buyer had possession of the plane for 3 days prior to the accident.

The jury could have also inferred from the evidence that the buyer and seller had an explicit agreement that title was to pass upon the completion of the "necessary paperwork." The code itself provides no definition of the term "explicit" as used in section 2-401, U. C. C. In Harney v. Spellman, 113 Ill. App. 2d 463, 251 N. E. 2d 265, 6 U. C. C. Rptng. Serv. 1185 (1969), the court defined "explicit" in reference to section 2-401, U. C. C., as follows: "The term 'explicit' means that which is so clearly stated or distinctly set forth that there is no doubt as to its meaning." See, also, Binkley Co. v. Teledyne Mid-America Corp., 333 F. Supp. 1183 (E. D. Mo., 1971), affirmed 460 F. 2d 276 (8th Cir., 1972), for a discussion of the term explicit as used in another section of the code.

Bowman testified that it was agreed that he was to remain the owner of the aircraft until "we were able to fill out the necessary paperwork." The only other testimony by Bowman on this subject was the testimony of Bowman on cross-examination that he thought a sale had occurred on December 12, 1970. On redirect however, Bowman testified that he meant an agreement to sell the plane was entered into on December 12, 1970. The buyer testified numerous times that there was an agreement that he was to be the owner when he received the bill of sale. This was to allow the buyer to complete the Federal Aviation Administration requirements and make arrangements for insurance prior to the time he was to become the owner. From all this testimony the jury could infer that there was an explicit agreement. The credibility of the witnesses and weight to be given to their testimony are for the triers of fact. First Nat. Bank of Omaha v. First Cadco Corp., 189 Neb. 734, 205 N. W. 2d 115 (1973). On the record as a whole, we cannot conclude that there was not suf-

ficient evidence to support a jury finding that there was an explicit agreement as to the passage of title of the aircraft.

The evidence showed that the bill of sale sent to the buyer from the sellers on the day of the accident was not signed by both sellers until the day of the accident. The bill of sale was not received by the buyer until several days after the accident, and even at this time it remained in blank form. The parties knew that the buyer would fill in and complete the bill of sale after he received it. Thus, it is clear from the evidence that "completion of the necessary paperwork" involved more than the mere signing of the bill of sale by both sellers. It at least included receipt of the blank bill of sale by the buyer, but it could also have included the action of the buyer in filling out the necessary Federal Aviation Administration papers and completing the bill of sale. None of the above steps had been completed at the time of the accident, and therefore the time of the completion of the necessary paperwork had not occurred at the time of the accident.

In summary, the jury could reasonably have found from substantial evidence that either (1) the seller had not completed physical delivery of the goods under section 2-401, U. C. C., or (2) there was an explicit agreement for title to pass upon completion of the necessary paperwork which had not occurred at the time of the accident. Under either of these findings title had not passed to the buyer under section 2-401, U. C. C., and therefore under section 2-501, U. C. C., the sellers retained an insurable interest. For these reasons we affirm the judgment of the District Court.

AFFIRMED.

CAROLYN MILLER, APPELLANT, V. DEAN MILLER, APPELLEE.
212 N. W. 2d 646

Filed December 7, 1973. No. 39035.

1. **Motions, Rules, and Orders: Trial: Evidence.** A motion to vacate is not available to a party to supply deficiencies, if any, in the evidence adduced at the trial.
2. **Divorce: Courts: Time.** The control of a divorce decree during the 6-month period pending finality is within the sound judicial discretion of the trial court.
3. **Divorce: Alimony: Appeal and Error.** The judgment of a trial court fixing the amount of alimony will not be disturbed on appeal unless good cause is shown.
4. **Divorce: Alimony: Property.** The amount of alimony to be granted a wife is not to be determined alone from the property possessed by the husband. Many other factors enter into this determination.

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

Marks, Clare, Hopkins, Rauth & Garber, for appellant.

Haney, Wintroub & Haney, for appellee.

Heard before SPENCER, BOSLAUGH, SMITH, and CLINTON, JJ., and C. THOMAS WHITE, District Judge.

SPENCER, J.

Petitioner, Carolyn Miller, appeals from the denial of her motion for a new trial and her motion to set aside and vacate a divorce decree rendered July 27, 1972. We affirm.

The motion for a new trial was filed on petitioner's behalf by trial counsel. Subsequently, she discharged trial counsel and hired other counsel who filed a motion to set aside and vacate the decree. This motion was filed January 24, 1973, within 6 months from the entry of the decree and while the motion for new trial was still pending. It alleged inter alia that the court had grossly underestimated the value of respondent's property and alleged a change in circumstances because petitioner was unemployed. Both motions were set

for hearing February 13, 1973. No showing was made on the motion for new trial but evidence was adduced on the motion to vacate.

The only issues involved in this appeal are the division of the property and the adequacy of the alimony allowance. Except for the fact that petitioner was unemployed at the time of her motion to vacate the decree, the issues raised involve the valuation of the property of the parties and the amount awarded to petitioner in the decree. It is pertinent to note that most of the values placed on the property in the divorce proceeding were fixed by stipulation of the parties, by the petitioner herself, or by evidence adduced on her behalf. We are satisfied that the evidence presented in support of petitioner's motion to set aside the decree was readily available to her at the time of trial. A motion to vacate is not available to a party to supply deficiencies, if any, in the evidence adduced at the trial. Petitioner cannot be permitted to retry the issues after she has had her day in court. There must be an end to litigation.

Section 42-372, R. S. Supp., 1972, permitting the trial court to modify its decree within 6 months, impliedly requires a showing of good cause. The refusal of the trial court to set aside a decree of divorce within the 6-month period pending finality may not be reversed by the Supreme Court in the absence of an affirmative showing of an abuse of discretion. As we said in Zachry v. Zachry (1970), 185 Neb. 336, 175 N. W. 2d 616: "The control of a divorce decree during the 6-month period pending finality is within the sound judicial discretion of the trial court." The motion to vacate was properly denied.

The rule is well established that the judgment of a trial court fixing the amount of alimony will not be disturbed on appeal unless good cause is shown. Newton v. Newton (1972), 188 Neb. 242, 196 N. W. 2d 116.

We have also said that the amount of alimony to be granted a wife is not to be determined alone from the property possessed by the husband. Many other factors enter into this determination. Here, in addition to a division of property, petitioner was awarded $450 per month until remarriage, death, or further order of the court.

The judgment of the trial court is affirmed.

AFFIRMED.

ROBERT T. RASMUSSEN, APPELLANT, V. MARGARET WEDGE, EXECUTRIX OF THE ESTATE OF ESTHER M. RASMUSSEN, DECEASED, APPELLEE.

212 N. W. 2d 637

Filed December 7, 1973. No. 39044.

1. **Wills: Taxation.** The testator's intention as expressed in the will considered as a whole is controlling in determining whether a particular gift is exonerated from diminution under the statute providing for apportionment of taxes.
2. **Wills.** The provisions and conditions of a will are to be construed by the courts with a view of carrying out the intention of the testator. The basic object of will construction is to ascertain the intent and purpose of the testator as shown by the will, and then to give that intention effect if not contrary to law. The intention which must be given effect is the intention which the testator expressed by the language employed in his will.

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

Brock & Seiler and Lester R. Seiler, for appellant.

Bernard B. Smith for Smith Brothers, for appellee.

Heard before SPENCER, BOSLAUGH, SMITH, and CLINTON, JJ., and C. THOMAS WHITE, District Judge.

CLINTON, J.

This is an action for the construction of the will of

the defendant executrix' decedent. The will directed payment of inheritance and estate taxes from the "residuary estate." The only issue involved is whether a certain portion of the estate described in the will as "my farm real estate" and which the testatrix exempted from the mandatory liquidation provision of the will and as to which in the trust administration provisions she expressed the "wish" that it "not be sold, paid over or transferred, except for the most compelling or necessary reasons," was intended to be devised free from the burden of the federal estate tax. The trial court held it was free, adopting the construction urged by the executrix. The practical result of that construction was to prevent or diminish the full funding of a trust established by the will for the benefit of the plaintiff. The plaintiff appeals. We affirm.

The decedent executed the will in question on August 20, 1969, and died on September 26th of the same year. We summarize and quote portions of the will we deem pertinent to its construction. In the first paragraph of the will, the decedent identified her three children, Margaret Wedge, the executrix, Donald F. Rasmussen, and Robert T. Rasmussen, the plaintiff. In paragraph third she made certain specific bequests of tangible personal property to Margaret and Donald.

Paragraph fourth provided as follows: "I direct my Executors to pay all Federal and State estate, inheritance, succession, transfer or other death taxes which are assessed against my estate or any beneficiary including any such tax which may be so assessed by reason of property which may be included in my estate for such tax purposes whether or not so included for probate purposes, out of my residuary estate." In paragraph fifth, she sets forth the description of two specific tracts of real estate "hereafter described as my farm real estate." This paragraph makes no disposition of these tracts. She then in the same paragraph authorizes and directs the executor to "sell and dispose of all

the rest, residue and remainder of my estate, not herein specifically bequeathed, excepting however, my farm real estate." She then authorizes the executor to make and deliver deeds and bills of sale.

In paragraph sixth she states: "After the satisfaction and payment of all my just debts, costs and expense of administration and succession and inheritance taxes as above provided, I give and bequeath the residue and remainder of my personal estate, including the proceeds derived from the liquidation of such residue and remainder, but not to exceed the sum of $20,000.00, to my daughter, MARGARET WEDGE, IN TRUST NEVERTHELESS, for the use and benefit of my son, ROBERT T. RASMUSSEN." She then directs that the income from the trust be used for the support of Robert and that any excess income be accumulated and added to the principal; she makes provision for the burial expense of Robert and directs that after his death any residue remaining of the trust pass to Margaret and Donald and Margaret's children.

Paragraph seventh establishes a trust, with Margaret again as trustee, of: "All the rest, residue and remainder of my estate, of whatsoever kind and wheresoever situated," for the benefit of Margaret, Donald, and Margaret's son, Fred. This paragraph among others provides that if the income of the trust for Robert is "inadequate or insufficient, . . . equal amounts may be paid from the Trust of MARGARET WEDGE and the Trust of DONALD F. RASMUSSEN for his support and needs." This same paragraph authorizes the trustee to pay to Margaret and Donald the principal from their trust and states: "It is my wish, however, that the 'Farm Real Estate' not be sold, paid over or transferred, except for the most compelling or necessary reasons."

The general powers granted the trustee, but not the executor, include: "To borrow money for any purpose connected with the protection, preservation or improvement of my estate or of the trust estates whenever in

her judgment advisable, and as security to mortgage or pledge any real estate or personal property of which I may die seized or possessed or forming a part of the trust estates upon such terms and conditions as she may deem advisable."

The record shows by stipulation that all the personal property and real estate other than the farm real estate has been sold, that federal estate tax in the amount of $26,858.08 has been paid, that the residue of the personal property is insufficient to fund the trust for Robert in the full amount of $20,000, and that the only property remaining in the trust for Margaret and Donald is the farm real estate.

The foregoing résumé establishes that: (1) The testatrix directed that the federal estate taxes (among others) be paid from her "residuary estate." (2) That after certain minor specific bequests she establishes from the balance of the estate two trusts: The first for Robert from the personal estate, but not to exceed $20,000; the second consisting of the residue, if any, of the liquidated and personal property and the farm real estate for the benefit of Margaret and Donald.

The ambiguity which creates the present controversy arises in part from the fact that in paragraph sixth reference is made to "payment of all my just debts, costs and expense of administration and succession and inheritance taxes," and reference to federal and state estate taxes is omitted. The plaintiff points out that the term "succession taxes" does not in the technical sense include estate taxes. McLaughlin v. Green, 136 Conn. 138, 69 A. 2d 289, 15 A. L. R. 2d 1210. From this he argues that it was the intention of the testatrix that the personal property from which the trust for his benefit is to be funded should bear no portion of the estate tax burden and that that tax should be charged wholly to the balance of the residuary estate, including the farm real estate. Any other construction would, he asserts, result in the possibility that his trust might not be

funded at all and so the intention of the testatrix would be defeated.

The executrix, on the other hand, argues that the words in paragraph sixth "as above provided" can refer back only to the direction of paragraph fourth to pay all the items there mentioned, including federal estate tax, and from the language of the whole will it is clear that the testatrix did not intend to charge any of these items against the farm real estate if there were other sources in the residuary estate, namely, the personal property and the proceeds of the sale of the real property other than the farm real estate from which such items could be paid. In effect, she argues that the omission of federal estate tax from paragraph sixth is, as is made clear by the will as a whole, an obvious inadvertence. The plaintiff counters with the argument that the general powers of the trustee granted in the will authorize her to borrow for the purpose of preserving the trust and thus the farm real estate should bear an equitable portion of the federal estate tax burden under the provisions of section 77-2108, R. R. S. 1943.

We note a further ambiguity and this involves the question of just what is the residuary estate. Does it include all the property disposed of in paragraphs sixth and seventh? Is the farm real estate excluded even though it is not disposed of by specific designation? We note also that if we accept the argument that the words "as above provided" incorporates the words "federal estate tax" omitted in paragraph sixth, then the incorporation must also include the words "out of my residuary estate." It can plausibly be argued that the direction in paragraph sixth establishing the trust for Robert from "my personal estate" after satisfaction of debts, expenses of administration, and taxes, recognizes that the personal estate, being part of the residuary estate, must bear a portion of the federal estate tax and thus may be diminished somewhat, but that it does not evidence any intention that the property which passes under

paragraph seventh including the farm real estate be exempt from the burden of federal estate tax. It can therefore be claimed that the provisions of section 77-2108, R. R. S. 1943, providing for apportionment of federal estate tax ought to be applied as between the properties passing under paragraphs sixth and seventh including farm real estate.

The fundamental principle applicable to the construction and interpretation of wills has been stated by this court many times. Both parties cite Cast v. National Bank of Commerce T. & S. Assn., 185 Neb. 358, 176 N. W. 2d 29, where this court stated: "The provisions and conditions of a will are to be construed by the courts with a view of carrying out the intention of the testator. The basic object of will construction is to ascertain the intent and purpose of the testator as shown by the will, and then to give that intention effect if not contrary to law. National Bank of Commerce Trust & Savings Assn. v. Crowell Memorial Home, 181 Neb. 341, 148 N. W. 2d 304. The intention which must be given effect is the intention which the testator expressed by the language employed in his will. In re Estate of Zents, 148 Neb. 104, 26 N. W. 2d 793. . . . The intention of the testator is not to be ascertained by subtle rules of construction or obscure legal principles and technicalities, but by the ordinary meaning of the language employed by the testator in his will." The testator's intention as expressed in the will considered as a whole is controlling in determining whether a particular gift is exonerated from diminution under the statute providing for apportionment of taxes. Stuckey v. Rosenberg, 169 Neb. 557, 100 N. W. 2d 526.

Beginning at page 1170 of 72 A. L. R. 2d, are collected numerous cases in which courts have considered the question of whether or not certain specific property included in a residuary clause was nonetheless a specific devise or bequest. Those cases are not particularly helpful to us here and seem to be merely specific applica-

tions of the general principle of will construction which we have earlier cited.

Certain considerations gleaned from an examination of the will as a whole lead us to the conclusion that the testatrix did intend to exclude the farm real estate from the burden of estate expense, including federal estate taxes, as long as any other property was available for said purposes. The considerations are: (1) The special prominence she gives to the farm real estate, specifically describing it in paragraph fifth. (2) The direction to the executor to sell all property except the farm real estate. (3) The authorization in paragraph seventh to use the income of that trust for Robert if the income from his own trust is insufficient. (4) The clear evidence in paragraph seventh C showing that the testatrix anticipated the farm real estate would be the principal part of the trust established by paragraph seventh and the expression therein that: "It is my wish, however, that the 'Farm Real Estate' not be sold, paid over or transferred, except for the most compelling or necessary reasons." (5) The clear expectation in paragraph eighth that the principal of the trust after the death of Margaret and Donald of paragraph seventh pass to the grandson of the testatrix. (6) The fact that the power to borrow for the preservation of the trust is granted in paragraph tenth only to the trustee and that the executor as such has no such power. This has some significance in the light of the fact that it is the legal duty of the executor to pay the federal estate tax.

One stipulation of fact also has bearing on the determination of the intention of the testatrix when taken in connection with certain provisions of the will. It is agreed that only an undivided one-half interest in the farm real estate passes under the terms of the will. The testatrix had, prior to her death, conveyed the other undivided one-half to the beneficiaries of paragraph seventh. She appears to have known of the possibility that the one-half conveyed by her might be included in

her estate for estate and inheritance tax purposes as it in fact was. As we have already pointed out, the direction of paragraph fourth concerning payment of death taxes out of the residuary estate included death taxes on account of property "included in my estate for such tax purposes whether or not so included for probate purposes." It is at least arguably questionable whether she would seek to exclude from the burden of death taxes the one-half interest which she had earlier conveyed and still subject the remaining undivided one-half interest in the same property to that burden simply because it passed under the will.

Because, as we have earlier pointed out, the parties act upon the premise that all property passing under paragraph seventh is exhausted save the farm real estate we are not called upon to consider whether section 77-2108, R. R. S. 1943, would apply as between the personal property passing under paragraph sixth and from which the trust for Robert is to be funded and the property which would pass under paragraph seventh excepting the farm real estate.

It appears from the stipulation and the briefs that the parties have made a settlement, growing out of considerations other than those involved in this appeal, which has resulted in the trust for Robert being partially funded. What we have said here does not, of course, disturb that settlement.

The judgment of the lower court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DOMENIC FRANKLIN ROMONTO, APPELLANT.
212 N. W. 2d 641

Filed December 7, 1973. No. 39049.

1. **Searches and Seizures: Motor Vehicles: Probable Couse: Criminal Law.** Probable cause for searching a motor vehicle may

not be treated the same as questions arising out of searches of fixed structures, like houses.

2. **Searches and Seizures: Probable Cause: Criminal Law.** The existence of probable cause must be determined by a practical and not by a technical standard.
3. **Searches and Seizures: Criminal Law.** Objects falling within plain view of an officer, who has the right to be in the position to have such view, does not constitute a search.
4. **Searches and Seizures: Criminal Law: Motor Vehicles.** Where materials in an automobile, which are indicative of a criminal offense, are in plain sight of an officer looking into the automobile from the outside, a search is justified and legal.
5. **Searches and Seizures: Criminal Law: Motor Vehicles: Arrest.** There is no illegal search and seizure of objects found in an automobile, even if the defendant is not under arrest, if the defendant freely and intelligently gives his consent to officers making the search.
6. **Searches and Seizures: Criminal Law: Probable Cause: Arrest: Time.** In determining probable cause for a warrantless search, it is not significant whether the search preceded or followed the arrest. The controlling factor in a warrantless search is whether the officer had reasonable grounds before the search to make an arrest.

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

Padley & Dudden, for appellant.

Clarence A. H. Meyer, Attorney General, and Melvin K. Kammerlohr, for appellee.

Heard before WHITE, C. J., BOSLAUGH, and MCCOWN, JJ., and TESAR and HAMILTON, District Judges.

TESAR, District Judge.

In a criminal proceeding for having possession of marijuana weighing more than one pound, the defendant moved to suppress the evidence that the state troopers, without a warrant, seized from the automobile defendant was operating. The court overruled his motion, and after trial, the jury found the defendant guilty as charged. On appeal, defendant's main thrust is the contention the court erred in its ruling in failing to sustain

the motion to suppress the evidence. We affirm the District Court's decision.

Officers of the Nebraska State Patrol, on May 13, 1972, were traveling west on Interstate Highway No. 80 in Keith County, when they met the defendant traveling east in his station wagon. Defendant was stopped because the officers thought the defendant did not have a license plate on the front of his vehicle. When the defendant's vehicle was stopped, it was discovered that the front end had been damaged and there was a winch which covered or shielded the license plate. There was, however, a license plate affixed but it was turned at an angle making it difficult to see. Upon being stopped, the defendant hurriedly removed himself from his vehicle and met the officer outside his vehicle. The officer, after checking the license plate, asked to see the driver's license of defendant, and the defendant produced an expired Ohio driver's license. When informed of said fact, he produced a valid Ohio license. He then produced from his person the registration certificate for the car, which was registered to one Brian McDonald, along with an affidavit from Brian McDonald, that defendant had his permission from May 9th to June 1st to drive the Toyota vehicle to Cleveland, Ohio. From his position outside the car, the officer noted cigarette papers on the dash of the car, and also noted that on the front seat in plain view, was a round piece of material, in ball form, that looked like rabbit dung, and which the officer, at the time, believed to be temple ball hashish. This ball ultimately turned out to be hashish.

The officer, after receiving the registration slip from the person of the defendant, instead of its being affixed in said car, was granted permission to examine the glove compartment. This he did, and about the same time he noticed a jacket lying on the seat with some suspicious bulges therein, and he asked permission and was granted consent to examine and search said jacket. The jacket was searched and two odd pipes were found, which had

been used for smoking marijuana. The odor of marijuana was very strong in the car, and it was at this point that the officer then placed the defendant under arrest, and he was given the Miranda warnings. In the meantime, another officer came up to the car and he found, sticking out from underneath the front seat of the driver's side, a matchbox, which he removed and found therein another small pipe, with a pipe bowl the approximate size to accommodate the hashish previously found in the car. He also detected a strong odor of marijuana. From his past experience as a highway trooper in smelling marijuana, he found the odor to be very strong. This officer then went back to where the defendant and the first officer were standing and asked the defendant if he had any marijuana in the car. The defendant answered in the negative. He then later stated, "Well, if I give you what I have, will you let me go?" With this, the officer asked the defendant to unlock the back door, which he did. There were many duffle bags in the car, and the officer took one out, unzipped it, and emanating therefrom was a strong odor of marijuana. He took out a single package and found it to be marijuana. A search of the vehicle disclosed over 135 kilos or approximately 300 pounds of marijuana. After the kilos of marijuana were discovered, the defendant voluntarily, after being asked if there was any other contraband in the car, told the officers, "I might as well be honest about it. There is some more by the transmission." He then directed the officers to the front seat and showed them where, under the floor mat near the transmission bulge area, there was a plastic bag containing marijuana and marijuana cigarettes.

The question presented therefore, was a warrantless search of the motor vehicle unreasonable and thus violative of defendant's constitutional rights?

We are confronted by a search of an automobile that can easily be moved, as distinguished from the search

of fixed structures. In State v. Forney, 182 Neb. 802, 157 N. W. 2d 403, we said: Probable cause for searching motor vehicles may not be treated the same as questions arising out of searches of fixed structures, like houses. See, also, Preston v. United States, 376 U. S. 364, 84 S. Ct. 881, 11 L. Ed. 2d 777. One does not have to be blessed with charismatic powers to realize the wisdom of such a rule.

Our court has said numerous times that, in the evaluation of the reasonableness of a search and seizure without a warrant, it is imperative that the facts be judged against an objective standard, to-wit: The facts available to the officer at the moment of the search or seizure should warrant a man of reasonable caution to believe the action taken was appropriate. State v. Nichols, 189 Neb. 664, 204 N. W. 2d 376. The existence of probable cause must be determined by a factual and not by a technical standard. State v. Oltjenbruns, 187 Neb. 694, 193 N. W. 2d 744. What is a reasonable search is not to be determined by any fixed formula, but is to be resolved according to the facts of the particular case. State v. Smith, 184 Neb. 363, 167 N. W. 2d 568.

It is clear from the record that the officer observed cigarette papers on the dash, saw what turned out to be hashish in the car in plain sight, smelled the strong odor of marijuana emanating from the car, and saw the presence of a jacket with suspicious protrusions therein. It is the rule that objects falling within the plain view of an officer, who has the right to be in the position to have such view, does not constitute a search. State v. Smith, *supra*. In State v. Moore, 189 Neb. 380, 202 N. W. 2d 747, we said: "When materials in an automobile which are indicative of a criminal offense are in plain sight of an officer looking into the automobile from the outside, a search is justified and legal." There are a plethora of cases in our jurisdiction, to the same effect. State v. Rys, 186 Neb. 341, 183 N. W. 2d 253.

An officer is entitled to rely on his senses in determining whether contraband is present in a vehicle. If contraband is seen or smelled, the officer is not required to close his eyes or nostrils, walk away, and leave the contraband where he sees or smells it. State v. Carpenter, 181 Neb. 639, 150 N. W. 2d 129. Probable cause may result from the use of any of the senses. State v. Connor, 189 Neb. 269, 202 N. W. 2d 172.

We now turn our attention to the action of the officers in stopping defendant's vehicle. Defendant apparently is laboring under the misapprehension that the same rule of probable cause applies where a person is merely stopped and questioned, as when he is arrested. Defendant's approach presents a clash of interest between the protection of the public and the right of an individual. His premise is false and would cripple law enforcement. To require that an officer must have probable cause for arrest before he can stop and question a person would extend the Constitution beyond the realm of reasonable intendment. By so holding, we would be needlessly limiting police power for the mere sake of limitation. To do so would emasculate crime prevention and render peace officers impotent and useless. Individual rights on occasion must give way to the rights of society. This is the very purpose of law—to restrict the rights of the individual to provide protection for society. It is not possible to ignore the fact that police officers are charged with the duty to prevent crime as well as to detect it. Often an immediate inquiry is an indispensible attribute to the prevention and discovery of crime. This is particularly true where a moving vehicle is involved. Time is of the essence. State v. Carpenter, *supra;* State v. Harding, 184 Neb. 159, 165 N. W. 2d 723.

A prompt inquiry was in order and warranted, and the presence of probable cause to search, plus exigent circumstances, justified the search without a search warrant. It is only by alertness to proper occasions

for prompt inquiries and investigation that effective prevention of crime and enforcement of law is possible. Commendation, rather than condemnation, should be accorded to the officers for their detection of the commission of a very serious offense. This is not a case, as defendant tries to make out, of officers "coming with their star and their gun to force their way into the car." Nothing could be further from the truth of these assertions, for the officers' conduct at the scene of the arrest was of the highest standard of good officers and they evidenced same by their refusal to make a deal with the defendant for his release.

There is another reason the defendant's position is untenable in this proceeding, that is the defendant's consent to the search of the car's glove compartment and the jacket found in the car from which the pipes were removed, as well as his voluntary disclosure of other hidden contraband. In State v. Forney, 181 Neb. 757, 150 N. W. 2d 915, wherein this court dealt directly with the question of suppression of evidence, we said: "There is no illegal search and seizure of objects found in defendant's automobile, *even if defendant was not under arrest,* and even if the officers did not have a search warrant, if the defendant freely and intelligently gave his consent to the officers making the search." (Emphasis supplied.) Affirmative consent may be established by acts entirely aside from the use of words.

The same evidence that sustained the finding of guilt of the defendant amply supports the finding of the court that consent was freely and intelligently given.

In passing we might add that the evidence disclosed the exterior of the car to be very dirty, as if being on the road for a considerable period of time; affixed to the front and rear windows were decals indicating a visit to Mexico; statements were made by the defendant that the contents of the vehicle were his property, and that he had procured the marijuana in Mexico; likewise, a strong odor of patchouli oil emanated from

the body of the defendant, which the evidence disclosed as being one of the colognes to cover up the smell of marijuana; and further that the contraband was being transported back to the State of Ohio, where it was to be sold to students.

Accordingly, therefore, the trial court's decisions (1) in refusing to sustain defendant's motion to suppress the seized evidence; (2) in permitting the same to be received in evidence over defendant's objections, and (3) in refusing to give defendant's tendered instruction which stated in effect "that a search, preceding an arrest was unlawful," were all correct.

The actions of the officers in searching defendant's automobile without a search warrant satisfied constitutional requirement of probable cause.

The trial court in safeguarding the constitutional rights of the defendant, and acting on a matter which was discretionary with the court, allowed an inspection, at the insistence of the defendant, of defendant's car. The officer was likewise required to place into the car various exhibits which had been introduced in the trial and to place them in the position that he claimed he saw them prior to the arrest. After being so placed, the court allowed the jury to retrace the trooper's steps, as they walked by the car, and allowed them to make observations into the car to ascertain what could be seen and to determine whether the evidence was in plain sight and observable. In doing so, the trial court did not forget that the primary objective of any trial is to search out the truth.

The verdict of the jury, we think, amply verifies the truth of the officer's statements.

AFFIRMED.

McCOWN, J., concurs in the result only.

STATE OF NEBRASKA, APPELLEE, V. MARDEN MAYES, APPELLANT.
212 N. W. 2d 621

Filed December 7, 1973. No. 39081.

Guilty Plea: Post Conviction: Criminal Law. Where the record discloses that a plea of guilty was understandingly and voluntarily entered, it is not subject to post conviction relief.

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

Renne Edmunds, for appellant.

Clarence A. H. Meyer, Attorney General, and James J. Duggan, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, McCOWN, NEWTON, and CLINTON, JJ.

SPENCER, J.

Defendant appeals from the denial of post conviction relief. He assigns as error the failure of the trial court to find that his plea was not voluntary and the dismissal of his motion for post conviction relief. We affirm.

Defendant, who was represented by counsel, pled guilty to a charge of forgery, and was sentenced to a term of 8 years in the Nebraska Penal and Correctional Complex on June 22, 1972. In his post conviction application, he makes two basic contentions: (1) That as a part of a plea bargain he was promised a sentence of no more than 5 years, which promise was not kept; and (2) that his plea of guilty was made under a threat by the State to file an habitual criminal charge, which charge was not brought because he entered the guilty plea. There is no merit to either claim.

The only evidence as to a bargain for 5 years is defendant's own statement. The testimony of his attorney on cross-examination is as follows: "Q. It was brought to the Court's attention that there was a plea bargain at the time of the plea? A. Yes, sir. Q. And just

for the record again, will you tell us what the plea bargain was? A. The plea bargain was that the auto theft would be dismissed and that Mr. Mayes would plead to the forgery charge. Q. There was no discussion of any certain amount of years that Mr. Mayes was to receive? A. No, sir. Q. You never indicated to Mr. Mayes that he was going to get a definite 'X' number of years, did you? A. No, I did not. Q. Did you give him a best guess as to what he might get? A. No."

At the time of the acceptance of the plea, the defendant was specifically asked whether any promise had been made to him as to a possible sentence. The proceedings show the following: "THE COURT: Have any promises been made to you at all as to what the possible sentence may be? THE DEFENDANT: None other than the dismissal of the other charge."

Defendant's next allegation is that he was coerced by the possible filing of an habitual criminal charge. At the time of the filing of the forgery information defendant could well have expected an habitual criminal charge. None was filed. The record does not substantiate defendant's claim that this was a part of the plea bargain. A charge of auto theft was pending against defendant at the time of the bargain, and the evidence indicates that he withdrew his original plea of innocent and pled guilty to forgery in return for the State's agreement to drop the auto theft charge. The testimony on the withdrawal of the plea is as follows: "THE COURT: It is my understanding you wish to withdraw your plea of not guilty, is that correct? THE DEFENDANT: I was arraigned also on auto theft, Your Honor, and I think there is a Stipulation about that, isn't there? MR. CULLAN: Yes. We will get into that in a minute. THE COURT: I understand there is a plea bargain, if you enter your plea to forgery, the auto theft charge will be dismissed. THE DEFENDANT: Yes I have discussed it and I would enter a guilty plea to the forgery charge. THE COURT: Mr. Cullan, are you

convinced this proposed plea here today, after your discussion with him, is a free, intelligent, and a voluntary plea? MR. CULLAN: Yes, I am, Your Honor. THE COURT: And are you convinced that there is a factual basis for this forgery charge? MR. CULLAN: Yes, Your Honor."

Defendant's trial counsel testified as follows: "Q. Mr. Cullan, the plea bargain that was struck between you and Mr. Slusky was followed, was it not? A. Yes. Q. It was brought to the Court's attention that there was a plea bargain at the time of the plea? A. Yes, sir. Q. And just for the record again, will you tell us what the plea bargain was? A. The plea bargain was that the auto theft would be dismissed and that Mr. Mayes would plead to the forgery charge. * * * Q. This discussion about the habitual criminal charge being filed, was it not your testimony in response to Mr. Edmunds' questions that Mr. Slusky told you that he didn't intend to file it? A. That's correct. Q. So you didn't go to Mr. Mayes and try to coerce a plea from him by telling him that, you didn't say that Mr. Slusky was going to pile it on? A. No, I told him Mr. Slusky was not going to file habitual criminal charges. Q. So that would not have been a consideration then, would it? A. I didn't think it was at the time. Q. You had definitely told him that this wasn't in the picture, that they weren't going to file? A. That's correct. Q. So the only negotiations then had to do with the dropping of the auto theft charge, plea to the forgery with no recommendation from the County Attorney as to any number of years, is that correct? A. That's correct. Q. And isn't this all reflected in the transcript of the plea? A. Yes, it is."

There is no merit to any of defendant's contentions. With eight previous convictions, he was no stranger to criminal proceedings. We are convinced that his plea was voluntary. He was represented by competent counsel and his rights were fully protected. Actually, the

sentence he received on the forgery conviction was only 1 year more than he received for the same crime in 1967. See State v. Mayes (1968), 183 Neb. 165, 159 N. W. 2d 203.

Where the record discloss that a plea of guilty was understandingly and voluntarily entered, it is not subject to post conviction relief. State v. Turner (1971), 186 Neb. 424, 183 N. W. 2d 763.

The judgment denying post conviction relief is affirmed.

AFFIRMED.

JOSEPH T. BURAS, APPELLANT, V. SCHOOL DISTRICT NO. 37, SARPY COUNTY, NEBRASKA, NOW KNOWN AS THE SCHOOL DISTRICT OF GRETNA, COUNTY OF SARPY, ET AL., APPELLEES.
212 N. W. 2d 632

Filed December 7, 1973. No. 39098.

Schools and School Districts: Municipal Corporations: Public Lands: Words and Phrases. A school district is an "other municipal corporation" and its real estate is "other public grounds" within the provisions of section 25-202, R. R. S. 1943.

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

John P. Kelly and Eugene T. Atkinson of Atkinson & Kelly, for appellant.

Perry, Perry & Witthoff, for appellees.

Heard before SPENCER, SMITH, and CLINTON, JJ., and KUNS and FLORY, District Judges.

FLORY, District Judge.

In this action, plaintiff-appellant, Joseph T. Buras, sought to quiet the title in himself to one acre of land in the southwest corner of Section 1, Township 12 North, Range 10 East of the 6th P.M., Sarpy County, Nebraska. He owned the other 159 acres in the quarter section, and

had used the acre as pasture since 1957. The defendant school district, appellee, was the record titleholder to the acre that had formerly been used as a school site. In 1957 the improvements were sold and removed. The trial court dismissed plaintiff's petition. We affirm.

Section 25-202, R. R. S. 1943, so far as pertinent here, provides: "An action for the recovery of the title or possession of lands, tenements or hereditaments, or for the foreclosure of mortgages thereon, can only be brought within ten years after the cause of action shall have accrued; Provided, no limitation shall apply to the time within which any county, city, town or village, *or other municipal corporation,* may begin an action for the recovery of the title or possession of any public road, street, alley *or other public grounds,* or city or town lots." (Italics supplied.)

We construe the terms "other municipal corporation" and "other public grounds" to apply to school districts and their lands.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MARDEN MAYES, APPELLANT.
212 N. W. 2d 623

Filed December 7, 1973. No. 39108.

1. **Penal Institutions: Administrative Law: Criminal Law.** While receiving treatment in a hospital or psychiatric facility, a prisoner remains subject to the jurisdiction and custody of the Division of Corrections.
2. **Penal Institutions: Escape.** A failure to return to a treating facility after a temporary leave constitutes an escape from custody under the provisions of section 28-736, R. R. S. 1943.
3. **Penal Institutions: Escape: Administrative Law: Double Jeopardy.** An administrative disciplinary proceeding in which a prisoner loses good time for escape from confinement does not place him in jeopardy. A subsequent conviction and sentence in a criminal prosecution for the escape do not therefore constitute double jeopardy.

Appeal from the District Court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed.

T. Clement Gaughan and Richard L Goos, for appellant.

Clarence A. H. Meyer, Attorney General, and Ralph H. Gillan, for appellee.

Heard before SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

SPENCER, J.

Defendant appeals his conviction for escape from custody and urges two assignments of error. He contends: (1) The facts proved at the trial do not constitute a crime under section 83-184, R. R. S. 1943; and (2) the court erred in overruling his motion to dismiss. We affirm.

Defendant was sentenced to the Nebraska Penal and Correctional Complex on June 22, 1972, for a term of 8 years. He was subsequently transferred to the Veterans Hospital in Lincoln, Nebraska, for medical treatment. On September 30, 1972, the Veterans Hospital, without the permission of the Penal and Correctional Complex authorities issued defendant a pass to the Nebraska-Minnesota football game. He did not attend the game nor did he return to the Veterans Hospital or to the Penal and Correctional Complex. On October 17, 1972, he was arrested in Gulfport, Mississippi, and subsequently was returned to the Penal and Correctional Complex.

Upon his return he was deprived of 26 days of previously earned good time by the good time forfeiture board. He was also charged with the costs incurred in returning him from Mississippi. On May 3, 1973, defendant was sentenced to a term of 1 year in the Penal and Correctional Complex, to run consecutively to the sentence then being served.

Defendant seems to be laboring under the misappre-

hension that since permission to attend the football game was given by the Veterans Hospital and not by the Director of Corrections, he could go where he pleased, and be guilty of no crime. We are unable to accept this premise.

Defendant was lawfully transferred to the Veterans Hospital for medical attention. This was authorized by sections 83-184 and 83-180(2), R. R. S. 1943. The latter section provides in part as follows: "While receiving treatment in such hospital or psychiatric facility, the person shall remain subject to the jurisdiction and custody of the Division of Corrections, and shall be returned to the division when, prior to the expiration of his sentence, such hospital or psychiatric treatment is no longer necessary." At all times defendant remained subject to the custody and control of the Penal and Correctional Complex. He broke that custody by failing to return from the football game and fleeing the state. This constitutes an escape from custody under the provisions of section 28-736, R. R. S. 1943.

Defendant has some theory that because the pass was issued by the Veterans Administration and not by the Nebraska penal authorities, his action in failing to return did not constitute an escape. He also seems to contend that the hospital authorities did not have the authority to give him a football pass.

The obvious answer to these contentions is that while receiving medical treatment in the Veterans Administration Hospital defendant remained subject to the jurisdiction and control of the Penal and Correctional Complex. Regardless of how he left the hospital he was ultimately required to return to the Penal Complex. When he did not return to either the hospital or the Complex, but left the state, he obviously escaped.

Defendant next argues that because he was punished administratively by the revocation of accumulated good time, his subsequent prosecution constituted double jeopardy. This contention was answered by State v.

Maddox (1973), *ante* p. 361, 208 N. W. 2d 274, in which we said: "An administrative disciplinary proceeding in which a prisoner loses good time for escape from confinement does not place him in jeopardy. A subsequent conviction and sentence in a criminal prosecution for the escape do not therefore constitute double jeopardy which federal constitutional clauses prohibit."

Finally, defendant attempts to attack the constitutionality of section 83-183(5) (b), R. R. S. 1943. This provision requires an escapee from the Penal Complex to pay the reasonable costs incurred in returning him to the Penal and Correctional Complex. This is an appeal from a criminal conviction and sentence. The trial court did not, as a part of its sentence, make any order concerning the reimbursement of the State for the costs incurred in returning defendant from Mississippi. This is purely a collateral matter between the Director of Corrections and defendant. It is not a proper matter to be raised in this action and we do not pass on it.

The judgment is affirmed.

AFFIRMED.

UNIVERSITY OF NEBRASKA AT OMAHA, APPELLANT, V. THEODORE L. PAUSTIAN, APPELLEE.
212 N. W. 2d 704

Filed December 7, 1973. No. 39171.

Workmen's Compensation: Constitutional Law: Penalties. The provisions of section 48-125, R. R. S. 1943, of the Workmen's Compensation Act, providing that "fifty per cent shall be added for waiting time for all delinquent payments after thirty days' notice has been given of disability," does not impose a penalty payable to an individual within the prohibitions of Article VII, section 5, of the Constitution of Nebraska.

Appeal from the District Court for Douglas County: JAMES P. O'BRIEN, Judge. Affirmed.

Clarence A. H. Meyer, Attorney General, and Harold S. Salter, for appellant.

James C. Cripe of Taylor, Hornstein, Peters & Cripe, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ.

CLINTON, J.

This is an appeal from an order of the District Court for Douglas County affirming an order of the Workmen's Compensation Court en banc, which in turn affirmed an order of a single judge of the compensation court, awarding the plaintiff under the provisions of section 48-125, R. R. S. 1943, 50 percent additional compensation for delinquent payments. The payments involved are those for the period November 29, 1971, to September 17, 1972.

The propriety of the award under the facts of the case is not an issue on this appeal. The only issue here is whether section 48-125, R. R. S. 1943, is unconstitutional because it authorizes the recovery of a penalty by a private individual contrary to the provisions of Article VII, section 5, of the Constitution of Nebraska. We affirm the award.

Section 48-125, R. R. S. 1943, provides in part as follows: "Except as hereinafter provided, all amounts of compensation payable under the provisions of this act shall be payable periodically in accordance with the methods of payment of wages of the employee at the time of the injury or death; Provided, fifty per cent shall be added for waiting time for all delinquent payments after thirty days' notice has been given of disability." Article VII, section 5, of the Constitution of Nebraska, provides as follows: "All fines, penalties, and license money, arising under the general laws of the state, except fines and penalties for violation of laws prohibiting the overloading of vehicles used upon the public roads and highways of this state, shall belong

and be paid over to the counties respectively, where the same may be levied or imposed, and all fines, penalties, and license money arising under the rules, by-laws, or ordinances of cities, villages, precincts, or other municipal subdivision less than a county, shall belong and be paid over to the same respectively. All such fines, penalties, and license money shall be appropriated exclusively to the use and support of the common schools in the respective subdivisions where the same may accrue, except that all fines and penalties for violation of laws prohibiting the overloading of vehicles used upon the public roads and highways shall be placed as follows: Seventy-five per cent in a fund for state highways, and twenty-five per cent to the county general fund where the fine or penalty is paid."

Neither party has cited to us any opinion of this court in which we have considered the constitutionality of section 48-125, R. R. S. 1943, in the light of Article VII, section 5, of the Constitution. Our own research has disclosed no such case. Neither have we been able to find an opinion from any other jurisdiction where a similar statute and constitutional provision were considered.

The appellant relies primarily upon the holding of this court in Abel v. Conover, 170 Neb. 926, 104 N. W. 2d 684. There the court had under consideration and declared unconstitutional provisions of section 7-106, R. R. S. 1943, which provided for treble damages in an action for deceit or collusion. In that case this court analyzed many of the preceding cases, distinguished some of them, and placed primary reliance on Sunderland Bros. Co. v. Chicago, B. & Q. R. R. Co., 104 Neb. 319, 177 N. W. 156, on rehearing, 104 Neb. 322, 179 N. W. 546, and said: "The holdings of that case are: A statute which imposes a liability for actual damages and in addition thereto a penalty to be paid to the injured party is repugnant to section 5, Article VIII, now Article VII, of the Constitution, which requires all fines

and penalties arising under the general laws to go exclusively to the school fund. A statute which imposes liability for actual damages and additional liability for the same act provides a penalty." The court also said: "It is clearly within the province of the Legislature to provide for liquidated damages in favor of a private person, although in form a penalty, if the amount provided bears a reasonable relation to the actual damages which might be sustained and which damages are not susceptible of measurement by ordinary pecuniary standards. But where it appears that the provision provides for the payment of an amount clearly in excess of compensatory damages, it is a penalty and violates the due process clause of the Constitution when considered with Article VII, section 5, thereof. . . . Whether or not the granting of double or treble damages is in violation of the due process clause standing alone, it is a violation of such clause when considered with Article VII, section 5, of the Constitution. Since all penalties must go to the benefit of the common schools of the state, a penalty for the benefit of a private person is violative of the cited constitutional provisions."

It seems clear to us that our holding in Abel v. Conover, *supra,* has no application in this case. Where the court there refers to "liability for actual damages" it seems evident that it is talking about actual damages as determined under the rules of the common law as applied by this court. The opinion in that case was founded upon a premise which the court stated in the following language: "It has been a fundamental rule of law in this state that punitive, vindictive, or exemplary damages will not be allowed, and that the measure of recovery in all civil cases is compensation for the injury sustained."

The Workmen's Compensation Act creates rights which did not exist at common law and the Legislature may place such restrictions thereon as it sees fit. Ray v. Sanitary Garbage Co., 134 Neb. 178, 278 N. W. 139.

Compensation under the act need bear no relationship to actual damages resulting from the injury. See Micek v. Omaha Steel Works, 136 Neb. 843, 287 N. W. 645, where this court rejected the contention that the claimant was not entitled to compensation because his earnings were greater after the injury than before.

It can scarcely be denied that the various measures of compensation as prescribed by the Workmen's Compensation Act are not to be equated with the term "actual damages" as used by this court in Abel v. Conover, *supra,* in connection with the interpretation of Article VII, section 5, Constitution of Nebraska. Our point may be illustrated by the following examples: Subsection (1) of section 48-121, R. R. S. 1943, makes two-thirds of weekly wages the standard of compensation for total disability. Imposition of the added 50 percent compensation or "penalty" for delay would make the "damage" payment 100 percent. Subsection (3) of section 48-121, R. R. S. 1943, provides compensation for losses from injuries in the specified categories, the so-called schedule injuries, on a purely arbitrary formula, e.g., the loss of an arm is compensated at 66 2/3 percent of daily wages during 225 weeks. This obviously has no necessary relationship to "actual damages." These and the other measures of compensation provided for by the compensation act are by legislative fiat the "damages" which the workman is entitled to in cases which at common law afforded no compensation whatever.

We have no doubt that it was within the province of the Legislature to increase the compensation by 50 percent for delay in payment of compensation due periodically. This court has on some occasions referred to this imposition as a penalty. See Gill v. Hrupek, 184 Neb. 436, 168 N. W. 2d 377. However, the statute itself does not use this designation. The fact that we have used the word penalty in a context that has no reference to the constitutional provision which we have

under consideration does not make it so.

We hold that the provision of section 48-125, R. R. S. 1943, providing that "fifty per cent shall be added for waiting time for all delinquent payments after thirty days' notice has been given of disability," does not impose a penalty payable to an individual within the prohibitions of Article VII, section 5, of the Constitution of Nebraska.

The appellee is awarded an attorney's fee in the amount of $450 for the services of his attorney in this court.

AFFIRMED.

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2. Ordinarily, real estate broker, who for commission undertakes to sell land on certain terms and within specified period, not entitled to compensation for his services unless he produces purchaser within time limited who is ready, able, and willing to buy upon terms prescribed. Huston Co. v. Mooney -------- 242
3. Where real estate broker obtains purchaser for real estate and no sale made during existence of agreement but sale therafter made by owner to person produced by agent but not on substantially terms that had been offered through agent's efforts, broker not entitled to commission for making sale. Huston Co. v. Mooney ---------- 242
4. Where plaintiff's contract is that he should sell or furnish defendant a purchaser for land, in order to entitle him to compensation provided in contract, he must show performance on his part; in other words, that he was the efficient, procuring cause of sale. Abboud v. Cir Cal Stables ---------- 396

5. Broker's petition for recovery of brokerage commission which fails to allege that he was the efficient, procuring cause of sale of land fails to state a cause of action. Abboud v. Cir Cal Stables ---------- 396

Buildings.

1. Change of level at entrances or exits of buildings to be expected and sidewalk and entrance elevations to most places, public and private, are quite without uniformity. Whitcomb v. State Fed. Sav. & Loan Assn. ---------- 26
2. Mere fact that invitee falls at entrance of building where difference in level present does not raise presumption of negligence. Whitcomb v. State Fed. Sav. & Loan Assn. ---------- 26
3. While owner of premises owes duty to invitee to exercise ordinary care to have premises in reasonably safe condition for use in manner consonant with purposes of invitation, generally, there is no duty on part of inviter owner to protect invitee against hazards which are known to invitee or so apparent that he may reasonably be expected to discover them and protect himself. Whitcomb v. State Fed. Sav. & Loan Assn. ---------- 26

Burglary.

A breaking necessary to constitute offense of burglary may be by act of physical force, however slight, by which obstruction to entering is removed; lifting of a hook with which a door is fastened or opening of a closed door in order to enter a building is a breaking, although entry might have been effected through a door already open. State v. Campbell -- 394

Carriers.

1. Indemnification clause in a trip lease of operating equipment by licensed motor carrier, subject to ICC regulations, which obligates lessor to reimburse lessee for any payment made on account of any accident, claim, or suit arising out of operation of equipment during term of lease unenforceable as against public policy. Denver Midwest Motor Freight, Inc. v. Busboom Trucking, Inc. ---------- 231
2. Under section 75-315, R. R. S. 1943, relating to motor common carriers, the phrase "willful failure" ordinarily means behavior that justifies the belief in

intentional failure. The latter may be inferred from nonperformance of the requisite act over a long period of time. Dahlsten v. Harris ---------- 652

Checks.

1. Offense of issuing check without sufficient funds complete when check issued with knowledge and intent to defraud, even though no one defrauded thereby. State v. Koester ---------- 485
2. To be guilty of crime of uttering insufficient fund check under section 28-1213, R. S. Supp., 1972, not necessary that there be any reliance upon false representation of defendant as is necessary in prosecution for obtaining of money under false pretenses. State v. Koester ---------- 485

Civil Service.

1. Section 19-1808, R. R. S. 1943, provides that no person in classified civil service shall be removed, suspended, demoted, or discharged except for cause and then only upon written accusation of appointing power or any citizen or taxpayer; written statement of such accusation shall be served upon accused and duplicate filed with commission. Wachtel v. Fremont Civil Service Commission ---------- 49
2. Section 19-1808, R. R. S. 1943, provides that power of discharge lodged solely in civil service commission. Wachtel v. Fremont Civil Service Commission 49
3. Civil Service Act, where applicable, prohibits suspension or discharge of employees for political or religious reasons but provides that employees may be suspended or discharged for cause for any of reasons listed in section 19-1807, R. R. S. 1943. Sailors v. City of Falls City ---------- 103
4. Final determination of discharge of employee under Civil Service Act rests in civil service commission. Sailors v. City of Falls City ---------- 103
5. If evidence in District Court on appeal sufficient to show that order of commission suspending or discharging employee made in good faith for cause, then order of commission must be affirmed. Sailors v. City of Falls City ---------- 103
6. One asserting disqualification of civil service commissioner for prejudice must prove facts and circumstances which clearly show such bias or preju-

dice in order to overcome presumption of impartiality. Sailors v. City of Falls City ---------- 103

Collisions.

Where aircraft equipped with dual controls and both occupants pilots, proof as to who may have been piloting craft at time of take-off not conclusive where crash more than an hour later. Mitchell v. Eyre -- 182

Compacts.

1. In exercising the authority granted by the Driver License Compact, the Director of the Nebraska Department of Motor Vehicles has no power or authority other than that specifically conferred. Johnston v. Department of Motor Vehicles ---------- 606
2. To be applicable in Nebraska, a report of a conviction in another jurisdiction must substantially comply with the provisions set out in Article II of the Driver License Compact. Johnston v. Department of Motor Vehicles ---------- 606
3. For a report of an out-of-state conviction to be effective in Nebraska under the provisions of the Driver License Compact, it must be authenticated in due form for admission in evidence in the courts of this State. Johnston v. Department of Motor Vehicles ---------- 606

Confessions.

A statement made by a defendant, although inadmissible, due to a failure to comply with Miranda, during the State's case-in-chief, is admissible for impeachment purposes. State v. Bazis ---------- 586

Constitutional Law.

1. Habitual criminal statute does not contravene constitutional prohibition against cruel and unusual punishment. State v. Martin ---------- 212
2. Attack upon constitutionality of a statute cannot ordinarily originate on appeal from District Court. Craig v. Gage County ---------- 320
3. Administrative disciplinary proceeding in which prisoner loses good time for escape from confinement does not place him in jeopardy; subsequent conviction and sentence in criminal prosecution for escape do not therefore constitute double jeopardy

which federal constitutional clauses prohibit. State v. Maddox ---------- 361
4. Although defendant not entitled under all circumstances to jury containing members of his race, State's purposeful racial denial of their participation as jurors in the administration of justice violates Equal Protection Clause; discrimination, however, may not be assumed but must be proved; not proved by establishing that identifiable group in community is underrepresented by as much as ten percent. State v. Campbell ---------- 394
5. Duties of court stated where jury impaneled and sworn as one of several juries selected from single jury panel for subsequent trial of series of criminal cases. State v. Myers ---------- 466
6. Courts will not decide questions of constitutionality unless they have been raised by litigant whose interests are adversely affected. Ritums v. Howell -- 503
7. A court has no power to summarily pass upon constitutionality of an act of Legislature; it has power only to decide justiciable disputes; its power to declare an act of Legislature unconstitutional arises only when it affects a right of a litigant in such a case. Ritums v. Howell ---------- 503
8. One may not urge unconstitutionality of a statute who is not harmfully affected by particular feature of statute alleged to be in conflict with Constitution. Ritums v. Howell ---------- 503
9. In order to deny a claim to the privilege against self-incrimination by a witness, it must be perfectly clear to the judge from a careful consideration of all the circumstances in the case that the witness is mistaken and that the answer or answers cannot possibly have a tendency to incriminate. State v. Bazis ---------- 586
10. A legislative act will not be permitted, even if an intent so to do is clear, to operate retrospectively where it will have the effect of invalidating or impairing rights which have vested by virtue of the judgment of a court. Karrer v. Karrer ---------- 610
11. The provisions of section 42-365, R. S. Supp., 1972, authorizing the modification of alimony awards, do not apply to judgments entered previous to July 6, 1972, awarding alimony in gross. Karrer v. Karrer - 610
12. Section 60-430.07, R. R. S. 1943, is not vague, indefinite, or uncertain. State v. Etchison -------- 629

13. The fixing of criminal penalties is primarily a legislative function and courts will not interfere except in those cases where the punishment is so excessive as to shock the sense of mankind. State v. Etchison ---------- 629
14. The double jeopardy clauses of the United States and Nebraska Constitutions do not preclude successive prosecutions by federal and Nebraska governments in the exercise of concurrent jurisdiction over substantially the same offense. State v. Pope ---- 689
15. The double jeopardy clauses do not prevent Nebraska fixing higher standards by statute or, in the absence of statute, by judicial decision. State v. Pope ---------- 689
16. At common law, where there is concurrent jurisdiction over substantially the same offense, the determination of whether a federal conviction bars prosecution by Nebraska depends upon vindication of the public policy of the State. State v. Pope -- 689
17. Where there is concurrent jurisdiction over substantially the same offense and the public policy of the State requires vindication, then in order to make federal punishment for the act a satisfaction and bar to state trial and sentence, it is necessary that the federal sentence should be complete and should have been executed to its full extent. State v. Pope 689
18. The compulsory giving of a blood, breath, or urine sample under the provisions of the implied consent law does not violate the constitutional right against self-incrimination under the Fifth Amendment to the Constitution of the United States. Wiseman v. Sullivan ---------- 724
19. A driver who is requested to give a blood, breath, or urine sample under the implied consent statute is not entitled prior to being asked to give such sample to be warned of his right not to incriminate himself. Wiseman v. Sullivan ---------- 724
20. If a Miranda type warning is given in connection with information concerning the implied consent statute, it is incumbent upon the arresting officer to explicitly inform the arrested person that the constitutional rights to counsel and against self-incrimination which may have been previously explained are not applicable to the decision the driver must make concerning the giving of samples, that he has no right to consult with an attorney before

making that decision, and that the right against self-incrimination does not permit the driver to refuse to either comply with or answer the request for such samples. Wiseman v. Sullivan ---------- 724

21. Any unreasonable delay occurring in the prosecution of any felony offense prior to the filing of an information or the return of an indictment will be considered by the court, in conjunction with statutory requirements, in determining whether or not a defendant has been denied the constitutional right to a speedy trial. State v. Born ---------- 767

22. The provisions of section 48-125, R. R. S. 1943, of the Workmen's Compensation Act, providing that "fifty per cent shall be added for waiting time for all delinquent payments after thirty days' notice has been given of disability," does not impose a penalty payable to an individual within the prohibitions of Article VII, section 5, of the Constitution of Nebraska. University of Nebraska at Omaha v. Paustian ---------- 840

Contempt.

1. Civil contempt proceeding has for its purpose preservation and enforcement of rights of private parties. Megel v. City of Papillion ---------- 238

2. Failure to obey an order of the court made for benefit of opposing party ordinarily civil contempt, but the disobedience must be willful before it may be punished as a contempt. Megel v. City of Papillion ---------- 238

3. If impossible to comply with order of the court, failure to comply not willful. Megel v. City of Papillion ---------- 238

4. By statute, courts of record have power to punish as for criminal contempt persons guilty of willful disobedience of or resistance willfully offered to any lawful process or order of court, or any willful attempt to obstruct proceedings, or hinder due administration of justice in any suit or proceeding pending before court. Payne v. Glebe ---------- 268

Continuances.

1. Matter of granting of continuance in criminal case peculiarly within province of discretionary judgment of trial court. State v. Coleman ---------- 441

2. Criminal defendant may not discharge his counsel

at eve of trial and seek continuance without demonstrating good cause therefor. State v. Coleman 441
3. Requests for appointment of new counsel on eve of trial should not become vehicle for achieving delay. State v. Coleman ---------- 441

Contracts.

1. By its terms, section 44-501, R. R. S. 1943, mandatorily requiring inclusion of provisions of 1943 Standard Fire Insurance Policy of State of New York are applicable only to policy or contract of fire and lightning insurance. Wulf v. Farm Bureau Ins. Co. ---------- 34
2. Fire insurance policy legally issued in Nebraska which contains provision requiring suit be brought within 12 months after inception of loss, but which also contains provisions amending any terms of policy which are in conflict with state statutes to conform with such statutes, subject to limitations set out in section 44-357, R. R. S. 1943. Wulf v. Farm Bureau Ins. Co. ---------- 34
3. A corporation may agree to pay any rate of interest by agreeing in writing which sets out amount or rate charged. § 45-101, R. R. S. 1943. Northland Mortgage Co. v. Royalwood Estates, Inc. ---- 46
4. Instruments made in reference to and as part of transaction should be considered and construed together. Northland Mortgage Co. v. Royalwood Estates, Inc. ---------- 46
5. Specific performance of contract will not be decreed unless minds of parties to contract have met. Reifenrath v. Hansen ---------- 58
6. To establish contract capable of specific enforcement, must be shown was definite offer and unconditional acceptance. Reifenrath v. Hansen ---- 58
7. Not function of court of equity to make contract for parties or to supply any material stipulations thereof. Reifenrath v. Hansen ---------- 58
8. Memorandum required by statute of frauds must contain essential terms of contract. Reifenrath v. Hansen ---------- 58
9. Under Nebraska Revenue Act of 1967, if any property was sold prior to January 1, 1968, under installment contract which conforms to provisions of Section 453 of Internal Revenue Code, and taxpayer has elected option provided for in that section,

capital gain portion of, or income portion of, any contract payment received on or after January 1, 1968, is to be included in computation of taxpayer's adjusted federal income tax liability which is subject to Nebraska tax rate. Altsuler v. Peters ---- 113

10. An option to purchase land constituting homestead void when not executed and acknowledged by both husband and wife as required by section 40-104, R. R. S. 1943. Struempler v. Peterson ---------- 133

11. Where contract for purchase and sale of real estate includes both homestead and nonhomestead property but not executed and acknowledged as required by section 40-104, R. R. S. 1943, specific performance may be obtained as to nonhomestead land with abatement of total purchase price, where contract under its provisions clearly severable as to nonhomestead property. Struempler v. Peterson ---- 133

12. Where contract not severable as between homestead and nonhomestead property, Supreme Court will not ordinarily attempt to make new contract for parties; nor impose new conditions; nor will it require specific performance of contract which does not contain substance of agreement made. Struempler v. Peterson ---------- 133

13. In quantum meruit action, price agreed upon by parties competent evidence of reasonable value, and when this is only evidence on subject, it presents proper measure of damages. Koehler v. Boyle -- 143

14. General contractor, in control of premises where work performance under contract with owner to be carried out, owes duty to persons rightfully on premises to keep premises in reasonably safe condition while contract in course of performance. Hand v. Rorick Constr. Co. ---------- 191

15. Duty of general contractor to employees of subcontractor extends only to providing reasonably safe place to work as distinguished from apparatus, tools, or machinery furnished by subcontractor for use of his own employees. Hand v. Rorick Constr. Co. ---- 191

16. General contractor's mere failure to inspect scaffold owned, erected, and controlled by subcontractor and furnished by subcontractor for use of his own employees does not make general contractor liable to subcontractor's employees for injuries caused by defects in scaffold. Hand v. Rorick Constr. Co. ---- 191

17. Provision in contract between general contractor and

owner providing: "The Contractor shall take all necessary precautions for the safety of employees on the work, and shall comply with all applicable provisions of Federal, State, and Municipal safety laws and building codes to prevent accidents or injury to persons on, about or adjacent to the premises where the work is being performed," does not enlarge common law duty of general contractor to employees of subcontractor so as to require inspection by general contractor of tools and equipment furnished by subcontractor for exclusive use of his own employees. Hand v. Rorick Constr. Co. ---------- 191

18. Contractual provision regarding safety precautions does not have effect of giving to employee of subcontractor cause of action under Nebraska statutes pertaining to scaffold safety, because those statutes place liability upon person who erects, constructs, maintains, or supplies unsafe scaffold. Hand v. Rorick Constr. Co. ---------- 191

19. Indemnification clause in a trip lease of operating equipment by licensed motor carrier, subject to ICC regulations, which obligates lessor to reimburse lessee for any payment made on account of any accident, claim, or suit arising out of operation of equipment during term of lease unenforceable as against public policy. Denver Midwest Motor Freight, Inc. v. Busboom Trucking, Inc. ---------- 231

20. When one school district by statute succeeds to all property and assets, and is responsible for all unbonded indebtedness of former dissolved districts, it is liable for all breaches of teachers' contracts by former districts if latter would have been liable. Knapp v. School Dist. No. 109R ---------- 237

21. Where real estate broker employed to procure purchaser of real property, he is entitled to compensation when has secured proposed purchaser ready, able, and willing to buy property on terms and conditions upon which broker authorized to procure such purchaser. Huston Co. v. Mooney ---------- 242

22. Ordinarily, real estate broker, who for commission undertakes to sell land on certain terms and within specified period, not entitled to compensation for his services unless he produces purchaser within time limited who is ready, able, and willing to buy upon terms prescribed. Huston Co. v. Mooney ---------- 242

23. Where real estate broker obtains purchaser for real

estate and no sale made during existence of agreement but sale thereafter made by owner to person produced by agent but not on substantially terms that had been offered through agent's efforts, broker not entitled to commission for making sale. Huston Co. v. Mooney ---------- 242

24. Lien of one who furnishes material for repairs and alteration of building upon land in possession of vendee under executory contract of purchase subordinate to lien of vendor who retains legal title to secure deferred installments of purchase price except in cases where vendor himself promotes improvement or causes it to be made. O'Hara Plumbing Co., Inc. v. Roschynialski ---------- 246

25. Injury is either expected or intended within meaning of exclusion in policy of liability insurance reading as follows: "This policy does not apply to bodily injury or property damage which is either expected or intended from the standpoint of the insured," if insured acted with specific intent to cause harm to third party. State Farm Fire & Cas. Co. v. Muth -- 248

26. Judgment creditor of insured under policy of liability insurance entitled to award of attorney's fee under section 44-359, R. S. Supp., 1972, where insurer brings action for declaratory judgment to determine coverage under policy and judgment creditor prevails. State Farm Fire & Cas. Co. v. Muth ---------- 248

27. Provision in insurance policy for reinstatement represents valuable contract right which survives lapse of policy and which insurer cannot arbitrarily condition or deny. Ewoldt v. American Nat. Ins. Co. -- 290

28. Purpose and effect of statutory and policy provisions requiring application for reinstatement of lapsed insurance policy to permit insurer to reexamine risk it is considering reinsuring. Ewoldt v. American Nat. Ins. Co. ---------- 290

29. Requirement, for reinstatement of life insurance policy, that satisfactory evidence of insurability be presented is part of contract of which insurer entitled to performance. Ewoldt v. American Nat. Ins. Co. -- 290

30. Upon receipt of reinstatement application of insurance policy, insurer has right to require further evidence of insurability or to agree to reinstate policy on basis of information in application itself, but in either event, reinstatement never effectuated

until insurer acts on application. Ewoldt v. American Nat. Ins. Co. ---------- 290
31. Insurer under fidelity bond is liable only for losses sustained by insured and of type described in insurance contract. KAMI Kountry Broadcasting Co. v. United States F. & G. Co. ---------- 330
32. Statute of frauds provides that agreement for sale of land void in absence of written memorandum signed by vendor. Krueger v. Callies ---------- 376
33. Where is question as to meaning of contract, it is to be construed most strongly against party preparing it. Abboud v. Cir Cal Stables ---------- 396
34. Where plaintiff's contract is that he should sell or furnish defendant a purchaser for land, in order to entitle him to compensation provided in contract, he must show performance on his part; in other words, that he was the efficient, procuring cause of sale. Abboud v. Cir Cal Stables ---------- 396
35. While writing consisting of several separate documents may satisfy statute of frauds, fact that each is part of a total writing relied upon must be shown either by express references in documents or from contents of documents, but, in attempting to satisfy statute of frauds, fact that two or more writings constitute part of entire written agreement may not be shown by parol. Abboud v. Cir Cal Stables ---------- 396
36. An action for relief of reformation of a contract rests on theory that parties came to an understanding, but in reducing it to writing, through mutual mistake or mistake and fraud, some provision of language was omitted, inserted, or incorrectly worded, and action is to change instrument so as to conform it to contract agreed upon. Schweitz v. State Farm Fire & Cas. Co. ---------- 400
37. In proceeding to reform a contract on ground of mutual mistake, burden of proof on party interposing that plea. Schweitz v. State Farm Fire & Cas. Co.-- 400
38. In order to obtain reformation of written instrument on ground of mistake, mistake must be mutual; to grant such relief, equity insists that reformation must be consistent with a complete mutual understanding of essential terms of their bargain. Schweitz v. State Farm Fire & Cas. Co. ---------- 400
39. In order to warrant reformation of written instrument in any material respect, evidence must be clear,

convincing, and satisfactory; and, until overcome by such proof, terms of instrument must stand as evidencing intention of parties. Schweitz v. State Farm Fire & Cas. Co. ---------- 400

40. Contract of surety for compensation receives an interpretation in favor of objectively reasonable expectations of obligee. Cornett v. White Motor Corp. ---------- 496

41. Endorsement which is not misleading, ambiguous, or conflicting which amends an omnibus clause in uncertified automobile liability insurance policy by limiting application of omnibus clause to use of automobile by person over the age of 25 years, except for insured or any resident of his household, is authorized contract of insurance; such endorsement not proscribed by any statute, nor is it against public policy; it is not rendered void merely because it has not been filed with and approved by Department of Insurance prior to its issuance. Equity Mut. Ins. Co. v. Allstate Ins. Co. ---------- 515

42. If insurance contract prepared by insurer, and contains provisions which under facts are reasonably subject to different interpretations, and purpose and intent of provision or clause clear, the one favorable to insured will be adopted if harmonious with enforcement of intent and purpose of provisions of whole policy. Townley v. Whetstone ---------- 541

43. Separate exclusionary clause in insurance contract should be construed in light of provisions of whole contract and harmonized therewith if reasonably possible, considering intent and purposes of parties drawn from examination of whole contract of insurance. Townley v. Whetstone ---------- 541

44. A manufacturer or seller may be held liable under advertising warranty even though he is not in privity of contract with the purchaser. Hawkins Constr. Co. v. Matthews Co., Inc. ---------- 546

45. An insurance policy is a contract which requires an offer and acceptance to be effective. Chappelear v. Grange & Farmers Ins. Co. ---------- 589

46. Damages for breach of contract that are susceptible of definite proof are recoverable only to the extent the evidence affords a basis of ascertaining their amount in money with reasonable certainty. Kroeger v. Franchise Equities Inc. ---------- 731

47. Under the Uniform Commercial Code, a security

interest continues in collateral notwithstanding sale, exchange or other disposition thereof by the debtor unless his action was authorized by the secured party in the security agreement or otherwise, and also continues in any identifiable proceeds including collections received by the debtor. Farmers State Bank v. Edison Non-Stock Coop. Assn. ---------- 789

48. Where a sale of farm products by a debtor engaged in farming operations is claimed to be authorized under the terms of a security agreement, the sale must ordinarily be made in compliance with the conditions and limitations of the authorization. Farmers State Bank v. Edison Non-Stock Coop. Assn. ---------- 789

49. A company engaged in the transmission and distribution of natural gas to the public on a regular basis is a public utility company within the meaning of section 70-624.04, R. R. S. 1943, providing that employees of such company may serve on a council or board of a municipal corporation with whom the utility company has contracts, without invalidating those contracts. Kansas-Nebraska Nat. Gas Co., Inc. v. Wiles ---------- 795

50. Under sections 79-488.06 and 79-328 (12), R. R. S. 1943, a school bus driver's contract is valid and enforceable if he complies with the statutory requirements before operating a bus, notwithstanding a failure to fully comply before the contract was entered into. Rase v. Southeast Nebraska Consol. School Dist. ---------- 800

51. Rescission of a contract is an affirmative defense which must be pleaded and cannot be asserted under a general denial. Rase v. Southeast Nebraska Consol. School Dist. ---------- 800

52. Under the Uniform Commercial Code the seller retains an insurable interest in goods so long as title to or any security interest in the goods remains in him. Bowman v. American Home Assur. Co. -- 810

53. Under the Uniform Commercial Code, unless otherwise explicitly agreed, title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods. Bowman v. American Home Assur. Co. ---------- 810

Controlled Substances.

1. Evidence relating to tests or analyses by State may be suppressed where, as result of neglect by representative of State, evidence necessary to enable defense to conduct tests or analyses is unavailable. S. 29-1913 (2), R. S. Supp., 1972. State v. Brodrick 19
2. Proof of physical or constructive possession of a drug with knowledge of its presence and its character as controlled substance sufficient to support finding of possession. State v. Shimp ---------- 137
3. A female 15 years of age or older convicted of unlawful possession of controlled substance, except marijuana, may be sentenced to Division of Corrections for term of 2 to 4 months. State v. Shimp 137
4. Where only evidence in prosecution involving possession of a controlled substance tends to establish actual physical possession, no special definition of term possession required to be given to jury. State v. Myers ---------- 146
5. Possession of a large quantity of a controlled substance packaged in a form customarily used for distribution will support a finding of possession with intent to distribute. State v. Sullivan ------- 621

Corporations.

1. A corporation may agree to pay any rate of interest by agreement in writing which sets out amount or rate charged. S. 45-101, R. R. S. 1943. Northland Mortgage Co. v. Royalwood Estates, Inc. ---- 46
2. Nebraska Revenue Act of 1967 does not authorize State Tax Commissioner to exclude corporations having in effect valid Subchapter S election and its shareholders from benefit of transitional period regulation promulgated under section 77-27,124, R. R. S. 1943, pertaining to filing of returns for taxable periods of less than 12 calendar months. Altsuler v. Peters ---------- 113

Counties.

Findings of District Court under Political Subdivision Tort Claims Act will not be disturbed on appeal unless they are clearly wrong. Craig v. Gage County ---------- 320

County Officers and Employees.

In counties where person who holds position of county

clerk ex officio clerk of District Court, service of notice upon county clerk of intention to appeal from proceedings before freeholders' board will be deemed sufficiently proved and shown notwithstanding absence of proof by attached acknowledgment of service, affidavit of service, or other means, where appropriate notice directed to county clerk of proper county appears in proper case file in District Court, and where notice in that file bears completed filing stamp, showing date and time of filing, and signature as ex officio clerk of District Court of person who holds both offices. Elson v. Harbert -- 437

Courts.

1. Not function of court of equity to make contract for parties or to supply any material stipulations thereof. Reifenrath v. Hansen ---------- 58
2. Courts will not decide questions of constitutionality unless they have been raised by litigant whose interests are adversely affected. Ritums v. Howell - 503
3. A court has no power to summarily pass upon constitutionality of an act of Legislature; it has power only to decide justiciable disputes; its power to declare an act of Legislature unconstitutional arises only when it affects a right of a litigant in such a case. Ritums v. Howell ---------- 503
4. An obvious, inadvertent omission from a statute may be supplied judicially. State v. Daniels ---- 602
5. For purposes of appeal a final order of a county court in a juvenile proceeding encompasses every dispositive order that rests on an adjudication of delinquency. State v. Belding ---------- 646
6. A limitation of 1 year for filing of a motion for new trial on the ground of newly discovered evidence and the filing of a supporting affidavit is not controlling in a juvenile proceeding in county court, but they affect the requirement of the exercise of reasonable diligence. State v. Belding ---------- 646
7. It is not within the function of the Supreme Court to decide moot questions. Kansas-Nebraska Nat. Gas Co., Inc. v. Wiles ---------- 795
8. The control of a divorce decree during the 6-month period pending finality is within the sound judicial discretion of the trial court. Miller v. Miller ---- 816

Criminal Conversation.

In the absence of evidence of some special element of damage for which the law provides a specific means of measurement, it is the general rule that in an action for criminal conversation damages are incapable of precise measurement and there is no fixed rule for determining the amount thereof. White v. Longo ---------- 703

Criminal Law.

1. Defendant in criminal action presumed sane until evidence of insanity produced; State then has burden of proving beyond reasonable doubt that defendant sane at time crime committed. State v. Jacobs -- 4
2. Test of responsibility for crime is defendant's capacity to understand nature of act alleged to be criminal and ability to distinguish between right and wrong with respect to the act. State v. Jacobs ---- 4
3. Fact that defendant may have some form of mental illness or deficiency does not of itself constitute a defense or establish lack of responsibility. State v. Jacobs ---------- 4
4. The law recognizes no form of insanity or uncontrolled impulse as a defense even though mental faculties are disordered or deranged if defendant had capacity to know what he was doing and to understand the act was wrong. State v. Jacobs -- 4
5. Issue of criminal responsibility to be determined from all the evidence. State v. Jacobs ---------- 4
6. Evidence relating to tests or analyses by State may be suppressed where, as result of neglect by representative of State, evidence necessary to enable defense to conduct tests or analyses is unavailable. § 29-1913 (2), R. S. Supp., 1972. State v. Brodrick ---------- 19
7. In prosecution for forcible rape, degree of force required to sustain conviction and degree of resistance required of prosecutrix are both relative depending upon particular circumstances. State v. Campbell ---------- 22
8. In prosecution for forcible rape, only required that female make reasonable resistance in good faith under all the circumstances and that resistance be such as to make nonconsent and actual opposition genuine and real. State v. Campbell ---------- 22
9. Where punishment of offense created by statute left

to discretion of trial court within prescribed limits, sentence imposed within those limits will not be disturbed on appeal unless appears to be abuse of discretion. State v. Kelly ---------- 41
State v. Shay ---------- 140
State v. Keyser ---------- 445
State v. Bazis ---------- 586
State v. Bayliss ---------- 594
State v. Michigaud ---------- 599

10. In examining question of abuse of discretion in imposing sentence, significance may be given to fact that crime committed involved violence and great moral turpitude. State v. Kelly ---------- 41
11. Allegation concerning ineffectiveness of counsel must be supported by facts which establish that counsel failed in his duty to carefully investigate and failed to present an issue which would assist his client, and that prejudice resulted from these failures. State v. Kelly ---------- 41
12. Person challenging competence of counsel has burden of proof to establish counsel's incompetence. State v. Kelly ---------- 41
13. As general rule, evidence of other crimes than that with which accused charged not admissible in criminal prosecution. State v. Brown ---------- 96
14. Evidence of possession of revolver a short time after stolen is admissible as circumstance in proof that it was stolen by person in whose possession it was found. State v. Brown ---------- 96
15. Competent for prosecution to put in evidence all relevant facts and circumstances which tend to establish any of constituent elements of crime with which accused charged even though such facts and circumstances may prove or tend to prove that defendant committed other crimes. State v. Brown -- 96
16. Well-established rules have developed concerning admission of evidence of other criminal conduct; although this evidence generally admissible since it suggests that defendant has propensity to commit crime, trial court can in its discretion admit relevant evidence of other criminal acts and reversal only commanded when it is clear questioned evidence has no bearing upon any of issues involved. State v. Brown ---------- 96
17. Problem concerning admissibility of evidence of other offenses is special aspect of broad general

problem of relevancy, and generally test of admissibility of such evidence whether evidence relevant and material to any issue on trial, or whether it fairly tends to prove particular offense charged or essential element thereof. State v. Brown ------ 96

18. Motion to vacate judgment and sentence under Post Conviction Act cannot be used as substitute for appeal or to secure further review of issues already litigated. State v. Weiland ---------- 111

19. Malice in legal sense denotes that condition of mind which is manifested by intentional doing of wrongful act without just cause or excuse. State v. Russ ---------- 130

20. Proof of physical or constructive possession of a drug with knowledge of its presence and its character as controlled substance sufficient to support finding of possession. State v. Shimp ---------- 137

21. Cases may be consolidated for trial if offenses charged based on same act or transaction. State v. Shimp ---------- 137

22. Ruling on motion for consolidation will not be disturbed in absence of abuse of discretion. State v. Shimp ---------- 137

23. A female 15 years of age or older convicted of unlawful possession of controlled substance, except marijuana, may be sentenced to Division of Corrections for term of 2 to 4 months. State v. Shimp -- 137

24. When sentence pronounced upon one already serving sentence from another court, second sentence does not begin to run until sentence which prisoner is serving has expired, unless court pronouncing second sentence specifically states otherwise. Nelson v. Wolff ---------- 141

25. Defendant may not complain of use of lawful tape recordings of conversations between himself and undercover agent made when he was not yet accused or under indictment when he has taken no steps to discover such evidence under section 29-1912, R. S. Supp., 1972, and has himself on cross-examination elicited from witness oral testimony of conversation. State v. Myers ---------- 146

26. Undercover agent who associates himself with police before association with wrongdoer or before actual perpetration of offense not an accomplice. State v. Myers ---------- 146

27. Nebraska Jury Instruction 14.81 pertaining to credi-

bility of witnesses applicable to testimony of defendant; not usually necessary to give at defendant's request special instruction highlighting his testimony. State v. Myers ---------- 146

28. Admissions generally pertain to past offense or transaction and do not include statements which are part of res gestae. State v. Myers ---------- 146

29. Where only evidence in prosecution involving possession of a controlled substance tends to establish actual physical possession, no special definition of term possession required to be given to jury. State v. Myers ---------- 146

30. If evidence in criminal case such as to warrant only verdict of greater offense, or one of not guilty, then is not proper to give instruction on lesser included offense. State v. DeBerry ---------- 177

31. Word "receiving" in offense of receiving stolen property, essentially means acquisition of control in sense of physical dominion or of apparent legal power to dispose. State v. Martin ---------- 212

32. Habitual criminal statute does not contravene constitutional prohibition against cruel and unusual punishment. State v. Martin ---------- 212

33. It is only where there is total failure of competent proof in criminal case to support material allegation in information, or where testimony adduced is of so weak or doubtful character that conviction based thereon could not be sustained, that trial court justified in directing verdict of not guilty. State v. Turner ---------- 261

34. Is no constitutional right to separate trial; rather, right statutory in origin and depends upon showing that prejudice will result from joint trial. State v. Turner ---------- 261

35. When evidence of in-court identification alleged to be tainted by prior illegal line-up first challenged on appeal, such challenge, in absence of clear showing of prejudicial error, will not be considered; failure to object will be attributed to defense counsel's choice of trial tactics. State v. Turner ------ 261

36. Sentence to 3 years' imprisonment for driving while intoxicated not excessive where defendant had six previous convictions for same offense, had violated his probation order, and had failed to continue with treatment for alcoholism. State v. Klinkacek ---- 293

37. In determining sufficiency of evidence to sustain

conviction in criminal prosecution, not province of Supreme Court to resolve conflicts in evidence, pass on credibility of witnesses, or weigh evidence. State v. Hiatt ---------- 315
State v. Tripple ---------- 713
38. Right of defendant's counsel to be present at time verdict received may be waived. State v. Hiatt ---- 315
39. Trial court not required to poll jury unless requested to do so. State v. Hiatt ---------- 315
40. Defendant may waive his right to have jury polled; when upon inquiry by court he replies in negative, right waived. State v. Hiatt ---------- 315
41. Test of sufficiency of circumstantial evidence in criminal prosecution is whether facts and circumstances tending to connect accused with crime charged are of such conclusive nature as to exclude to moral certainty every rational hypothesis except that of guilt. State v. Young ---------- 325
42. Ordinarily, hearsay rule does not operate to exclude evidence of a statement, request, or message offered for mere purpose of proving fact that the statement, request, or message was made or delivered, where such occurrence establishes a fact in issue or circumstantially bears on such a fact. State v. Young ---- 325
43. Evidence of other crimes, similar to that charged, relevant and admissible when it tends to prove a particular criminal intent which is necessary to constitute crime charged or where is some legal connection between the two upon which it can be said that one tends to establish the other or some essential fact in issue. State v. Young ---------- 325
44. In prosecution for manslaughter in commission of assault and battery, time of offense fixed at time fatal blow is struck. State v. Hare ---------- 339
45. To sustain conviction for manslaughter, evidence must be sufficient to justify finding of causal connection between unlawful act and death of victim. State v. Hare ---------- 339
46. Rule 11 of Federal Rules of Criminal Procedure not applicable to the states. State v. Leger ---------- 352
47. Not required that the court, prior to sentence, ascertain that factual basis exists for plea of guilty, or that defendant be personally addressed for that purpose. State v. Leger ---------- 352
48. Administrative disciplinary proceeding in which prisoner loses good time for escape from confinement

does not place him in jeopardy; subsequent conviction and sentence in criminal prosecution for escape do not therefore constitute double jeopardy which federal constitutional clauses prohibit. State v. Maddox ---------- 361

49. County attorney, under direction of District Court, has statutory authority to procure assistance in any trial of any person charged with felony, and in absence of facts which indicate contrary, presumed that District Court properly exercised its discretion in that regard. State v. Amen ---------- 362

50. Where person already has readiness or willingness to violate the law, mere fact that an officer provides what appears to be favorable opportunity for such violation or merely seeks to collect evidence of offense does not constitute unlawful entrapment and is no defense. State v. Amen ---------- 362

51. A breaking necessary to constitute offense of burglary may be by act of physical force, however slight, by which obstruction to entering is removed; lifting of a hook with which a door is fastened or opening of a closed door in order to enter a building is a breaking, although entry might have been effected through a door already open. State v. Campbell ---------- 394

52. When defendant voluntarily and understandingly enters plea of guilty with full knowledge and understanding of a prior violation of his rights, plea of guilty waives such rights. State v. Griger -------- 405

53. In imposing sentence and denying probation in criminal case judgment of District Court will not be disturbed on appeal unless record shows abuse of discretion. State v. Heckathorn ---------- 418

54. Threat to prosecute under state law where facts warrant prosecution should not be considered as coercive or intimidating; to constitute fear and coercion on a plea, petitioner must show he was subjected to threats or promises of illegitimate action; and fear of greater sentence may induce valid plea of guilty. State v. Fitzgerald -------- 436

55. Matter of granting of continuance in criminal case peculiarly within province of discretionary judgment of trial court. State v. Coleman ---------- 441

56. Criminal defendant may not discharge his counsel at eve of trial and seek continuance without demonstrating good cause therefor. State v. Coleman ---- 441

57. Requests for appointment of new counsel on eve of trial should not become vehicle for achieving delay. State v. Coleman ---------- 441
58. Any search of person of arrestee incident to such arrest constitutionally reasonable. State v. Coleman ---------- 441
59. In absence of statute, District Court after commitment of prisoner possesses no authority to set aside sentence and place prisoner on probation. State v. Keyser ---------- 445
60. Section 29-1207, R. S. Supp., 1972, provides for limitation of 6 months for time of trial and states that such 6 months' period shall commence to run from date indictment returned or information filed. State v. Watkins ---------- 450
61. Appropriate form of relief from claimed excessive bail in Nebraska is by habeas corpus. State v. Watkins ---------- 450
62. Excessiveness of pretrial bail not reviewable after conviction and sentence. State v. Watkins ---------- 450
63. Duty of trial court to see that defendants in criminal cases are tried by jury such that not even suspicion or prejudice can attach to any member thereof. State v. Myers ---------- 466
64. Duties of court stated where jury impaneled and sworn as one of several juries selected from single jury panel for subsequent trial of series of criminal cases. State v. Myers ---------- 466
65. Slightest penetration of sexual organ of female sufficient, if established beyond reasonable doubt, to constitute necessary element of penetration in prosecution for rape, and such element may be proved by either direct or circumstantial evidence. State v. Atkinson ---------- 473
66. It is only where there is total failure of proof to establish material allegation of information or testimony is of so weak or doubtful a character that conviction based thereon cannot be sustained, that trial court justified in directing verdict for defendant. State v. Atkinson ---------- 473
67. It is true rape is a most detestable crime, and therefore ought severely and impartially to be punished but it must be remembered that it is an accusation easily to be made and hard to be proved, and harder to be defended by party accused, although never so innocent, and that court should be the more

cautious upon trials of offense of this nature; in light thereof, courts have generally exercised great care and vigilance to insure that verdict of conviction was supported by sufficient competent evidence and not result of passion and prejudice, inspired by wiles of a malicious contriver or very heniousness of offense charged. State v. Atkinson ---------- 473

68. Error may creep into proceedings in criminal prosecutions in spite of impartiality, care, learning, and vigilance of trial judge; it is only error prejudicial to right of accused or denial of substantial legal right that requires reversal of his conviction; harmless error does not require second trial; law recognizes possibility of harmless imperfections in proceedings of judicial tribunals and does not defeat itself by exacting absolute perfection in bringing malefactors to justice. State v. Atkinson ---------- 473

69. Where punishment of statutory offense left to discretion of court, sentence imposed within statutory limits will not be disturbed on appeal unless abuse of discretion appears. State v. Atkinson ---------- 473

70. Offense of issuing check without sufficient funds complete when check issued with knowledge and intent to defraud, even though no one defrauded thereby. State v. Koester ---------- 485

71. To be guilty of crime of uttering insufficient fund check under section 28-1213, R. S. Supp., 1972, not necessary that there be any reliance upon false representation of defendant as is necessary in prosecution for obtaining of money under false pretenses. State v. Koester ---------- 485

72. In this state all public offenses are statutory; no act is criminal unless 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 plain import of written law. State v. Hauck ---------- 534

73. Term "steal" as used in criminal code includes all elements of larceny at common law. State v. Hauck ---------- 534

74. Evidence that defendant changed price tag on carton containing rifle scope on display shelf in self service store, and openly and without any attempt to conceal or hide carton, picked it up and carried it to checkout counter and offered to pay for it, insufficient to establish essential elements of larceny

necessary to sustain conviction for stealing rifle scope. State v. Hauck ---------- 534
75. In determining the sufficiency of an affidavit for a search warrant, only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause. State v. Bazis ---------- 586
76. In judging probable cause, magistrates are not to be confined by niggardly limitations or by restrictions on the use of their common sense and their determination is entitled to reasonable deference by reviewing courts. State v. Bazis ---------- 586
77. Delay of arraignment over the weekend of one arrested on a Sunday is not unreasonable. State v. Bazis ---------- 586
78. A statement made by a defendant, although inadmissible, due to a failure to comply with Miranda, during the State's case-in-chief, is admissible for impeachment purposes. State v. Bazis ---------- 586
79. In order to deny a claim to the privilege against self-incrimination by a witness, it must be perfectly clear to the judge from a careful consideration of all the circumstances in the case that the witness is mistaken and that the answer or answers cannot possibly have a tendency to incriminate. State v. Bazis ---------- 586
80. The filing of a felony complaint before a magistrate charging embezzlement and the issuance of an arrest warrant within 3 years after the date of the offense tolls the statute of limitations. § 29-110, R. S. Supp., 1972. State v. Donoho ---------- 593
81. To sustain a conviction for manslaughter, the evidence must be sufficient to justify the finding of a causal connection between the unlawful act and the death of the victim. State v. Bayliss ---------- 594
82. In passing sentence, it is proper for the trial court to take into consideration other offenses that have been committed by the accused. State v. Welton ---------- 600
83. A sentence within statutory limits will not be disturbed on appeal in the absence of an abuse of discretion. State v. Welton ---------- 600
84. In determining whether a factual basis for a plea of guilty exists, a court is not required to interrogate the defendant. Inquiry of the prosecutor or examination of the presentence report is an alternative. State v. Daniels ---------- 602

85. In the absence of a showing in a criminal prosecution that a withdrawal is necessary to correct a manifest injustice, a defendant may not withdraw his plea of guilty or nolo contendere as a matter of right once the plea has been accepted by the court. State v. Daniels ---------- 602

86. Before sentence in a criminal prosecution the court in its discretion may allow the defendant to withdraw his plea for any fair and just reason unless the prosecution has been substantially prejudiced by reliance upon the defendant's plea. State v. Daniels 602

87. A waiver of objections to evidence on the ground that it was seized in an unreasonable search occurs when no objection is made at least 10 days before trial and where the exceptions thereto have no application. State v. Stowell ---------- 615

88. Where the value of property is an element of the offense, the State must prove by competent evidence that the value of the property at the time and place of the alleged offense equalled or exceeded the requisite minimum value. State v. Stowell ---------- 615

89. Possession of a large quantity of a controlled substance packaged in a form customarily used for distribution will support a finding of possession with intent to distribute. State v. Sullivan ---------- 621

90. This court having affirmed a judgment against a defendant in a criminal prosecution, it is not error for the District Court to overrule a motion that simply requests a redetermination of the sentence in the judgment on these grounds alone: (1) A lapse of time between conviction and affirmance, and (2) a sufficient change in the circumstances of the defendant to warrant the redetermination. State v. Smith ---------- 623

91. Generally, the failure to object promptly to an offer of evidence waives the objection. State v. Sanders -- 625

92. A charge of inadequate representation can prevail only if it can be said that what was or was not done by the defendant's attorney for his client made the proceedings a farce and a mockery of justice, shocking to the conscience of the court. State v. Sanders ---------- 625

93. Defects which might have been attacked by motion to quash or plea in abatement are waived when defendant pleads to the general issue or when such

a plea is entered for him by the court. State v. Etchison ---------- 629
94. The fixing of criminal penalties is primarily a legislative function and courts will not interfere except in those cases where the punishment is so excessive as to shock the sense of mankind. State v. Etchison 629
95. An error by the jury in calculating the amount of damage sustained in a prosecution under section 28-572, R. R. S. 1943, is not material where the amount proved is found to be in excess of $100. State v. Hackbarth ---------- 641
96. A sentence imposed within the statutory limits will not be disturbed on appeal unless an abuse of discretion appears in the record. State v. Haines ---- 645
97. A 1-year consecutive sentence for escape from custody is not excessive. State v. Haines ---------- 645
98. A police officer may in appropriate circumstances and in an appropriate manner approach a person for the purpose of investigating possible criminal behavior even though there is no probable cause to make an arrest. State v. Brewer ---------- 667
99. A peace officer may stop any person in a public place whom he reasonably suspects of committing, who has committed, or who is about to commit a crime and may demand of him his name, address, and an explanation of his actions. § 29-829, R. S. Supp., 1972. State v. Brewer ---------- 667
100. Probable cause does not require the same type of specific evidence of each element of the offense as would be needed to support a conviction. State v. Brewer ---------- 667
101. Probable cause exists where the facts and circumstances, within the officers' knowledge and of which they have reasonably trustworthy information, are sufficient in themselves to warrant a belief by a man of reasonable caution that a crime is being committed. State v. Brewer ---------- 667
102. An automobile may be searched without a warrant as an incident to a valid arrest. The justification for such search grows out of the inherent necessities of the particular situation at the time of the arrest. State v. Brewer ---------- 667
103. A sentence validly imposed takes effect from the day it is pronounced and a subsequent sentence fixing a different term is a nullity. State v. Brewer -- 667
104. The double jeopardy clauses of the United States

and Nebraska Constitutions do not preclude successive prosecutions by federal and Nebraska governments in the exercise of concurrent jurisdiction over substantially the same offense. State v. Pope ---- 689

105. The double jeopardy clauses do not prevent Nebraska fixing higher standards by statute or, in the absence of statute, by judicial decision. State v. Pope ---- 689

106. At common law, where there is concurrent jurisdiction over substantially the same offense, the determination of whether a federal conviction bars prosecution by Nebraska depends upon vindication of the public policy of the State. State v. Pope ---- 689

107. Where there is concurrent jurisdiction over substantially the same offense and the public policy of the State requires vindication, then in order to make federal punishment for the act a satisfaction and bar to state trial and sentence, it is necessary that the federal sentence should be complete and should have been executed to its full extent. State v. Pope ---------- 689

108. Where the general charge fairly presents the case to the jury, a party who desires an instruction on some particular question should request it, and cannot base error on the omission otherwise. State v. Tripple ---------- 713

109. The test of responsibility for crime is the defendant's capacity to understand the nature of the act alleged to be criminal and the ability to distinguish between right and wrong with respect to the act. State v. Smith ---------- 722

110. Where there is no competent evidence tending to prove insanity no instruction on the burden of proof as to insanity is required. State v. Smith -------- 722

111. As a matter of law the testimony of the prosecutrix alone, uncorroborated by any other evidence, is not sufficient to sustain a conviction for rape, or assault with intent to commit rape. State v. Fisher ------ 742

112. In the absence of statute the court has no power to impose a period of imprisonment as a condition of probation. State v. Nuss ---------- 755

113. Where a sentence of imprisonment, imposed as a condition of probation, constitutes an authorized legal sentence for the crime for which the defendant stands convicted, and such sentence of imprisonment has been fully executed, the defendant is entitled to be discharged and may not be resentenced to a new

term of imprisonment for that crime. State v. Nuss 755
114. Under the provisions of section 29-1207, R. S. Supp., 1972, where a felony offense is involved, the 6-month period commences to run from the date the indictment is returned or the information filed and not from the time the complaint is filed. State v. Born 767
115. Any unreasonable delay occurring in the prosecution of any felony offense prior to the filing of an information or the return of an indictment will be considered by the court, in conjunction with statutory requirements, in determining whether or not a defendant has been denied the constitutional right to a speedy trial. State v. Born ---------- 767
116. Probable cause for searching a motor vehicle may not be treated the same as questions arising out of searches of fixed structures, like houses. State v. Romonto ---------- 825
117. The existence of probable cause must be determined by a practical and not by a technical standard. State v. Romonto ---------- 825
118. Objects falling within plain view of an officer, who has the right to be in the position to have such view, does not constitute a search. State v. Romonto ---- 825
119. Where materials in an automobile, which are indicative of a criminal offense, are in plain sight of an officer looking into the automobile from the outside, a search is justified and legal. State v. Romonto -- 825
120. There is no illegal search and seizure of objects found in an automobile, even if the defendant is not under arrest, if the defendant freely and intelligently gives his consent to officers making the search. State v. Romonto ---------- 825
121. In determining probable cause for a warrantless search, it is not significant whether the search preceded or followed the arrest. The controlling factor in a warrantless search is whether the officer had reasonable grounds before the search to make an arrest. State v. Romonto ---------- 825
122. Where the record discloses that a plea of guilty was understandingly and voluntarily entered, it is not subject to post conviction relief. State v. Mayes -- 833
123. While receiving treatment in a hospital or psychiatric facility, a prisoner remains subject to the jurisdiction and custody of the Division of Corrections. State v. Mayes ---------- 837

Crops.

Where a tenant for life of farm land leases the land, with the rent payable in a share of the crop, and dies while the crop is growing, title to the share of the crop reserved as rent passes to the executor of the estate of the tenant for life as assets of that estate. Estate of Ruwe v. Ruwe ---------- 663

Damages.

1. One who seeks to recover multiple damages given by statute must distinctly claim these in his petition; insufficient merely to set forth facts upon which liability therefor might arise; sufficient to recite facts constituting cause of action within statute and then to give reference to act itself. George Rose Sodding & Grading Co., Inc. v. City of Omaha 12
2. Amount of damages sustained by landowner in proceeding in eminent domain peculiarly of local nature and ordinarily to be determined by jury; such verdict will not be set aside unless clearly wrong. Pauley Lumber Co. v. City of Nebraska City ---------- 94
3. In quantum meruit action, price agreed upon by parties competent evidence of reasonable value, and when this is only evidence on subject, it presents proper measure of damages. Koehler v. Boyle ---- 143
4. Elements of unforeseen or unexpected damage or consequence as distinguished from normal or probable consequence from negligent act important in describing causation by accident within insurance policy. City of Kimball v. St. Paul Fire & Marine Ins. Co. ---------- 152
5. In general, element of unforeseen or unexpected damages as distinguished from normal and probable consequence from negligent act, dominant in describing causation by accident. City of Kimball v. St. Paul Fire & Marine Ins. Co. ---------- 152
6. Measure of damages for wrongful death of minor child should be extended to include loss of society, comfort, and companionship of child. Selders v. Armentrout ---------- 275
7. Loss resulting from unreasonable delay in liquidating property of deceased determined to be difference between lowest price reached during 6-month period following appointing of executor and price eventually obtained. Bates v. Scottsbluff Nat. Bank -------- 456
8. Damages must be proved with as much certainty as

case permits and cannot be left to conjecture, guess, or speculation; generally, evidence must be sufficient to enable court or jury to determine amount of damages with reasonable certainty. Crowder v. Allied Investment Co. ---------- 487

9. Direct effect of sale that is not commercially reasonable under section 9-405, U. C. C., is to alter measure of deficiency; in such case, fair and reasonable value of collateral as of time of sale is offset against balance due on security agreement. Cornett v. White Motor Corp. ---------- 496

10. Injunction will not be granted unless right is clear, damage irreparable, and remedy at law inadequate to prevent failure of justice. Czarnick v. Loup River P. P. Dist. ---------- 521

11. Acts which destroy or result in serious change of property either physically or in the character in which it has been held or enjoyed may constitute irreparable injury and warrant injunctive relief. Czarnick v. Loup River P. P. Dist. ---------- 521

12. Where injury wrongfully committed continuous or being constantly repeated so that complainant's remedy at law requires bringing of successive actions, that remedy inadequate and injury may be prevented by injunction. Czarnick v. Loup River P. P. Dist ---------- 521

13. In an action for assault and battery, the recovery is limited to compensatory damages and evidence of threats or words and acts of provocation are not admissible in mitigation thereof. Haumont v. Alexander ---------- 637

14. An error by the jury in calculating the amount of damage sustained in a prosecution under section 28-572, R. R. S. 1943, is not material where the amount proved is found to be in excess of $100. State v. Hackbarth ---------- 641

15. Where the law provides a definite measure of damages, the court should instruct the jury specifically how the damages should be assessed. Where there is no such definite measure of damages, then the general instruction on compensatory damage is sufficient. White v. Longo ---------- 703

16. In the absence of evidence of some special element of damage for which the law provides a specific means of measurement, it is the general rule that in an action for criminal conversation damages are

incapable of precise measurement and there is no fixed rule for determining the amount thereof. White v. Longo ---------- 703

17. Damages for breach of contract that are susceptible of definite proof are recoverable only to the extent the evidence affords a basis of ascertaining their amount in money with reasonable certainty. Kroeger v. Franchise Equities Inc. ---------- 731

18. In the mitigation of damages the burden is upon the employer to prove that the employee obtained other employment or, with reasonable diligence, might have obtained other employment. Rase v. Southeast Nebraska Consol. School Dist. ---------- 800

Death.

Measure of damages for wrongful death of minor child should be extended to include loss of society, comfort, and companionship of child. Selders v. Armentrout ---------- 275

Declaratory Judgments.

Action for declaratory judgment will not ordinarily be entertained where another equally serviceable remedy has been provided by law. School Dist. No. 30 v. School Dist. No. 6 ---------- 454

Deeds.

1. Delivery essential to validity of deed. Krueger v. Callies ---------- 376

2. A homestead cannot be conveyed or encumbered except by instrument executed and acknowledged by both husband and wife. Krueger v. Callies ------ 376

3. Where the owner of an interest in land transferred it inter vivos to another in trust for a third person, but no memorandum properly evidencing the intention to create a trust was signed, and the transferee refused to perform the trust, the transferee holds the interest upon a constructive trust for the third person if the transferee at the time of the transfer was in a confidential relation to the transferor. Lukowski v. Deleski ---------- 771

Depositions.

Depositions offered in evidence on motion for summary judgment must be included in bill of exceptions to

be reviewed in Supreme Court on appeal. Brown v. Shamberg ---------- 171

Discovery.

1. Report or other communication made by insured to his liability insurance company, concerning an event which may be made basis of claim against him covered by the policy, is privileged communication, as being between attorney and client, if policy requires company to defend him through its attorney, and communication intended for information or assistance of attorney in so defending him. Brakhage v. Graff ---------- 53
2. Defendant may not complain of use of lawful tape recordings of conversations between himself and undercover agent made when he was not yet accused or under indictment when he has taken no steps to discover such evidence under section 29-1912, R. S. Supp., 1972, and has himself on cross-examination elicited from witness oral testimony of conversation. State v. Myers ---------- 146
3. If District Court has inherent power to require complaining witness in prosecution for sex crime to submit to psychiatric examination prior to trial, it is not abuse of discretion to deny such examination in absence of showing of good cause. State v. Maestas ---------- 312

Dismissal and Nonsuit.

Dismissal of plaintiff's petition or cause of action does not affect intervening petitioner's right to proceed and obtain a determination of his claim to affirmative relief. Progressive Design, Inc. v. Olson Bros. Manuf. Co. ---------- 208

Divorce.

1. In determining child custody, controlling consideration is best interests and welfare of children. Schott v. Schott ---------- 84
2. When a court, having jurisdiction of children in divorce action, has placed custody of children in the court with possession and care in a parent, the court may summarily in best interests of children modify possession of parent or parents. Benson v. Benson ---------- 87
3. In determining question of who should have care

and custody of children upon dissolution of marriage, paramount consideration is best interests and welfare of children. Broadstone v. Broadstone ---- 299

4. In cases involving determinations of child custody, findings of trial court, both as to evaluation of evidence and as to matter of custody, will not be disturbed unless is clear abuse of discretion. Broadstone v. Broadstone ---------- 299

5. Fixing of child support and alimony rests in sound discretion of court and, in absence of abuse of discretion, will not be disturbed. Broadstone v. Broadstone ---------- 299

6. In determining reasonable visitation rights, best interests and welfare of child are primary considerations; his age, health, and need for stability and continuity in his home environment must be considered. Brisby v. Whitted ---------- 309

7. Only in exceptional circumstances should the parent deprived of custody be totally denied any right of visitation. Brisby v. Whitted ---------- 309

8. Original decree fixing custody of minor children will not be modified unless has been change in circumstances indicating that person having custody unfit for that purpose or that best interests of child require such action. Scripter v. Scripter ---------- 317

9. Decree fixing custody of minor children will not be modified unless has been change in circumstances indicating that person having custody unfit for that purpose or that best interests of children require such action. Flesher v. Flesher ---------- 359

10. Discretion of trial court with respect to changing custody of minor children subject to review, but determination of court will not ordinarily be disturbed unless is clear abuse of discretion or is clearly against weight of evidence. Flesher v. Flesher ---------- 359
Adamson v. Adamson ---------- 716

11. When dissolution of marriage decreed, court may order payment of such alimony by one party to the other as may be reasonable, having regard for circumstances of the parties, duration of marriage, and ability of supported party to engage in gainful employment without interfering with interests of any minor children in custody of such party. Corn v. Corn ---------- 383
Magruder v. Magruder ---------- 573

12. Rules for determining alimony or division of property in divorce action provide no mathematical formula by which such awards can be precisely determined; they are always to be determined by facts in each case, and courts will consider all pertinent facts in reaching an award that is just and equitable. Corn v. Corn ---------- 383
13. When dissolution of a marriage decreed, court may order payment of such alimony by one party to the other as may be reasonable, having regard for circumstances of the parties, duration of marriage, and ability of supported party to engage in gainful employment. Albrecht v. Albrecht ---------- 392
14. Fixing of alimony rests in sound discretion of court and in absence of abuse of discretion will not be disturbed on appeal. Albrecht v. Albrecht ------- 392
15. Decree fixing custody of minor children will not be modified unless there has been change in circumstances indicating that person having custody unfit for that purpose or that best interests of children require such action. Gilman v. Riis ------ 409
16. Discretion of trial court with respect to changing custody of minor children subject to review, but determination of court will not ordinarily be disturbed unless is clear abuse of discretion or it is clearly against weight of evidence. Gilman v. Riis - 409
Petersen v. Petersen ---------- 805
17. Judgment for child support may be revised or altered at any time as to future payments if circumstances of parties change. McGee v. McGee ---------- 415
18. Where decree of divorce gives visitation rights, law contemplates that children shall remain within the state so that rights may be exercised; mother's removal of children from state without consent of father or of court may be sufficient change of circumstances to justify court in suspending or reducing amount of child support payments until children have returned to state. McGee v. McGee ------- 415
19. District Court in its discretion may appoint attorney to protect interests of any minor children of the parties; limits upon discretion must evolve case by case. Pieck v. Pieck ---------- 419
20. Rules for determining alimony or division of property in divorce action provide no mathematical formula by which such awards can be precisely determined; they are always to be determined by facts

in each case and courts will consider all pertinent facts in reaching an award that is just and equitable. Bliven v. Bliven ---------- 492

21. Except as otherwise agreed by parties in writing or by order of court, alimony orders shall terminate upon death of either party or remarriage of recipient. Bliven v. Bliven ---------- 492

22. In determining amount of child support to be awarded, status, character, and situation of parties and all attendant circumstances must be considered, and amount rests in sound discretion of court. Bliven v. Bliven ---------- 492

23. Chapter 42, article 8, R. R. S. 1943, not applicable in counties in which District Court has failed to find procedures therein provided for to be necessary. Condreay v. Condreay ---------- 513

24. It is only when there exists reasonable possibility of reconciliation that statutes require efforts to effect reconciliation to be made. Condreay v. Condreay ---------- 513

25. Alimony may be ordered in addition to property settlement award. Magruder v. Magruder -------- 573

26. Unless otherwise agreed by the parties in writing or by order of court, alimony order shall terminate upon the death of either party or remarriage of recipient. Magruder v. Magruder ---------- 573

27. The relevant circumstances in determining whether alimony should be awarded and in what amount will vary from case to case. Magruder v. Magruder 573

28. An unqualified allowance of alimony in gross, whether payable immediately in full or periodically in installments, and whether intended solely as a property settlement or as an allowance for support, or both, is such a definite and final adjustment of mutual rights and obligations between husband and wife as to be capable of a present vesting and to constitute an absolute judgment. Karrer v. Karrer 610

29. The provisions of section 42-365, R. S. Supp., 1972, authorizing the modification of alimony awards, do not apply to judgments entered previous to July 6, 1972, awarding alimony in gross. Karrer v. Karrer 610

30. Where, in an action for dissolution of marriage, the wife is awarded a judgment for alimony the court should, if possible, divide the property in such a manner as to permit the husband the means of paying the judgment awarded the wife. Snow v. Snow 655

31. In awarding or changing custody the welfare of the minor child is the question of primary importance. Adamson v. Adamson ---------- 716
32. An application for modification of a divorce decree with respect to the care, custody, and maintenance of minor children must be founded upon new facts and circumstances which have arisen since the entry of the decree. Adamson v. Adamson ---------- 716
33. A parent found unfit for custody should not, by the mere passage of time without further misconduct, be able to change child custody provisions in a divorce decree in the absence of clear and convincing evidence that the best interests and welfare of the child require it. Adamson v. Adamson ---------- 716
34. In determining the question of who should have the care and custody of minor children the paramount consideration is the best interests and welfare of the children. Petersen v. Petersen ---------- 805
35. The power of a court to reduce, suspend, or terminate its order for child support payments is a power that generally will only be exercised as a last resort or where it is apparent that to do so affords the only remedy that can reasonably be expected to fit the mischief. Biesecker v. Biesecker ---------- 808
36. The control of a divorce decree during the 6-month period pending finality is within the sound judicial discretion of the trial court. Miller v. Miller ------ 816
37. The judgment of a trial court fixing the amount of alimony will not be disturbed on appeal unless good cause is shown. Miller v. Miller ---------- 816
38. The amount of alimony to be granted a wife is not to be determined alone from the property possessed by the husband. Many other factors enter into this determination. Miller v. Miller -------- 816

Double Jeopardy.

1. Administrative disciplinary proceeding in which prisoner loses good time for escape from confinement does not place him in jeopardy; subsequent conviction and sentence in criminal prosecution for escape do not therefore constitute double jeopardy which federal constitutional clauses prohibit. State v. Maddox ---------- 361
2. The double jeopardy clauses of the United States and Nebraska Constitutions do not preclude successive prosecutions by federal and Nebraska gov-

ernments in the exercise of concurrent jurisdiction over substantially the same offense. State v. Pope 689

3. The double jeopardy clauses do not prevent Nebraska fixing higher standards by statute or, in the absence of statute, by judicial decision. State v. Pope ---------- 689

4. At common law, where there is concurrent jurisdiction over substantially the same offense, the determination of whether a federal conviction bars prosecution by Nebraska depends upon vindication of the public policy of the State. State v. Pope -- 689

5. Where there is concurrent jurisdiction over substantially the same offense and the public policy of the State requires vindication, then in order to make federal punishment for the act a satisfaction and bar to state trial and sentence, it is necessary that the federal sentence should be complete and should have been executed to its full extent. State v. Pope ---------- 689

6. An administrative disciplinary proceeding in which a prisoner loses good time for escape from confinement does not place him in jeopardy. A subsequent conviction and sentence in a criminal prosecution for the escape do not therefore constitute double jeopardy. State v. Mayes ---------- 837

Drains.

1. Diffused surface waters, which ordinarily result from rainfall and melting snow and have no permanent source of supply or regular course, may be dammed, diverted, or otherwise repelled by an adjoining landowner without liability, if it is necessary and done without negligence. Paasch v. Brown ---------- 421

2. When surface waters concentrate and gather in volume, so as to lose their character as diffused surface waters and flow into a natural depression, draw, swale, or other natural drainway, flow may not be arrested or interfered with to injury of neighboring proprietors. Paasch v. Brown ------ 421

Eminent Domain.

1. Ordinarily evidence of prices paid for improved properties offered as substantial proof of value of unimproved property admissible only where properties and circumstances substantially similar. Pauley Lumber Co. v. City of Nebraska City ---- 94

2. Trial court vested with sound discretion in determining admissibility of sale prices of other lands. Pauley Lumber Co. v. City of Nebraska City ---- 94
3. Amount of damages sustained by landowner in proceeding in eminent domain peculiarly of local nature and ordinarily to be determined by jury; such verdict will not be set aside unless clearly wrong. Pauley Lumber Co. v. City of Nebraska City ---- 94
4. A suit against the State for taking or damaging of private property for public use must be commenced within 2 years from time of taking or damaging of the property occurred. Czarnick v. Loup River P. P. Dist. ---------- 521

Employer and Employee.

1. Duty of general contractor to employees of subcontractor extends only to providing reasonably safe place to work as distinguished from apparatus, tools, or machinery furnished by subcontractor for use of his own employees. Hand v. Rorick Constr. Co. ---------- 191
2. General contractor's mere failure to inspect scaffold owned, erected, and controlled by subcontractor and furnished by subcontractor for use of his own employees does not make general contractor liable to subcontractor's employees for injuries caused by defects in scaffold. Hand v. Rorick Constr. Co. 191
3. Provision in contract between general contractor and owner providing: "The Contractor shall take all necessary precautions for the safety of employees on the work, and shall comply with all applicable provisions of Federal, State, and Municipal safety laws and building codes to prevent accidents or injury to persons on, about or adjacent to the premises where the work is being performed," does not enlarge common law duty of general contractor to employees of subcontractor so as to require inspection by general contractor of tools and equipment furnished by subcontractor for exclusive use of his own employees. Hand v. Rorick Constr. Co. ---- 191
4. Contractual provision regarding safety precautions does not have effect of giving to employee of subcontractor cause of action under Nebraska statutes pertaining to scaffold safety, because those statutes place liability upon person who erects, constructs,

maintains, or supplies unsafe scaffold. Hand v. Rorick Constr. Co. ---------- 191
5. In the mitigation of damages the burden is upon the employer to prove that the employee obtained other employment or, with reasonable diligence, might have obtained other employment. Rase v. Southeast Nebraska Consol. School Dist. ---------- 800

Entrapment.

Where person already has readiness or willingness to violate the law, mere fact that an officer provides what appears to be favorable opportunity for such violation or merely seeks to collect evidence of offense does not constitute unlawful entrapment and is no defense. State v. Amen ---------- 362

Equity.

1. Courts of equity will not enjoin commission of acts for sole reason that they constitute violations of criminal statutes. State ex rel. Meyer v. Weiner - 30
2. Acts constituting continuous violations of Real Estate Brokers Act, sections 81-862 to 81-887, R. R. S. 1943, may be enjoined by court of equity in protection of public rights, property, or welfare. State ex rel. Meyer v. Weiner ---------- 30
3. In order to obtain reformation of written instrument on ground of mistake, mistake must be mutual; to grant such relief, equity insists that reformation must be consistent with a complete mutual understanding of essential terms of their bargain. Schweitz v. State Farm Fire & Cas. Co. ---------- 400

Escape.

1. A failure to return to a treating facility after a temporary leave constitutes an escape from custody under the provisions of section 28-736, R. R. S. 1943. State v. Mayes ---------- 837
2. An administrative disciplinary proceeding in which a prisoner loses good time for escape from confinement does not place him in jeopardy. A subsequent conviction and sentence in a criminal prosecution for the escape do not therefore constitute double jeopardy. State v. Mayes ---------- 837

Estates.

Where a tenant for life of farm land leases the land,

with the rent payable in a share of the crop, and dies while the crop is growing, title to the share of the crop reserved as rent passes to the executor of the estate of the tenant for life as assets of that estate. Estate of Ruwe v. Ruwe ---------- 663

Estoppel.

1. Essential elements of equitable estoppel stated. Chappelear v. Grange & Farmers Ins. Co. -------- 589
2. A party may not properly base a claim of estoppel in his favor on his own wrongful act or dereliction of duty, or fraud committed or participated in by him, or on acts or omissions induced by his own conduct, concealment, or representations. Chappelear v. Grange & Farmers Ins. Co. ---------- 589
3. The essential element of estoppel is a representation relied upon by the party claiming the benefit of the estoppel, which induced him to act, or refrain from acting to his prejudice. Chappelear v. Grange & Farmers Ins. Co. ---------- 589
4. Ordinarily to establish a waiver of legal right there must be a clear, unequivocal, and decisive act of a party showing such a purpose or acts amounting to an estoppel on his part. Farmers State Bank v. Edison Non-Stock Coop. Assn. ---------- 789

Evidence.

1. Issue of criminal responsibility to be determined from all the evidence. State v. Jacobs ---------- 4
2. Evidence relating to tests or analyses by State may be suppressed where, as result of neglect by representative of State, evidence necessary to enable defense to conduct tests or analyses is unavailable. § 29-1913 (2), R. S. Supp., 1972. State v. Brodrick 19
3. Violation of city ordinance is evidence of negligence. Whitcomb v. State Fed. Sav. & Loan Assn. ------ 26
4. Burden upon plaintiff to show that violation of city ordinance contributed to her accident. Whitcomb v. State Fed. Sav. & Loan Assn. ---------- 26
5. In appeal to county board of equalization or to District Court, and from District Court to Supreme Court, burden of persuasion imposed on complaining taxpayer not met by showing mere difference of opinion unless it is established by clear and convincing evidence that valuation placed upon his property when compared with valuations placed on

other similar property grossly excessive and result of systematic exercise of intentional will or failure of plain duty, and not mere errors of judgment. Hastings Building Co. v. Board of Equalization -- 64

6. Since appeal of assessment to Supreme Court triable de novo, it can make independent evaluation of facts; is presumption that assessment made by board of equalization has sufficient foundation in evidence until this presumption is overcome by competent evidence to contrary. Hastings Building Co. v. Board of Equalization ---------- 64

7. A party may not successfully complain of introduction of evidence of like character to that which is subsequently introduced. Pauley Lumber Co. v. City of Nebraska City ---------- 94

8. One who fails to object to or move to strike testimony may not predicate error on its admission. Pauley Lumber Co. v. City of Nebraska City ---- 94

9. Ordinarily evidence of prices paid for improved properties offered as substantial proof of value of unimproved property admissible only where properties and circumstances substantially similar. Pauley Lumber Co. v. City of Nebraska City ---- 94

10. Trial court vested with sound discretion in determining admissibility of sale prices of other lands. Pauley Lumber Co. v. City of Nebraska City ---- 94

11. There is no hard and fast rule for demarcation between that which is and that which is not res gestae, but a declaration to be competent evidence as part of res gestae must have been made at such time and under such circumstances as to raise presumption that it was unpremeditated and spontaneous explanation of matter about which made. State v. Brown ---------- 96

12. Determination of admissibility generally rests within sound discretion of trial court. State v. Brown _ 96

13. Consensus of authorities seem to be that a declaration, to be part of res gestae, need not be coincident in point of time with main fact proved; enough that the two so clearly connected that declaration can in ordinary course of affairs be said to be spontaneous declaration of real cause. State v. Brown ---------- 96

14. As general rule, evidence of other crimes than that with which accused charged not admissible in criminal prosecution. State v. Brown ---------- 96

15. Evidence of possession of revolver a short time after stolen is admissible as circumstance in proof that it was stolen by person in whose possession it was found. State v. Brown ---------- 96
16. Competent for prosecution to put in evidence all relevant facts and circumstances which tend to establish any of constituent elements of crime with which accused charged even though such facts and circumstances may prove or tend to prove that defendant committed other crimes. State v. Brown -- 96
17. Well-established rules have developed concerning admission of evidence of other criminal conduct; although this evidence generally admissible since it suggests that defendant has propensity to commit crime, trial court can in its discretion admit relevant evidence of other criminal acts and reversal only commanded when it is clear questioned evidence has no bearing upon any of issues involved. State v. Brown ---------- 96
18. Problem concerning admissibility of evidence of other offenses is special aspect of broad general problem of relevancy, and generally test of admissibility of such evidence whether evidence relevant and material to any issue on trial, or whether it fairly tends to prove particular offense charged or essential element thereof. State v. Brown ---------- 96
19. One asserting disqualification of civil service commissioner for prejudice must prove facts and circumstances which clearly show such bias or prejudice in order to overcome presumption of impartiality. Sailors v. City of Falls City ---------- 103
20. Proof of physical or constructive possession of a drug with knowledge of its presence and its character as controlled substance sufficient to support finding of possession. State v. Shimp ---------- 137
21. In quantum meruit action, price agreed upon by parties competent evidence of reasonable value, and when this is only evidence on subject, it presents proper measure of damages. Koehler v. Boyle ---- 143
22. Tape recordings of relevant and material conversations admissible as evidence of such conversations and in corroboration of oral testimony of conversations, provided proper foundation laid. State v. Myers ---------- 146
23. Rerecording of original tape recording admissible where proper foundation laid and such rerecording

from original necessary because of poor quality of original; admission does not constitute violation of best evidence rule. State v. Myers ---------- 146
24. Defendant may not complain of use of lawful tape recordings of conversations between himself and undercover agent made when he was not yet accused or under indictment when he has taken no steps to discover such evidence under section 29-1912, R. S. Supp., 1972, and has himself on cross-examination elicited from witness oral testimony of conversation. State v. Myers ---------- 146
25. Admissions generally pertain to past offense or transaction and do not include statements which are part of res gestae. State v. Myers ---------- 146
26. Where only evidence in prosecution involving possession of a controlled substance tends to establish actual physical possession, no special definition of term possession required to be given to jury. State v. Myers ---------- 146
27. Any assignment of error that requires examination of evidence cannot prevail on appeal in absence of bill of exceptions. Brown v. Shamberg ---------- 171
28. Depositions offered in evidence on motion for summary judgment must be included in bill of exceptions to be reviewed in Supreme Court on appeal. Brown v. Shamberg ---------- 171
29. If evidence in criminal case such as to warrant only verdict of greater offense, or one of not guilty, then is not proper to give instruction on lesser included offense. State v. DeBerry ---------- 177
30. Burden of proving cause of action not sustained by evidence from which negligence can only be surmised or conjectured. Mitchell v. Eyre ---------- 182
31. An issue depending entirely upon speculation, surmise, or conjecture never sufficient to sustain a judgment; consequently, judgment solely based upon speculation, surmise, or conjecture must be set aside. Mitchell v. Eyre ---------- 182
32. Proceedings at hearing before State Board of Equalization and Assessment not bound by strict technical rules of evidence demanded in court of law. County of Sioux v. State Board of Equalization & Assessment ---------- 198
33. Determinations of State Board of Equalization and Assessment clothed with presumption of validity and burden of proof on appellant to establish that

record of proceedings does not support action of board. County of Sioux v. State Board of Equalization & Assessment ---------- 198

34. Where evidence discloses consistent use of reasonably current reappraisals done under uniform conditions and regulations and approved by State Tax Commissioner, such procedures meet constitutional test of uniformity. County of Sioux v. State Board of Equalization & Assessment ---------- 198

35. Professional reappraisals conducted in accordance with statutory requirements and applicable rules and regulations of State Tax Commissioner, and approved by him, constitute adequate basis upon which State Board of Equalization and Assessment may rely in absence of clear evidence that such appraisals or reappraisals erroneous or that they fail to establish equality and uniformity required by law. County of Sioux v. State Board of Equalization & Assessment ---------- 198

36. Unless it is directly in issue, character or reputation of party to civil action generally regarded as legally irrelevant in determination of controversy; consequently, evidence relating thereto not admissible. Kenaston v. Teeters ---------- 216

37. Under section 39-757, R. R. S. 1943, where evidence shows that vehicle left standing on paved, improved, or main-traveled portion of highway, prima facie violation of statute established and is incumbent upon person charged to show existence of facts which take him out of scope of application of statute. Fleischer v. Rosentrater ---------- 219

38. Where prima facie violation of section 39-757, R. R. S. 1943, shown under evidence, questions of whether reasonable excuse for stopping existed, or whether reasonable effort made to remove vehicle from traveled portion of highway, and whether reasonable precautions taken for protection of highway traffic, ordinarily for jury. Fleischer v. Rosentrater 219

39. Standing alone, declaration by defendant that he is sorry he hit plaintiff not an admission of negligence. Giangrasso v. Schimmel ---------- 228

40. In determining sufficiency of evidence to sustain a judgment, must be considered in light most favorable to successful party. Schmidt v. Orton -------- 257

41. Where reasonable minds may draw different conclusions and inferences from evidence as to negli-

gence of defendant and contributory negligence of plaintiff, and degree thereof when one compared with other, issues must be submitted to jury. Schmidt v. Orton ---------- 257

42. It is only where there is total failure of competent proof in criminal case to support material allegation in information, or where testimony adduced is of so weak or doubtful character that conviction based thereon could not be sustained, that trial court justified in directing verdict of not guilty. State v. Turner ---------- 261

43. When evidence of in-court identification alleged to be tainted by prior illegal line-up first challenged on appeal, such challenge, in absence of clear showing of prejudicial error, will not be considered; failure to object will be attributed to defense counsel's choice of trial tactics. State v. Turner ------ 261

44. In workmen's compensation case, burden of proof upon claimant to establish that his disability was caused by accident arising out of and in course of his employment. McPhillips v. Knox Constr. Co., Inc. ---------- 306

45. District Court shall set aside a judgment of Workmen's Compensation Court on rehearing only upon grounds provided by statute which include "(3) the findings of fact by the court are not supported by the record." McPhillips v. Knox Constr. Co., Inc. 306

46. Supreme Court, on appeal from District Court in workmen's compensation case, may set aside judgment of District Court only upon grounds provided by statute which include "(3) the findings of fact are not supported by the evidence as disclosed by the record." McPhillips v. Knox Constr. Co., Inc. 306

47. If Supreme Court, on appeal from District Court in workmen's compensation case, finds that findings of fact not supported by evidence as disclosed by record, it then considers matter de novo. McPhillips v. Knox Constr. Co., Inc. ---------- 306

48. Finding of fact by Workmen's Compensation Court on rehearing against party having burden of proof will be set aside only if evidence compels finding for that party. McPhillips v. Knox Constr. Co., Inc. 306

49. In determining sufficiency of evidence to sustain conviction in criminal prosecution, not province of Supreme Court to resolve conflicts in evidence, pass

on credibility of witnesses, or weigh evidence. State v. Hiatt ---------- 315

50. Test of sufficiency of circumstantial evidence in criminal prosecution is whether facts and circumstances tending to connect accused with crime charged are of such conclusive nature as to exclude to moral certainty every rational hypothesis except that of guilt. State v. Young ---------- 325

51. Ordinarily, hearsay rule does not operate to exclude evidence of a statement, request, or message offered for mere purpose of proving fact that the statement, request, or message was made or delivered, where such occurrence establishes a fact in issue or circumstantially bears on such a fact. State v. Young 325

52. Evidence of other crimes, similar to that charged, relevant and admissible when it tends to prove a particular criminal intent which is necessary to constitute crime charged or where is some legal connection between the two upon which it can be said that one tends to establish the other or some essential fact in issue. State v. Young ---------- 325

53. To sustain conviction for manslaughter, evidence must be sufficient to justify finding of causal connection between unlawful act and death of victim. State v. Hare ---------- 339

54. For purposes of evaluating motion for directed verdict or dismissal of cause of action, all doubt must be resolved in favor of party against whom verdict or dismissal urged; truth of all evidence he has submitted must be assumed, and he must be given benefit of all inferences therefrom. Wilgro, Inc. v. Vowers & Burback ---------- 369

55. Circumstantial evidence not sufficient to sustain verdict depending solely thereon for support, unless circumstances proved by evidence of such nature and so related to each other that conclusion reached by jury is only one that can fairly and reasonably be drawn therefrom. Wilgro, Inc. v. Vowers & Burback ---------- 369

56. Where several inferences are deducible from facts presented, which inferences opposed to each other, but equally consistent with facts proved, plaintiffs do not sustain their position by reliance alone on inferences which would entitle them to recover. Wilgro, Inc. v. Vowers & Burback ---------- 369

57. Where appears in error proceeding that adminis-

trative tribunal has acted within its jurisdiction and for that type of proceeding some competent evidence sustains its findings and order, order of administrative agency will be affirmed. Tinsley v. City of Omaha ---------- 380

58. Under section 25-12,112, R. S. Supp., 1972, copy or reproduction of any memorandum kept or recorded in regular course of business or activity of any department or agency of government, when satisfactorily identified, as admissible in evidence as original itself in any judicial or administrative proceeding. Corn v. Corn ---------- 383

59. Under principle of law of case, burden of showing material and substantial difference in facts on retrial upon party who asserts difference. Weber v. Southwest Nebraska Dairy Suppliers, Inc. ---------- 389

60. While writing consisting of several separate documents may satisfy statute of frauds, fact that each is part of a total writing relied upon must be shown either by express references in documents or from contents of documents, but, in attempting to satisfy statute of frauds, fact that two or more writings constitute part of entire written agreement may not be shown by parol. Abboud v. Cir Cal Stables ---------- 396

61. In order to warrant reformation of written instrument in any material respect, evidence must be clear, convincing, and satisfactory; and, until overcome by such proof, terms of instrument must stand as evidencing intention of parties. Schweitz v. State Farm Fire & Cas. Co. ---------- 400

62. Purported evidence which is not included in record before Supreme Court on appeal cannot be considered. State v. Griger ---------- 405

63. New trial may not be granted for arbitrary, vague, or fanciful reasons; but when granting of new trial requires consideration of conflicting evidence, findings of trial court thereon will not ordinarily be disturbed on appeal. Kremlacek v. Sedlacek ---------- 460

64. Trial court has wide discretion in receiving affidavits and in weight it gives them, in accordance with general rule that affidavits of jurors may be received, for purpose of voiding verdict, to show any matter occurring during trial, or in jury room, which does not essentially inhere in verdict itself. Kremlacek v. Sedlacek ---------- 460

65. Slightest penetration of sexual organ of female sufficient, if established beyond reasonable doubt, to constitute necessary element of penetration in prosecution for rape, and such element may be proved by either direct or circumstantial evidence. State v. Atkinson ---------- 473

66. It is only where there is total failure of proof to establish material allegation of information or testimony is of so weak or doubtful a character that conviction based thereon cannot be sustained, that trial court justified in directing verdict for defendant. State v. Atkinson ---------- 473

67. It is true rape is a most detestable crime, and therefore ought severely and impartially to be punished but it must be remembered that it is an accusation easily to be made and hard to be proved, and harder to be defended by party accused, although never so innocent, and that courts should be the more cautious upon trials of offense of this nature; in light thereof, courts have generally exercised great care and vigilance to insure that verdict of conviction was supported by sufficient competent evidence and not result of passion and prejudice, inspired by wiles of a malicious contriver or very heniousness of offense charged. State v. Atkinson ---------- 473

68. Damages must be proved with as much certainty as case permits and cannot be left to conjecture, guess, or speculation; generally, evidence must be sufficient to enable court or jury to determine amount of damages with reasonable certainty. Crowder v. Allied Investment Co. ---------- 487

69. Burden of production of evidence of value of labor or materials satisfied if such value may be reasonably inferred from evidence. Cornett v. White Motor Corp. ---------- 496

70. On appeal of a workmen's compensation case to the Supreme Court, if there is reasonable competent evidence to support findings of fact in trial court, judgment, order, or award will not be modified or set aside for insufficiency of evidence. Smith v. Ruan Transport, Inc. ---------- 509

71. In workmen's compensation case, burden of proof upon claimant to establish that his disability was caused by accident arising out of and in course of his employment. Barbaglia v. General Motors Acceptance Corp. ---------- 529

72. Rule of liberal construction of Workmen's Compensation Act applies to the law but does not apply to evidence offered in support of claim made for benefits under the act. Barbaglia v. General Motors Acceptance Corp. ---------- 529

73. On appeal of a workmen's compensation case to Supreme Court, if there is reasonable competent evidence to support findings of fact in trial court, judgment, order, or award will not be modified or set aside for insufficiency of evidence; cause will be considered de novo only where findings of fact not supported by evidence as disclosed by record. Barbaglia v. General Motors Acceptance Corp. ---------- 529

74. Jury verdict may not be set aside unless it is clearly wrong and it is sufficient if there is any competent evidence presented to jury upon which it could find for successful party and all conflicts in evidence, expert or lay, and credibility of witnesses is for jury and not the court. Hawkins Constr. Co. v. Matthews Co., Inc. ---------- 546

75. Difficulties attending offer of evidence of illustrative experiments requires that in such cases wide latitude or discretion be conferred upon trial court and unless is clear abuse of discretion judgment will not be reversed on account of admission or rejection of such testimony. Hawkins Constr. Co. v. Matthews Co., Inc. ---------- 546

76. Proponent of expert testimony based upon experiment must demonstrate that person who makes experiment competent to do so; that apparatus used was of kind and in condition suitable for experiment; and that experiment was honestly and fairly made. Hawkins Constr. Co. v. Matthews Co., Inc. ---------- 546

77. A hypothetical question should fairly reflect proven facts. Hawkins Constr. Co. v. Matthews Co., Inc. ---------- 546

78. A hypothetical question is not improper simply because it includes only a part of facts testified to. Hawkins Constr. Co. v. Matthews Co., Inc. ---------- 546

79. Expert witness in giving an opinion has right to confine facts that he recites to those which are believed to be true, and which are believed to be material to the issue. Hawkins Constr. Co. v. Matthews Co., Inc. ---------- 546

80. To sustain a conviction for manslaughter, the evidence must be sufficient to justify the finding of a

causal connection between the unlawful act and the death of the victim. State v. Bayliss ---------- 594
81. For a report of an out-of-state conviction to be effective in Nebraska under the provisions of the Driver License Compact, it must be authenticated in due form for admission in evidence in the courts of this State. Johnston v. Department of Motor Vehicles ---------- 606
82. A waiver of objections to evidence on the ground that it was seized in an unreasonable search occurs when no objection is made at least 10 days before trial and where the exceptions thereto have no application. State v. Stowell ---------- 615
83. Where the value of property is an element of the offense, the State must prove by competent evidence that the value of the property at the time and place of the alleged offense equalled or exceeded the requisite minimum value. State v. Stowell ---------- 615
84. When part of a declaration or conversation is given in evidence by one party, the whole on the same subject may be inquired into by the other. Baker v. Daly ---------- 618
85. The admission of evidence under the provisions of section 25-1215, R. R. S. 1943, falls within the area reserved to the sound discretion of the trial court. The trial court must determine whether the evidence offered is on the same subject. Its ruling will not be regarded as erroneous unless there is a clear abuse of discretion. Baker v. Daly ---------- 618
86. In an action for assault and battery, the recovery is limited to compensatory damages and evidence of threats or words and acts of provocation are not admissible in mitigation thereof. Haumont v. Alexander ---------- 637
87. If evidence sustains the findings of the Nebraska State Railway Commission, the court cannot decide that the findings are unreasonable. Dahlsten v. Harris ---------- 652
88. A claim is liquidated if the evidence furnishes data which, if believed, makes it possible to compute the amount, without reliance upon opinion or discretion. Estate of Ruwe v. Ruwe ---------- 663
89. Probable cause does not require the same type of specific evidence of each element of the offense as would be needed to support a conviction. State v. Brewer ---------- 667

90. The rule that the trial court, as well as this court, is bound by a legal principle once determined in a case does not apply to decisions rendered on questions of fact. Sufficiency of testimony on a particular feature of the case as disclosed by the record on the former trial is not binding in a subsequent trial where the testimony is or may be presumed to be materially different. System Meat Co. v. Stewart ---------- 682

91. The defense of payment is an affirmative one which must be pleaded and the burden of proof on the issue is on the party asserting it. Poland v. Gibson ---------- 696

92. In an action upon a written instrument the defense of material alteration must be affirmatively pleaded and evidence that the instrument has been materially altered is inadmissible under a general denial. Poland v. Gibson ---------- 696

93. In determining the sufficiency of the evidence to sustain a conviction in a criminal prosecution, it is not the province of the court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence. State v. Tripple ---------- 713

94. Where a thing which causes the injury is under the control and management of the defendant and the accident is such as in the ordinary course of things does not happen if those who have its management or control use proper care, it affords reasonable evidence, in the absence of an explanation by the defendant, that the accident arose from want of proper care. Fynbu v. Strain ---------- 719

95. The applicability of the doctrine of res ipsa loquitur depends upon the facts and circumstances in each case. Fynbu v. Strain ---------- 719

96. The doctrine of res ipsa loquitur is applicable only where the evidence shows the accident or injury was caused by the instrumentality or thing under the control of the defendant. Fynbu v. Strain ---------- 719

97. Where there is no competent evidence tending to prove insanity no instruction on the burden of proof as to insanity is required. State v. Smith ---------- 722

98. Damages for breach of contract that are susceptible of definite proof are recoverable only to the extent the evidence affords a basis of ascertaining their amount in money with reasonable certainty. Kroeger v. Franchise Equities Inc. ---------- 731

99. Where the claimant in a workmen's compensation case fails to show with reasonable certainty that the disability of which he complains arose out of and in the course of his employment, the proceeding will be dismissed. Atkinson v. Little Audrey's Transfer Co., Inc. ---------- 738

100. As a matter of law the testimony of the prosecutrix alone, uncorroborated by any other evidence, is not sufficient to sustain a conviction for rape, or assault with intent to commit rape. State v. Fisher ------ 742

101. Under the Uniform Commercial Code, the adequacy or insufficiency of the price for which collateral is sold at a private sale after default and repossession is one of the "terms" of sale, and is relevant along with other issues, in determining whether the sale was commercially reasonable. Associates Finance Co. v. Teske ---------- 747

102. A general denial is available to a defendant to challenge one or more elements essential to a recovery by the plaintiff and the effect of the denial is to put the burden on the plaintiff to establish by evidence the matter denied. Associates Finance Co. v. Teske ---------- 747

103. Where the evidence is irreconcilable and in direct conflict, this court will consider the trial court's observation of the witnesses and their manner of testifying and that the court must have accepted one version of the evidence rather than the opposite. Associates Finance Co. v. Teske ---------- 747

104. A constructive trust must be proved by evidence that is clear and convincing. Lukowski v. Deleski ---- 771

105. When a litigant files an amended pleading, the averments of which are inconsistent with the averments of his original pleading, the original is not a judicial admission but competent as an evidentiary admission by a party against his interest. Saum v. L. R. Foy Constr. Co., Inc. ---------- 783

106. A motion to vacate is not available to a party to supply deficiencies, if any, in the evidence adduced at the trial. Miller v. Miller ---------- 816

Executors and Administrators.

1. Executor in discharging his trust duties must exercise care, prudence, and judgment that a man of fair, average capacity and ability exercises in trans-

action of his own business. Bates v. Scottsbluff Nat. Bank ---------- 456
2. Where will directs executor to convert property of deceased into cash, any loss resulting from unreasonable delay in selling the property must be charged to executor. Bates v. Scottsbluff Nat. Bank ----- 456
3. Section 24-602, R. R. S. 1943, which provides that trust funds received by an executor may be kept invested in securities received by him, unless otherwise ordered by the court or unless trust instrument directs change in investments, not applicable where will directs that securities owned by deceased shall be converted into cash. Bates v. Scottsbluff Nat. Bank ---------- 456
4. Delay of more than 6 months in converting securities of speculative nature into cash, as directed by will, unreasonable under facts and circumstances of this case. Bates v. Scottsbluff Nat. Bank ---------- 456
5. Loss resulting from unreasonable delay in liquidating property of deceased determined to be difference between lowest price reached during 6-month period following appointing of executor and price eventually obtained. Bates v. Scottsbluff Nat. Bank -------- 456

Exemptions.

If property is partly exempt and partly nonexempt, the value of the nonexempt portion is subject to taxation and the value of the exempt portion is not subject to taxation. Nebraska Conf. Assn. of Seventh Day Adventists v. Board of Equalization -------- 658

Fees.

1. Collision carrier which obtains payment in full of its subrogation claim directly from liability carrier not liable in any amount for services of attorneys employed by its insured unless it has received some benefit from services for which insurer in fairness should pay. Moyer & Moyer v. State Farm Mut. Ins. Co. ---------- 174
2. Where real estate broker employed to procure purchaser of real property, he is entitled to compensation when has secured proposed purchaser ready, able, and willing to buy property on terms and conditions upon which broker authorized to procure such purchaser. Huston Co. v. Mooney ---------- 242
3. Ordinarily, real estate broker, who for commission

undertakes to sell land on certain terms and within specified period, not entitled to compensation for his services unless he produces purchaser within time limited who is ready, able, and willing to buy upon terms prescribed. Huston Co. v. Mooney ---- 242

4. Where real estate broker obtains purchaser for real estate and no sale made by owner to person produced by agent but not on substantially terms that had been offered through agent's efforts, broker not entitled to commission for making sale. Huston Co. v. Mooney ---------- 242

5. Judgment creditor of insured under policy of liability insurance entitled to award of attorney's fee under section 44-359, R. S. Supp., 1972, where insurer brings action for declaratory judgment to determine coverage under policy and judgment creditor prevails. State Farm Fire & Cas. Co. v. Muth - 248

Fraud.

1. Evidence that defendant changed price tag on carton containing rifle scope on display shelf in self service store, and openly and without any attempt to conceal or hide carton, picked it up and carried it to checkout counter and offered to pay for it, insufficient to establish essential elements of larceny necessary to sustain conviction for stealing rifle scope. State v. Hauck ---------- 534

2. A party may not properly base a claim of estoppel in his favor on his own wrongful act or dereliction of duty, or fraud committed or participated in by him, or on acts or omissions induced by his own conduct, concealment, or representations. Chappelear v. Grange & Farmers Ins. Co. ---------- 589

Frauds, Statute of.

1. Memorandum required by statute of frauds must contain essential terms of contract. Reifenrath v. Hansen ---------- 58

2. Statute of frauds provides that agreement for sale of land void in absence of written memorandum signed by vendor. Krueger v. Callies ---------- 376

3. While writing consisting of several separate documents may satisfy statute of frauds, fact that each is part of a total writing relied upon must be shown either by express references in documents or from contents of documents, but, in attempting to satisfy

statute of frauds, fact that two or more writings constitute part of entire written agreement may not be shown by parol. Abboud v. Cir Cal Stables - 396

Games.

Person hitting golf ball must exercise ordinary care under the circumstances for safety of others; must give adequate and timely notice to persons who appear to be unaware of his intention to hit the ball when he knows, or by exercise of ordinary care should know, that such persons so close to intended flight of ball that danger to them might reasonably be anticipated. Schmidt v. Orton ---------- 257

Guilty Plea.

1. Rule 11 of Federal Rules of Criminal Procedure not applicable to the states. State v. Leger ---------- 352
2. Not required that the court, prior to sentence, ascertain that factual basis exists for plea of guilty, or that defendant be personally addressed for that purpose. State v. Leger ---------- 352
3. When defendant voluntarily and understandingly enters plea of guilty with full knowledge and understanding of a prior violation of his rights, plea of guilty waives such rights. State v. Griger ------- 405
4. Threat to prosecute under state law where facts warrant prosecution should not be considered as coercive or intimidating; to constitute fear and coercion on a plea, petitioner must show he was subjected to threats or promises of illegitimate action; and fear of greater sentence may induce valid plea of guilty. State v. Fitzgerald ---------- 436
5. In determining whether a factual basis for a plea of guilty exists, a court is not required to interrogate the defendant. Inquiry of the prosecutor or examination of the presentence report is an alternative. State v. Daniels ---------- 602
6. In the absence of a showing in a criminal prosecution that a withdrawal is necessary to correct a manifest injustice, a defendant may not withdraw his plea of guilty or nolo contendere as a matter of right once the plea has been accepted by the court. State v. Daniels ---------- 602
7. Before sentence in a criminal prosecution the court in its discretion may allow the defendant to with-

draw his plea for any fair and just reason unless the prosecution has been substantially prejudiced by reliance upon the defendant's plea. State v. Daniels ---------- 602

8. Where the record discloses that a plea of guilty was understandingly and voluntarily entered, it is not subject to post conviction relief. State v. Mayes 833

Habeas Corpus.

1. Ordinarily, basis for issuance of writ of habeas corpus is an illegal detention, but in case of a writ sued out for detention of a child, law is concerned not so much about illegality of detention as about welfare of child. Syrovatka ex rel. Syrovatka v. Graham ---------- 355
2. Appropriate form of relief from claimed excessive bail in Nebraska is by habeas corpus. State v. Watkins ---------- 450

Homestead.

1. An option to purchase land constituting homestead void when not executed and acknowledged by both husband and wife as required by section 40-104, R. R. S. 1943. Struempler v. Peterson ---------- 133
2. Once acquired, homestead continues as long as residence maintained on premises. Struempler v. Peterson ---------- 133
3. Once established, homestead not abandoned until there is both intent to abandon and actual abandonment. Struempler v. Peterson ---------- 133
4. Where contract for purchase and sale of real estate includes both homestead and nonhomestead property but not executed and acknowledged as required by section 40-104, R. R. S. 1943, specific performance may be obtained as to nonhomestead land with abatement of total purchase price, where contract under its provisions clearly severable as to nonhomestead property. Struempler v. Peterson ---------- 133
5. Where contract not severable as between homestead and nonhomestead property, Supreme Court will not ordinarily attempt to make new contract for parties; nor impose new conditions; nor will it require specific performance of contract which does not contain substance of agreement made. Struempler v. Peterson ---------- 133
6. A homestead cannot be conveyed or encumbered

except by instrument executed and acknowledged by both husband and wife. Krueger v. Callies ------- 376

Homicide.

1. In prosecution for manslaughter in commission of assault and battery, time of offense fixed at time fatal blow is struck. State v. Hare ---------- 339
2. To sustain conviction for manslaughter, evidence must be sufficient to justify finding of causal connection between unlawful act and death of victim. State v. Hare ---------- 339
State v. Bayliss ---------- 594

Implied Consent Law.

1. Refusal of request of arrested person to contact an attorney before consenting to alcoholic test under Implied Consent Law affords no reasonable ground for refusing to submit to test. Stevenson v. Sullivan 295
2. Section 39-727.03, R. S. Supp., 1972, must be construed in conjunction with sections 39-727, 39-727.15, and 39-727.16, R. S. Supp., 1972, all of which are clearly pari materia to each other. Stevenson v. Sullivan ---------- 295
3. On appeal from a revocation of a motor vehicle operator's license under the implied consent statute this court reviews the finding of the trial court de novo. Wiseman v. Sullivan ---------- 724
4. A conditional or qualified refusal to take one of the authorized tests to determine the alcoholic content of body fluids under the implied consent law is not sanctioned by the act and such a refusal is a refusal to submit to the test within the meaning of the act. Wiseman v. Sullivan ---------- 724
5. A driver who has been arrested for operating a motor vehicle upon a public street or highway while under the influence of intoxicating liquor is not entitled either under the Constitution or the implied consent statute to consult with a lawyer previous to giving a sample of blood, breath, or urine, or to have a lawyer present during the giving of the sample. Wiseman v. Sullivan ---------- 724
6. The taking of a sample of blood, breath, or urine for chemical analysis on the request of the arresting officer, as authorized by the implied consent law, is not required to be delayed by a request of the

arrested motorist that he be permitted to contact a lawyer. Wiseman v. Sullivan ---------- 724
7. The compulsory giving of a blood, breath, or urine sample under the provisions of the implied consent law does not violate the constitutional right against self-incrimination under the Fifth Amendment to the Constitution of the United States. Wiseman v. Sullivan ---------- 724
8. A driver who is requested to give a blood, breath, or urine sample under the implied consent statute is not entitled prior to being asked to give such sample to be warned of his right not to incriminate himself. Wiseman v. Sullivan ---------- 724
9. The statement in Pickard v. Director of Motor Vehicles, 184 Neb. 13, 165 N. W. 2d 96, suggesting that in some undefined circumstances a delay may be appropriate to give a driver an opportunity to consult a lawyer before giving a sample under the implied consent statute is disapproved. Wiseman v. Sullivan ---------- 724
10. The right to a Miranda type warning applies only to in-custody interrogation and has no application to a proper request to a motor vehicle driver to give a specimen under the implied consent statute. Wiseman v. Sullivan ---------- 724
11. If a Miranda type warning is given in connection with information concerning the implied consent statute, it is incumbent upon the arresting officer to explicitly inform the arrested person that the constitutional rights to counsel and against self-incrimination which may have been previously explained are not applicable to the decision the driver must make concerning the giving of samples, that he has no right to consult with an attorney before making that decision, and that the right against self-incrimination does not permit the driver to refuse to either comply with or answer the request for such samples. Wiseman v. Sullivan ---------- 724
12. Where it appears from the evidence that a request to see an attorney before giving a sample under the implied consent law was induced by confusion resulting from the commingling of Miranda type warnings with information concerning the demands of the implied consent statute, such request for an attorney does not constitute a refusal under the implied consent statute. Wiseman v. Sullivan ---------- 724

Indemnity.

Indemnification clause in a trip lease of operating equipment by licensed motor carrier, subject to ICC regulations, which obligates lessor to reimburse lessee for any payment made on account of any accident, claim, or suit arising out of operation of equipment during term of lease unenforceable as against public policy. Denver Midwest Motor Freight, Inc. v. Busboom Trucking, Inc. ---------- 231

Indigents.

Prior to June 22, 1970, it was not required that indigent defendant be supplied with counsel at preliminary hearing. State v. Moore ---------- 271

Infants.

1. In determining child custody, controlling consideration is best interests and welfare of children. Schott v. Schott ---------- 84
2. When a court, having jurisdiction of children in divorce action, has placed custody of children in the court with possession and care in a parent, the court may summarily in best interests of children modify possession of parent or parents. Benson v. Benson ---------- 87
3. A female 15 years of age or older convicted of unlawful possession of controlled substance, except marijuana, may be sentenced to Division of Corrections for term of 2 to 4 months. State v. Shimp 137
4. Child custody statutes of Nebraska to be liberally construed to accomplish purpose of serving best interests of child involved. State v. Vogt -------- 205
5. In cases involving child custody, finding of trial court both as to evaluation of evidence and as to matter of custody will not be disturbed unless is clear abuse of discretion or decision against weight of evidence. State v. Vogt ---------- 205
6. In proceeding to terminate parental rights under section 43-209, R. R. S. 1943, indigent parent, upon request, entitled to appointment of counsel at expense of county. State v. Caha ---------- 347
7. In proceeding to terminate parental rights under section 43-209, R. R. S. 1943, a guardian ad litem should be appointed to represent children where it appears necessary or desirable. State v. Caha ---- 347
8. Ordinarily, basis for issuance of writ of habeas

corpus is an illegal detention, but in case of a writ sued out for detention of a child, law is concerned not so much about illegality of detention as about welfare of child. Syrovatka ex rel. Syrovatka v. Graham ---------- 355

9. When any county court in Nebraska shall enter of record a decree of adoption it shall be conclusively presumed that said adoption and all instruments and proceedings in connection therewith are valid in all respects unless action brought within 2 years from entry of such decree of adoption attacking its validity. Syrovatka ex rel. Syrovatka v. Graham 355

10. Decree fixing custody of minor children will not be modified unless has been change in circumstances indicating that person having custody unfit for that purpose or that best interests of children require such action. Flesher v. Flesher ---------- 359

11. Discretion of trial court with respect to changing custody of minor children subject to review, but determination of court will not ordinarily be disturbed unless is clear abuse of discretion or is clearly against weight of evidence. Flesher v. Flesher -- 359

12. Decree fixing custody of minor children will not be modified unless there has been change in circumstances indicating that person having custody unfit for that purpose or that best interests of children require such action. Gilman v. Riis ---------- 409

13. Discretion of trial court with respect to changing custody of minor children subject to review, but determination of court will not ordinarily be disturbed unless is clear abuse of discretion or it is clearly against weight of evidence. Gilman v. Riis 409
Adamson v. Adamson ---------- 716
Petersen v. Petersen ---------- 805

14. Judgment for child support may be revised or altered at any time as to future payments if circumstances of parties change. McGee v. McGee ---------- 415

15. Where decree of divorce gives visitation rights, law contemplates that children shall remain within the state so that rights may be exercised; mother's removal of children from state without consent of father or of court may be sufficient change of circumstances to justify court in suspending or reducing amount of child support payments until children have returned to state. McGee v. McGee ---- 415

16. District Court in its discretion may appoint attor-

ney to protect interests of any minor children of the parties; limits upon discretion must evolve case by case. Pieck v. Pieck ---------- 419

17. In determining amount of child support to be awarded, status, character, and situation of parties and all attendant circumstances must be considered, and amount rests in sound discretion of court. Bliven v. Bliven ---------- 492

18. For purposes of appeal a final order of a county court in a juvenile proceeding encompasses every dispositive order that rests on an adjudication of delinquency. State v. Belding ---------- 646

19. A limitation of 1 year for filing of a motion for new trial on the ground of newly discovered evidence and the filing of a supporting affidavit is not controlling in a juvenile proceeding in county court, but they affect the requirement of the exercise of reasonable diligence. State v. Belding ---------- 646

20. In awarding or changing custody the welfare of the minor child is the question of primary importance. Adamson v. Adamson ---------- 716

21. An application for modification of a divorce decree with respect to the care, custody, and maintenance of minor children must be founded upon new facts and circumstances which have arisen since the entry of the decree. Adamson v. Adamson ---------- 716

22. A parent found unfit for custody should not, by the mere passage of time without further misconduct, be able to change child custody provisions in a divorce decree in the absence of clear and convincing evidence that the best interests and welfare of the child require it. Adamson v. Adamson ---------- 716

23. In determining the question of who should have the care and custody of minor children the paramount consideration is the best interests and welfare of the children. Petersen v. Petersen ---------- 805

24. The power of a court to reduce, suspend, or terminate its order for child support payments is a power that generally will only be exercised as a last resort or where it is apparent that to do so affords the only remedy that can reasonably be expected to fit the mischief. Biesecker v. Biesecker ---------- 808

Injunction.

1. Courts of equity will not enjoin commission of acts for sole reason that they constitute violations of

criminal statutes. State ex rel. Meyer v. Weiner -- 30
2. Injunction is proper remedy to be used by State in protection of public rights, property, or welfare, whether or not acts complained of violate criminal statute or whether or not they constitute a nuisance. State ex rel. Meyer v. Weiner ---------- 30
3. Acts constituting continuous violations of Real Estate Brokers Act, sections 81-862 to 81-887, R. R. S. 1943, may be enjoined by court of equity in protection of public rights, property, or welfare. State ex rel. Meyer v. Weiner ---------- 30
4. Injunction will not be granted unless right is clear, damage irreparable, and remedy at law inadequate to prevent failure of justice. Czarnick v. Loup River P. P. Dist. ---------- 521
5. Acts which destroy or result in serious change of property either physically or in the character in which it has been held or enjoyed may constitute irreparable injury and warrant injunctive relief. Czarnick v. Loup River P. P. Dist. ---------- 521
6. Where injury wrongfully committed continuous or being constantly repeated so that complainant's remedy at law requires bringing of successive actions, that remedy inadequate and injury may be prevented by injunction. Czarnick v. Loup River P. P. Dist. ---------- 521

Insane Persons.

1. Defendant in criminal action presumed sane until evidence of insanity produced; State then has burden of proving beyond reasonable doubt that defendant sane at time crime committed. State v. Jacobs ---------- 4
2. Test of responsibility for crime is defendant's capacity to understand nature of act alleged to be criminal and ability to distinguish between right and wrong with respect to the act. State v. Jacobs 4
State v. Smith ---------- 722
3. Fact that defendant may have some form of mental illness or deficiency does not of itself constitute a defense or establish lack of responsibility. State v. Jacobs ---------- 4
4. The law recognizes no form of insanity or uncontrolled impulse as a defense even though mental faculties are disordered or deranged if defendant

had capacity to know what he was doing and to understand the act was wrong. State v. Jacobs ---- 4
5. Issue of criminal responsibility to be determined from all the evidence. State v. Jacobs ---------- 4
6. Where there is no competent evidence tending to prove insanity no instruction on the burden of proof as to insanity is required. State v. Smith -------- 722

Instructions.

1. Nebraska Jury Instruction 14.81 pertaining to credibility of witnesses applicable to testimony of defendant; not usually necessary to give at defendant's request special instruction highlighting his testimony. State v. Myers ---------- 146
2. If evidence in criminal case such as to warrant only verdict of greater offense, or one of not guilty, then is not proper to give instruction on lesser included offense. State v. DeBerry ---------- 177
3. Duty of trial court to submit to jury all issues properly pleaded and which find support in evidence. Fleischer v. Rosentrater ---------- 219
4. It is the duty of the trial court to submit to the jury all material issues which are presented by the pleadings and supported by evidence. Baker v. Daly 618
5. In a civil action for assault and battery where the evidence conclusively shows that defendant made a voluntary attack upon plaintiff without provocation and was the sole active aggressor throughout the assault, the plea of self-defense has no proper place in the transaction and a request for an instruction looking to the exoneration of the defendant on that ground is properly refused. Haumont v. Alexander 637
6. It is not error for the trial court to refuse to submit to the consideration of the jury a defense which finds no support in the evidence. Haumont v. Alexander ---------- 637
7. The failure to object to instructions after they have been submitted to counsel for review will preclude raising an objection on appeal. Haumont v. Alexander ---------- 637
Webber v. City of Omaha ---------- 678
8. The purpose of the instruction conference is to give the trial court an opportunity to correct any errors being made by it. Consequently, the parties should object to any errors of commission or omission. Haumont v. Alexander ---------- 637

9. Instructions must be considered and construed together, and if they are not sufficiently specific in some respects, it is the duty of counsel to offer requests for instructions that will supply the omission, and, unless this is done, the judgment will not ordinarily be reversed for such defects. Fisher v. Gate City Steel Corp. ---------- 699

10. Where instructions correctly state the law, it is not error for the court, in the absence of a request for a more specific instruction, to fail to give a more elaborate one. Fisher v. Gate City Steel Corp. ---- 699

11. Where a general instruction on an issue is correct, if a party desires a fuller or more specific instruction on the subject matter it must be asked for. White v. Longo ---------- 703

12. Where the law provides a definite measure of damages, the court should instruct the jury specifically how the damages should be assessed. Where there is no such definite measure of damages, then the general instruction on compensatory damage is sufficient. White v. Longo ---------- 703

13. In the absence of evidence of some special element of damage for which the law provides a specific means of measurement, it is the general rule that in an action for criminal conversation damages are incapable of precise measurement and there is no fixed rule for determining the amount thereof. White v. Longo ---------- 703

14. Where the general charge fairly presents the case to the jury, a party who desires an instruction on some particular question should request it, and cannot base error on the omission otherwise. State v. Tripple ---------- 713

15. Where there is no competent evidence tending to prove insanity no instruction on the burden of proof as to insanity is required. State v. Smith ---------- 722

16. Failure of counsel to object to proposed jury instructions after their submission to him by the court for review precludes objection on appeal. Barta v. Betzer ---------- 752

17. Noncompliance with the requirement that counsel is under a duty to object to proposed jury instructions submitted to him for review, does not bar this court from opting to consider plain errors in a record indicative of a probable miscarriage of justice. Barta v. Betzer ---------- 752

18. The last sentence of NJI No. 2.01A (1969), is erroneous and should not be given. Barta v. Betzer -- 752

Insurance.

1. By its terms, section 44-501, R. R. S. 1943, mandatorily requiring inclusion of provisions of 1943 Standard Fire Insurance Policy of State of New York are applicable only to policy or contract of fire and lightning insurance. Wulf v. Farm Bureau Ins. Co. 34
2. Fire insurance policy legally issued in Nebraska which contains provision requiring suit be brought within 12 months after inception of loss, but which also contains provisions amending any terms of policy which are in conflict with state statutes to conform with such statutes, subject to limitations set out in section 44-357, R. R. S. 1943. Wulf v. Farm Bureau Ins. Co. ---------- 34
3. Report or other communication made by insured to his liability insurance company, concerning an event which may be made basis of claim against him covered by the policy, is privileged communication, as being between attorney and client, if policy requires company to defend him through its attorney, and communication intended for information or assistance of attorney in so defending him. Brakhage v. Graff ---------- 53
4. Word "accident" as used in liability insurance more comprehensive term than "negligence" and in its common signification word means an unexpected happening without intention. City of Kimball v. St. Paul Fire & Marine Ins. Co. ---------- 152
5. Word "accident" has many meanings, and when used in contract of liability insurance, unless otherwise stipulated, should be given construction most favorable to insured. City of Kimball v. St. Paul Fire & Marine Ins. Co. ---------- 152
6. Elements of unforeseen or unexpected damage or consequence as distinguished from normal or probable consequence from negligent act important in describing causation by accident within insurance policy. City of Kimball v. St. Paul Fire & Marine Ins. Co. ---------- 152
7. In absence of express provision describing causation by accident in insurance policy, inability to fix exact time when and where accident occurred does not

preclude recovery under policy. City of Kimball v. St. Paul Fire & Marine Ins. Co. ---------- 152

8. Accident covered by insurance policy may be a process; where accident is process how long then not significant; is nature of process which is important. City of Kimball v. St. Paul Fire & Marine Ins. Co. 152

9. In general, element of unforeseen or unexpected damages as distinguished from normal and probable consequence from negligent act, dominant in describing causation by accident. City of Kimball v. St. Paul Fire & Marine Ins. Co. ---------- 152

10. Collision carrier which obtains payment in full of its subrogation claim directly from liability carrier not liable in any amount for services of attorneys employed by its insured unless it has received some benefit from services for which insurer in fairness should pay. Moyer & Moyer v. State Farm Mut. Ins. Co. ---------- 174

11. Injury is either expected or intended within meaning of exclusion in policy of liability insurance reading as follows: "This policy does not apply to bodily injury or property damage which is either expected or intended from the standpoint of the insured," if insured acted with specific intent to cause harm to third party. State Farm Fire & Cas. Co. v. Muth ---------- 248

12. Judgment creditor of insured under policy of liability insurance entitled to award of attorney's fee under section 44-359, R. S. Supp., 1972, where insurer brings action for declaratory judgment to determine coverage under policy and judgment creditor prevails. State Farm Fire & Cas. Co. v. Muth ---- 248

13. Provision in insurance policy for reinstatement represents valuable contract right which survives lapse of policy and which insurer cannot arbitrarily condition or deny. Ewoldt v. American Nat. Ins. Co. -- 290

14. In acting upon application for reinstatement of insurance policy, insurer may not act capriciously or unreasonably. Ewoldt v. American Nat. Ins. Co. -- 290

15. Purpose and effect of statutory and policy provisions requiring application for reinstatement of lapsed insurance policy to permit insurer to reexamine risk it is considering reinsuring. Ewoldt v. American Nat. Ins. Co. ---------- 290

16. Requirement, for reinstatement of life insurance policy, that satisfactory evidence of insurability be

presented is part of contract of which insurer entitled to performance. Ewoldt v. American Nat. Ins. Co. ---------- 290

17. Upon receipt of reinstatement application of insurance policy, insurer has right to require further evidence of insurability or to agree to reinstate policy on basis of information in application itself, but in either event, reinstatement never effectuated until insurer acts on application. Ewoldt v. American Nat. Ins. Co. ---------- 290

18. Insurer under fidelity bond is liable only for losses sustained by insured and of type described in insurance contract. KAMI Kountry Broadcasting Co. v. United States F. &. G. Co. ---------- 330

19. Endorsement which is not misleading, ambiguous, or conflicting which amends an omnibus clause in uncertified automobile liability insurance policy by limiting application of omnibus clause to use of automobile by person over the age of 25 years, except for insured or any resident of his household, is authorized contract of insurance; such endorsement not proscribed by any statute, nor is it against public policy; it is not rendered void merely because it has not been filed with and approved by Department of Insurance prior to its issuance. Equity Mut. Ins. Co. v. Allstate Ins. Co. -------- 515

20. If insurance contract prepared by insurer, and contains provisions which under facts are reasonably subject to different interpretations, and purpose and intent of provision or clause clear, the one favorable to insured will be adopted if harmonious with enforcement of intent and purpose of provisions of whole policy. Townley v. Whetstone ---------- 541

21. Separate exclusionary clause in insurance contract should be construed in light of provisions of whole contract and harmonized therewith if reasonably possible, considering intent and purposes of parties drawn from examination of whole contract of insurance. Townley v. Whetstone ---------- 541

22. An insurance policy is a contract which requires an offer and acceptance to be effective. Chappelear v. Grange & Farmers Ins. Co. ---------- 589

23. Essential elements of equitable estoppel stated. Chappelear v. Grange & Farmers Ins. Co. -------- 589

24. A party may not properly base a claim of estoppel in his favor on his own wrongful act or dereliction

of duty, or fraud committed or participated in by him, or on acts or omissions induced by his own conduct, concealment, or representations. Chappelear v. Grange & Farmers Ins. Co. ---------- 589

25. The essential element of estoppel is a representation relied upon by the party claiming the benefit of the estoppel, which induced him to act, or refrain from acting to his prejudice. Chappelear v. Grange & Farmers Ins. Co. ---------- 589

26. Under the Uniform Commercial Code the seller retains an insurable interest in goods so long as title to or any security interest in the goods remains in him. Bowman v. American Home Assur. Co. -- 810

Intent.

1. Malice in legal sense denotes that condition of mind which is manifested by intentional doing of wrongful act without just cause or excuse. State v. Russ 130

2. Evidence of other crimes, similar to that charged, relevant and admissible when it tends to prove a particular criminal intent which is necessary to constitute crime charged or where is some legal connection between the two upon which it can be said that one tends to establish the other or some essential fact in issue. State v. Young ---------- 325

3. Possession of a large quantity of a controlled substance packaged in a form customarily used for distribution will support a finding of possession with intent to distribute. State v. Sullivan ---------- 621

Interest.

1. A corporation may agree to pay any rate of interest by agreement in writing which sets out amount or rate charged. § 45-101, R. R. S. 1943. Northland Mortgage Co. v. Royalwood Estates, Inc. ---- 46

2. A claim is liquidated if the evidence furnishes data which, if believed, makes it possible to compute the amount, without reliance upon opinion or discretion. Estate of Ruwe v. Ruwe ---------- 663

Intoxicating Liquors.

1. Phrase "not of good character" concerning eligibility for license under Nebraska Liquor Control Act imports lack of good faith or honesty of purpose. C & L Co. v. Nebraska Liquor Control Commission - 91

2. Sentence to 3 years' imprisonment for driving while

intoxicated not excessive where defendant had six previous convictions for same offense, had violated his probation order, and had failed to continue with treatment for alcoholism. State v. Klinkacek ---- 293

3. Refusal of request of arrested person to contact an attorney before consenting to alcoholic test under Implied Consent Law affords no reasonable ground for refusing to submit to test. Stevenson v. Sullivan ---------- 295

4. Section 39-727.03, R. S. Supp., 1972, must be construed in conjunction with sections 39-727, 39-727.15, and 39-727.16, R. S. Supp., 1972, all of which are clearly pari materia to each other. Stevenson v. Sullivan ---------- 295

5. The fact that a person was intoxicated is a circumstance which may be considered in determining whether he exercised the degree of care for his own safety which a prudent sober person would exercise under the same or similar circumstances. The mere fact that he was intoxicated at the time he was injured does not of itself constitute contributory negligence. Webber v. City of Omaha ---------- 678

6. The care required of a person who has voluntarily become intoxicated is the same as that required of one who is sober. If he fails to exercise that degree of care for his own safety which an ordinarily prudent sober person would exercise under the same or similar circumstances, and such failure contributes as a proximate cause to the injury of which he complains, he is guilty of contributory negligence. Webber v. City of Omaha ---------- 678

7. A conditional or qualified refusal to take one of the authorized tests to determine the alcoholic content of body fluids under the implied consent law is not sanctioned by the act and such a refusal is a refusal to submit to the test within the meaning of the act. Wiseman v. Sullivan ---------- 724

8. A driver who has been arrested for operating a motor vehicle upon a public street or highway while under the influence of intoxicating liquor is not entitled either under the Constitution or the implied consent statute to consult with a lawyer previous to giving a sample of blood, breath, or urine, or to have a lawyer present during the giving of the sample. Wiseman v. Sullivan ---------- 724

9. The taking of a sample of blood, breath, or urine for

chemical analysis on the request of the arresting officer, as authorized by the implied consent law, is not required to be delayed by a request of the arrested motorist that he be permitted to contact a lawyer. Wiseman v. Sullivan ---------- 724

10. The compulsory giving of a blood, breath, or urine sample under the provisions of the implied consent law does not violate the constitutional right against self-incrimination under the Fifth Amendment to the Constitution of the United States. Wiseman v. Sullivan ---------- 724

11. A driver who is requested to give a blood, breath, or urine sample under the implied consent statute is not entitled prior to being asked to give such sample to be warned of his right not to incriminate himself. Wiseman v. Sullivan ---------- 724

12. The statement in Pickard v. Director of Motor Vehicles, 184 Neb. 13, 165 N. W. 2d 96, suggesting that in some undefined circumstances a delay may be appropriate to give a driver an opportunity to consult a lawyer before giving a sample under the implied consent statute is disapproved. Wiseman v. Sullivan ---------- 724

13. The right to a Miranda type warning applies only to in-custody interrogation and has no application to a proper request to a motor vehicle driver to give a specimen under the implied consent statute. Wiseman v. Sullivan ---------- 724

14. If a Miranda type warning is given in connection with information concerning the implied consent statute, it is incumbent upon the arresting officer to explicitly inform the arrested person that the consitutional rights to counsel and against self-incrimination which may have been previously explained are not applicable to the decision the driver must make concerning the giving of samples, that he has no right to consult with an attorney before making that decision, and that the right against self-incrimination does not permit the driver to refuse to either comply with or answer the request for such samples. Wiseman v. Sullivan ---------- 724

15. Where it appears from the evidence that a request to see an attorney before giving a sample under the implied consent law was induced by confusion resulting from the commingling of Miranda type warn-

ings with information concerning the demands of the implied consent statute, such request for an attorney does not constitute a refusal under the implied consent statute. Wiseman v. Sullivan ---------- 724

16. In an appeal to this court from an order of the Nebraska Liquor Control Commission suspending a liquor license, under the provisions of section 84-918, R. R. S. 1943, we determine only whether its findings are supported by substantial evidence under section 84-917(6) (e), R. R. S. 1943, and whether the District Court has applied the proper statutory criteria in its review of the commission's decision. The 20's, Inc. v. Nebraska Liquor Control Commission ---------- 761

Inviter and Invitee.

1. Mere fact that invitee falls at entrance of building where difference in level present does not raise presumption of negligence. Whitcomb v. State Fed. Sav. & Loan Assn. ---------- 26
2. While owner of premises owes duty to invitee to exercise ordinary care to have premises in reasonably safe condition for use in manner consonant with purposes of invitation, generally, there is no duty on part of inviter owner to protect invitee against hazards which are known to invitee or so apparent that he may reasonably be expected to discover them and protect himself. Whitcomb v. State Fed. Sav. & Loan Assn. ---------- 26
3. If conditions and circumstances such that invitee has knowledge of condition in advance or should have knowledge comparable to that of inviter, it may not be said that inviter guilty of actionable negligence. Whitcomb v. State Fed. Sav. & Loan Assn. 26
4. One capable of understanding and discretion and who fails to exercise ordinary care and prudence to avoid defects and dangers which are open and obvious is negligent or contributorily negligent. Whitcomb v. State Fed. Sav. & Loan Assn. ----- 26
5. General contractor, in control of premises where work performance under contract with owner to be carried out, owes duty to persons rightfully on premises to keep premises in reasonably safe condition while contract in course of performance. Hand v. Rorick Constr. Co. ---------- 191

Joint Ventures.

To be joint venturers, must be not only joint interest in objects and purposes of enterprise but also equal right to direct and control conduct of each other in operation of vehicle. Kremlacek v. Sedlacek -- 460

Judgments.

1. An issue depending entirely upon speculation, surmise, or conjecture never sufficient to sustain a judgment; consequently, judgment solely based upon speculation, surmise, or conjecture must be set aside. Mitchell v. Eyre ---------- 182
2. Judgment dismissing plaintiff's petition in accordance with proper motion for judgment after mistrial and discharge of jury but containing phrase "notwithstanding verdict," harmless error. Giangrasso v. Schimmel ---------- 228
3. Findings of trial court in action where jury waived have effect of verdict of jury and will not be set aside unless clearly wrong. State Farm Fire & Cas. Co. v. Muth ---------- 248
4. Judgment creditor of insured under policy of liability insurance entitled to award of attorney's fee under section 44-359, R. S. Supp., 1972, where insurer brings action for declaratory judgment to determine coverage under policy and judgment creditor prevails. State Farm Fire & Cas. Co. v. Muth - 248
5. In determining sufficiency of evidence to sustain a judgment, must be considered in light most favorable to successful party. Schmidt v. Orton ------ 257
6. Where law action tried to court without jury, finding of court has effect of jury verdict and will not be disturbed on appeal unless clearly wrong. Larutan Corp. v. Magnolia Homes Manuf. Co. ---------- 425
7. In declaratory judgment action, issues of fact may be tried and determined in same manner as issues of fact are tried and determined in other civil actions in court in which proceeding pending. Larutan Corp. v. Magnolia Homes Manuf. Co. ---------- 425
8. Determination of factual issues in declaratory judgment action, which would otherwise be an action at law, will be treated in same manner as if jury had been waived. Larutan Corp. v. Magnolia Homes Manuf. Co. ---------- 425
9. An unqualified allowance of alimony in gross, whether payable immediately in full or periodically in

installments, and whether intended solely as a property settlement or as an allowance for support, or both, is such a definite and final adjustment of mutual rights and obligations between husband and wife as to be capable of a present vesting and to constitute an absolute judgment. Karrer v. Karrer 610

10. A legislative act will not be permitted, even if an intent so to do is clear, to operate retrospectively where it will have the effect of invalidating or impairing rights which have vested by virtue of the judgment of a court. Karrer v. Karrer ---------- 610

11. The provisions of section 42-365, R. S. Supp., 1972, authorizing the modification of alimony awards, do not apply to judgments entered previous to July 6, 1972, awarding alimony in gross. Karrer v. Karrer 610

12. Possession of a statutory mechanic's lien alone is not enough to entitle a subcontractor to recover a personal judgment against the owner of the premises. Saum v. L. R. Foy Constr. Co., Inc. ---------- 783

13. A party on appeal ordinarily cannot successfully assert error in a judgment that granted him the relief demanded by his pleadings. Saum v. L. R. Foy Constr. Co., Inc. ---------- 783

Jury.

1. In jury cases, jurors are judges of credibility of witnesses and of weight to be given their testimony and, within their province, they have right to credit or reject the whole or any part of testimony of witness in exercise of their judgment. State v. Godinez ---- 1

2. Trial court not required to poll jury unless requested to do so. State v. Hiatt ---------- 315

3. Defendant may waive his right to have jury polled; when upon inquiry by court he replies in negative, right waived. State v. Hiatt ---------- 315

4. Although defendant not entitled under all circumstances to jury containing members of his race, State's purposeful racial denial of their participation as jurors in the administration of justice violates Equal Protection Clause; discrimination, however, may not be assumed but must be proved; not proved by establishing that identifiable group in community is underrepresented by as much as ten percent. State v. Campbell ---------- 394

5. Motion for new trial for alleged juror misconduct

addressed to sound discretion of trial court. Kremlacek v. Sedlacek ---------- 460
6. Unauthorized view or visit by juror, even though uncommunicated to his fellow jurors, sufficient to sustain finding of prejudicial error and warrant granting of new trial. Kremlacek v. Sedlacek --- 460
7. Trial court has wide discretion in receiving affidavits and in weight it gives them, in accordance with general rule that affidavits of jurors may be received, for purpose of voiding verdict, to show any matter occurring during trial, or in jury room, which does not essentially inhere in verdict itself. Kremlacek v. Sedlacek ---------- 460
8. Duty of trial court to see that defendants in criminal cases are tried by jury such that not even suspicion or prejudice can attach to any member thereof. State v. Myers ---------- 466
9. Duties of court stated where jury impaneled and sworn as one of several juries selected from single jury panel for subsequent trial of series of criminal cases. State v. Myers ---------- 466

Landlord and Tenant.

Where a tenant for life of farm land leases the land, with the rent payable in a share of the crop, and dies while the crop is growing, title to the share of the crop reserved as rent passes to the executor of the estate of the tenant for life as assets of that estate. Estate of Ruwe v. Ruwe ---------- 663

Larceny.

1. Term "steal" as used in criminal code includes all elements of larceny at common law. State v. Hauck 534
2. Evidence that defendant changed price tag on carton containing rifle scope on display shelf in self service store, and openly and without any attempt to conceal or hide carton, picked it up and carried it to checkout counter and offered to pay for it, insufficient to establish essential elements of larceny necessary to sustain conviction for stealing rifle scope. State v. Hauck ---------- 534

Leases and Assignments.

If upon compliance with terms of lease, lessee has option to become owner of property for nominal consideration, lease intended for security. Crowder v. Allied Invstment Co. ---------- 487

Licensee.

1. A social guest is a mere licensee. Casey v. Addison _ 634
2. The owner or occupant of property owes to a licensee the duty only to refrain from injuring him by willful or wanton negligence or a designed injury, or by failure to warn of a hidden danger or peril known to the owner or occupant but unknown to or unobservable by the licensee in the exercise of ordinary care. Casey v. Addison ---------- 634

Licenses.

1. Phrase "not of good character" concerning eligibility for license under Nebraska Liquor Control Act imports lack of good faith or honesty of purpose. C & L Co. v. Nebraska Liquor Control Commission -- 91
2. In exercising the authority granted by the Driver License Compact, the Director of the Nebraska Department of Motor Vehicles has no power or authority other than that specifically conferred. Johnston v. Department of Motor Vehicles ---------- 606
3. To be applicable in Nebraska, a report of a conviction in another jurisdiction must substantially comply with the provisions set out in Article II of the Driver License Compact. Johnston v. Department of Motor Vehicles ---------- 606
4. For a report of an out-of-state conviction to be effective in Nebraska under the provisions of the Driver License Compact, it must be authenticated in due form for admission in evidence in the courts of this State. Johnston v. Department of Motor Vehicles ---------- 606

Liens.

1. Once it is determined that person protected by statutory lien granted agister, statute will be liberally construed so that its object will be effectuated. Mousel v. Daringer ---------- 77
2. Person who furnished materials or services with respect to goods that are already subject to perfected security interest is not engaged in ordinary course of his business under section 9-310, U. C. C., with respect to any part of his charges that are unreasonable. Mousel v. Daringer ---------- 77
3. Lien of one who furnishes material for repairs and alteration of building upon land in possession of vendee under executory contract of purchase sub-

ordinate to lien of vendor who retains legal title to secure deferred installments of purchase price except in cases where vendor himself promotes improvement or causes it to be made. O'Hara Plumbing Co., Inc. v. Roschynialski ---------- 246
4. Section 52-102, R. R. S. 1943, requires filing of lien within 3 months from furnishing of material. Tub-Master Corp. v. State Surety Co. ---------- 266

Limitations of Actions.

1. Fire insurance policy legally issued in Nebraska which contains provision requiring suit be brought within 12 months after inception of loss, but which also contains provisions amending any terms of policy which are in conflict with state statutes to conform with such statutes, subject to limitations set out in section 44-357, R. R. S. 1943. Wulf v. Farm Bureau Ins. Co. ---------- 34
2. When any county court in Nebraska shall enter of record a decree of adoption it shall be conclusively presumed that said adoption and all instruments and proceedings in connection therewith are valid in all respects unless action brought within 2 years from entry of such decree of adoption attacking its validity. Syrovatka ex rel. Syrovatka v. Graham 355
3. Section 25-218, R. R. S. 1943, provides that every claim and demand against the State shall be forever barred, unless action be brought within 2 years after claim arose. Czarnick v. Loup River P. P. Dist. ---- 521
4. A suit against the State for taking or damaging of private property for public use must be commenced within 2 years from time taking or damaging of the property occurred. Czarnick v. Loup River P. P. Dist. ---------- 521
5. The filing of a felony complaint before a magistrate charging embezzlement and the issuance of an arrest warrant within 3 years after the date of the offense tolls the statute of limitations. § 29-110, R. S. Supp., 1972. State v. Donoho ---------- 593
6. A limitation of 1 year for filing of a motion for new trial on the ground of newly discovered evidence and the filing of a supporting affidavit is not controlling in a juvenile proceeding in county court, but they affect the requirement of the exercise of reasonable diligence. State v. Belding ---------- 646
7. A voluntary payment upon a claim otherwise barred

by the statute of limitations is one that was intentionally and consciously made and accepted as part payment of the particular indebtedness in question under such circumstances as would warrant a clear inference that the debtor assented to and acknowledged the greater debt to be due as an existing liability. Estate of Ruwe v. Ruwe ---------- 663

Malicious Prosecution.

In action for malicious prosecution, whether facts and circumstances established by uncontradicted evidence amount to probable cause for criminal prosecution is question of law for trial court and not issue of fact for jury. Jones v. Brockman ---------- 15

Mechanic's Liens.

Possession of a statutory mechanic's lien alone is not enough to entitle a subcontractor to recover a personal judgment against the owner of the premises. Saum v. L. R. Foy Constr. Co., Inc. ---------- 783

Motions, Rules, and Orders.

1. For purposes of evaluating motion for directed verdict or dismissal of cause of action, all doubt must be resolved in favor of party against whom verdict or dismissal urged; truth of all evidence he has submitted must be assumed, and he must be given benefit of all inferences therefrom. Wilgro, Inc. v. Vowers & Burback ---------- 369
2. Motion for new trial for alleged juror misconduct addressed to sound discretion of trial court. Kremlacek v. Sedlacek ---------- 460
3. A motion to vacate is not available to a party to supply deficiencies, if any, in the evidence adduced at the trial. Miller v. Miller ---------- 816

Motor Vehicles.

1. Under section 39-757, R. R. S. 1943, where evidence shows that vehicle left standing on paved, improved, or main-traveled portion of highway, prima facie violation of statute established and is incumbent upon person charged to show existence of facts which take him out of scope of application of statute. Fleischer v. Rosentrater ---------- 219
2. Where prima facie violation of section 39-757, R. R. S. 1943, shown under evidence, questions of

whether reasonable excuse for stopping existed, or whether reasonable effort made to remove vehicle from traveled portion of highway, and whether reasonable precautions taken for protection of highway traffic, ordinarily for jury. Fleischer v. Rosentrater ---------- 219

3. Sentence to 3 years' imprisonment for driving while intoxicated not excessive where defendant had six previous convictions for same offense, had violated his probation order, and had failed to continue with treatment for alcoholism. State v. Klinkacek ---- 293

4. Gross negligence within meaning of Motor Vehicle Guest Act means gross and excessive negligence or negligence in very high degree; absence of slight care in performance of duty; an entire failure to exercise care; or exercise of so slight a degree of care as to justify belief there was an indifference to safety of others. Toth v. Bacon ---------- 344

5. Failure to heed warning of imminent danger not made in time to afford driver reasonable opportunity to avoid accident not evidence of gross negligence. Toth v. Bacon ---------- 344

6. Failure to maintain proper lookout alone does not ordinarily constitute gross negligence. Toth v. Bacon ---------- 344

7. Where negligence of driver of automobile in which plaintiff is riding is sole proximate cause of accident, plaintiff has no right of recovery as against third person. Toth v. Bacon ---------- 344

8. Under point system, abstract of conviction for speeding should show amount by which applicable speed limit exceeded. Jarmin v. Kissack ---------- 365

9. Under point system, Director of Motor Vehicles required to interpret abstracts of conviction in accordance with laws regulating use and operation of motor vehicles. Jarmin v. Kissack ---------- 365

10. To be joint venturers, must be not only joint interest in objects and purposes of enterprise but also equal right to direct and control conduct of each other in operation of vehicle. Kremlacek v. Sedlacek ---- 460

11. Where owner is passenger in his own automobile while it is being operated by another, negligence of operator imputable to owner where owner assumes to direct or has power to direct operation of automobile and to exercise control over it. Kremlacek v. Sedlacek ---------- 460

12. Before verdict can be directed against motorist for failing to see approaching vehicle at unprotected intersection, position of approaching vehicle must be undisputedly located in favored position. Kremlacek v. Sedlacek ---------- 460
13. In exercising the authority granted by the Driver License Compact, the Director of the Nebraska Department of Motor Vehicles has no power or authority other than that specifically conferred. Johnston v. Department of Motor Vehicles ---------- 606
14. To be applicable in Nebraska, a report of a conviction in another jurisdiction must substantially comply with the provisions set out in Article II of the Driver License Compact. Johnston v. Department of Motor Vehicles ---------- 606
15. For a report of an out-of-state conviction to be effective in Nebraska under the provisions of the Driver License Compact, it must be authenticated in due form for admission in evidence in the courts of this State. Johnston v. Department of Motor Vehicles -- 606
16. An automobile may be searched without a warrant as an incident to a valid arrest. The justification for such search grows out of the inherent necessities of the particular situation at the time of the arrest. State v. Brewer ---------- 667
17. A conditional or qualified refusal to take one of the authorized tests to determine the alcoholic content of body fluids under the implied consent law is not sanctioned by the act and such a refusal is a refusal to submit to the test within the meaning of the act. Wiseman v. Sullivan ---------- 724
18. A driver who has been arrested for operating a motor vehicle upon a public street or highway while under the influence of intoxicating liquor is not entitled either under the Constitution or the implied consent statute to consult with a lawyer previous to giving a sample of blood, breath, or urine, or to have a lawyer present during the giving of the sample. Wiseman v. Sullivan ---------- 724
19. The taking of a sample of blood, breath, or urine for chemical analysis on the request of the arresting officer, as authorized by the implied consent law, is not required to be delayed by a request of the arrested motorist that he be permitted to contact a lawyer. Wiseman v. Sullivan ---------- 724
20. The right to a Miranda type warning applies only

to in-custody interrogation and has no application to a proper request to a motor vehicle driver to give a specimen under the implied consent statute. Wiseman v. Sullivan ---------- 724

21. If a Miranda type warning is given in connection with information concerning the implied consent statute, it is incumbent upon the arresting officer to explicitly inform the arrested person that the constitutional rights to counsel and against self-incrimination which may have been previously explained are not applicable to the decision the driver must make concerning the giving of samples, that he has no right to consult with an attorney before making that decision, and that the right against self-incrimination does not permit the driver to refuse to either comply with or answer the request for such samples. Wiseman v. Sullivan ---------- 724

22. Probable cause for searching a motor vehicle may not be treated the same as questions arising out of searches of fixed structures, like houses. State v. Romonto ---------- 825

23. Where materials in an automobile, which are indicative of a criminal offense, are in plain sight of an officer looking into the automobile from the outside, a search is justified and legal. State v. Romonto ---------- 825

24. There is no illegal search and seizure of objects found in an automobile, even if the defendant is not under arrest, if the defendant freely and intelligently gives his consent to officers making the search. State v. Romonto ---------- 825

Municipal Corporations.

1. Section 19-1808, R. R. S. 1943, provides that no person in classified civil service shall be removed, suspended, demoted, or discharged except for cause and then only upon written accusation of appointing power or any citizen or taxpayer; written statement of such accusation shall be served upon accused and duplicate filed with commission. Wachtel v. Fremont Civil Service Commission ---------- 49

2. Section 19-1808, R. R. S. 1943, provides that power of discharge lodged solely in Civil Service Commission. Wachtel v. Fremont Civil Service Commission 49

3. Civil Service Act, where applicable, prohibits suspension or discharge of employees for political or

religious reasons but provides that employees may be suspended or discharged for cause for any of reasons listed in section 19-1807, R. R. S. 1943. Sailors v. City of Falls City ---------- 103
4. Final determination of discharge of employee under Civil Service Act rests in civil service commission. Sailors v. City of Falls City ---------- 103
5. If evidence in District Court on appeal sufficient to show that order of commission suspending or discharging employee made in good faith for cause, then order of commission must be affirmed. Sailors v. City of Falls City ---------- 103
6. In the law of land use the approval of a conditional use permit in the nature of a special exception use by the legislative body of a political subdivision is ordinarily subject to a statutory provision that requires a favorable three-fourths majority vote in event of requisite protests against a change or supplement of regulations or restrictions. Stec v. Countryside of Hastings, Inc. ---------- 733
7. A company engaged in the transmission and distribution of natural gas to the public on a regular basis is a public utility company within the meaning of section 70-624.04, R. R. S. 1943, providing that employees of such company may serve on a council or board of a municipal corporation with whom the utility company has contracts, without invalidating those contracts. Kansas-Nebraska Nat. Gas Co., Inc. v. Wiles ---------- 795
8. Municipal corporations are legislative creations and it is within the exclusive province of the Legislature, subject to constitutional limitations, to provide for qualifications for office and grounds for removal of the members of the governing boards of such corporations. Kansas-Nebraska Nat. Gas Co., Inc. v. Wiles ---------- 795
9. A school district is an "other municipal corporation" and its real estate is "other public grounds" within the provisions of section 25-202, R. R. S. 1943. Buras v. School Dist. No. 37 ---------- 836

Negligence.

1. Violation of city ordinance is evidence of negligence. Whitcomb v. State Fed. Sav. & Loan Assn. ------ 26
2. Change of level at entrances or exits of buildings to be expected and sidewalk and entrance elevations

to most places, public and private, are quite without uniformity. Whitcomb v. State Fed. Sav. & Loan Assn. ---------- 26
3. Mere fact that invitee falls at entrance of building where difference in level present does not raise presumption of negligence. Whitcomb v. State Fed. Sav. & Loan Assn. ---------- 26
4. While owner of premises owes duty to invitee to exercise ordinary care to have premises in reasonably safe condition for use in manner consonant with purposes of invitation, generally, there is no duty on part of inviter owner to protect invitee against hazards which are known to invitee or so apparent that he may reasonably be expected to discover them and protect himself. Whitcomb v. State Fed. Sav. & Loan Assn. ---------- 26
5. Burden upon plaintiff to show that violation of city ordinance contributed to her accident. Whitcomb v. State Fed. Sav. & Loan Assn. ---------- 26
6. If conditions and circumstances such that invitee has knowledge of condition in advance or should have knowledge comparable to that of inviter, it may not be said that inviter guilty of actionable negligence. Whitcomb v. State Fed. Sav. & Loan Assn. ---------- 26
7. One capable of understanding and discretion and who fails to exercise ordinary care and prudence to avoid defects and dangers which are open and obvious is negligent or contributorily negligent. Whitcomb v. State Fed. Sav. & Loan Assn. ---------- 26
8. Burden of proving cause of action not sustained by evidence from which negligence can only be surmised or conjectured. Mitchell v. Eyre ---------- 182
9. Finding of negligence immaterial until Supreme Court can determine identity of person to be charged with responsibility for negligence. Mitchell v. Eyre 182
10. Standing alone, declaration by defendant that he is sorry he hit plaintiff not an admission of negligence. Giangrasso v. Schimmel ---------- 228
11. Where reasonable minds may draw different conclusions and inferences from evidence as to negligence of defendant and contributory negligence of plaintiff, and degree thereof when one compared with other, issues must be submitted to jury. Schmidt v. Orton ---------- 257
12. Person hitting golf ball must exercise ordinary care

under the circumstances for safety of others; must give adequate and timely notice to persons who appear to be unaware of his intention to hit the ball when he knows, or by exercise of ordinary care should know, that such persons so close to intended flight of ball that danger to them might reasonably be anticipated. Schmidt v. Orton ---------- 257

13. Gross negligence within meaning of Motor Vehicle Guest Act means gross and excessive negligence or negligence in very high degree; absence of slight care in performance of duty; an entire failure to exercise care; or exercise of so slight a degree of care as to justify belief there was an indifference to safety of others. Toth v. Bacon ---------- 344

14. Failure to heed warning of imminent danger not made in time to afford driver reasonable opportunity to avoid accident not evidence of gross negligence. Toth v. Bacon ---------- 344

15. Failure to maintain proper lookout alone does not ordinarily constitute gross negligence. Toth v. Bacon 344

16. Where negligence of driver of automobile in which plaintiff is riding is sole proximate cause of accident, plaintiff has no right of recovery as against third person. Toth v. Bacon ---------- 344

17. Where owner is passenger in his own automobile while it is being operated by another, negligence of operator imputable to owner where owner assumes to direct or has power to direct operation of automobile and to exercise control over it. Kremlacek v. Sedlacek ---------- 460

18. Before verdict can be directed against motorist for failing to see approaching vehicle at unprotected intersection, position of approaching vehicle must be undisputedly located in favored position. Kremlacek v. Sedlacek ---------- 460

19. Manufacturer is strictly liable in tort when article he placed in the market, knowing it is to be used without inspection for defects, proves to have defect which causes injury to human being rightfully using that product. Hawkins Constr. Co. v. Matthews Co., Inc. ---------- 546

20. Traditional "contributory negligence," in sense of failure to discover defect or to guard against it, not a defense to suit in strict tort, or for breach of warranty; assumption of risk and misuse of product are. Hawkins Constr. Co. v. Matthews Co., Inc. 546

21. A general averment that the defendant was negligent, without setting out the negligent acts or omissions, is sufficient, unless the pleading be attacked by motion. Baker v. Daly ---------- 618
22. A social guest is a mere licensee. Casey v. Addison 634
23. The owner or occupant of property owes to a licensee the duty only to refrain from injuring him by willful or wanton negligence or a designed injury, or by failure to warn of a hidden danger or peril known to the owner or occupant but unknown to or unobservable by the licensee in the exercise of ordinary care. Casey v. Addison ---------- 634
24. The fact that a person was intoxicated is a circumstance which may be considered in determining whether he exercised the degree of care for his own safety which a prudent sober person would exercise under the same or similar circumstances. The mere fact that he was intoxicated at the time he was injured does not of itself constitute contributory negligence. Webber v. City of Omaha ---------- 678
25. The care required of a person who has voluntarily become intoxicated is the same as that required of one who is sober. If he fails to exercise that degree of care for his own safety which an ordinarily prudent sober person would exercise under the same or similar circumstances, and such failure contributes as a proximate cause to the injury of which he complains, he is guilty of contributory negligence. Webber v. City of Omaha ---------- 678
26. Where it is claimed that the conduct of another, not a party to the suit, was the sole proximate cause of the accident, such defense is not an affirmative plea in avoidance of plaintiff's cause of action and imposes no burden of proof upon defendant with relation thereto but is one entirely consistent with and provable under the general issue. Fisher v. Gate City Steel Corp. ---------- 699
27. Where a thing which causes the injury is under the control and management of the defendant and the accident is such as in the ordinary course of things does not happen if those who have its management or control use proper care, it affords reasonable evidence, in the absence of an explanation by the defendant, that the accident arose from want of proper care. Fynbu v. Strain ---------- 719
28. The applicability of the doctrine of res ipsa loquitur

depends upon the facts and circumstances in each case. Fynbu v. Strain ---------- 719

29. The doctrine of res ipsa loquitur is applicable only where the evidence shows the accident or injury was caused by the instrumentality or thing under the control of the defendant. Fynbu v. Strain ------ 719

30. The words "slight" and "gross" as employed in the comparative negligence act of this state are comparative terms. The negligence of the plaintiff or defendant is not to be evaluated as slight, gross, or otherwise, standing alone. The criterion by which the degree of negligence of plaintiff is to be measured is the extent thereof by comparison with the negligence of the defendant. Niemeyer v. Tichota ---------- 775

31. The question of the existence of negligence or contributory negligence is for the trier of facts where different minds may reasonably draw different conclusions from the evidence. Niemeyer v. Tichota -- 775

New Trial.

1. Alleged errors of trial court in action at law which are not referred to in motion for new trial will not be considered in Supreme Court. George Rose Sodding & Grading Co., Inc. v. City of Grand Island -- 12

2. If consideration of record of District Court does not require examination of any issue of fact or error of law occurring at trial, which could only be preserved by bill of exceptions, motion for new trial not condition precedent to review of that record in Supreme Court. Progressive Design, Inc. v. Olson Bros. Manuf. Co. ---------- 208

3. A holding of Supreme Court on a first appeal becomes law of the case on a retrial of same issues unless on second trial facts materially and substantially different. Weber v. Southwest Nebraska Dairy Suppliers, Inc. ---------- 389

4. Under principle of law of case, burden of showing material and substantial difference in facts on retrial upon party who asserts difference. Weber v. Southwest Nebraska Dairy Suppliers, Inc. ---------- 389

5. Failure to assert an alleged error in motion for new trial will be deemed a waiver of claimed error and will not be considered on appeal. State v. Griger 405

6. Motion for new trial for alleged juror misconduct

addressed to sound discretion of trial court. Kremlacek v. Sedlacek ---------- 460
7. New trial may not be granted for arbitrary, vague, or fanciful reasons; but when granting of new trial requires consideration of conflicting evidence, findings of trial court thereon will not ordinarily be disturbed on appeal. Kremlacek v. Sedlacek ---------- 460
8. Unauthorized view or visit by juror, even though uncommunicated to his fellow jurors, sufficient to sustain finding of prejudicial error and warrant granting of new trial. Kremlacek v. Sedlacek ---- 460
9. A limitation of 1 year for filing of a motion for new trial on the ground of newly discovered evidence and the filing of a supporting affidavit is not controlling in a juvenile proceeding in county court, but they affect the requirement of the exercise of reasonable diligence. State v. Belding ---------- 646

Notice.

1. Section 19-1808, R. R. S. 1943, provides that no person in classified civil service shall be removed, suspended, demoted, or discharged except for cause and then only upon written accusation of appointing power or any citizen or taxpayer; written statement of such accusation shall be served upon accused and duplicate filed with commission. Wachtel v. Fremont Civil Service Commission ---------- 49
2. In counties where person who holds position of county clerk ex officio clerk of District Court, service of notice upon county clerk of intention to appeal from proceedings before freeholders' board will be deemed sufficiently proved and shown notwithstanding absence of proof by attached acknowledgment of service, affidavit of service, or other means, where appropriate notice directed to county clerk of proper county appears in proper case file in District Court, and where notice in that file bears completed filing stamp, showing date and time of filing, and signature as ex officio clerk of District Court of person who holds both offices. Elson v. Harbert ---------- 437
3. Secured party who disposes of collateral without reasonable notification to debtor liable for any loss caused by failure to comply with provisions of Uniform Commercial Code. Crowder v. Allied Investment Co. ---------- 487

Obstructing Justice.

By statute, courts of record have power to punish as for criminal contempt persons guilty of willful disobedience of or resistance willfully offered to any lawful process or order of court, or any willful attempt to obstruct proceedings, or hinder due administration of justice in any suit or proceeding pending before court. Payne v. Glebe ---------- 268

Parent and Child.

1. In determining child custody, controlling consideration is best interests and welfare of children. Schott v. Schott ---------- 84
2. When a court, having jurisdiction of children in divorce action, has placed custody of children in the court with possession and care in a parent, the court may summarily in best interests of children modify possession of parent or parents. Benson v. Benson ---------- 87
3. Child custody statutes of Nebraska to be liberally construed to accomplish purpose of serving best interests of child involved. State v. Vogt -------- 205
4. In cases involving child custody, finding of trial court both as to evaluation of evidence and as to matter of custody will not be disturbed unless is clear abuse of discretion or decision against weight of evidence. State v. Vogt ---------- 205
5. Measure of damages for wrongful death of minor child should be extended to include loss of society, comfort, and companionship of child. Selders v. Armentrout ---------- 275
6. In determining question of who should have care and custody of children upon dissolution of marriage, paramount consideration is best interests and welfare of children. Broadstone v. Broadstone ---- 299
7. In cases involving determinations of child custody, findings of trial court, both as to evaluation of evidence and as to matter of custody, will not be disturbed unless is clear abuse of discretion. Broadstone v. Broadstone ---------- 299
8. Fixing of child support and alimony rests in sound discretion of court and, in absence of abuse of discretion, will not be disturbed. Broadstone v. Broadstone ---------- 299
9. In determining reasonable visitation rights, best interest and welfare of child are primary considera-

tions; his age, health, and need for stability and continuity in his home environment must be considered. Brisby v. Whitted ---------- 309

10. Only in exceptional circumstances should the parent deprived of custody be totally denied any right of visitation. Brisby v. Whitted ---------- 309

11. Original decree fixing custody of minor children will not be modified unless has been change in circumstances indicating that person having custody unfit for that purpose or that best interests of child require such action. Scripter v. Scripter ---- 317

12. In proceeding to terminate parental rights under section 43-209, R. R. S. 1943, indigent parent, upon request, entitled to appointment of counsel at expense of county. State v. Caha ---------- 347

13. In proceeding to terminate parental rights under section 43-209, R. R. S. 1943, a guardian ad litem should be appointed to represent children where it appears necessary or desirable. State v. Caha ------ 347

14. When any county court in Nebraska shall enter of record a decree of adoption it shall be conclusively presumed that said adoption and all instruments and proceedings in connection therewith are valid in all respects unless action brought within 2 years from entry of such decree of adoption attacking its validity. Syrovatka ex rel. Syrovatka v. Graham -- 355

15. Decree fixing custody of minor children will not be modified unless has been change in circumstances indicating that person having custody unfit for that purpose or that best interests of children require such action. Flesher v. Flesher ---------- 359

16. Discretion of trial court with respect to changing custody of minor children subject to review, but determination of court will not ordinarily be disturbed unless is clear abuse of discretion or is clearly against weight of evidence. Flesher v. Flesher ---------- 359
Gilman v. Riis ---------- 409
Adamson v. Adamson ---------- 716
Petersen v. Petersen ---------- 805

17. Decree fixing custody of minor children will not be modified unless there has been change in circumstances indicating that person having custody unfit for that purpose or that best interests of children require such action. Gilman v. Riis ------ 409

18. Judgment for child support may be revised or altered at any time as to future payments if circumstances of parties change. McGee v. McGee -- 415

19. Where decree of divorce gives visitation rights, law contemplates that children shall remain within the state so that rights may be exercised; mother's removal of children from state without consent of father or of court may be sufficient change of circumstances to justify court in suspending or reducing amount of child support payments until children have returned to state. McGee v. McGee ---- 415

20. District Court in its discretion may appoint attorney to protect interests of any minor children of the parties; limits upon discretion must evolve case by case. Pieck v. Pieck ---------- 419

21. In determining amount of child support to be awarded, status, character, and situation of parties and all attendant circumstances must be considered, and amount rests in sound discretion of court. Bliven v. Bliven ---------- 492

22. In awarding or changing custody the welfare of the minor child is the question of primary importance. Adamson v. Adamson ---------- 716

23. An application for modification of a divorce decree with respect to the care, custody, and maintenance of minor children must be founded upon new facts and circumstances which have arisen since the entry of the decree. Adamson v. Adamson ---------- 716

24. A parent found unfit for custody should not, by the mere passage of time without further misconduct, be able to change child custody provisions in a divorce decree in the absence of clear and convincing evidence that the best interests and welfare of the child require it. Adamson v. Adamson ---------- 716

25. In determining the question of who should have the care and custody of minor children the paramount consideration is the best interests and welfare of the children. Petersen v. Petersen ---------- 805

26. The power of a court to reduce, suspend, or terminate its order for child support payments is a power that generally will only be exercised as a last resort or where it is apparent that to do so affords the only remedy that can reasonably be expected to fit the mischief. Biesecker v. Biesecker ---------- 808

Parties.

1. Dismissal of plaintiff's petition or cause of action does not affect intervening petitioner's right to proceed and obtain a determination of his claim to affirmative relief. Progressive Design, Inc. v. Olson Bros. Manuf. Co. ---------- 208
2. Civil contempt proceeding has for its purpose preservation and enforcement of rights of private parties. Megel v. City of Papillion ---------- 238
3. Failure to obey an order of the court made for benefit of opposing party ordinarily civil contempt, but the disobedience must be willful before it may be punished as a contempt. Megel v. City of Papillion 238
4. Courts will not decide questions of constitutionality unless they have been raised by litigant whose interests are adversely affected. Ritums v. Howell -- 503
5. A court has no power to summarily pass upon constitutionality of an act of Legislature; it has power only to decide justiciable disputes; its power to declare an act of Legislature unconstitutional arises only when it affects a right of a litigant in such a case. Ritums v. Howell ---------- 503
6. One may not urge unconstitutionality of a statute who is not harmfully affected by particular feature of statute alleged to be in conflict with Constitution. Ritums v. Howell ---------- 503
7. A manufacturer or seller may be held liable under advertising warranty even though he is not in privity of contract with purchaser. Hawkins Constr. Co. v. Matthews Co., Inc. ---------- 546
8. Traditional "contributory negligence," in sense of failure to discover defect or to guard against it, not a defense to suit in strict tort, or for breach of warranty; assumption of risk and misuse of product are. Hawkins Constr. Co. v. Matthews Co., Inc. -- 546

Partnership.

1. Nebraska Revenue Act of 1967 does not authorize State Tax Commissioner to exclude partners and partnerships from benefit of transitional period regulation promulgated under section 77-27,124, R. R. S. 1943, pertaining to filing of returns for taxable periods of less than 12 calendar months. Altsuler v. Peters ---------- 113
2. Under Nebraska Revenue Act of 1967, capital gain or loss realized by fiscal year partnership prior to

January 1, 1968, not includable in determining partners' income tax liability for 1968. Altsuler v. Peters ---------- 113

Payment.

1. A voluntary payment upon a claim otherwise barred by the statute of limitations is one that was intentionally and consciously made and accepted as part payment of the particular indebtedness in question under such circumstances as would warrant a clear inference that the debtor assented to and acknowledged the greater debt to be due as an existing liability. Estate of Ruwe v. Ruwe ---------- 663
2. The defense of payment is an affirmative one which must be pleaded and the burden of proof on the issue is on the party asserting it. Poland v. Gibson 696

Penal Institutions.

1. Administrative disciplinary proceeding in which prisoner loses good time for escape from confinement does not place him in jeopardy; subsequent conviction and sentence in criminal prosecution for escape do not therefore constitute double jeopardy which federal constitutional clauses prohibit. State v. Maddox ---------- 361
2. While receiving treatment in a hospital or psychiatric facility, a prisoner remains subject to the jurisdiction and custody of the Division of Corrections. State v. Mayes ---------- 837
3. A failure to return to a treating facility after a temporary leave constitutes an escape from custody under the provisions of section 28-736, R. R. S. 1943. State v. Mayes ---------- 837
4. An administrative disciplinary proceeding in which a prisoner loses good time for escape from confinement does not place him in jeopardy. A subsequent conviction and sentence in a criminal prosecution for the escape do not therefore constitute double jeopardy. State v. Mayes ---------- 837

Penalties.

The provisions of section 48-125, R. R. S. 1943, of the Workmen's Compensation Act, providing that "fifty per cent shall be added for waiting time for all delinquent payments after thirty days' notice has been given of disability," does not impose a penalty pay-

able to an individual within the prohibitions of Article VII, section 5, of the Constitution of Nebraska. University of Nebraska at Omaha v. Paustian ---- 840

Pilots.

1. Where aircraft equipped with dual controls and both occupants pilots, proof as to who may have been piloting craft at time of take-off not conclusive where crash more than an hour later. Mitchell v. Eyre ---------- 182
2. Finding of negligence immaterial until Supreme Court can determine identity of person to be charged with responsibility for negligence. Mitchell v. Eyre 182

Pleadings.

1. One who seeks to recover multiple damages given by statute must distinctly claim these in his petition; insufficient merely to set forth facts upon which liability therefor might arise; sufficient to recite facts constituting cause of action within statute and then to give reference to act itself. George Rose Sodding & Grading Co., Inc. v. City of Omaha 12
2. Broker's petition for recovery of brokerage commission which fails to allege that he was the efficient, procuring cause of sale of land fails to state a cause of action. Abboud v. Cir Cal Stables -- 396
3. A general averment that the defendant was negligent, without setting out the negligent acts or omissions, is sufficient, unless the pleading be attacked by motion. Baker v. Daly ---------- 618
4. The general rule that the allegations of the pleadings and proof thereunder must agree will not be applied to reverse a judgment, where an issue is tried by both parties without objection from either that such issue is not sufficiently pleaded. Under such conditions, the appellate court will consider the pleadings as sufficient to raise the particular issue. Estate of Ruwe v. Ruwe ---------- 663
5. The defense of payment is an affirmative one which must be pleaded and the burden of proof on the issue is on the party asserting it. Poland v. Gibson 696
6. In an action upon a written instrument the defense of material alteration must be affirmatively pleaded and evidence that the instrument has been materially altered is inadmissible under a general denial. Poland v. Gibson ---------- 696

7. Where it is claimed that the conduct of another, not a party to the suit, was the sole proximate cause of the accident, such defense is not an affirmative plea in avoidance of plaintiff's cause of action and imposes no burden of proof upon defendant with relation thereto but is one entirely consistent with and provable under the general issue. Fisher v. Gate City Steel Corp. ---------- 699
8. A general denial is available to a defendant to challenge one or more elements essential to a recovery by the plaintiff and the effect of the denial is to put the burden on the plaintiff to establish by evidence the matter denied. Associates Finance Co. v. Teske ---------- 747
9. A judicial admission in a pleading does not extend beyond the intendment of the admission as clearly disclosed by its context. Saum v. L. R. Foy Constr. Co., Inc. ---------- 783
10. When a litigant files an amended pleading, the averments of which are inconsistent with the averments of his original pleading, the original is not a judicial admission but competent as an evidentiary admission by a party against his interest. Saum v. L. R. Foy Constr. Co., Inc. ---------- 783
11. A party on appeal ordinarily cannot successfully assert error in a judgment that granted him the relief demanded by his pleadings. Saum v. L. R. Foy Constr. Co., Inc. ---------- 783
12. An appeal to this court in a civil action will be considered upon the theories presented by the parties at the trial, provided a liberal construction of the pleadings, as construed by the parties, will permit. Saum v. L. R. Foy Constr. Co., Inc. ---------- 783
13. Rescission of a contract is an affirmative defense which must be pleaded and cannot be asserted under a general denial. Rase v. Southeast Nebraska Consol. School Dist. ---------- 800

Police Officers and Sheriffs.

1. A police officer may in appropriate circumstances and in an appropriate manner approach a person for the purpose of investigating possible criminal behavior even though there is no probable cause to make an arrest. State v. Brewer ---------- 667
2. A peace officer may stop any person in a public place whom he reasonably suspects of committing, who

has committed, or who is about to commit a crime and may demand of him his name, address, and an explanation of his actions. § 29-829, R. S. Supp., 1972. State v. Brewer ---------- 667

Political Subdivisions.

Findings of District Court under Political Subdivisions Tort Claims Act will not be disturbed on appeal unless they are clearly wrong. Craig v. Gage County ---------- 320

Post Conviction.

1. Motion to vacate judgment and sentence under Post Conviction Act cannot be used as substitute for appeal or to secure further review of issues already litigated. State v. Weiland ---------- 111
2. Where facts and issues which are grounds of motion for post conviction relief were known to defendant and his counsel, and were raised, heard, and determined at time of trial resulting in his conviction but were not raised in his direct appeal, those issues will not ordinarily be considered in post conviction review. State v. Weiland ---------- 111
3. Post Conviction Act extends relief only to persons "in custody." State v. Moore ---------- 271
4. Trial court not required to entertain successive motions under Post Conviction Act for similar relief from same prisoner. State v. Huffman ---------- 319
5. Where the record discloses that a plea of guilty was understandingly and voluntarily entered, it is not subject to post conviction relief. State v. Mayes 833

Privileged Communications.

Report or other communication made by insured to his liability insurance company, concerning an event which may be made basis of claim against him covered by the policy, is privileged communication, as being between attorney and client, if policy requires company to defend him through its attorney, and communication intended for information or assistance of attorney in so defending him. Brakhage v. Graff ---------- 53

Probable Cause.

1. A police officer may in appropriate circumstances and in an appropriate manner approach a person

for the purpose of investigating possible criminal behavior even though there is no probable cause to make an arrest. State v. Brewer ---------- 667
2. A peace officer may stop any person in a public place whom he reasonably suspects of committing, who has committed, or who is about to commit a crime and may demand of him his name, address, and an explanation of his actions. § 29-829, R. S. Supp., 1972. State v. Brewer ---------- 667
3. Probable cause does not require the same type of specific evidence of each element of the offense as would be needed to support a conviction. State v. Brewer ---------- 667
4. Probable cause exists where the facts and circumstances, within the officers' knowledge and of which they have reasonably trustworthy information, are sufficient in themselves to warrant a belief by a man of reasonable caution that a crime is being committed. State v. Brewer ---------- 667
5. Probable cause for searching a motor vehicle may not be treated the same as questions arising out of searches of fixed structures, like houses. State v. Romonto ---------- 825
6. The existence of probable cause must be determined by a practical and not by a technical standard. State v. Romonto ---------- 825
7. In determining probable cause for a warrantless search, it is not significant whether the search preceded or followed the arrest. The controlling factor in a warrantless search is whether the officer had reasonable grounds before the search to make an arrest. State v. Romonto ---------- 825

Probation and Parole.

1. In imposing sentence and denying probation in criminal case judgment of District Court will not be disturbed on appeal unless record shows abuse of discretion. State v. Heckathorn ---------- 418
2. In absence of statute, District Court after commitment of prisoner possesses no authority to set aside sentence and place prisoner on probation. State v. Keyser ---------- 445
3. In the absence of statute the court has no power to impose a period of imprisonment as a condition of probation. State v. Nuss ---------- 755
4. Where a sentence of imprisonment, imposed as a

condition of probation, constitutes an authorized legal sentence for the crime for which the defendant stands convicted, and such sentence of imprisonment has been fully executed, the defendant is entitled to be discharged and may not be resentenced to a new term of imprisonment for that crime. State v. Nuss ---------- 755

Profit or Loss.

Nebraska Revenue Act of 1967 does not contemplate use of a January 1, 1968, fair market value basis for determining gain or loss of capital asset acquired or sold on or after that date, and federal law and regulations are to be used in determining basis. Altsuler v. Peters ---------- 113

Property.

1. General contractor, in control of premises where work performance under contract with owner to be carried out, owes duty to persons rightfully on premises to keep premises in reasonably safe condition while contract in course of performance. Hand v. Rorick Constr. Co. ---------- 191
2. Duty of general contractor to employees of subcontractor extends only to providing reasonably safe place to work as distinguished from apparatus, tools, or machinery furnished by subcontractor for use of his own employees. Hand v. Rorick Constr. Co. ---------- 191
3. Provision in contract between general contractor and owner providing: "The Contractor shall take all necessary precautions for the safety of employees on the work, and shall comply with all applicable provisions of Federal, State, and Municipal safety laws and building codes to prevent accidents or injury to persons on, about or adjacent to the premises where the work is being performed," does not enlarge common law duty of general contractor to employees of subcontractor so as to require inspection by general contractor of tools and equipment furnished by subcontractor for exclusive use of his own employees. Hand v. Rorick Constr. Co. ---------- 191
4. Where real estate broker employed to procure purchaser of real property, he is entitled to compensation when has secured proposed purchaser ready,

able, and willing to buy property on terms and conditions upon which broker authorized to procure such purchaser. Huston Co. v. Mooney ---------- 242

5. Ordinarily, real estate broker, who for commission undertakes to sell land on certain terms and within specified period, not entitled to compensation for his services unless he produces purchaser within time limited who is ready, able, and willing to buy upon terms prescribed. Huston Co. v. Mooney -- 242

6. Where real estate broker obtains purchaser for real estate and no sale made during existence of agreement but sale thereafter made by owner to person produced by agent but not on substantially terms that had been offered through agent's efforts, broker not entitled to commission for making sale. Huston Co. v. Mooney ---------- 242

7. A suit against the State for taking or damaging of private property for public use must be commenced within 2 years from time taking or damaging of the property occurred. Czarnick v. Loup River P. P. Dist. ---------- 521

8. Acts which destroy or result in serious change of property either physically or in the character in which it has been held or enjoyed may constitute irreparable injury and warrant injunctive relief. Czarnick v. Loup River P. P. Dist. ---------- 521

9. Where injury wrongfully committed continuous or being constantly repeated so that complainant's remedy at law requires bringing of successive actions, that remedy inadequate and injury may be prevented by injunction. Czarnick v. Loup River P. P. Dist. ---------- 521

10. Alimony may be ordered in addition to property settlement award. Magruder v. Magruder -------- 573

11. Where the value of property is an element of the offense, the State must prove by competent evidence that the value of the property at the time and place of the alleged offense equalled or exceeded the requisite minimum value. State v. Stowell -- 615

12. A social guest is a mere licensee. Casey v. Addison 634

13. The owner or occupant of property owes to a licensee the duty only to refrain from injuring him by willful or wanton negligence or a designed injury, or by failure to warn of a hidden danger or peril known to the owner or occupant but unknown to or

unobservable by the licensee in the exercise of ordinary care. Casey v. Addison ---------- 634

14. An error by the jury in calculating the amount of damage sustained in a prosecution under section 28-572, R. R. S. 1943, is not material where the amount proved is found to be in excess of $100. State v. Hackbarth ---------- 641

15. Where, in an action for dissolution of marriage, the wife is awarded a judgment for alimony the court should, if possible, divide the property in such a manner as to permit the husband the means of paying the judgment awarded the wife. Snow v. Snow ---------- 655

16. If property is partly exempt and partly nonexempt, the value of the nonexempt portion is subject to taxation and the value of the exempt portion is not subject to taxation. Nebraska Conf. Assn. of Seventh Day Adventists v. Board of Equalization ---------- 658

17. Where the owner of an interest in land transferred it inter vivos to another in trust for a third person, but no memorandum properly evidencing the intention to create a trust was signed, and the transferee refused to perform the trust, the transferee holds the interest upon a constructive trust for the third person if the transferee at the time of the transfer was in a confidential relation to the transferor. Lukowski v. Deleski ---------- 771

18. The amount of alimony to be granted a wife is not to be determined alone from the property possessed by the husband. Many other factors enter into this determination. Miller v. Miller ---------- 816

Prosecuting Attorneys.

1. Objection to misconduct of prosecutor in argument to jury must be made at time and a record must be made then; is too late to object for first time on motion for new trial upon showing by affidavit of defendant's attorney. State v. Godinez ---------- 1

2. County attorney, under direction of District Court, has statutory authority to procure assistance in any trial of any person charged with felony, and in absence of facts which indicate contrary, presumed that District Court properly exercised its discretion in that regard. State v. Amen ---------- 362

Public Lands.

A school district is an "other municipal corporation" and its real estate is "other public grounds" within the provisions of section 25-202, R. R. S. 1943. Buras v. School Dist. No. 37 ---------- 836

Public Officers and Employees.

1. Generally, only issue in quo warranto action which may be litigated is right of respondents to hold public office, and action must be strictly confined to that issue. State ex rel. Tomek v. Colfax County Reorganization Committee ---------- 447
2. A company engaged in the transmission and distribution of natural gas to the public on a regular basis is a public utility company within the meaning of section 70-624.04, R. R. S. 1943, providing that employees of such company may serve on a council or board of a municipal corporation with whom the utility company has contracts, without invalidating those contracts. Kansas-Nebraska Nat. Gas Co., Inc. v. Wiles ---------- 795
3. Municipal corporations are legislative creations and it is within the exclusive province of the Legislature, subject to constitutional limitations, to provide for qualifications for office and grounds for removal of the members of the governing boards of such corporations. Kansas-Nebraska Nat. Gas Co., Inc. v. Wiles ---------- 795

Public Service Commissions.

1. Under section 75-315, R. R. S. 1943, relating to motor common carriers, the phrase "willful failure" ordinarily means behavior that justifies the belief in intentional failure. The latter may be inferred from nonperformance of the requisite act over a long period of time. Dahlsten v. Harris ---------- 652
2. If evidence sustains the findings of the Nebraska State Railway Commission, the court cannot decide that the findings are unreasonable. Dahlsten v. Harris ---------- 652

Public Utilities.

A company engaged in the transmission and distribution of natural gas to the public on a regular basis is a public utility company within the meaning of section 70-624.04, R. R. S. 1943, providing that em-

ployees of such company may serve on a council or board of a municipal corporation with whom the utility company has contracts, without invalidating those contracts. Kansas-Nebraska Nat. Gas Co., Inc. v. Wiles ---------- 795

Quo Warranto.

1. Generally, only issue in quo warranto action which may be litigated is right of respondents to hold public office, and action must be strictly confined to that issue. State ex rel. Tomek v. Colfax County Reorganization Committee ---------- 447
2. As general rule, quo warranto will not lie for mere irregular exercise of conferred power although such irregularity may be sufficient when tested by other remedies to vitiate or render void act done; if power attaches, manner of its exercise cannot be challenged by information in quo warranto. State ex rel. Tomek v. Colfax County Reorganization Committee 447
3. Action in quo warranto proper remedy to determine validity of organization of school district. School Dist. No. 30 v. School Dist. No. 6 ---------- 454
4. Action for declaratory judgment will not ordinarily be entertained where another equally serviceable remedy has been provided by law. School Dist. No. 30 v. School Dist. No. 6 ---------- 454

Rape.

1. In prosecution for forcible rape, degree of force required to sustain conviction and degree of resistance required of prosecutrix are both relative depending upon particular circumstances. State v. Campbell ---------- 22
2. In prosecution for forcible rape, only required that female make reasonable resistance in good faith under all the circumstances and that resistance be such as to make nonconsent and actual opposition genuine and real. State v. Campbell ---------- 22
3. If District Court has inherent power to require complaining witness in prosecution for sex crime to submit to psychiatric examination prior to trial, it is not abuse of discretion to deny such examination in absence of showing of good cause. State v. Maestas ---------- 312
4. Slightest penetration of sexual organ of female sufficient, if established beyond reasonable doubt, to

constitute necessary element of penetration in prosecution for rape, and such element may be proved by either direct or circumstantial evidence. State v. Atkinson ---------- 473

5. It is true rape is a most detestable crime, and therefore ought severely and impartially to be punished but it must be remembered that it is an accusation easily to be made and hard to be proved, and harder to be defended by party accused, although never so innocent, and that courts should be the more cautious upon trials of offense of this nature; in light thereof, courts have generally exercised great care and vigilance to insure that verdict of conviction was supported by sufficient competent evidence and not result of passion and prejudice, inspired by wiles of a malicious contriver or very heniousness of offense charged. State v. Atkinson - 473

6. As a matter of law the testimony of the prosecutrix alone, uncorroborated by any other evidence, is not sufficient to sustain a conviction for rape, or assault with intent to commit rape. State v. Fisher ---- 742

Receiving Stolen Goods.

Word "receiving" in offense of receiving stolen property, essentially means acquisition of control in sense of physical dominion or of apparent legal power to dispose. State v. Martin ---------- 212

Records.

1. Objection to misconduct of prosecutor in argument to jury must be made at time and a record must be made then; is too late to object for first time on motion for new trial upon showing by affidavit of defendant's attorney. State v. Godinez ---------- 1

2. Any assignment of error that requires examination of evidence cannot prevail on appeal in absence of bill of exceptions. Brown v. Shamberg ---------- 171

3. Depositions offered in evidence on motion for summary judgment must be included in bill of exceptions to be reviewed in Supreme Court on appeal. Brown v. Shamberg ---------- 171

4. Determinations of State Board of Equalization and Assessment clothed with presumption of validity and burden of proof on appellant to establish that record of proceedings does not support action of

board. County of Sioux v. State Board of Equalization & Assessment ---------- 198
5. If consideration of record of District Court does not require examination of any issue of fact or error of law occurring at trial, which could only be preserved by bill of exceptions, motion for new trial not condition precedent to review of that record in Supreme Court. Progressive Design, Inc. v. Olson Bros. Manuf. Co. ---------- 208
6. Under point system, abstract of conviction for speeding should show amount by which applicable speed limit exceeded. Jarmin v. Kissack ---------- 365
7. Under section 25-12,112, R. S. Supp., 1972, copy or reproduction of any memorandum kept or recorded in regular course of business or activity of any department or agency of government, when satisfactorily identified, as admissible in evidence as original itself in any judicial or administrative proceeding. Corn v. Corn ---------- 383
8. Purported evidence which is not included in record before Supreme Court on appeal cannot be considered. State v. Griger ---------- 405

Reformation of Instruments.

1. An action for relief of reformation of a contract rests on theory that parties came to an understanding, but in reducing it to writing, through mutual mistake or mistake and fraud, some provision of language was omitted, inserted, or incorrectly worded, and action is to change instrument so as to conform it to contract agreed upon. Schweitz v. State Farm Fire & Cas. Co. ---------- 400
2. In proceeding to reform a contract on ground of mutual mistake, burden of proof on party interposing that plea. Schweitz v. State Farm Fire & Cas. Co. ---------- 400
3. In order to obtain reformation of written instrument on ground of mistake, mistake must be mutual; to grant such relief, equity insists that reformation must be consistent with a complete mutual understanding of essential terms of their bargain. Schweitz v. State Farm Fire & Cas. Co. ---------- 400
4. In order to warrant reformation of written instrument in any material respect, evidence must be clear, convincing, and satisfactory; and, until overcome by such proof, terms of instrument must stand

as evidencing intention of parties. Schweitz v. State Farm Fire & Cas. Co. ---------- 400

Res Judicata.

Trial court not required to entertain successive motions under Post Conviction Act for similar relief from same prisoner. State v. Huffman ---------- 319

Right to Counsel.

1. Prior to June 22, 1970, it was not required that indigent defendant be supplied with counsel at preliminary hearing. State v. Moore ---------- 271
2. In proceeding to terminate parental rights under section 43-209, R. R. S. 1943, indigent parent, upon request, entitled to appointment of counsel at expense of county. State v. Caha ---------- 347
3. In proceeding to terminate parental rights under section 43-209, R. R. S. 1943, a guardian ad litem should be appointed to represent children where it appears necessary or desirable. State v. Caha ---- 347
4. District Court in its discretion may appoint attorney to protect interests of any minor children of the parties; limits upon discretion must evolve case by case. Pieck v. Pieck ---------- 419
5. Requests for appointment of new counsel on eve of trial should not become vehicle for achieving delay. State v. Coleman ---------- 441
6. A driver who has been arrested for operating a motor vehicle upon a public street or highway while under the influence of intoxicating liquor is not entitled either under the Constitution or the implied consent statute to consult with a lawyer previous to giving a sample of blood, breath, or urine, or to have a lawyer present during the giving of the sample. Wiseman v. Sullivan ---------- 724
7. The taking of a sample of blood, breath, or urine for chemical analysis on the request of the arresting officer, as authorized by the implied consent law, is not required to be delayed by a request of the arrested motorist that he be permitted to contact a lawyer. Wiseman v. Sullivan ---------- 724
8. The statement in Pickard v. Director of Motor Vehicles, 184 Neb. 13, 165 N. W. 2d 96, suggesting that in some undefined circumstances a delay may be appropriate to give a driver an opportunity to consult a lawyer before giving a sample under the

implied consent statute is disapproved. Wiseman v. Sullivan ---------- 724

9. If a Miranda type warning is given in connection with information concerning the implied consent statute, it is incumbent upon the arresting officer to explicitly inform the arrested person that the constitutional rights to counsel and against self-incrimination which may have been previously explained are not applicable to the decision the driver must make concerning the giving of samples, that he has no right to consult with an attorney before making that decision, and that the right against self-incrimination does not permit the driver to refuse to either comply with or answer the request for such samples. Wiseman v. Sullivan ---------- 724

10. Where it appears from the evidence that a request to see an attorney before giving a sample under the implied consent law was induced by confusion resulting from the commingling of Miranda type warnings with information concerning the demands of the implied consent statute, such request for an attorney does not constitute a refusal under the implied consent statute. Wiseman v. Sullivan ---- 724

Rules of Court.

Rule 20. State v. Pratt ---------- 110
State v. Little Art Corp. ---------- 289
State v. Myles ---------- 585
Scott v. Scott ---------- 805

Sales.

1. Where real estate broker employed to procure purchaser of real property, he is entitled to compensation when has secured proposed purchaser ready, able, and willing to buy property on terms and conditions upon which broker authorized to procure such purchaser. Huston Co. v. Mooney ---------- 242

2. Ordinarily, real estate broker, who for commission undertakes to sell land on certain terms and within specified period, not entitled to compensation for his services unless he produces purchaser within time limited who is ready, able, and willing to buy upon terms prescribed. Huston Co. v. Mooney 242

3. Where real estate broker obtains purchaser for real estate and no sale made by owner to person produced by agent but not on substantially terms that

had been offered through agent's efforts, broker not entitled to commission for making sale. Huston Co. v. Mooney ---------- 242

4. Under Uniform Commercial Code, any affirmation of fact or promise made by seller to buyer which relates to goods and becomes part of basis of bargain creates express warranty that goods shall conform to affirmation or promise. Larutan Corp. v. Magnolia Homes Manuf. Co. ---------- 425

5. Any description of goods or any sample or model which is made part of basis of bargain creates express warranty that goods shall conform to description or to sample. Larutan Corp. v. Magnolia Homes Manuf. Co. ---------- 425

6. Where seller at time of contracting has reason to know any particular purpose for which goods are required and that buyer is relying on seller's skill or judgment to select or furnish suitable goods, there is, unless excluded or modified under section 2-316, U. C. C., implied warranty that goods shall be fit for such purpose. Larutan Corp. v. Magnolia Homes Manuf. Co. ---------- 425

7. Secured party who disposes of collateral without reasonable notification to debtor liable for any loss caused by failure to comply with provisions of Uniform Commercial Code. Crowder v. Allied Investment Co. ---------- 487

8. Direct effect of sale that is not commercially reasonable under section 9-405, U. C. C., is to alter measure of deficiency; in such case, fair and reasonable value of collateral as of time of sale is offset against balance due on security agreement. Cornett v. White Motor Corp. ---------- 496

9. Manufacturer is strictly liable in tort when an article he placed in the market, knowing it is to be used without inspection for defects, proves to have defect which causes injury to human being rightfully using that product. Hawkins Constr. Co. v. Matthews Co., Inc. ---------- 546

10. Any affirmation of fact or promise made by seller to buyer which relates to goods and becomes part of basis of bargain creates express warranty that goods shall conform to affirmation or promise. Hawkins Constr. Co. v. Matthews Co., Inc. ---------- 546

11. Any description of goods which is made part of basis of bargain creates express warranty that goods

shall conform to description. Hawkins Constr. Co. v. Matthews Co., Inc. ---------- 546

12. Not necessary to creation of express warranty that seller use formal words such as "warranty" or "guarantee" or that he have specific intention to make a warranty, but an affirmation merely of value of goods or statement purporting to be merely seller's opinion or commendation of goods does not create warranty. Hawkins Constr. Co. v. Matthews Co., Inc. ---------- 546

13. Express warranties may be made in advertising brochure. Hawkins Constr. Co. v. Matthews Co., Inc. ---------- 546

14. A manufacturer or seller may be held liable under advertising warranty even though he is not in privity of contract with the purchaser. Hawkins Constr. Co. v. Matthews Co., Inc. ---------- 546

15. Traditional "contributory negligence," in sense of failure to discover defect or to guard against it, not a defense to suit in strict tort, or for breach of warranty; assumption of risk and misuse of product are. Hawkins Constr. Co. v. Matthews Co., Inc. -- 546

16. Under the Uniform Commercial Code, the adequacy or insufficiency of the price for which collateral is sold at a private sale after default and repossession is one of the "terms" of sale, and is relevant along with other issues, in determining whether the sale was commercially reasonable. Associates Finance Co. v. Teske ---------- 747

17. Under the Uniform Commercial Code, a security interest continues in collateral notwithstanding sale, exchange or other disposition thereof by the debtor unless his action was authorized by the secured party in the security agreement or otherwise, and also continues in any identifiable proceeds including collections received by the debtor. Farmers State Bank v. Edison Non-Stock Coop. Assn. ---------- 789

18. Where a sale of farm products by a debtor engaged in farming operations is claimed to be authorized under the terms of a security agreement, the sale must ordinarily be made in compliance with the conditions and limitations of the authorization. Farmers State Bank v. Edison Non-Stock Coop. Assn. ------ 789

19. Under the Uniform Commercial Code, unless otherwise explicitly agreed, title passes to the buyer at

the time and place at which the seller completes his performance with reference to the physical delivery of the goods. Bowman v. American Home Assur. Co. ---------- 810

Scaffolds.

1. Duty of general contractor to employees of subcontractor extends only to providing reasonably safe place to work as distinguished from apparatus, tools, or machinery furnished by subcontractor for use of his own employees. Hand v. Rorick Constr. Co. _ 191
2. General contractor's mere failure to inspect scaffold owned, erected, and controlled by subcontractor and furnished by subcontractor for use of his own employees does not make general contractor liable to subcontractor's employees for injuries caused by defects in scaffold. Hand v. Rorick Constr. Co. ------ 191
3. Provision in contract between general contractor and owner providing: "The Contractor shall take all necessary precautions for the safety of employees on the work, and shall comply with all applicable provisions of Federal, State, and Municipal safety laws and building codes to prevent accidents or injury to persons on, about or adjacent to the premises where the work is being performed," does not enlarge common law duty of general contractor to employees of subcontractor so as to require inspection by general contractor of tools and equipment furnished by subcontractor for exclusive use of his own employees. Hand v. Rorick Constr. Co. ---------- 191
4. Contractual provision regarding safety precautions does not have effect of giving to employee of subcontractor cause of action under Nebraska statutes pertaining to scaffold safety, because those statutes place liability upon person who erects, constructs, maintains, or supplies unsafe scaffold. Hand v. Rorick Constr. Co. ---------- 191

Schools and School Districts.

1. When one school district by statute succeeds to all property and assets, and is responsible for all unbonded indebtedness of former dissolved districts, it is liable for all breaches of teachers' contracts by former districts if latter would have been liable. Knapp v. School Dist. No. 109R ---------- 237

2. In counties where person who holds position of county clerk ex officio clerk of District Court, service of notice upon county clerk of intention to appeal from proceedings before freeholders' board will be deemed sufficiently proved and shown, notwithstanding absence of proof by attached acknowledgment of service, affidavit of service, or other means, where appropriate notice directed to county clerk of proper county appears in proper case file in District Court, and where notice in that file bears completed filing stamp, showing date and time of filing, and signature as ex officio clerk of District Court of person who holds both offices. Elson v. Harbert ---------- 437

3. Generally, only issue in quo warranto action which may be litigated is right of respondents to hold public office, and action must be strictly confined to that issue. State ex rel. Tomek v. Colfax County Reorganization Committee ---------- 447

4. As general rule, quo warranto will not lie for mere irregular exercise of conferred power although such irregularity may be sufficient when tested by other remedies to vitiate or render void act done; if power attaches, manner of its exercise cannot be challenged by information in quo warranto. State ex rel. Tomek v. Colfax County Reorganization Committee ---------- 447

5. Action in quo warranto proper remedy to determine validity of organization of school district. School Dist. No. 30 v. School Dist. No. 6 ---------- 454

6. Action for declaratory judgment will not ordinarily be entertained where another equally serviceable remedy has been provided by law. School Dist. No. 30 v. School Dist. No. 6 ---------- 454

7. Under sections 79-488.06 and 79-328 (12), R. R. S. 1943, a school bus driver's contract is valid and enforceable if he complies with the statutory requirements before operating a bus, notwithstanding a failure to fully comply before the contract was entered into. Rase v. Southeast Nebraska Consol. School Dist. ---------- 800

8. A school district is an "other municipal corporation" and its real estate is "other public grounds" within the provisions of section 25-202, R. R. S. 1943. Buras v. School Dist. No. 37 ---------- 836

Searches and Seizures.

1. Any search of person of arrestee incident to such arrest constitutionally reasonable. State v. Coleman 441
2. In determining the sufficiency of an affidavit for a search warrant, only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause. State v. Bazis ---------- 586
3. In judging probable cause, magistrates are not to be confined by niggardly limitations or by restrictions on the use of their common sense and their determination is entitled to reasonable deference by reviewing courts. State v. Bazis ---------- 586
4. A waiver of objections to evidence on the ground that it was seized in an unreasonable search occurs when no objection is made at least 10 days before trial and where the exceptions thereto have no application. State v. Stowell ---------- 615
5. A police officer may in appropriate circumstances and in an appropriate manner approach a person for the purpose of investigating possible criminal behavior even though there is no probable cause to make an arrest. State v. Brewer ---------- 667
6. A peace officer may stop any person in a public place whom he reasonably suspects of committing, who has committed, or who is about to commit a crime and may demand of him his name, address, and an explanation of his actions. § 29-829, R. S. Supp., 1972. State v. Brewer ---------- 667
7. An automobile may be searched without a warrant as an incident to a valid arrest. The justification for such search grows out of the inherent necessities of the particular situation at the time of the arrest. State v. Brewer ---------- 667
8. Probable cause for searching a motor vehicle may not be treated the same as questions arising out of searches of fixed structures, like houses. State v. Romonto ---------- 825
9. The existence of probable cause must be determined by a practical and not by a technical standard. State v. Romonto ---------- 825
10. Objects falling within plain view of an officer, who has the right to be in the position to have such view, does not constitute a search. State v. Romonto 825
11. Where materials in an automobile, which are indicative of a criminal offense, are in plain sight of an officer looking into the automobile from the out-

side, a search is justified and legal. State v. Romonto ---------- 825
12. There is no illegal search and seizure of objects found in an automobile, even if the defendant is not under arrest, if the defendant freely and intelligently gives his consent to officers making the search. State v. Romonto ---------- 825
13. In determining probable cause for a warrantless search, it is not significant whether the search preceded or followed the arrest. The controlling factor in a warrantless search is whether the officer had reasonable grounds before the search to make an arrest. State v. Romonto ---------- 825

Security Interest.

1. Person who furnished materials or services with respect to goods that are already subject to perfected security interest is not engaged in ordinary course of his business under section 9-310, U. C. C., with respect to any part of his charges that are unreasonable. Mousel v. Daringer ---------- 77
2. If upon compliance with terms of lease, lessee has option to become owner of property for nominal consideration, lease intended for security. Crowder v. Allied Investment Co. ---------- 487
3. Secured party who disposes of collateral without reasonable notification to debtor liable for any loss caused by failure to comply with provisions of Uniform Commercial Code. Crowder v. Allied Investment Co. ---------- 487
4. Direct effect of sale that is not commercially reasonable under section 9-405, U. C. C., is to alter measure of deficiency; in such case, fair and reasonable value of collateral as of time of sale is offset against balance due on security agreement. Cornett v. White Motor Corp. ---------- 496
5. Under the Uniform Commercial Code, the adequacy or insufficiency of the price for which collateral is sold at a private sale after default and repossession is one of the "terms" of sale, and is relevant along with other issues, in determining whether the sale was commercially reasonable. Associates Finance Co. v. Teske ---------- 747
6. Under the Uniform Commercial Code, a security interest continues in collateral notwithstanding sale, exchange or other disposition thereof by the debtor

unless his action was authorized by the secured party in the security agreement or otherwise, and also continues in any identifiable proceeds including collections received by the debtor. Farmers State Bank v. Edison Non-Stock Coop. Assn. ---------- 789

7. Where a sale of farm products by a debtor engaged in farming operations is claimed to be authorized under the terms of a security agreement, the sale must ordinarily be made in compliance with the conditions and limitations of the authorization. Farmers State Bank v. Edison Non-Stock Coop. Assn. ---------- 789

8. Under the Uniform Commercial Code the seller retains an insurable interest in goods so long as title to or any security interest in the goods remains in him. Bowman v. American Home Assur. Co. ---------- 810

Sentences.

1. Where punishment of offense created by statute left to discretion of trial court within prescribed limits, sentence imposed within those limits will not be disturbed on appeal unless appears to be abuse of discretion. State v. Kelly ---------- 41
State v. Shay ---------- 140
State v. Keyser ---------- 445
State v. Bazis ---------- 586
State v. Bayliss ---------- 594
State v. Michigaud ---------- 599

2. In examining question of abuse of discretion in imposing sentence, significance may be given to fact that crime committed involved violence and great moral turpitude. State v. Kelly ---------- 41

3. A female 15 years of age or older convicted of unlawful possession of controlled substance, except marijuana, may be sentenced to Division of Corrections for term of 2 to 4 months. State v. Shimp -- 137

4. When sentence pronounced upon one already serving sentence from another court, second sentence does not begin to run until sentence which prisoner is serving has expired, unless court pronouncing second sentence specifically states otherwise. State v. Shay ---------- 141

5. Sentence to 3 years' imprisonment for driving while intoxicated not excessive where defendant had six previous convictions for same offense, had violated

his probation order, and had failed to continue with treatment for alcoholism. State v. Klinkacek 293

6. In imposing sentence and denying probation in criminal case judgment of District Court will not be disturbed on appeal unless record shows abuse of discretion. State v. Heckathorn ---------- 418

7. In absence of statute, District Court after commitment of prisoner possesses no authority to set aside sentence and place prisoner on probation. State v. Keyser ---------- 445

8. Where punishment of statutory offense left to discretion of court, sentence imposed within statutory limits will not be disturbed on appeal unless abuse of discretion appears. State v. Atkinson -------- 473

9. In passing sentence, it is proper for the trial court to take into consideration other offenses that have been committed by the accused. State v. Welton -- 600

10. A sentence within statutory limits will not be disturbed on appeal in the absence of an abuse of discretion. State v. Welton ---------- 600

11. This court having affirmed a judgment against a defendant in a criminal prosecution, it is not error for the District Court to overrule a motion that simply requests a redetermination of the sentence in the judgment on these grounds alone: (1) A lapse of time between conviction and affirmance, and (2) a sufficient change in the circumstances of the defendant to warrant the redetermination. State v. Smith ---------- 623

12. A sentence imposed within the statutory limits will not be disturbed on appeal unless an abuse of discretion appears in the record. State v. Haines -- 645

13. A 1-year consecutive sentence for escape from custody is not excessive. State v. Haines ---------- 645

14. A sentence validly imposed takes effect from the day it is pronounced and a subsequent sentence fixing a different term is a nullity. State v. Brewer 667

15. Where there is concurrent jurisdiction over substantially the same offense and the public policy of the State requires vindication, then in order to make federal punishment for the act a satisfaction and bar to state trial and sentence, it is necessary that the federal sentence should be complete and should have been executed to its full extent. State v. Pope ---------- 689

16. In the absence of statute the court has no power

to impose a period of imprisonment as a condition of probation. State v. Nuss ---------- 755

17. Where a sentence of imprisonment, imposed as a condition of probation, constitutes an authorized legal sentence for the crime for which the defendant stands convicted, and such sentence of imprisonment has been fully executed, the defendant is entitled to be discharged and may not be resentenced to a new term of imprisonment for that crime. State v. Nuss ---------- 755

Specific Performance.

1. Specific performance of contract will not be decreed unless minds of parties to contract have met. Reifenrath v. Hansen ---------- 58
2. To establish contract capable of specific enforcement, must be shown was definite offer and unconditional acceptance. Reifenrath v. Hansen ---- 58
3. Where contract for purchase and sale of real estate includes both homestead and nonhomestead property but not executed and acknowledged as required by section 40-104, R. R. S. 1943, specific performance may be obtained as to nonhomestead land with abatement of total purchase price, where contract under its provisions clearly severable as to nonhomestead property. Struempler v. Peterson ---- 133
4. Where contract not severable as between homestead and nonhomestead property, Supreme Court will not ordinarily attempt to make new contract for parties; nor impose new conditions; nor will it require specific performance of contract which does not contain substance of agreement made. Struempler v. Peterson ---------- 133

States.

1. Section 25-218, R. R. S. 1943, provides that every claim and demand against the State shall be forever barred, unless action be brought within 2 years after claim arose. Czarnick v. Loup River P. P. Dist. ---------- 521
2. A suit against the State for taking or damaging of private property for public use must be commenced within 2 years from time taking or damaging of the property occurred. Czarnick v. Loup River P. P. Dist. ---------- 521

Statutes.

1. Courts of equity will not enjoin commission of acts for sole reason that they constitute violations of criminal statutes. State ex rel. Meyer v. Weiner - 30
2. Injunction is proper remedy to be used by State in protection of public rights, property, or welfare, whether or not acts complained of violate criminal statute or whether or not they constitute a nuisance. State ex rel. Meyer v. Weiner ---------- 30
3. Acts constituting continuous violations of Real Estate Brokers Act, sections 81-862 to 81-887, R. R. S. 1943, may be enjoined by court of equity in protection of public rights, property, or welfare. State ex rel. Meyer v. Weiner ---------- 30
4. By its terms, section 44-501, R. R. S. 1943, mandatorily requiring inclusion of provisions of 1943 Standard Fire Insurance Policy of State of New York are applicable only to policy or contract of fire and lightning insurance. Wulf v. Farm Bureau Ins. Co. ---------- 34
5. Fire insurance policy legally issued in Nebraska which contains provision requiring suit be brought within 12 months after inception of loss, but which also contains provisions amending any terms of policy which are in conflict with state statutes to conform with such statutes, subject to limitations set out in section 44-357, R. R. S. 1943. Wulf v. Farm Bureau Ins. Co. ---------- 34
6. Section 19-1808, R. R. S. 1943, provides that no person in classified civil service shall be removed, suspended, demoted, or discharged except for cause and then only upon written accusation of appointing power or any citizen or taxpayer; written statement of such accusation shall be served upon accused and duplicate filed with commission. Wachtel v. Fremont Civil Service Commission ---------- 49
7. Section 19-1808, R. R. S. 1943, provides that power of discharge lodged solely in Civil Service Commission. Wachtel v. Fremont Civil Service Commission ---------- 49
8. Person who furnished materials or services with respect to goods that are already subject to perfected security interest is not engaged in ordinary course of his business under section 9-310, U. C. C., with respect to any part of his charges that are unreasonable. Mousel v. Daringer ---------- 77

9. Civil Service Act, where applicable, prohibits suspension or discharge of employees for political or religious reasons but provides that employees may be suspended or discharged for cause for any of reasons listed in section 19-1807, R. R. S. 1943. Sailors v. City of Falls City ---------- 103
10. Final determination of discharge of employee under Civil Service Act rests in civil service commission. Sailors v. City of Falls City ---------- 103
11. Nebraska Revenue Act of 1967 does not authorize State Tax Commissioner to exclude partners and partnerships from benefit of transitional period regulation promulgated under section 77-27,124, R. R. S. 1943, pertaining to filing of returns for taxable periods of less than 12 calendar months. Altsuler v. Peters ---------- 113
12. Nebraska Revenue Act of 1967 does not authorize State Tax Commissioner to exclude corporations having in effect valid Subchapter S election and its shareholders from benefit of transitional period regulation promulgated under section 77-27,124, R. R. S. 1943, pertaining to filing of returns for taxable periods of less than 12 calendar months. Altsuler v. Peters ---------- 113
13. Under Nebraska Revenue Act of 1967, capital gain or loss realized by fiscal year partnership prior to January 1, 1968, not includable in determining partners' income tax liability for 1968. Altsuler v. Peters ---------- 113
14. Under Nebraska Revenue Act of 1967, if any property was sold prior to January 1, 1968, under installment contract which conforms to provisions of Section 453 of Internal Revenue Code, and taxpayer has elected option provided for in that section, capital gain portion of, or income portion of, any contract payment received on or after January 1, 1968, is to be included in computation of taxpayer's adjusted federal income tax liability which is subject to Nebraska tax rate. Altsuler v. Peters ---- 113
15. Nebraska Revenue Act of 1967 does not contemplate use of a January 1, 1968, fair market value basis for determining gain or loss of capital asset acquired or sold on or after that date, and federal law and regulations are to be used in determining basis. Altsuler v. Peters ---------- 113
16. An option to purchase land constituting homestead

void when not executed and acknowledged by both husband and wife as required by section 40-104, R. R. S. 1943. Struempler v. Peterson ---------- 133

17. Where contract for purchase and sale of real estate includes both homestead and nonhomestead property but not executed and acknowledged as required by section 40-104, R. R. S. 1943, specific performance may be obtained as to nonhomestead land with abatement of total purchase price, where contract under its provisions clearly severable as to nonhomestead property. Struempler v. Peterson ---- 133

18. Child custody statutes of Nebraska to be liberally construed to accomplish purpose of serving best interests of child involved. State v. Vogt ------- 205

19. Habitual criminal statute does not contravene constitutional prohibition against cruel and unusual punishment. State v. Martin ---------- 212

20. Under section 39-757, R. R. S. 1943, where evidence shows that vehicle left standing on paved, improved, or main-traveled portion of highway, prima facie violation of statute established and is incumbent upon person charged to show existence of facts which take him out of scope of application of statute. Fleischer v. Rosentrater ---------- 219

21. Where prima facie violation of section 39-757, R. R. S. 1943, shown under evidence, questions of whether reasonable excuse for stopping existed, or whether reasonable effort made to remove vehicle from traveled portion of highway, and whether reasonable precautions taken for protection of highway traffic, ordinarily for jury. Fleischer v. Rosentrater ---------- 219

22. Judgment creditor of insured under policy of liability insurance entitled to award of attorney's fee under section 44-359, R. S. Supp., 1972, where insurer brings action for declaratory judgment to determine coverage under policy and judgment creditor prevails. State Farm Fire & Cas. Co. v. Muth 248

23. Section 52-102, R. R. S. 1943, requires filing of lien within 3 months from furnishing of material. Tub-Master Corp. v. State Surety Co. ---------- 266

24. Section 39-727.03, R. S. Supp., 1972, must be construed in conjunction with sections 39-727, 39-727.15, and 39-727.16, R. S. Supp., 1972, all of which are clearly pari materia to each other. Stevenson v. Sullivan ---------- 295

25. Attack upon constitutionality of a statute cannot ordinarily originate on appeal from District Court. Craig v. Gage County ---------- 320
26. Under section 25-12,112, R. S. Supp., 1972, copy or reproduction of any memorandum kept or recorded in regular course of business or activity of any department or agency of government, when satisfactorily identified, as admissible in evidence as original itself in any judicial or administrative proceeding. Corn v. Corn ---------- 383
27. Chapter 42, article 8, R. R. S. 1943, not applicable in counties in which District Court has failed to find procedures therein provided for to be necessary. Condreay v. Condreay ---------- 513
28. In this state all public offenses are statutory; no act is criminal unless 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 plain import of written law. State v. Hauck ---------- 534
29. An obvious, inadvertent omission from a statute may be supplied judicially. State v. Daniels ---- 602
30. A legislative act will not be permitted, even if an intent so to do is clear, to operate retrospectively where it will have the effect of invalidating or impairing rights which have vested by virtue of the judgment of a court. Karrer v. Karrer ----- 610
31. The provisions of section 42-365, R. S. Supp., 1972, authorizing the modification of alimony awards, do not apply to judgments entered previous to July 6, 1972, awarding alimony in gross. Karrer v. Karrer 610
32. Section 60-430.07, R. R. S. 1943, is not vague, indefinite, or uncertain. State v. Etchison -------- 629
33. The fixing of criminal penalties is primarily a legislative function and courts will not interfere except in those cases where the punishment is so excessive as to shock the sense of mankind. State v. Etchison ---------- 629
34. In the law of land use the approval of a conditional use permit in the nature of a special exception use by the legislative body of a political subdivision is ordinarily subject to a statutory provision that requires a favorable three-fourths majority vote in event of requisite protests against a change or supplement of regulations or restrictions. Stec v. Countryside of Hastings, Inc. ---------- 733

35. Under the provisions of section 29-1207, R. S. Supp., 1972, where a felony offense is involved, the 6-month period commences to run from the date the indictment is returned or the information filed and not from the time the complaint is filed. State v. Born ---------- 767
36. In the interpretation or construction of statutes, ascertainment of the intention of the Legislature is the end or purpose to be accomplished. Rase v. Southeast Nebraska Consol. School Dist. ----- 800
37. In construing a statute, the court must look to the object to be accomplished, the evils and mischief sought to be remedied, or the purpose to be subserved, and place on it a reasonable or liberal construction which will best effect its purposes rather than one which will defeat it. Rase v. Southeast Nebraska Consol. School Dist. ---------- 800
38. Under sections 79-488.06 and 79-328 (12), R. R. S. 1943, a school bus driver's contract is valid and enforceable if he complies with the statutory requirements before operating a bus, notwithstanding a failure to fully comply before the contract was entered into. Rase v. Southeast Nebraska Consol. School Dist. ---------- 800

Strict Liability.

Manufacturer is strictly liable in tort when article he placed in the market, knowing it is to be used without inspection for defects, proves to have defect which causes injury to human being rightfully using that product. Hawkins Constr. Co. v. Matthews Co., Inc. ---------- 546

Taxation.

1. Appeal to District Court from action of county board of equalization heard as in equity, and upon appeal therefrom to Supreme Court tried de novo. Hastings Building Co. v. Board of Equalization -- 64
2. Burden of proof upon taxpayer to establish his contention that value of his property has not been fairly and proportionately equalized with all other property, resulting in discriminatory, unjust, and unfair assessment. Hastings Building Co. v. Board of Equalization ---------- 64
3. Law imposes duty of valuing and equalizing of property for taxation purposes upon county as-

sessor and county board of equalization; in reviewing actions of tribunals created by law for ascertaining valuation and equalization of property for taxation purposes, courts will not usurp functions of such tribunals; only where such assessed valuations not in accordance with law or is made to appear they were made arbitrarily or capriciously, that courts will interfere. Hastings Building Co. v. Board of Equalization ---------- 64

4. In appeal to county board of equalization or to District Court, and from District Court to Supreme Court, burden of persuasion imposed on complaining taxpayer not met by showing mere difference of opinion unless it is established by clear and convincing evidence that valuation placed upon his property when compared with valuations placed on other similar property grossly excessive and result of systematic exercise of intentional will or failure of plain duty, and not mere errors of judgment. Hastings Building Co. v. Board of Equalization -- 64

5. Since appeal of assessment to Supreme Court triable de novo, it can make independent evaluation of facts; is presumption that assessment made by board of equalization has sufficient foundation in evidence until this presumption is overcome by competent evidence to contrary. Hastings Building Co. v. Board of Equalization ---------- 64

6. Nebraska Revenue Act of 1967 does not authorize State Tax Commissioner to exclude partners and partnerships from benefit of transitional period regulation promulgated under section 77-27,124, R. R. S. 1943, pertaining to filing of returns for taxable periods of less than 12 calendar months. Altsuler v. Peters ---------- 113

7. Nebraska Revenue Act of 1967 does not authorize State Tax Commissioner to exclude corporations having in effect valid Subchapter S election and its shareholders from benefit of transitional period regulation promulgated under section 77-27,124, R. R. S. 1943, pertaining to filing of returns for taxable periods of less than 12 calendar months. Altsuler v. Peters ---------- 113

8. Under Nebraska Revenue Act of 1967, capital gain or loss realized by fiscal year partnership prior to January 1, 1968, not includable in determining part-

ners' income tax liability for 1968. Altsuler v. Peters ---------- 113
9. Under Nebraska Revenue Act of 1967, if any property was sold prior to January 1, 1968, under installment contract which conforms to provisions of Section 453 of Internal Revenue Code, and taxpayer has elected option provided for in that section, capital gain portion of, or income portion of, any contract payment received on or after January 1, 1968, is to be included in computation of taxpayer's adjusted federal income tax liability which is subject to Nebraska tax rate. Altsuler v. Peters 113
10. Nebraska Revenue Act of 1967 does not contemplate use of a January 1, 1968, fair market value basis for determining gain or loss of capital asset acquired or sold on or after that date, and federal law and regulations are to be used in determining basis. Altsuler v. Peters ---------- 113
11. Proceedings at hearing before State Board of Equalization and Assessment not bound by strict technical rules of evidence demanded in court of law. County of Sioux v. State Board of Equalization & Assessment ---------- 198
12. Determinations of State Board of Equalization and Assessment clothed with presumption of validity and burden of proof on appellant to establish that record of proceedings does not support action of board. County of Sioux v. State Board of Equalization & Assessment ---------- 198
13. Where evidence discloses consistent use of reasonably current reappraisals done under uniform conditions and regulations and approved by State Tax Commissioner, such procedures meet constitutional test of uniformity. County of Sioux v. State Board of Equalization & Assessment ---------- 198
14. Professional reappraisals conducted in accordance with statutory requirements and applicable rules and regulations of State Tax Commissioner, and approved by him, constitute adequate basis upon which State Board of Equalization and Assessment may rely in absence of clear evidence that such appraisals or reappraisals erroneous or that they fail to establish equality and uniformity required by law. County of Sioux v. State Board of Equalization & Assessment ---------- 198
15. Burden of proof upon taxpayer to establish that

value of his property has been arbitrarily or unlawfully fixed in amount greater than its actual value. Rien v. Board of Equalization ---------- 481
16. Court must affirm action taken by board of equalization unless it is established that its action was arbitrary or unreasonable. Rien v. Board of Equalization ---------- 481
17. Where assessed value of real property has been determined and fixed in course of professionel county-wide reappraisal, such assessed values will not ordinarily be disturbed on appeal on evidence indicating mere difference of opinion as to such valuation. Rien v. Board of Equalization ---------- 481
18. If property is partly exempt and partly nonexempt, the value of the nonexempt portion is subject to taxation and the value of the exempt portion is not subject to taxation. Nebraska Conf. Assn. of Seventh Day Adventists v. Board of Equalization -------- 658
19. The testator's intention as expressed in the will considered as a whole is controlling in determining whether a particular gift is exonerated from diminution under the statute providing for apportionment of taxes. Rasmussen v. Wedge ---------- 818

Telecommunications.

Evidence of telephone conversations obtained by wiretaps in violation of the provisions of sections 86-701 to 86-707, R. R. S. 1943, are inadmissible in evidence if timely objection is made. White v. Longo ---------- 703

Time.

1. In absence of express provision describing causation by accident in insurance policy, inability to fix exact time when and where accident occurred does not preclude recovery under policy. City of Kimball v. St. Paul Fire & Marine Ins. Co. ---------- 152
2. Accident covered by insurance policy may be a process; where accident is process how long then not significant; is nature of process which is important. City of Kimball v. St. Paul Fire & Marine Ins. Co. ---------- 152
3. Section 52-102, R. R. S. 1943, requires filing of lien within 3 months from furnishing of material. Tub-Master Corp. v. State Surety Co. ---------- 266
4. Prior to June 22, 1970, it was not required that

indigent defendant be supplied with counsel at preliminary hearing. State v. Moore ---------- 271
5. Upon receipt of reinstatement application of insurance policy, insurer has right to require further evidence of insurability or to agree to reinstate policy on basis of information in application itself, but in either event, reinstatement never effectuated until insurer acts on application. Ewoldt v. American Nat. Ins. Co. ---------- 290
6. In prosecution for manslaughter in commission of assault and battery, time of offense fixed at time fatal blow is struck. State v. Hare ---------- 339
7. Where seller at time of contracting has reason to know any particular purpose for which goods are required and that buyer is relying on seller's skill or judgment to select or furnish suitable goods, there is, unless excluded or modified under section 2-316, U. C. C., implied warranty that goods shall be fit for such purpose. Larutan Corp. v. Magnolia Homes Manuf. Co. ---------- 425
8. Section 29-1207, R. S. Supp., 1972, provides for limitation of 6 months for time of trial and states that such 6 months' period shall commence to run from date indictment returned or information filed. State v. Watkins ---------- 450
9. Where will directs executor to convert property of deceased into cash, any loss resulting from unreasonable delay in selling the property must be charged to executor. Bates v. Scottsbluff Nat. Bank ---- 456
10. Delay of more than 6 months in converting securities of speculative nature into cash, as directed by will, unreasonable under facts and circumstances of this case. Bates v. Scottsbluff Nat. Bank ---------- 456
11. Loss resulting from unreasonable delay in liquidating property of deceased determined to be difference between lowest price reached during 6-month period following appointing of executor and price eventually obtained. Bates v. Scottsbluff Nat. Bank --- 456
12. Delay of arraignment over the weekend of one arrested on a Sunday is not unreasonable. State v. Bazis ---------- 586
13. The filing of a felony complaint before a magistrate charging embezzlement and the issuance of an arrest warrant within 3 years after the date of the offense tolls the statute of limitations. § 29-110, R. S. Supp., 1972. State v. Donoho ---------- 593

14. The provisions of section 42-365, R. S. Supp., 1972, authorizing the modification of alimony awards, do not apply to judgments entered previous to July 6, 1972, awarding alimony in gross. Karrer v. Karrer ---------- 610
15. A sentence validly imposed takes effect from the day it is pronounced and a subsequent sentence fixing a different term is a nullity. State v. Brewer - 667
16. An application for modification of a divorce decree with respect to the care, custody, and maintenance of minor children must be founded upon new facts and circumstances which have arisen since the entry of the decree. Adamson v. Adamson ---------- 716
17. A parent found unfit for custody should not, by the mere passage of time without further misconduct, be able to change child custody provisions in a divorce decree in the absence of clear and convincing evidence that the best interests and welfare of the child require it. Adamson v. Adamson ---- 716
18. The taking of a sample of blood, breath, or urine for chemical analysis on the request of the arresting officer, as authorized by the implied consent law, is not required to be delayed by a request of the arrested motorist that he be permitted to contact a lawyer. Wiseman v. Sullivan ---------- 724
19. A driver who is requested to give a blood, breath, or urine sample under the implied consent statute is not entitled prior to being asked to give such sample to be warned of his right not to incriminate himself. Wiseman v. Sullivan ---------- 724
20. The statement in Pickard v. Director of Motor Vehicles, 184 Neb. 13, 165 N. W. 2d 96, suggesting that in some undefined circumstances a delay may be appropriate to give a driver an opportunity to consult a lawyer before giving a sample under the implied consent statute is disapproved. Wiseman v. Sullivan ---------- 724
21. Under the provisions of section 29-1207, R. S. Supp., 1972, where a felony offense is involved, the 6-month period commences to run from the date the indictment is returned or the information filed and not from the time the complaint is filed. State v. Born 767
22. Any unreasonable delay occurring in the prosecution of any felony offense prior to the filing of an information or the return of an indictment will be considered by the court, in conjunction with statutory

requirements, in determining whether or not a defendant has been denied the constitutional right to a speedy trial. State v. Born ---------- 767

23. Under the Uniform Commercial Code, unless otherwise explicitly agreed, title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods. Bowman v. American Home Assur. Co. ---------- 810

24. The control of a divorce decree during the 6-month period pending finality is within the sound judicial discretion of the trial court. Miller v. Miller ---- 816

25. In determining probable cause for a warrantless search, it is not significant whether the search preceded or followed the arrest. The controlling factor in a warrantless search is whether the officer had reasonable grounds before the search to make an arrest. State v. Romonto ---------- 825

Torts.

1. Findings of District Court under Political Subdivisions Tort Claims Act will not be disturbed on appeal unless they are clearly wrong. Craig v. Gage County ---------- 320

2. Manufacturer strictly liable in tort when article he placed in the market, knowing it is to be used without inspection for defects, proves to have defect which causes injury to human being rightfully using that product. Hawkins Constr. Co. v. Matthews Co., Inc. ---------- 546

3. Traditional "contributory negligence," in sense of failure to discover defect or to guard against it, not a defense to suit in strict tort, or for breach of warranty; assumption of risk and misuse of product are. Hawkins Constr. Co. v. Matthews Co., Inc. ---------- 546

Trial.

1. In jury cases, jurors are judges of credibility of witnesses and of weight to be given their testimony and, within their province, they have right to credit or reject the whole or any part of testimony of witness in exercise of their judgment. State v. Godinez ---------- 1

2. Objection to misconduct of prosecutor in argument to jury must be made at time and a record must

be made then; is too late to object for first time on motion for new trial upon showing by affidavit of defendant's attorney. State v. Godinez ------- 1

3. Defendant in criminal action presumed sane until evidence of insanity produced; State then has burden of proving beyond reasonable doubt that defendant sane at time crime committed. State v. Jacobs ---------- 4

4. Alleged errors of trial court in action at law which are not referred to in motion for new trial will not be considered in Supreme Court. George Rose Sodding & Grading Co., Inc. v. City of Omaha ---- 12

5. A verdict will not be set aside as inadequate unless it is clearly against weight and reasonableness of the evidence and is so disproportionate to injury proved as to indicate that it was result of passion, prejudice, mistake, or some other means not apparent in record, or that jury disregarded evidence or instructions of trial court. George Rose Sodding & Grading Co., Inc. v. City of Omaha ---------- 12

6. In action for malicious prosecution, whether facts and circumstances established by uncontradicted evidence amount to probable cause for criminal prosecution is question of law for trial court and not issue of fact for jury. Jones v. Brockman ------- 15

7. Burden upon plaintiff to show that violation of city ordinance contributed to her accident. Whitcomb v. State Fed. Sav. & Loan Assn. ---------- 26

8. In examining question of abuse of discretion in imposing sentence, significance may be given to fact that crime committed involved violence and great moral turpitude. State v. Kelly ---------- 41

9. Person challenging competence of counsel has burden of proof to establish counsel's incompetence. State v. Kelly ---------- 41

10. Instruments made in reference to and as part of transaction should be considered and construed together. Northland Mortgage Co. v. Royalwood Estates, Inc. ---------- 46

11. Burden of proof upon taxpayer to establish his contention that value of his property has not been fairly and proportionately equalized with all other property, resulting in discriminatory, unjust, and unfair assessment. Hastings Building Co. v. Board of Equalization ---------- 63

12. A party may not successfully complain of introduc-

tion of evidence of like character to that which is subsequently introduced. Pauley Lumber Co. v. City of Nebraska City ---------- 94

13. One who fails to object to or move to strike testimony may not predicate error on its admission. Pauley Lumber Co. v. City of Nebraska City ----- 94

14. Ordinarily evidence of prices paid for improved properties offered as substantial proof of value of unimproved property admissible only where properties and circumstances substantially similar. Pauley Lumber Co. v. City of Nebraska City ---- 94

15. Trial court vested with sound discretion in determining admissibility of sale prices of other lands. Pauley Lumber Co. v. City of Nebraska City ----- 94

16. Amount of damages sustained by landowner in proceeding in eminent domain peculiarly of local nature and ordinarily to be determined by jury; such verdict will not be set aside unless clearly wrong. Pauley Lumber Co. v. City of Nebraska City ------ 94

17. Determination of admissibility generally rests within sound discretion of trial court. State v. Brown _ 96

18. As general rule, evidence of other crimes than that with which accused charged not admissible in criminal prosecution. State v. Brown ---------- 96

19. Evidence of possession of revolver a short time after stolen is admissible as circumstance in proof that it was stolen by person in whose possession it was found. State v. Brown ---------- 96

20. Competent for prosecution to put in evidence all relevant facts and circumstances which tend to establish any of constituent elements of crime with which accused charged even though such facts and circumstances may prove or tend to prove that defendant committed other crimes. State v. Brown _ 96

21. Well-established rules have developed concerning admission of evidence of other criminal conduct; although this evidence generally admissible since it suggests that defendant has propensity to commit crime, trial court can in its discretion admit relevant evidence of other criminal acts and reversal only commanded when it is clear questioned evidence has no bearing upon any of issues involved. State v. Brown ---------- 96

22. Problem concerning admissibility of evidence of other offenses is special aspect of board general problem of relevancy, and generally test of admissi-

bility of such evidence whether evidence relevant and material to any issue on trial, or whether it fairly tends to prove particular offense charged or essential element thereof. State v. Brown ------- 96

23. Where facts and issues which are grounds of motion for post conviction relief were known to defendant and his counsel, and were raised, heard, and determined at time of trial resulting in his conviction but were not raised in his direct appeal, those issues will not ordinarily be considered in post conviction review. State v. Weiland ---------- 111

24. Cases may be consolidated for trial if offenses charged based on same act or transaction. State v. Shimp ---------- 137

25. Ruling on motion for consolidation will not be disturbed in absence of abuse of discretion. State v. Shimp ---------- 137

26. Tape recordings of relevant and material conversations admissible as evidence of such conversations and in corroboration of oral testimony of conversations, provided proper foundation laid. State v. Myers ---------- 146

27. Rerecording of original tape recording admissible where proper foundation laid and such rerecording from original necessary because of poor quality of original; admission does not constitute violation of best evidence rule. State v. Myers ---------- 146

28. Defendant may not complain of use of lawful tape recordings of conversations between himself and undercover agent made when he was not yet accused or under indictment when he has taken no steps to discover such evidence under section 29-1912, R. S. Supp., 1972, and has himself on cross-examination elicited from witness oral testimony of conversation. State v. Myers ---------- 146

29. Nebraska Jury Instruction 14.81 pertaining to credibility of witnesses applicable to testimony of defendant; not usually necessary to give at defendant's request special instruction highlighting his testimony. State v. Myers ---------- 146

30. If evidence in criminal case such as to warrant only verdict of greater offense, or one of not guilty, then is not proper to give instruction on lesser included offense. State v. DeBerry ---------- 177

31. Burden of proving cause of action not sustained

by evidence from which negligence can only be surmised or conjectured. Mitchell v. Eyre ------- 182
32. In cases involving child custody, finding of trial court both as to evaluation of evidence and as to matter of custody will not be disturbed unless is clear abuse of discretion or decision against weight of evidence. State v. Vogt ---------- 205
33. Unless it is directly in issue, character or reputation of party to civil action generally regarded as legally irrelevant in determination of controversy; consequently, evidence relating thereto not admissible. Kenaston v. Teeters ---------- 216
34. Duty of trial court to submit to jury all issues properly pleaded and which find support in evidence. Fleischer v. Rosentrater ---------- 219
35. Under section 39-757, R. R. S. 1943, where evidence shows that vehicle left standing on paved, improved, or main-traveled portion of highway, prima facie violation of statute established and is incumbent upon person charged to show existence of facts which take him out of scope of application of statute. Fleischer v. Rosentrater ---------- 219
36. Where prima facie violation of section 39-757, R. R. S. 1943, shown under evidence, questions of whether reasonable excuse for stopping existed, or whether reasonable effort made to remove vehicle from traveled portion of highway, and whether reasonable precautions taken for protection of highway traffic, ordinarily for jury. Fleischer v. Rosentrater ---------- 219
37. Judgment dismissing plaintiff's petition in accordance with proper motion for judgment after mistrial and discharge of jury but containing phrase "notwithstanding verdict," harmless error. Giangrasso v. Schimmel ---------- 228
38. Findings of trial court in action where jury waived have effect of verdict of jury and will not be set aside unless clearly wrong. State Farm Fire & Cas. Co. v. Muth ---------- 248
39. In determining sufficiency of evidence to sustain a judgment, must be considered in light most favorable to successful party. Schmidt v. Orton ----- 257
40. Where reasonable minds may draw different conclusions and inferences from evidence as to negligence of defendant and contributory negligence of plaintiff, and degree thereof when one compared with

other, issues must be submitted to jury. Schmidt v. Orton ---------- 257
41. It is only where there is total failure of competent proof in criminal case to support material allegation in information, or where testimony adduced is of so weak or doubtful character that conviction based thereon could not be sustained, that trial court justified in directing verdict of not guilty. State v. Turner ---------- 261
42. Is no constitutional right to separate trial; rather, right statutory in origin and depends upon showing that prejudice will result from joint trial. State v. Turner ---------- 261
43. When evidence of in-court identification alleged to be tainted by prior illegal line-up first challenged on appeal, such challenge, in absence of clear showing of prejudicial error, will not be considered; failure to object will be attributed to defense counsel's choice of trial tactics. State v. Turner ---- 261
44. By statute, courts of record have power to punish as for criminal contempt persons guilty of willful disobedience of or resistance willfully offered to any lawful process or order of court, or any willful attempt to obstruct proceedings, or hinder due administration of justice in any suit or proceeding pending before court. Payne v. Glebe ---------- 268
45. In workmen's compensation case, burden of proof upon claimant to establish that his disability was caused by accident arising out of and in course of his employment. McPhillips v. Knox Constr. Co., Inc. ---------- 306
Smith v. Ruan Transport, Inc. ---------- 509
Barbaglia v. General Motors Acceptance Corp. ---- 529
46. Where claimant in workmen's compensation case fails to show with reasonable certainty that disability of which he complains arose out of and in course of his employment, proceeding will be dismissed. McPhillips v. Knox Constr. Co., Inc. ---- 306
Atkinson v. Little Audrey's Transfer Co., Inc. ---- 738
47. District Court shall set aside a judgment of Workmen's Compensation Court on rehearing only upon grounds provided by statute which include "(3) the findings of fact by the court are not supported by the record." McPhillips v. Knox Constr. Co., Inc. ---------- 306
48. Finding of fact by Workmen's Compensation Court

on rehearing against party having burden of proof will be set aside only if evidence compels finding for that party. McPhillips v. Knox Constr. Co., Inc. ---------- 306
49. Right of defendant's counsel to be present at time verdict received may be waived. State v. Hiatt -- 315
50. Trial court not required to poll jury unless requested to do so. State v. Hiatt ---------- 315
51. Defendant may waive his right to have jury polled; when upon inquiry by court he replies in negative, right waived. State v. Hiatt ---------- 315
52. Ordinarily, hearsay rule does not operate to exclude evidence of a statement, request, or message offered for mere purpose of proving fact that the statement, request, or message was made or delivered, where such occurrence establishes a fact in issue or circumstantially bears on such a fact. State v. Young ---------- 325
53. Evidence of other crimes, similar to that charged, relevant and admissible when it tends to prove a particular criminal intent which is necessary to constitute crime charged or where is some legal connection between the two upon which it can be said that one tends to establish the other or some essential fact in issue. State v. Young ---------- 325
54. Rule 11 of Federal Rules of Criminal Procedure not applicable to the states. State v. Leger ---------- 352
55. Not required that the court, prior to sentence, ascertain that factual basis exists for plea of guilty, or that defendant be personally addressed for that purpose. State v. Leger ---------- 352
56. County attorney, under direction of District Court, has statutory authority to procure assistance in any trial of any person charged with felony, and in absence of facts which indicate contrary, presumed that District Court properly exercised its discretion in that regard. State v. Amen ---------- 362
57. For purposes of evaluating motion for directed verdict or dismissal of cause of action, all doubt must be resolved in favor of party against whom verdict or dismissal urged; truth of all evidence he has submitted must be assumed, and he must be given benefit of all inferences therefrom. Wilgro, Inc. v. Vowers & Burback ---------- 369
58. Circumstantial evidence not sufficient to sustain verdict depending solely thereon for support, unless

circumstances proved by evidence of such nature and so related to each other that conclusion reached by jury is only one that can fairly and reasonably be drawn therefrom. Wilgro, Inc. v. Vowers & Burback ---------- 369

59. Where several inferences are deducible from facts presented, which inferences opposed to each other, but equally consistent with facts proved, plaintiffs do not sustain their position by reliance alone on inferences which would entitle them to recover. Wilgro, Inc. v. Vowers & Burback ---------- 369

60. Under section 25-12,112, R. S. Supp., 1972, copy or reproduction of any memorandum kept or recorded in regular course of business or activity of any department or agency of government, when satisfactorily identified, as admissible in evidence as original itself in any judicial or administrative proceeding. Corn v. Corn ---------- 383

61. Alleged improper conduct of trial judge in presence of jury will not be reviewed on appeal in absence of timely objection. Weber v. Southwest Nebraska Dairy Suppliers, Inc. ---------- 389

62. In proceeding to reform a contract on ground of mutual mistake, burden of proof on party interposing that plea. Schweitz v. State Farm Fire & Cas. Co. ---------- 400

63. In order to warrant reformation of written instrument in any material respect, evidence must be clear, convincing, and satisfactory; and, until overcome by such proof, terms of instrument must stand as evidencing intention of parties. Schweitz v. State Farm Fire & Cas. Co. ---------- 400

64. Where law action tried to court without jury, finding of court has effect of jury verdict and will not be disturbed on appeal unless clearly wrong. Larutan Corp. v. Magnolia Homes Manuf. Co. ---- 425

65. In declaratory judgment action, issues of fact may be tried and determined in same manner as issues of fact are tried and determined in other civil actions in court in which proceeding pending. Larutan Corp. v. Magnolia Homes Manuf. Co. ---- 425

66. Determination of factual issues in declaratory judgment action, which would otherwise be an action at law, will be treated in same manner as if jury had been waived. Larutan Corp. v. Magnolia Homes Manuf. Co. ---------- 425

67. Section 29-1207, R. S. Supp., 1972, provides for limitation of 6 months for time of trial and states that such 6 months' period shall commence to run from date indictment returned or information filed. State v. Watkins ---------- 450
68. Trial court has wide discretion in receiving affidavits and in weight it gives them, in accordance with general rule that affidavits of jurors may be received, for purpose of voiding verdict, to show any matter occurring during trial, or in jury room, which does not essentially inhere in verdict itself. Kremlacek v. Sedlacek ---------- 460
69. Before verdict can be directed against motorist for failing to see approaching vehicle at unprotected intersection, position of approaching vehicle must be undisputedly located in favored position. Kremlacek v. Sedlacek ---------- 460
70. Duty of trial court to see that defendants in criminal cases are tried by jury such that not even suspicion or prejudice can attach to any member thereof. State v. Myers ---------- 466
71. Duties of court stated where jury impaneled and sworn as one of several juries selected from single jury panel for subsequent trial of series of criminal cases. State v. Myers ---------- 466
72. It is only where there is total failure of proof to establish material allegation of information or testimony is of so weak or doubtful a character that conviction based thereon cannot be sustained, that trial court justified in directing verdict for defendant. State v. Atkinson ---------- 473
73. It is true rape is a most detestable crime, and therefore ought severely and impartially to be punished but it must be remembered that it is an accusation easily to be made and hard to be proved, and harder to be defended by party accused, although never so innocent, and that courts should be the more cautious upon trials of offense of this nature; in light thereof, courts have generally exercised great care and vigilance to insure that verdict of conviction was supported by sufficient competent evidence and not result of passion and prejudice, inspired by wiles of a malicious contriver or very heniousness of offense charged. State v. Atkinson ---------- 473
74. Error may creep into proceedings in criminal prose-

cutions in spite of impartiality, care, learning, and vigilance of trial judge; it is only error prejudicial to right of accused or denial of substantial legal right that requires reversal of his conviction; harmless error does not require second trial; law recognizes possibility of harmless imperfections in proceedings of judicial tribunals and does not defeat itself by exacting absolute perfection in bringing malefactors to justice. State v. Atkinson ------ 473

75. Burden of proof upon taxpayer to establish that value of his property has been arbitrarily or unlawfully fixed in amount greater than its actual value. Rien v. Board of Equalization ---------- 481

76. Damages must be proved with as much certainty as case permits and cannot be left to conjecture, guess, or speculation; generally, evidence must be sufficient to enable court or jury to determine amount of damages with reasonable certainty. Crowder v. Allied Investment Co. ---------- 487

77. Burden of production of evidence of value of labor or materials satisfied if such value may be reasonably inferred from evidence. Cornett v. White Motor Corp. ---------- 496

78. Rule of liberal construction of Workmen's Compensation Act applies to the law but does not apply to evidence offered in support of claim made for benefits under the act. Barbaglia v. General Motors Acceptance Corp. ---------- 529

79. Difficulties attending offer of evidence of illustrative experiments require that in such cases wide latitude or discretion be conferred upon trial court and unless is clear abuse of discretion judgment will not be reversed on account of admission or rejection of such testimony. Hawkins Constr. Co. v. Matthews Co., Inc. ---------- 546

80. Proponent of expert testimony based upon experiment must demonstrate that person who makes experiment competent to do so; that apparatus used was of kind and in condition suitable for experiment; and that experiment was honestly and fairly made. Hawkins Constr. Co. v. Matthews Co., Inc. 546

81. A hypothetical question should fairly reflect proven facts. Hawkins Constr. Co. v. Matthews Co., Inc. 546

82. A hypothetical question is not improper simply because it includes only a part of facts testified to. Hawkins Constr. Co. v. Matthews Co., Inc. ----- 546

83. Expert witness in giving an opinion has right to confine facts that he recites to those which are believed to be true, and which are believed to be material to the issue. Hawkins Constr. Co. v. Matthews Co., Inc. ---------- 546
84. A statement made by a defendant, although inadmissible, due to a failure to comply with Miranda, during the State's case-in-chief, is admissible for impeachment purposes. State v. Bazis ---------- 586
85. In determining whether a factual basis for a plea of guilty exists, a court is not required to interrogate the defendant. Inquiry of the prosecutor or examination of the presentence report is an alternative. State v. Daniels ---------- 602
86. In the absence of a showing in a criminal prosecution that a withdrawal is necessary to correct a manifest injustice, a defendant may not withdraw his plea of guilty or nolo contendere as a matter of right once the plea has been accepted by the court. State v. Daniels ---------- 602
87. Before sentence in a criminal prosecution the court in its discretion may allow the defendant to withdraw his plea for any fair and just reason unless the prosecution has been substantially prejudiced by reliance upon the defendant's plea. State v. Daniels ---------- 602
88. A waiver of objections to evidence on the ground that it was seized in an unreasonable search occurs when no objection is made at least 10 days before trial and where the exceptions thereto have no application. State v. Stowell ---------- 615
89. Where the value of property is an element of the offense, the State must prove by competent evidence that the value of the property at the time and place of the alleged offense equalled or exceeded the requisite minimum value. State v. Stowell 615
90. When part of a declaration or conversation is given in evidence by one party, the whole on the same subject may be inquired into by the other. Baker v. Daly ---------- 618
91. The admission of evidence under the provisions of section 25-1215, R. R. S. 1943, falls within the area reserved to the sound discretion of the trial court. The trial court must determine whether the evidence offered is on the same subject. Its ruling will not

be regarded as erroneous unless there is a clear abuse of discretion. Baker v. Daly ---------- 618
92. It is the duty of the trial court to submit to the jury all material issues which are presented by the pleadings and supported by evidence. Baker v. Daly 618
93. Generally, the failure to object promptly to an offer of evidence waives the objection. State v. Sanders ---------- 625
94. Defects which might have been attacked by motion to quash or plea in abatement are waived when defendant pleads to the general issue or when such a plea is entered for him by the court. State v. Etchison ---------- 629
95. In an action for assault and battery, the recovery is limited to compensatory damages and evidence of threats or words and acts of provocation are not admissible in mitigation thereof. Haumont v. Alexander ---------- 637
96. In a civil action for assault and battery where the evidence conclusively shows that defendant made a voluntary attack upon plaintiff without provocation and was the sole active aggressor throughout the assault, the plea of self-defense has no proper place in the transaction and a request for an instruction looking to the exoneration of the defendant on that ground is properly refused. Haumont v. Alexander 637
97. It is not error for the trial court to refuse to submit to the consideration of the jury a defense which finds no support in the evidence. Haumont v. Alexander ---------- 637
98. The failure to object to instructions after they have been submitted to counsel for review will preclude raising an objection on appeal. Haumont v. Alexander ---------- 637
Webber v. City of Omaha ---------- 678
99. The purpose of the instruction conference is to give the trial court an opportunity to correct any errors being made by it. Consequently, the parties should object to any errors of commission or omission. Haumont v. Alexander ---------- 637
100. The general rule that the allegations of the pleadings and proof thereunder must agree will not be applied to reverse a judgment, where an issue is tried by both parties without objection from either that such issue is not sufficiently pleaded. Under such conditions, the appellate court will consider

the pleadings as sufficient to raise the particular issue. Estate of Ruwe v. Ruwe ---------- 663
101. The fact that a person was intoxicated is a circumstance which may be considered in determining whether he exercised the degree of care for his own safety which a prudent sober person would exercise under the same or similar circumstances. The mere fact that he was intoxicated at the time he was injured does not of itself constitute contributory negligence. Webber v. City of Omaha ------ 678
102. The care required of a person who has voluntarily become intoxicated is the same as that required of one who is sober. If he fails to exercise that degree of care for his own safety which an ordinarily prudent sober person would exercise under the same or similar circumstances, and such failure contributes as a proximate cause to the injury of which he complains, he is guilty of contributory negligence. Webber v. City of Omaha ---------- 678
103. The decision of questions presented to this court in reviewing the proceedings of the District Court becomes the law of the case and for purpose of litigation settles conclusively the matters adjudicated expressly or by necessary implication. System Meat Co. v. Stewart ---------- 682
104. The rule that the trial court, as well as this court, is bound by a legal principle once determined in a case does not apply to decisions rendered on questions of fact. Sufficiency of testimony on a particular feature of the case as disclosed by the record on the former trial is not binding in a subsequent trial where the testimony is or may be presumed to be materially different. System Meat Co. v. Stewart ---------- 682
105. The defense of payment is an affirmative one which must be pleaded and the burden of proof on the issue is on the party asserting it. Poland v. Gibson 696
106. In an action upon a written instrument the defense of material alteration must be affirmatively pleaded and evidence that the instrument has been materially altered is inadmissible under a general denial. Poland v. Gibson ---------- 696
107. A verdict should be directed where the evidence is not sufficient to reasonably satisfy a jury that the fact sought to be proved is established. Poland v. Gibson ---------- 696

108. Instructions must be considered and construed together, and if they are not sufficiently specific in some respects, it is the duty of counsel to offer requests for instructions that will supply the omission, and, unless this is done, the judgment will not ordinarily be reversed for such defects. Fisher v. Gate City Steel Corp. ---------- 699
109. Where instructions correctly state the law, it is not error for the court, in the absence of a request for a more specific instruction, to fail to give a more elaborate one. Fisher v. Gate City Steel Corp. 699
110. Where it is claimed that the conduct of another, not a party to the suit, was the sole proximate cause of the accident, such defense is not an affirmative plea in avoidance of plaintiff's cause of action and imposes no burden of proof upon defendant with relation thereto but is one entirely consistent with and provable under the general issue. Fisher v. Gate City Steel Corp. ---------- 699
111. Where a general instruction on an issue is correct, if a party desires a fuller or more specific instruction on the subject matter it must be asked for. White v. Longo ---------- 703
112. Where the law provides a definite measure of damages, the court should instruct the jury specifically how the damages should be assessed. Where there is no such definite measure of damages, then the general instruction on compensatory damage is sufficient. White v. Longo ---------- 703
113. In the absence of evidence of some special element of damage for which the law provides a specific means of measurement, it is the general rule that in an action for criminal conversation damages are incapable of precise measurement and there is no fixed rule for determining the amount thereof. White v. Longo ---------- 703
114. In determining the sufficiency of the evidence to sustain a conviction in a criminal prosecution, it is not the province of the court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence. State v. Tripple ---------- 713
115. Where the general charge fairly presents the case to the jury, a party who desires an instruction on some particular question should request it, and cannot base error on the omission otherwise. State v. Tripple ---------- 713

116. Where a thing which causes the injury is under the control and management of the defendant and the accident is such as in the ordinary course of things does not happen if those who have its management or control use proper care, it affords reasonable evidence, in the absence of an explanation by the defendant, that the accident arose from want of proper care. Fynbu v. Strain ---------- 719
117. The applicability of the doctrine of res ipsa loquitur depends upon the facts and circumstances in each case. Fynbu v. Strain ---------- 719
118. The doctrine of res ipsa loquitur is applicable only where the evidence shows the accident or injury was caused by the instrumentality or thing under the control of the defendant. Fynbu v. Strain -- 719
119. The test of responsibility for crime is the defendant's capacity to understand the nature of the act alleged to be criminal and the ability to distinguish between right and wrong with respect to the act. State v. Smith ---------- 722
120. Where there is no competent evidence tending to prove insanity no instruction on the burden of proof as to insanity is required. State v. Smith ------- 722
121. Under the Uniform Commercial Code, the adequacy or insufficiency of the price for which collateral is sold at a private sale after default and repossession is one of the "terms" of sale, and is relevant along with other issues, in determining whether the sale was commercially reasonable. Associates Finance Co. v. Teske ---------- 747
122. A general denial is available to a defendant to challenge one or more elements essential to a recovery by the plaintiff and the effect of the denial is to put the burden on the plaintiff to establish by evidence the matter denied. Associates Finance Co. v. Teske ---------- 747
123. Where the evidence is irreconcilable and in direct conflict, this court will consider the trial court's observation of the witnesses and their manner of testifying and that the court must have accepted one version of the evidence rather than the opposite. Associates Finance Co. v. Teske ---------- 747
124. Failure of counsel to object to proposed jury instructions after their submission to him by the court for review precludes objection on appeal. Barta v. Betzer ---------- 752

125. Noncompliance with the requirement that counsel is under a duty to object to proposed jury instructions submitted to him for review, does not bar this court from opting to consider plain errors in a record indicative of a probable miscarriage of justice. Barta v. Betzer ---------- 752
126. Under the provisions of section 29-1207, R. S. Supp., 1972, where a felony offense is involved, the 6-month period commences to run from the date the indictment is returned or the information filed and not from the time the complaint is filed. State v. Born ---------- 767
127. Any unreasonable delay occurring in the prosecution of any felony offense prior to the filing of an information or the return of an indictment will be considered by the court, in conjunction with statutory requirements, in determining whether or not a defendant has been denied the constitutional right to a speedy trial. State v. Born ---------- 767
128. The question of the existence of negligence or contributory negligence is for the trier of facts where different minds may reasonably draw different conclusions from the evidence. Niemeyer v. Tichota - 775
129. An appeal to this court in a civil action will be considered upon the theories presented by the parties at the trial, provided a liberal construction of the pleadings, as construed by the parties, will permit. Saum v. L. R. Foy Constr. Co., Inc. ---------- 783
130. Rescission of a contract is an affirmative defense which must be pleaded and cannot be asserted under a general denial. Rase v. Southeast Nebraska Consol. School Dist. ---------- 800
131. In the mitigation of damages the burden is upon the employer to prove that the employee obtained other employment or, with reasonable diligence, might have obtained other employment. Rase v. Southeast Nebraska Consol. School Dist. -------- 800
132. A motion to vacate is not available to a party to supply deficiencies, if any, in the evidence adduced at the trial. Miller v. Miller ---------- 816

Trusts.

1. Section 24-602, R. R. S. 1943, which provides that trust funds received by an executor may be kept invested in securities received by him, unless otherwise ordered by the court or unless trust instrument

directs change in investments, not applicable where will directs that securities owned by deceased shall be converted into cash. Bates v. Scottsbluff Nat. Bank ---------- 456

2. Where the owner of an interest in land transferred it inter vivos to another in trust for a third person, but no memorandum properly evidencing the intention to create a trust was signed, and the transferee refused to perform the trust, the transferee holds the interest upon a constructive trust for the third person if the transferee at the time of the transfer was in a confidential relation to the transferor. Lukowski v. Deleski ---------- 771

3. A constructive trust must be proved by evidence that is clear and convincing. Lukowski v. Deleski -- 771

Undercover Agents.

1. Defendant may not complain of use of lawful tape recordings of conversations between himself and undercover agent made when he was not yet accused or under indictment when he has taken no steps to discover such evidence under section 29-1912, R. S. Supp., 1972, and has himself on cross-examination elicited from witness oral testimony of conversation. State v. Myers ---------- 146

2. Undercover agent who associates himself with police before association with wrongdoer or before actual perpetration of offense not an accomplice. State v. Myers ---------- 146

Uniform Commercial Code.

Under the Uniform Commercial Code, unless otherwise explicitly agreed, title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods. Bowman v. American Home Assur. Co. ---------- 810

Vendor and Purchaser.

Lien of one who furnishes material for repairs and alteration of building upon land in possession of vendee under executory contract of purchase subordinate to lien of vendor who retains legal title to secure deferred installments of purchase price except in cases where vendor himself promotes improvement or causes it to be made. O'Hara Plumbing Co., Inc. v. Roschynialski ---------- 246

Verdicts.

1. A verdict will not be set aside as inadequate unless it is clearly against weight and reasonableness of the evidence and is so disproportionate to injury proved as to indicate that it was result of passion, prejudice, mistake, or some other means not apparent in record, or that jury disregarded evidence or instructions of trial court. George Rose Sodding & Grading Co., Inc. v. City of Omaha ---------- 12
2. Trial court has wide discretion in receiving affidavits and in weight it gives them, in accordance with general rule that affidavits of jurors may be received, for purpose of voiding verdict, to show any matter occurring during trial, or in jury room, which does not essentially inhere in verdict itself. Kremlacek v. Sedlacek ---------- 460
3. Jury verdict may not be set aside unless it is clearly wrong and it is sufficient if there is any competent evidence presented to jury upon which it could find for successful party and all conflicts in evidence, expert or lay, and credibility of witnesses is for jury and not the court. Hawkins Constr. Co. v. Matthews Co., Inc. ---------- 546
4. A verdict should be directed where the evidence is not sufficient to reasonably satisfy a jury that the fact sought to be proved is established. Poland v. Gibson ---------- 696

Waiver.

1. Waiver generally is voluntary, intentional, and understanding relinquishment of known right. Mousel v. Daringer ---------- 77
2. Right of defendant's counsel to be present at time verdict received may be waived. State v. Hiatt -- 315
3. Defendant may waive his right to have jury polled; when upon inquiry by court he replies in negative, right waived. State v. Hiatt ---------- 315
4. Failure to assert an alleged error in motion for new trial will be deemed a waiver of claimed error and will not be considered on appeal. State v. Griger ---------- 405
5. When defendant voluntarily and understandingly enters plea of guilty with full knowledge and understanding of a prior violation of his rights, plea of guilty waives such rights. State v. Griger ------ 405
6. Generally, the failure to object promptly to an offer of evidence waives the objection. State v. Sanders 625

7. Defects which might have been attacked by motion to quash or plea in abatement are waived when defendant pleads to the general issue or when such a plea is entered for him by the court. State v. Etchison ---------- 629
8. The failure to object to instructions after they have been submitted to counsel for review will preclude raising an objection on appeal. Haumont v. Alexander ---------- 637
9. The purpose of the instruction conference is to give the trial court an opportunity to correct any errors being made by it. Consequently, the parties should object to any errors of commission or omission. Haumont v. Alexander ---------- 637
10. Failure of counsel to object to proposed jury instructions after their submission to him by the court for review precludes objection on appeal. Barta v. Betzer ---------- 752
11. Ordinarily to establish a waiver of legal right there must be a clear, unequivocal, and decisive act of a party showing such a purpose or act amounting to an estoppel on his part. Farmers State Bank v. Edison Non-Stock Coop. Assn. ---------- 789
12. Ordinarily a waiver is a voluntary abandonment or surrender by a capable person of a right known by him to exist, with the intention that such right shall be surrendered. Farmers State Bank v. Edison Non-Stock Coop. Assn. ---------- 789

Warranty.

1. Under Uniform Commercial Code, any affirmation of fact or promise made by seller to buyer which relates to goods and becomes part of basis of bargain creates express warranty that goods shall conform to affirmation or promise. Larutan Corp. v. Magnolia Homes Manuf. Co. ---------- 425
2. Any description of goods or any sample or model which is made part of basis of bargain creates express warranty that goods shall conform to description or to sample. Larutan Corp. v. Magnolia Homes Manuf. Co. ---------- 425
3. Where seller at time of contracting has reason to know any particular purpose for which goods are required and that buyer is relying on seller's skill or judgment to select or furnish suitable goods, there is, unless excluded or modified under section 2-316, U. C. C., implied warranty that goods shall

be fit for such purpose. Larutan Corp. v. Magnolia Homes Manuf. Co. ---------- 425
4. Any affirmation of fact or promise made by seller to buyer which relates to goods and becomes part of basis of bargain creates express warranty that goods shall conform to affirmation or promise. Hawkins Constr. Co. v. Matthews Co., Inc. ---------- 546
5. Any description of goods which is made part of basis of bargain creates express warranty that goods shall conform to description. Hawkins Constr. Co. v. Matthews Co., Inc. ---------- 546
6. Not necessary to creation of express warranty that seller use formal words such as "warranty" or "guarantee" or that he have specific intention to make a warranty, but an affirmation merely of value of goods or statement purporting to be merely seller's opinion or commendation of goods does not create warranty. Hawkins Constr. Co. v. Matthews Co., Inc. ---------- 546
7. Express warranties may be made in advertising brochure. Hawkins Constr. Co. v. Matthews Co., Inc. ---------- 546
8. A manufacturer or seller may be held liabile under advertising warranty even though he is not in privity of contract with the purchaser. Hawkins Constr. Co. v. Matthews Co., Inc. ---------- 546

Waters.

1. Diffused surface waters, which ordinarily result from rainfall and melting snow and have no permanent source of supply or regular course, may be dammed, diverted, or otherwise repelled by an adjoining landowner without liability, if it is necessary and done without negligence. Paasch v. Brown -- 421
2. When surface waters concentrate and gather in volume, so as to lose their character as diffused surface waters and flow into a natural depression, draw, swale, or other natural drainway, flow may not be arrested or interfered with to injury of neighboring proprietors. Paasch v. Brown ---------- 421

Weapons and Firearms.

Evidence of possession of revolver a short time after stolen is admissible as circumstance in proof that it was stolen by person in whose possession it was found. State v. Brown ---------- 96

Wills.

1. Cardinal intention of testamentary construction to ascertain and effectuate intention of testator when can be done consistent with rules of law. Dover v. Grand Lodge of Nebraska Ind. Order of Odd Fellows 169
2. Where will directs executor to convert property of deceased into cash, any loss resulting from unreasonable delay in selling the property must be charged to executor. Bates v. Scottsbluff Nat. Bank 456
3. Section 24-602, R. R. S. 1943, which provides that trust funds received by an executor may be kept invested in securities received by him, unless otherwise ordered by the court or unless trust instrument directs change in investments, not applicable where will directs that securities owned by deceased shall be converted into cash. Bates v. Scottsbluff Nat. Bank ---------- 456
4. Delay of more than 6 months in converting securities of speculative nature into cash, as directed by will, unreasonable under facts and circumstances of this case. Bates v. Scottsbluff Nat. Bank ---------- 456
5. The testator's intention as expressed in the will considered as a whole is controlling in determining whether a particular gift is exonerated from diminution under the statute providing for apportionment of taxes. Rasmussen v. Wedge ---------- 818
6. The provisions and conditions of a will are to be construed by the courts with a view of carrying out the intention of the testator. The basic object of will construction is to ascertain the intent and purpose of the testator as shown by the will, and then to give that intention effect if not contrary to law. The intention which must be given effect is the intention which the testator expressed by the language employed in his will. Rasmussen v. Wedge ---------- 818

Wiretaps.

Evidence of telephone conversations obtained by wiretaps in violation of the provisions of sections 86-701 to 86-707, R. R. S. 1943, are inadmissible in evidence if timely objection is made. White v. Longo ---------- 703

Witnesses.

1. Nebraska Jury Instruction 14.81 pertaining to credibility of witnesses applicable to testimony of

defendant; not usually necessary to give at defendant's request special instruction highlighting his testimony. State v. Myers ---------- 146
2. If District Court has inherent power to require complaining witness in prosecution for sex crime to submit to psychiatric examination prior to trial, it is not abuse of discretion to deny such examination in absence of showing of good cause. State v. Maestas ---------- 312
3. Proponent of expert testimony based upon experiment must demonstrate that person who makes experiment competent to do so; that apparatus used was of kind and in condition suitable for experiment; and that experiment was honestly and fairly made. Hawkins Constr. Co. v. Matthews Co., Inc. ---------- 546
4. A hypothetical question should fairly reflect proven facts. Hawkins Constr. Co. v. Matthews Co., Inc. -- 546
5. A hypothetical question is not improper simply because it includes only a part of facts testified to. Hawkins Constr. Co. v. Matthews Co., Inc. ---------- 546
6. Expert witness in giving an opinion has right to confine facts that he recites to those which are believed to be true, and which are believed to be material to the issue. Hawkins Constr. Co. v. Matthews Co., Inc. 546
7. In order to deny a claim to the privilege against self-incrimination by a witness, it must be perfectly clear to the judge from a careful consideration of all the circumstances in the case that the witness is mistaken and that the answer or answers cannot possibly have a tendency to incriminate. State v. Bazis ---------- 586
8. As a matter of law the testimony of the prosecutrix alone, uncorroborated by any other evidence, is not sufficient to sustain a conviction for rape, or assault with intent to commit rape. State v. Fisher ---------- 742

Words and Phrases.

1. Waiver generally is voluntary, intentional, and understanding relinquishment of known right. Mousel v. Daringer ---------- 77
2. Phrase "not of good character" concerning eligibility for license under Nebraska Liquor Control Act imports lack of good faith or honesty of purpose. C & L Co. v. Nebraska Liquor Control Commission - 91
3. Malice in legal sense denotes that condition of mind

which is manifested by intentional doing of wrongful act without just cause or excuse. State v. Russ ---- 130

4. Where only evidence in prosecution involving possession of a controlled substance tends to establish actual physical possession, no special definition of term possession required to be given to jury. State v. Myers ---------- 146

5. Word "accident" as used in liability insurance more comprehensive term than "negligence" and in its common signification word means an unexpected happening without intention. City of Kimball v. St. Paul Fire & Marine Ins. Co. ---------- 152

6. Word "accident" has many meanings, and when used in contract of liability insurance, unless otherwise stipulated, should be given construction most favorable to insured. City of Kimball v. St. Paul Fire & Marine Ins. Co. ---------- 152

7. Elements of unforeseen or unexpected damage or consequence as distinguished from normal or probable consequence from negligent act important in describing causation by accident within insurance policy. City of Kimball v. St. Paul Fire & Marine Ins. Co. ---------- 152

8. Accident covered by insurance policy may be a process; where accident is process how long then not significant; is nature of process which is important. City of Kimball v. St. Paul Fire & Marine Ins. Co. ---------- 152

9. In general, element of unforeseen or unexpected damages as distinguished from normal and probable consequence from negligent act, dominant in describing causation by accident. City of Kimball v. St. Paul Fire & Marine Ins. Co. ---------- 152

10. Word "receiving," in offense of receiving stolen property, essentially means acquisition of control in sense of physical dominion or of apparent legal power to dispose. State v. Martin ---------- 212

11. Injury is either expected or intended within meaning of exclusion in policy of liability insurance reading as follows: "This policy does not apply to bodily injury or property damage which is either expected or intended from the standpoint of the insured," if insured acted with specific intent to cause harm to third party. State Farm Fire & Cas. Co. v. Muth -- 248

12. Gross negligence within meaning of Motor Vehicle Guest Act means gross and excessive negligence or negligence in very high degree; absence of slight

care in performance of duty; an entire failure to exercise care; or exercise of so slight a degree of care as to justify belief there was an indifference to safety of others. Toth v. Bacon ---------- 344
13. Term "steal" as used in criminal code includes all elements of larceny at common law. State v. Hauck 534
14. A social guest is a mere licensee. Casey v. Addison 634
15. A dependent in fact is a person who was dependent upon the earnings of the deceased employee for support. Warner v. State ---------- 643
16. Under section 75-315, R. R. S. 1943, relating to motor common carriers, the phrase "willful failure" ordinarily means behavior that justifies the belief in intentional failure. The latter may be inferred from nonperformance of the requisite act over a long period of time. Dahlsten v. Harris ---------- 652
17. The words "slight" and "gross" as employed in the comparative negligence act of this state are comparative terms. The negligence of the plaintiff or defendant is not to be evaluated as slight, gross, or otherwise, standing alone. The criterion by which the degree of negligence of plaintiff is to be measured is the extent thereof by comparison with the negligence of the defendant. Niemeyer v. Tichota ------ 775
18. Ordinarily a waiver is a voluntary abandonment or surrender by a capable person of a right known by him to exist, with the intention that such right shall be surrendered. Farmers State Bank v. Edison Non-Stock Coop. Assn. ---------- 789
19. A school district is an "other municipal corporation" and its real estate is "other public grounds" within the provisions of section 25-202, R. R. S. 1943. Buras v. School Dist. No. 37 ---------- 836

Workmen's Compensation.

1. In workmen's compensation case, burden of proof upon claimant to establish that his disability was caused by accident arising out of and in course of his employment. McPhillips v. Knox Constr. Co., Inc. ---------- 306
Smith v. Ruan Transport, Inc. ---------- 509
Barbaglia v. General Motors Acceptance Corp. -- 529
2. Where claimant in workmen's compensation case fails to show with reasonable certainty that disability of which he complains arose out of and in course of his employment, proceeding will be dismissed. McPhillips v. Knox Constr. Co., Inc. -- 306

Atkinson v. Little Audrey's Transfer Co., Inc. ---- 738

3. District Court shall set aside a judgment of Workmen's Compensation Court on rehearing only upon grounds provided by statute which include "(3) the findings of fact by the court are not supported by the record." McPhillips v. Knox Constr. Co., Inc. ---------- 306

4. Supreme Court, on appeal from District Court in workmen's compensation case, may set aside judgment of District Court only upon grounds provided by statute which include "(3) the findings of fact are not supported by the evidence as disclosed by the record." McPhillips v. Knox Constr. Co., Inc. - 306

5. If Supreme Court, on appeal from District Court in workmen's compensation case, finds that findings of fact not supported by evidence as disclosed by record, it then considers matter de novo. McPhillips v. Knox Constr. Co., Inc. ---------- 306

6. Finding of fact by Workmen's Compensation Court on rehearing against party having burden of proof will be set aside only if evidence compels finding for that party. McPhillips v. Knox Constr. Co., Inc. 306

7. On appeal of a workmen's compensation case to the Supreme Court, if there is reasonable competent evidence to support findings of fact in trial court, judgment, order, or award will not be modified or set aside for insufficiency of evidence. Smith v. Ruan Transport, Inc. ---------- 509

8. Rule of liberal construction of Workmen's Compensation Act applies to the law but does not apply to evidence offered in support of claim made for benefits under the act. Barbaglia v. General Motors Acceptance Corp. ---------- 529

9. On appeal of a workmen's compensation case to Supreme Court, if there is reasonable competent evidence to support findings of fact in trial court, judgment, order, or award will not be modified or set aside for insufficiency of evidence; cause will be considered de novo only where findings of fact not supported by evidence as disclosed by record. Barbaglia v. General Motors Acceptance Corp. -- 529

10. The purpose of the Workmen's Compensation Act is to compensate an employee for the loss of his earning power, and in case of the death of the employee, to compensate his dependents for the loss of support which they had been receiving and

which, but for the injury to the employee, they had a reasonable right to expect would continue. Warner v. State ---------- 643

11. A dependent in fact is a person who was dependent upon the earnings of the deceased employee for support. Warner v. State ---------- 643

12. Proof of economic loss or financial injury alone is not sufficient to establish dependency in fact. Warner v. State ---------- 643

13. A contribution of labor to the parents of a deceased employee, as distinguished from a contribution from his wages, will not support a finding of partial dependency in fact. Warner v. State ---------- 643

14. Upon appellate review of a workmen's compensation case in the Supreme Court, the cause will be considered de novo only where the findings of fact are not supported by the evidence as disclosed by the record. Atkinson v. Little Audrey's Transfer Co., Inc. ---------- 738

15. The provisions of section 48-125, R. R. S. 1943, of the Workmen's Compensation Act, providing that "fifty per cent shall be added for waiting time for all delinquent payments after thirty days' notice has been given of disability," does not impose a penalty payable to an individual within the prohibitions of Article VII, section 5, of the Constitution of Nebraska. University of Nebraska at Omaha v. Paustian ---------- 840

Zoning.

In the law of land use the approval of a conditional use permit in the nature of a special exception use by the legislative body of a political subdivision is ordinarily subject to a statutory provision that requires a favorable three-fourths majority vote in event of requisite protests against a change or supplement of regulations or restrictions. Stec v. Countryside of Hastings, Inc. ---------- 733